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IN 1887 John Henry Wigmore graduated from Harvard Law School. Only four years later, in 1891, there came from his pen an article in the *Harvard Law Review* entitled "Nemo Tenetur Seipsum Prodere,"[1] which showed to the profession that there had arrived at the bar a writer who was not only a deep student of legal history and knew his law of evidence, but who had no hesitation in smashing images, regardless of how sacredly they had theretofore been worshiped.

Good law review articles on evidence questions continued to come from Mr. Wigmore's pen during the years succeeding, but it was not until 1899 that he published his first book on that subject, being Volume I of the sixteenth and final edition of *Greenleaf on Evidence*, the other two volumes being edited by other authors. Volume I brought down to date that matter which was in the preceding editions of Greenleaf, and although it was considered a scholarly piece of editorial work, its publication caused no great amount of comment in the profession.

In 1905, however, there appeared a work on evidence which did occasion much discussion: the first edition of Wigmore.[2] Arranged upon novel lines, it showed the results of a tremendous amount of scholarly research, a skillful assembling of materials, and a great deal of original thought on the various subjects comprising that vast field of the law. Practicing lawyers and law professors alike acclaimed it to be the most outstanding contribution that had yet been made to the literature in that field, although there were the usual number of reviewers who criticized its form, its arrangement, and certain of its statements of legal doctrine.

The remainder of Mr. Wigmore's professional life since that time has been principally devoted to further developing and keeping up to date the material contained in that first edition of his work. In 1908,

*A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW; including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada. (3d ed.) 10 vols. By *John Henry Wigmore*—Professor of the Law of Evidence, Northwestern University Law School; author "Principles of Judicial Proof," "Panorama of the World's Legal Systems," etc. Boston: Little Brown & Co. 1940. Pp. xcii, 722; xxx, 813; xxviii, 740; xxviii, 733; xxviii, 864; xxvi, 609; xxvi, 665; xxvi, 850; xxvi, 615; 712 (indexes). $100.

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[1] 5 HARV. L. REV. 71 (1891).

[2] WIGMORE ON EVIDENCE, 4 vols., Little, Brown, and Company.

he published a supplement to the first edition; in 1915, another supplement. In 1923, he brought out the famous second edition of his work, this time in five volumes. In 1934, he published a lengthy supplement to the second edition. Now, in 1940, has come from the press the third and final edition, for it is to be kept up to date in the future by the recently developed pocket-part service. This third edition is based upon and is a continuation of the former editions, so far as arrangement and section numbering are concerned, but the tremendous growth of the work is illustrated by the fact that it now covers ten volumes in place of five. The first edition contained some 40,000 citations of judicial decisions, the second edition, 55,000, and this third edition contains not only 85,000 citations of judicial decisions but some 20,000 citations of statutes. The addition, in the 1934 supplement, of more than sixty new topics for text discussion has now been increased by twenty-six. The footnotes, which have always been voluminous, in endeavoring to cite the decisions from every jurisdiction on the particular point discussed in the text, have also grown in volume by the addition of the later citations, and they are now much more conveniently arranged for the reader's search, as the decisions from each jurisdiction are separately paragraphed, with the state name in italic type. The indices are most comprehensive, comprising the whole of the tenth volume of the work. There are 125 pages of index to statutes cited, 403 pages of index to cases cited, 151 pages of index to topics discussed in the text, and 25 pages of index to citations from other authors.

In reviewing the final edition of a textbook that has been in the process of development for nearly forty years, it is interesting to reread the critical reviews of the original edition,[8] to remember the remarks of the members of the practicing bar as to its deficiencies, and to see what effect those criticisms have had upon the further development of the work.

The original criticisms were of four different kinds:

(1) The novel arrangement, which was radically different from that of any previous textbook on that or on any other subject. For example, it was pointed out that under the general heading of Relevancy was collected all the material under such large and differing subjects as Circumstantial Evidence, Testimonial Evidence, and Real Evidence.

[8] E.g., 18 HARV. L. REV. 479 (1905), 5 COL. L. REV. 68 (1905), 3 MICH. L. REV. 679 (1905).

(2) The invention and constant use by the author of new terms which only he could define, e.g., "autoptic proferance," "prophylactic rules," "viatorial privilege," "integration of legal acts," "retrospective evidence," "analytic rules," "simplificative rules," "emotional capacity," etc.

(3) That as to certain principles of law, the author had made statements that not only were not supported by judicial authority but were not logically sound, e.g., that an extrajudicial admission by a party to a cause is admissible only because it is impeaching in character (§ 1048); his use of the "past recollection" theory as being unduly complicated (§ 734); his statement that is is desirable that a physician should be permitted to pronounce an opinion on information furnished by the nurse of a patient (§ 688).

(4) "Granted that it is a very learned treatise, you can't find anything in it." This was the complaint of the practitioners.

Taking up, in turn, these four classes of criticisms, it is interesting to see what effect they had upon the author and what experience has shown as to their soundness.

The arrangement, though unusual, is a thing to which all consultants of the work have become accustomed, and one rarely now hears that criticism.

The new nomenclature which Mr. Wigmore adopted and which he uses so earnestly has not been generally accepted by the profession. Lawyers still prefer "real evidence" to "autoptic proferance," "infancy" to "mental immaturity," and "interest" and "marital relationship" to "emotional capacity." Although certain of his new expressions, such as the "circumstantial guaranty of trustworthiness" (now changed to "circumstantial probability of trustworthiness" [§ 1422]), as a basis for receiving hearsay statements, have been quite generally adopted by lawyers, the greater number of Mr. Wigmore's innovations in terminology have not extended beyond the covers of his book.

To certain of the criticisms as to the position taken by him on specific questions of evidence, Mr. Wigmore has yielded in his later editions. For example, he now agrees that an extrajudicial admission of an opposing party to the cause has an affirmative probative value (§ 1048), although, for reasons of consistency in arrangement, he continues to carry that subject matter under the original general heading of "Testimonial Impeachment." On the other hand, he still adheres, in this latest edition, to the position theretofore taken by him (§ 1385) that, on preliminary rulings by a judge as to the admissibility of evi-

dence, the ordinary rules of evidence do not apply, notwithstanding that that position would seem to have been shown to be untenable by Messrs. Maguire and Epstein in their article on that subject.[4] On the whole, the positions taken by Mr. Wigmore in 1905 which were, at that time, considered so advanced that they would not be accepted by the courts, have become the settled law of America today. Rarely has a legal work accomplished so well the task of molding judicial thought to the principles there advocated.

The fourth general criticism, the one by the bar that one cannot find anything in the book, is no longer heard. That criticism was due to two things: the unusual arrangement and the fact that, whereas the practitioner had theretofore found in the work on evidence consulted by him a categorical statement of what the rule is on a particular point, here he had to read an historical discussion of the development of the rule, the arguments for and against its soundness, and often not until the end of the discussion the views of the author as to whether the rule should be recognized and to what extent. The bar, however, have now become accustomed to the unusual arrangement, and they have learned not only how to find in the work the material that they are after but to make intelligent use of it in briefs and arguments. There is no question that it is now more cited than any textbook in the field of law today, both in lawyers' briefs and in judicial opinions.

It is generally agreed to be the greatest work on evidence ever written. This last edition has immeasurably improved upon the first and the second. And yet the careful critic can still find in the work certain faults. For example, in his discussion of the parol evidence rule, the author discusses (§ 2406) the problem of the execution of a document merely as a sham, and he concludes, as seems proper to the reviewer, that admissibility of evidence that this was the purpose should be limited to cases where the pretense was a morally justifiable one, as to calm a lunatic or console a dying person. He cites certain decisions sustaining the position taken by him and two or three cases contra which he labels unsound, but he makes no mention of the more important cases contra and of the views of most law review commentators and text writers in support of such contrary stand.[5] To support his position he cites three New York Appellate Division decisions, but fails to mention the more binding New York Court of Appeals decisions of

[4] "Rules of Evidence in Preliminary Controversies as to Admissibility," 36 YALE L. J. 1101 (1927).

[5] See authorities cited in 33 MICH. L. REV. 410 (1935).

Grierson v. Mason[6] and *Bernstein v. Kritzer*[7] to the contrary, which unfortunate decisions have caused so much trouble in the law; and he fails to mention the decision containing the strongest argument in support of the position taken by him, viz., *Evans v. Dravo.*[8]

In his discussion of the admissibility of statements made in negotiations for a compromise (§ 1061), the author accepts the conventional doctrine that, while offers of compromise may not be received in evidence, statements of fact made during such negotiations are admissible. He supports his position by the application of certain legal propositions to show that neither the Massachusetts doctrine of privilege nor the English doctrine of contract based on an expressed or implied reservation of secrecy is sound and that the true basis of the rule barring a compromise offer is that it is merely an offer to buy peace. In taking this position, does not the author altogether overlook the practical aspects of the question? A layman who meets with an adversary in an attempt to settle their differences is not acquainted with the refinements of the distinction made by the law between offers and statements, in every such negotiation there is much give and take, tentative concessions made to feel out the disposition of the enemy, and the layman should have the same right to talk "off the record," without his statements being used against him, that the law gives to his attorney when he is in court.

One of the outstanding merits of Mr. Wigmore's work is his willingness to step in and solve a problem that has been a puzzler for the courts, by suggesting a common-sense rule to be laid down to fit that particular situation. An example of this is the problem of whether, in those jurisdictions that recognize that there are degrees of secondary evidence, the party desiring to use recollection testimony must consider the better secondary evidence, e.g., a carbon copy, as having the same sanctity as an original so far as concerns compliance with the rules relating to the best evidence, proof of loss, notice to produce, etc. Mr. Wigmore suggests (§ 1268) that the simple solution would be to let the proponent be required, before offering recollection testimony, to show that he has not within his control a copy. The suggestion would seem to be a wise one if to the words "within his control" were added "and conveniently available." This would take care of the situation where a party, attending trial in a jurisdiction far from his home, is unexpectedly confronted with a purported copy of a letter written by him, of which letter his opponent should have the only original,

[6] 60 N. Y. 394 (1875).
[7] 253 N. Y. 410, 171 N. E. 690 (1931).
[8] 24 Pa. St. 62 (1854).

and the party is not permitted to show that the document offered is not a correct copy of the original for the reason that the witness admits on the stand that he has in his office files at home a carbon copy of the letter which he wrote.[9]

Other illustrations of Mr. Wigmore's willingness to suggest changes in the law to meet difficult situations are in regard to the presumption of death and in regard to the proof of survivorship in common disaster cases. In both the first and second editions of his work both these problems were covered very briefly (§§ 2531, 2532) by merely a statement as to what the law seemed to be. By 1934, however, Mr. Wigmore had evidently become convinced that the problems were so knotty that some effort must be made to straighten them out. Therefore, in his 1934 supplement, he added to his original sections on these two subjects a number of new paragraphs of text and he suggested certain model statutes to remedy the difficulties. In this third edition he is able to report that the most important of his suggestions have now been embodied in proposed uniform acts,[10] which it is hoped will have general adoption.

In the prior editions, at the conclusion of his discussion of the exceptions to the hearsay rule, he had a very short paragraph (§ 1427) as to the future of such exceptions, contenting himself with the one suggestion that the hearsay rule be liberalized to admit all statements of deceased persons. In this third edition he elaborates at length upon the subject matter of that section, discussing the proposals made for codification of the law. He finally suggests the adoption of a very broad rule of court that the hearsay rule need not be enforced, if, in the opinion of the trial court, its strict enforcement would needlessly interrupt the narrative of the witness and if the hearsay incidentally testified to would not be likely to mislead the jury; also that any written statement, duly authenticated, by a person not called to the stand may be introduced without calling him, unless, in the opinion of the court, the statement is of such importance that, on demand of the opposite party, the person should be called for cross examination.

In his chapter on official statements as an exception to the hearsay rule, the author has inserted two new sections (§§ 1638, 1638a) pro-

[9] That actually happened in a fairly recent Michigan case, Baroda State Bank v. Peck, 235 Mich. 542, 209 N. W. 827 (1926).

[10] Uniform Absence as Evidence of Death and Absentees' Property Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1939. Uniform Simultaneous Death Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1940.

posing simplification and enlargement of the principle and suggesting a proposed statute or court rule codifying the subject.

He concludes his chapter on the burden of proof by a thoughtful discussion (§ 2498a) of the future treatment of the rules on that subject and proposes a somewhat lengthy court rule to clarify and simplify the traditional practice as to the burden of proof and the use of presumptions.

In his second edition, Mr. Wigmore added a section (§ 8a) entitled "Shortcomings of the Law of Evidence and Its Future." The title of this section has, in the third edition, been changed to "Present and Future of the Law of Evidence," and the discussion has been greatly enlarged, now covering nearly fifty pages. In these pages he discusses very frankly the qualities of current judicial decisions, in general and in the law of evidence, the progress of the law and the law makers and the faults and needs of the rules of evidence, both in general and in particular. This discussion is, in some respects, the most important part of the work, in its suggestions of possibilities for improvement in the law, for the reader feels that every word there written has been the result of deep consideration and the careful thought and rich experience of the author, extending over fifty years, in teaching, thinking, and writing in this, his chosen field. It is encouraging to observe that this particular section ends on a note of optimism. Having seen what he has already accomplished in the way of reform in this field of the law, Mr. Wigmore can well look with optimism toward a continued extension of the movement for reform, started by Bentham so many years ago and renewed and carried on by Mr. Wigmore as no other man could have done it.