


RECENT LITERATURE.

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A Treatise on the System of Evidence in Trials at Common Law.

By John Henry Wigmore. Second Edition in five volumes.

Boston: Little, Brown and Company, 1923. Pp. lxxxvi., 1-1140; xxxvi., 1-1069; xxxiv., 1-1002; xxxii., 1-972; xxx., 1-1141. Quarto.

When this work first appeared eighteen years ago it was hailed by Professor Beale as "the most complete and exhaustive treatise on a single branch of our law which has ever been written." It may confidently be asserted that the present edition, which contains numerous improvements and brings the work down to date, remains in practically all respects unequalled by any legal text-book in the English language. If this seems unduly high commendation, the reviewer's answer is that it is difficult to appraise this treatise and avoid the use of superlatives.

In the first place, it is a monumental work of five thousand pages, and contains citations of more than 55,000 judicial decisions and 15,000 statutes. These figures give some idea of the immensity of the task accomplished by Dean Wigmore and of the amount of research required by the undertaking. No book, however, is to be judged by its avoirdupois nor by its having a long index of authorities, and the great merit of this one in fact lies in those features to be later mentioned which place it in a category far above the average legal text-book manufactured out of head notes and dicta strung end to end without comment, or at any rate without any adequate discussion of the principles underlying the decisions.

Professor Thayer, whose disciple Dean Wigmore is grateful to be, points out in his *Preliminary Treatise on Evidence* that ours is a rational mode of trial which has emerged from the formal and mechanical tests employed by our forefathers. The present work is accordingly dedicated to the proposition that the Anglo-American law of evidence is a system of reasoned principles and rules, and that the judicial and other precedents may be aligned as the consistent product of these principles and rules. If this aim is to be achieved, it is obvious that every

rule must run the gauntlet of the author's critical judgment, and accordingly nowhere do we find that he hesitates to descend from the high ground of authority to the low ground of principle, and in nearly every instance, one feels that he has either said a new thing extremely well, or an old one better than it has ever been said before. For the outstanding characteristic of this book, which appears on every page, is its strong originality. The arrangement of topics is bold and arresting: it departs not infrequently from the traditional sequence, but it is invariably suggestive and illuminating. The novelty and comprehensiveness of the author's method of approach to each of the topics is one of the most striking features of the work. The reader may learn not merely what the law *is* in sixty or more jurisdictions, and where the precedents are conflicting, the weight of authority, but also the history of the rule, what it *was* and how it *came to be*. Next, he is offered a reasoned discussion of what in the learned writer's opinion the rule *ought to be*, and how the law may be improved. In this search for the ideal rule, the analysis is keen and penetrating, the evidence *pro* and *con* is marshalled in the best lawyer-like manner, and the solution offered is almost always convincing. And finally, the reader is once more set down on solid ground by a statement of what the law of the future is likely to be. All this is done in a style that is at once clear and vigorous,—at times, one is apt to think, a little too vigorous, for instance, where the author's comment on the court's decision in *Rex v. Thompson* (1912), 3 K. B. 19 reads "it is strange that in this day and generation an English court can be found so uninformed upon the principles of the law of evidence." Although such strong expressions are exceptional, there is never any doubt as to Dean Wigmore's convictions on any particular question. He has thought out each rule too carefully and thoroughly to take refuge behind the *semble* and the *quære*.

It must not be assumed, however, that we have here a mere dogmatic exposition of the author's views to the exclusion of what others have thought and said on these questions. On the contrary, one of the most valuable features of the book is the wonderful use made of apt quotations to show the development or to illustrate the scope of the rules. Passages from the best opinions of the great jurists on both sides of the Atlantic, from Coke, through Mansfield to Halsbury, and from Marshall and Story to Holmes may here be found, along with scathing denunciations from Bentham, scholarly elucidations from

Thayer, and expositions of logical fallacies from Sidgwick, to mention only a few of the many sources drawn on. And not infrequently a situation is illustrated by some happily chosen quotation from Shakespeare, Dickens or Edgar Allen Poe. Even legal anecdotes find a place, and if all law books were written in this way, a lawyer who would spend fifteen minutes a day reading them would be more likely to acquire a liberal education than the possessor of Dr. Eliot's five-foot shelf of books.

The matters of detail have all received the same careful attention and exhibit the same stamp of originality as distinguishes the rest of the work. The citations are arranged alphabetically by jurisdictions, the English first, followed by the Canadian—which for this purpose include those of Newfoundland—those of each province being likewise placed alphabetically, and finally the American ones, so that it is always easy to ascertain the state of the authorities in any one jurisdiction. And what is still more useful, each case is followed by a short statement of its distinguishing facts, so that a lawyer searching for authority can see at a glance if the case is likely to help him. The fifth volume contains three indexes, one of the statutes, a second of the cases and a third of the topics, and there is also in each volume a table of cross-references to the author's *Pocket Code of Evidence*, all of which will be very useful to the busy practitioner.

It is manifestly impossible in the course of a short review to examine in detail any of the topics discussed in this treatise. Nevertheless, mention should at least be made of a few of the subjects found here, for authority on which the lawyer will seek elsewhere in vain. There are sections, for example, on the rules of evidence before Industrial and Administrative Commissions, Juvenile Courts and other modern tribunals. Recent developments of the law in regard to such things as automobile sign-plates, finger prints, moving picture photographs, evidence of title under the Torrens system, evidence obtained by unlawful search and many other similar matters are treated at length. Nor can the courageous and powerful efforts made to unravel such tangled skeins of our jurisprudence as *Res Gestæ* and the Parol Evidence Rule be passed over in silence. With the author's own statement as to the former that the exposition of the topic "is to be approached with a feeling akin to despair," as well as with his quotation from Professor Thayer with reference to the latter that "Few things are darker than this, or

fuller of subtle difficulties" all who have had any experience with them will agree. The profession is all the more grateful for analyses of these difficult subjects which may have to be modified in detail, but which fundamentally are sound.

It is not to be expected, of course, that in a work so comprehensive and of such remarkable originality, all the orthodox views should be approved or that all readers should agree with the author's conclusions in every case. The older generation lawyers, for instance, will hardly concur in the statement that hearsay is objectionable solely because of the lack of cross-examination, but the reviewer would advise a patient reading of the argument advanced before the theory is branded as unsound. The same remark applies to the hearsay exception of Declarations of Mental and Physical Condition. What is perhaps still more shocking to students of the law brought up on Best and Phipson and Taylor is the strange nomenclature and coined expressions not to be found in these works, to say nothing of Gilbert and Starkie. The book abounds in such curious expressions as "autoptic proference" (real evidence), "prophylatic rules" (dealing with the guarantee afforded by the oath and the risk of perjury), "integration of jural acts" (the adoption of a written memorial in the Parol Evidence Rule), "viatorial privilege" (the privilege of a witness attending trial), and many other such startling novelties. A great deal of criticism has been levelled at this attempt of a single writer, learned and gifted as he admittedly is, to impose such new and strange locutions on the law. This becomes a conservative profession, no doubt, but it is submitted that there is considerable to be said in favour of the course adopted. The law of evidence almost more than any other branch of the law has suffered from a "lamentable ambiguity of phrase and confusion of terminology," and this tyranny of well-worn slippery phrases in place of ideas has led to not a few miscarriages of justice. The witticism that words were invented to conceal thought, or more often still to hide the absence of it, finds only too many examples in our law. An author with the courage to discard the mischief breeding terms, not always venerable even for their age, and to adopt new words with definite connotations, and if such are lacking, to invent those necessary for the purpose, may be doing a signal service to the law. Not all of Dean Wigmore's phrases will remain, but many of them will undoubtedly find a place.

What has the work to offer to the Canadian lawyer? In the first place, in the preparation of a case no advocate alert to his

client's interests can afford not to examine the views and the arguments advanced therefor set forth in these volumes. Further, from a narrowly practical point of view, this is the only book that contains the citations of English cases and statutes and in addition practically all of the Canadian decisions and the Dominion and provincial enactments bearing on evidence—even the relevant Orders-in-Council and provincial Rules of Court have been included. No doubt a Canadian edition of this treatise “shorn of the American cases, except when the quotation would be useful for the legal reasoning, and supplied with additional foot-notes on English [and Canadian] decisions” as has been suggested by Professor Chafee, would best meet our needs, but until some competent person appears to provide us with this desideratum, Wigmore on *Evidence* remains incomparably the best reference work in its field for the Canadian or English, no less than for the American, lawyer.

J. T. H.
