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WIGMORE AND EVIDENCE: A REVIEW

ROBERT A. LEFLAR*

It is not often that the publication of a treatise on the law is "news," or that such treatises are reviewed in popular magazines, but it sometimes is so. The new edition of *Wigmore on Evidence*¹ is this generation's subject for such unusual treatment.² That the recognition is appropriate, both to the author and his work, no lawyer will deny.

The first edition of *Wigmore on Evidence* appeared in 1904 in four volumes, and was almost at once accorded first place in its field. Praise even then bestowed upon it was almost fulsome. One reviewer said that "No legal treatise has ever anywhere been published which approaches this work in fullness and thoroughness of treatment."³ Another said that it "closely approximates, if, indeed, it does not surpass, the works of the great masters of law and jurisprudence . . . represents the life work of that finished legal scholar, John Henry Wigmore . . ."⁴ Joseph Henry Beale wrote: "It is hardly too much to say that this is the most complete and exhaustive treatise on a single branch of our law that has ever been written."⁵ The same attitude was expressed in one word: "Pro-digious!" in an English review of the second (five-volume) edition.⁶ Still later, in reviewing a supplemental volume, Zechariah Chafee took occasion to say of the whole treatise: "One hesitates to call it the greatest lawbook

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1. A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE, Third Edition. By John Henry Wigmore. Boston: Little Brown & Co., 1940. Ten volumes; 2597 sections; pp. cccix, 7324.

2. "The author of this monumental job was born 77 years ago in San Francisco of an Irish father and English mother (who, he says, never *really* had a place in society because they did not arrive in San Francisco until 1851.) He went to Harvard Law School, practiced in Boston, taught at Keio University between 1889 and 1892 (where he helped introduce baseball to Japan), and from 1901 to 1929 was Dean of the Northwestern University Law School. . . . Every Wednesday and Saturday for at least 30 years he has spent at home, scrawling in longhand with an ordinary old-fashioned pen . . ." TIME, May 27, 1940, p. 93.

3. (1905) 39 AM. L. REV. 478.

4. (1904) 59 CENT. L. J. 393.

5. (1905) 18 HARV. L. REV. 478.

6. (1924) 2 CAMB. L. J. 124.

in our language because there is no common denominator for purposes of comparison with writings like those of Holmes and Maitland which start our thinking in entirely new directions. Suffice it to say this—no other systematic legal treatise in English approaches Dean Wigmore's work . . . No other Anglo-American treatise has expounded so ably the law as it is, and none has done so much to make the law move toward what it ought to be.”⁷ Since the present work improves tremendously on the two earlier editions, it is at once obvious that a principal difficulty in describing it lies in the absence of further superlatives in the English language.⁸

Wigmore's work has a central thesis running persistently through it always. It is “Discover the truth if you would have justice.” The facts must be known if the law is to operate fairly in particular cases. Without

7. (1935) 48 HARV. L. REV. 1266, 1269.

8. Mechanically, the book could scarcely be more perfect. The entire tenth volume consists of indices—of statutes cited, of cases cited, of topics discussed, and of authors quoted or cited. The only part of the indices that could have been made more elaborate is that of topics discussed, which comprises 150 pages, and it is entirely adequate for one who is at all acquainted with the anatomy of the subject. A list of the latest judicial and statutory sources examined in the preparation of the treatise lets the reader know exactly how far he can rely upon the citations given to local authority, though the provision for pocket supplements indicates that this feature will soon be obsolete for the owner who keeps his set up to date. A table of cross-references to the 1935 edition of Wigmore's Pocket Code (Wigmore's Code of the Rules of Evidence (2d ed. 1935)) renders both the Code and the treatise more useful, both to those lawyers who have mastered the technical mechanics of the Pocket Code and to those who have not, though to the latter it will offer a temptation to forego such mastery in favor of merely finding the topic desired in the ten-volume work, and then cross-referring to the Code.

The Table of Contents (56 pages) presents the same masterful analysis as characterized the earlier editions, but by the same token it raises anew the same objection of incomplete intelligibility. Topic headings such as “Prospectant Evidence” and “Retrospectant Evidence,” chapter headings such as “Autoptic Preference” (c. 39), “Prophylactic Rules” (c. 62), “Synthetic (or Quantitative) Rules” (c. 71), and “Viatorial Privilege” (c. 77), leave ordinary lawyers in the dark. It is not enough to say of this, as was said 35 years ago, that once the Wigmorean language is mastered, it is clear. Wigmore's treatise has been accepted by the bar, but his language has not been taken into the law and it seems that it is not going to be. Wigmore himself, in discussing a proposed Code of Evidence to be formulated by the American Law Institute, has recently said that it should “avoid so far as possible the use of scientific generalizations in terms and expressions which are complex, novel, and unfamiliar to Bench and Bar, and which therefore do not on their face convey clearly their application to the every day situation which they seek to govern. Such terms, proper enough in a treatise, are out of place in a practical Code.” (*Discussion of Draft Restatements* (1940) 26 A. B. A. J. 476, 477.) Though an author's right to write not only what he pleases but in what language he pleases cannot be denied him, it is at least arguable that in respect to choice of understandable words the same considerations make for practical usefulness in both codes and treatises.

That is little more than a matter of mechanics, though, and the most that can be said of it is that it detracts an iota from the total value of the whole work, which is far above such little things.

the facts, judge and jury are but players with dice, reaching decisions by chance. If they have only part of the facts and not all of them, they are players with loaded dice, which is worse. The function of the law of Evidence is to provide machinery whereby all the facts may be made known to judge and jury and the truth thus discovered. That is the ideal.

To Wigmore this ideal is not something unattainable, to be talked about but not actually sought after. Nor is it a kind of sacred text set apart from mankind, like some men's religion which is the subject of worship on Sunday but deemed impracticable on weekdays (or while court is in session). Wigmore is not and never was one of the legal hypocrites who publicly mouth the ideals of the law as if they were already attained, praising perfections seldom achieved in practice as though they were the usual thing. He knows full well that too often the truth is not discovered in actual cases, and that justice lamely fails. And he knows also that time and again the reason for this is that the machinery of our law of Evidence is demonstrably and unnecessarily archaic and inadequate. All this he knows without any resultant sense of helplessness or futility; rather, he knows it as a challenge to the lawyer and the scholar in the law.

There is much in the law that is law for its own sake, and continues to be law merely because it has been law, regardless of its usefulness in serving the true ends of law in society or even in the courtroom. That is inevitable in the light of the doctrine of precedents, and it is true of the law of Evidence as well as of other areas of the law. Wigmore inexorably takes the measure of these old rules, asking always if they tend to aid in ultimate discovery of the truth. Always his test of any rule admitting or excluding evidence is, in the last analysis, whether the evidence which might be given under the rule would have logical probative value on the fact issues in reference to which it might be admitted. Antiquity of the rule has little relevancy in determining whether it satisfies this simple test; in fact, the history of old rules of the common law often shows that they were formulated wholly regardless of this test and in the light of other reasons now altogether obsolete. Wigmore the legal scholar is sure in ferreting out these obsolescences, Wigmore the advocate is vigorous in pointing home their disservice to modern law, and Wigmore the careful lawyer is deft in showing forth the available authority which supports the "better rule" that would

aid most in discovering the truth.⁹ All this involves no false picture of what "the law is." No lawyer reading Wigmore gets an incorrect idea of the state of the authorities and their weight. When he says that a case holds a certain way, no lawyer need doubt that it so holds. The point is that Wigmore does not stop there, but proceeds to put the case into its proper niche in the legal system and to see whether it fits there.

Wigmore's methods being what they have been, it was inevitable that he should exert vast influence upon the growth of American law. For more than a quarter of a century his work on Evidence has probably been more cited in judicial opinions than any other single American treatise on the law, and countless times decisions have gone one way or the other because of the strength of "Wigmore's view." The slow process of lawmaking by the judges has inched along the path he has hewn toward the goal of logical probative value of the evidence as the test of admissibility. His influence, however, has by no means been limited to judges' decisions. There is no American state today whose statute books do not show in some way the mark of his thinking and writing. Some of the Uniform Acts, and other legislative reforms enacted in one state or a few states, on one or another of the myriad topics which make up the whole law of Evidence, have been adopted on the strength of his name or his reasoning.¹⁰ True, it may be said that these procedural improvements would probably have occurred anyway, that they marked the current and the modern trend in judicial administration, and that had Wigmore not taken the lead some other man or men would have done so. Probably that is true. The fact remains that it is Wigmore who did take the lead and who has, therefore,

9. Thus of the various privileges and incompetencies: 8 WIGMORE, EVIDENCE (3rd ed., 1940) §§ 2227-45 (marital privilege); *id.*, §§ 2290-2329 (attorney-client privilege); *id.*, §§ 2367-79 (state secrets and official documents); of exclusions under the hearsay rule: 5 *id.*, §§ 1517-61 (regular business entries); 6 *id.*, §§ 1745-92 (so-called "*res gestae*"); many other areas of the law, such as that of discoveries: 6 *id.*, §§ 1845-63; the impeachment of one's own witness: 3 *id.*, §§ 896-918; incompetency on account of infancy: 2 *id.*, §§ 505-09; and innumerable other matters.

10. See, for example, the Uniform Business Records as Evidence Act, adopted in Idaho, Minnesota, Montana, North Dakota, Ohio, Pennsylvania, South Dakota and Vermont; the Uniform Composite Records as Evidence Act, adopted in Idaho, Ohio, Oregon and South Dakota; the Expert Testimony Act, adopted in Vermont; the Foreign Depositions Act, adopted in eleven states; and the Proof of Statutes Act, adopted in 25 states. Reference should also be made to The Law of Evidence—Some Proposals for Reform (1927), edited by Dean Wigmore, Professor E. M. Morgan and six other outstanding authorities on the law of Evidence, and proposing five particular improvements in the law. Also, Dean Wigmore is Chief Consultant today in the American Law Institute's undertaking to codify the law of Evidence.

had more to do with the direction of growth in the American Law of Evidence than has any other man. In that sense he has written not only of the past and present of the law, but of its future also. And that is as true of his new third edition as of either of the earlier ones. In it is to be found not only the law that is in the books today, but also much that will be written into the decisions and the session laws and the hornbooks of the next generation.

Dean Wigmore's zeal for admitting all evidence that, logically, has probative value leads him to inevitable conflict with democrats who deem it important to preserve those personal liberties and privileges which are guaranteed by both the letter and the spirit of the Bill of Rights. His attitude is typically expressed when, in condemning the federal rule which excludes illegally seized evidence, he states that the recent adoption of the rule by some state courts "may be ascribed to the temporary recrudescence of individualistic sentimentality for freedom of speech and conscience, stimulated by the stern repressive war measures against treason, disloyalty and sedition, in the years 1917-1919. In a certain type of mind, it was impossible to realize the vital necessity of temporarily subordinating the exercise of ordinary civic freedom during a bloody struggle for national safety and existence. In resistance to these war-measures, it was natural for the misguided pacifistic or semi-pro-German interests to invoke the protection of the Fourth Amendment."¹¹ These words first appeared in the second edition of the treatise, but they are brought forward unchanged into the present edition and, apart from having new relevance to national affairs in 1940, they deserve quotation because they still set the tone of the treatise. By this approach, constitutional guaranties are definitely secondary in importance. Discovery of the facts in litigation comes first.

The wire-tapping cases are closely related to those involving illegally discovered evidence, and Wigmore's position is consistent in urging that evidence procured by tapping telephone or telegraph wires ought to be admitted. "Why all this tenderness for the law-breaker? In a period when our people are cursed with a recklessness of law, why hamper the law-officers? Why expend our sympathies on the offender? It is a singular phenomenon, which will some day puzzle the historian."¹²

In discussing the rule which excludes confessions involuntarily made,

11. 8 WIGMORE, EVIDENCE (3d. ed. 1940) § 2184.

12. *Id.* § 2184b.

he calls the rule "nothing but sentimentalism, a false tenderness to guilty ones, and an unnecessary deviation from principle," and then adds that "occasional local abuses of authority by the police, which affect the trustworthiness of confessions secured by such abuse, deserve rectification on general principles of police administration; and Courts should not be content to try to reach such abuses merely by the indirect and ineffective expedient of altering the law of confessions."¹³

Easy extension of the privilege against self-incrimination is damned with equal vigor. "The judicial practice, now too common, of treating with warm and fostering respect every appeal to this privilege, and of amiably feigning each guilty invocator to be an unsullied victim hounded by the persecutions of a tyrant, is a mark of traditional sentimentality."¹⁴ Needless to say, the same strong-minded condemnation is visited upon the common view that no comment may be made upon nor inference drawn from a defendant's claim of this privilege.¹⁵ "But a reaction must come. A true conservatism must commence to operate."¹⁶ For fear these quotations might be misleading, however, it ought again to be pointed out that Wigmore is lawyer as well as philosopher, and his statement of the holdings of the cases and the legal theory underlying them is nowhere surpassed (save in occasional law review articles treating particular topics in greater detail). The dry hard bones of the law are there, but he breathes into them the living fire of his studied convictions.

In dealing with his materials, Wigmore employs what has been called the "analytical-historical method of legal scholarship," and is, along with Williston, probably the greatest exponent of that method. This has in some quarters been a basis for criticism of his work,¹⁷ though of course it must be admitted his processes are much the same as (only better than) those regularly appearing in practically all judicial decisions. He derives his conclusions primarily from the older legal materials, as lawyers are ac-

13. 3 *id.* § 865. On the same page, the elderly Dean shows what he thinks about "modern times" by referring to "the spirit of the community, whether we choose to call it by the name of Liberty or the name of Anarchy (and it has certainly the evil as well as the good savor). . . ."

14. 8 *id.* § 2251.

15. *Id.* §§ 2272-2273.

16. *Id.* § 2251. This special attitude in relation to the Bill of Rights has been discussed before, in reviews of his second edition, for example. See book review by Chafee (1924) 37 HARV. L. REV. 513, 516; Morgan (1924) 33 YALE L. J. 336, 337; and Gifford (1924) 24 COL. L. REV. 440, 445. The two first cited are critical, the last is commendatory.

17. For a sympathetically critical discussion, see (1924) 22 MICH. L. REV. 625, a review by Professor E. W. Patterson of Wigmore's second edition.

customed to doing, rather than from studies in psychology and related sciences, some of which studies are now available and do have decided relevancy to the problems of the law of Evidence.¹⁸ Nor can it be said that this derivation of conclusions from the older materials is strictly a logical process. It scarcely ever is, either with judges or writers, even when they appear most devoted to the method. Nearly all of them first conclude, or already "know," that a particular rule is desirable, and then find their support in the older materials. Time and again one can easily see this inverted process in Wigmore's work, and the distinguished author would be the last to deny the fact. It is orthodoxy itself. But at the same time it cannot be denied that a more realistic approach, based on at least semi-scientific examination of the effect of particular procedures in action to the extent that such examination has been made, might be superior to an approach based on the "hunches" and the experience of even the most distinguished and scholarly student of the law.

One problem which a ten-volume work such as Wigmore's is bound to raise is the hugeness, almost unwieldiness, of modern legal literature. Most of the English reviewers of the second edition commented with shocked surprise on the length of the work (five big volumes), but explained and justified it in terms of America's fifty separate jurisdictions, each with its own separate statutes and reports. Nevertheless they felt that English lawyers were fortunate in being able to compress their law of Evidence into much smaller compass. Undoubtedly they were fortunate in that respect.

Of course a shorter treatise on Evidence can be written for America, too. We already have our hornbooks and our one-volume student textbooks which undertake to state the whole law of Evidence, also a few longer books. As far as quality is concerned, no one even compares with Wigmore. We may wish that Wigmore's treatise were shorter, but not at the expense of making it like the lesser works.

Dean Wigmore cannot be blamed for the great bulk of the American law of Evidence, but that doesn't mean that there is not need for something to be done about it. The same must be said of every other branch of our common law. If case decisions are still to be our final authority, and they

18. These materials are discussed from the point of view of the law of Evidence in such articles as those by Hutchins and Slesinger, *Some Observations on the Law of Evidence* (1928) 28 COL. L. REV. 432, *State of Mind to Prove an Act* (1929) 38 YALE L. J. 283, and, *Consciousness of Guilt* (1929) 77 U. OF PA. L. REV. 725, which Wigmore barely cites.

continue to multiply as they do (and must), a twenty-volume work on Evidence will not hold the law, in the fashion that Wigmore expounds it, twenty years from now. The situation forty or fifty years from now is horrible to contemplate. The fault certainly is not Wigmore's. He has merely reached a high degree of perfection in a traditional form of writing. Nor is it any other man's. But something will have to be done about it.

Apparently an authoritative Code of Evidence is the only possible answer. Such a Code may be in the offing. The American Law Institute has just undertaken the project of drafting one, with Professor E. M. Morgan of the Harvard Law School as Reporter, Dean Wigmore as Chief Consultant, and ten other nationally known judges, lawyers, and law teachers as active assistants. Some portions of the first tentative draft were considered at the meeting of the Institute held in Washington last May.

The form which the Code is to take was the subject of some dispute before the Institute. A paragraph taken from the June issue of the *American Bar Association Journal* gives the gist of the controversy:

It is drafted in such form that it may be enacted by a legislature or adopted by a Court. To this there was no objection. Dean Wigmore, the Chief Consultant, however, proposed a formulation very similar to his Code of Evidence (2nd ed., 1935), which covers nearly 550 pages. In particular, he advocated a draft which would contain a definite affirmance or repudiation of each concrete rule that has been passed upon in the majority of jurisdictions, rather than a group of generalized statements. Each such rule should be only a guide to the trial judge, directory not mandatory, and his rulings in the application of any such rule should be subject to review only in extreme instances. The Reporter and his Advisers have proceeded upon a different assumption. They began by abolishing all disqualifications and privileges of witnesses and making all relevant evidence admissible, except as otherwise provided in a later rule. This, they believe, makes unnecessary a specific repudiation of any rule heretofore in force. They have not disturbed the existing law, making rulings reviewable for abuse of discretion. The rules submitted are much more general than the Consultant desires.¹⁹

Dean Wigmore's position is somewhat more completely stated in one of a series of "postulates" which he presented to the Institute at the May meeting as stating basic essentials for a Code of Evidence. It is as follows:

19. (1940) 26 A. B. A. J. 476. "In contrast to the position of the Consultant, Judge Charles E. Clark argued that these rules were much too detailed; they should be broad grants of power with details left to the discretion of the trial judge." *Idem*.

This Code, aiming as it does to become a practical guide in trials, must not be content with *abstractions*, but must *specifically deal with all the concrete rules exemplifying the application of an abstraction*, that have been passed upon in a majority of jurisdictions; the Code specifically either repudiating or affirming these rules. If the objection be made that the law of Evidence should no longer remain a network of petty detailed rules, the answers are first that both Bench and Bar need their guidance in order that a *normal routine* be ordinarily followed for *speedy dispatch at trials* without discussion; secondly, that the Bar needs them in order to *prepare evidence for trial* along normal *expected* lines; and, thirdly, that the really effective way to eliminate the present frequent overemphasis on detailed concrete rules, is to provide that they shall be only *guides*, not *chains*,—*directory*, not *mandatory*,—and therefore to *forbid the review* of the Trial Court's rulings, except in extreme instances.²⁰

A majority of the Institute opposed Dean Wigmore's position, and adhered to the view urged by the Reporter and his assistants. If the law books are ever to cease their growing, and the main body of the law is to be kept within such compass that an ordinary lawyer can at least pretend to know something about it, it is practically necessary that the view of the majority shall prevail. The Code that Dean Wigmore suggests would require annotations and commentaries just about as voluminous as his present ten-volume treatise. In fact, this treatise actually is a kind of commentary on and explanation of the 1935 Code, even though it is true that his Code grew out of the treatise rather than the treatise out of the Code.

Whatever happens to the law of Evidence in the years to come, nothing can dim the brilliance of Dean Wigmore's work today. Painstaking labor lasting through a whole lifetime, the patience of Job, a keen intellect, a tremendous capacity for organization and classification, a diligence constant through the years, careful analysis and relentless logic, originality in thought and vocabulary, true scholarship—all these are his, and they are graven deep on the monument which he has built for himself in the law. In the high respect of his fellow craftsmen there is none above him.

20. (1940) 26 A. B. A. J. 476, 477.