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## Select Cases on the Law of Evidence

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economist so thoroughly merged that it would frequently take the skill of a Higher Critic to separate their contributions. In general, the hand of the economist predominates in Book I, with its elaborate tables which measure the growing divergence between ownership and control. Book II is more lawyer-like in its study of the legal devices by which this separation has been effected and the resulting legal and factual positions of the various groups, particularly the stockholder. Here Mr. Berle touches again on his theory that corporate powers are essentially powers in trust.<sup>4</sup> Set in the framework of a study of the emergence of a "control" group whose interests are different from and may even be diametrically opposed to those of owners, this theory gains much in plausibility. Book III—on stock markets—takes us through a field in which neither the lawyer nor the economist has as yet marked out the roads, for nowhere is the corporate revolution so destructive of old concepts (though the old concepts are still enthroned) as in the open market for securities. Book IV is a very short but very clear call for a reorientation of enterprise. The traditional logic of property would give profits to the owners. The traditional logic of profits would give the owners but the wages of ownership, and profits would go to the service of control. A new synthesis is necessary. One is modestly put forward as a third possibility: that the community is in a position to coerce the modern corporation into serving not only the owners or "the control," but all society. "It is conceivable," say the authors, looking into the future, "indeed it seems almost essential if the corporate system is to survive, that the 'control' of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity." In this conclusion, if the posing of a problem can be called a conclusion, neither the lawyer nor the economist can be heard separately. They have cooperated admirably.

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SELECT CASES ON THE LAW OF EVIDENCE. Third edition. By John Henry Wigmore. Boston: Little, Brown & Co. 1932. pp. xli, 1419.

DEAN WIGMORE published the first<sup>1</sup> edition of this collection in 1906. A second edition, in which the material was revised and considerably expanded, appeared in 1913. In the period of nearly twenty years since that revision, the law of evidence has been steadily developing. Attempts to enforce prohibition laws have given rise to a multitude of problems under that perplexing topic, "Illegal Search and Seizure", with variant results in State and Federal Courts.

In many branches of the law of evidence, the decisions of the courts have reflected to a marked degree the influence of Dean Wigmore's great text.

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4. Cf. 5 HARV. BUSINESS REV. 424 (1926).

\*The reviewer has not felt that the adoption of this book into a series of which he is an editor would render his testimony incompetent, but he is willing to allow his unconcealed interest to bear on the question of creditability.

1. See Book Review (1906) 5 MICH. L. REV. 157.

Where formerly opinions were clogged with summaries and reviews of endless lists of cases, we find the courts settling the problem in hand by a quotation from this distinguished author. Because of Dean Wigmore's universally acknowledged position as the authority in this field, a new edition of his case-book is a matter of the greatest interest to every teacher of evidence.

Although the arrangement and classification substantially follows the second edition, the revision of the material has been thorough. In the selection of new cases the author has displayed his rare skill and judgment. Some familiar cases have disappeared, but their places have been taken by a surprising number of very recent decisions admirably chosen for their capacity to stimulate thought and discussion.

The present writer has been somewhat puzzled by the author's division of evidential material into three classes for the purposes of the excluding or eliminative rules. The author states in an introductory note (p. 15):

*"Kinds of Evidence.* In taking up the Eliminative Rules, it is necessary to distinguish between the three kinds of evidential materials: Circumstantial Evidence, Testimonial Evidence, and Autoptic Preference. The difference of the materials gives rise to entirely different rules."

*"Autoptic Preference.* This occurs when the tribunal observes the thing with its own senses. . . ."

*"Testimonial Evidence.* This includes all assertions made by a human being, as a source of the tribunal's belief in the fact asserted. . . ."

*"Circumstantial Evidence.* This comprises all evidence not testimonial. . . ."

Undoubtedly the rules differ as we deal either with physical objects presented to the senses of the tribunal or with human assertions; and also according to the intervening steps in reasoning or inference between the thing or assertion and the ultimate proposition to be established. A thing may be offered to establish the ultimate proposition directly, and so may a human assertion. On the other hand, either may be used to establish an intermediate proposition, to serve as a basis for a further inference.

In all cases the evidence seems to consist of either a human assertion of a fact (proposition) or of some thing (fact) perceived by the tribunal. If the fact asserted or perceived is not the ultimate matter to be established, a process of inference or reasoning must intervene. It would seem, therefore, that evidence (evidential material) should be divided into two classes only: Testimonial (human assertions) and Non-Testimonial (Autoptic Preference), and that each class might be subdivided into Circumstantial and Non-Circumstantial according to its bearing on the ultimate probandum. The circumstantial process, reasoning from an intermediate probandum to an ultimate probandum, seems to be precisely the same, whether the intermediate probandum was proved by the statements of a witness, describing, for example, a blood stained garment, or by the production of the garment itself for the inspection of the tribunal.

The author's arrangement in separating closely related topics does not seem to be the most desirable from the standpoint of either the teacher or the student. For example, the competency and qualifications of expert witnesses is separated from the opinion rule by a group of cases dealing with the examination of witnesses. Then too, the author does not consider admissions as hearsay receivable under an exception to the hearsay rule, but rather as a class of circumstantial evidence because of the inconsistency between the party's statements and his claim or defense, and accordingly this group of cases is separated by several hundred pages from the cases dealing with the hearsay rule and its exceptions.

Whether admissions should be classed as hearsay is a debatable question, and a strong case has been made for the hearsay view.<sup>2</sup> Clearly admissions and hearsay have many characteristics in common. Admissions may be, and commonly are, used directly to prove the truth of the proposition admitted, and that is precisely the ordinary use of hearsay. There is a rather striking similarity between a receipted bill from the adverse party, and a receipted bill from a third person since deceased, when each is used to prove the payment of money. If a student is to form any independent judgment on such a matter all of the materials ought to be before him.

Aside from objections to the arrangement of the materials, it seems to the writer that one or two rather important topics have not been adequately treated. The author deals with former testimony, not as an exception to the hearsay rule, but as satisfying the rule, and apparently for that reason omits several rather important technical limitations on the use of former testimony. On the topic of waiver of the privilege against self-incrimination, the case of *Fitzpatrick v. United States*, involving the cross-examination of a defendant, hardly furnishes sufficient material for a discussion of the various phases of the doctrine of waiver. It would have been better if the author had retained the case of *Regina v. Garbett* which appeared in the former edition.

Under the head of "To Whom Evidence is to be Presented", the author has reprinted one case, *Bartlett v. Smith*, dealing with the function of the judge in determining questions of fact upon which the admissibility of the evidence depends. This is a rather summary treatment of a topic which has proved confusing enough to the courts, as illustrated by the discussion in such cases as *Coughlan v. White*<sup>3</sup> and *Gila Valley, Globe & Northern Ry. v. Hall*.<sup>4</sup> Professor Maguire's edition of Thayer's Cases on Evidence reprints five cases with a number of summarized cases as problems. If the author found it necessary to economize in space, he might have omitted such a case as *Hutchison v. Bowker*,<sup>5</sup> dealing with the function of the judge in construing writings, which has a rather remote bearing on the law of evidence and cannot be treated adequately in a course primarily concerned with other matters. The late Professor Thayer devoted a great deal of space to such matters, but there was at that time no general course in procedure.

Although there may be teachers who will find this collection unsuited for their students, at least they can profit from a careful examination of it.

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POLITICA METHODICA DIGESTA OF JOHANNES ALTHUSIUS. Edited by Carl Joachim Friedrich. Cambridge: Harvard University Press. 1932. \$6.

ALTHUSIUS' book on politics, though written in Latin, is the most original and important contribution of German scholarship to that vast European philosophical and legal literature on the state and law that is focused in Grotius, Spinoza and Hobbes. That age is in political science and jurisprudence the period which

2. See Morgan, *Admissions as an Exception to the Hearsay Rule* (1921) 30 YALE L. J. 355.

3. 236 Mass. 165, 128 N. E. 33 (1920).

4. 232 U. S. 94 (1914).

5. 5 M. & W. 535 (1839).