

## THE CONTRIBUTION OF WIGMORE TO THE LAW OF EVIDENCE

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**T**O REVIEW Wigmore on Evidence<sup>1</sup> is a task before which the boldest might hesitate. Here, in ten handsome volumes, is the Anglo-American system of evidence in trials at common law. Its statement is exhaustive, critical and scholarly, supported not only by extensive annotation but by Dean Wigmore's own prestige as the acknowledged master of the field. What can the critic say, except that here is the authoritative text—perhaps the greatest modern legal treatise—bigger and better than ever?<sup>2</sup> Two avenues of approach remain open. Any work of this length can be examined section by section and specific points subjected to specific criticism. Or, it can be read as a book—and to judge its design, purpose and the expressed philosophy of its author involves primarily questions of taste. *De gustibus non est disputandum*, which is to say, there are no subjects for dispute at once so enjoyable and so safe as questions of taste, where one man's opinion may appear as good as another's. Combination of these two critical techniques should give a satisfactory picture, not perhaps of the book, but of the only thing which a review can portray—one reader's reaction.

An essential paradox which runs through the ten volumes is illustrated by two quotations. In discussing the present and future of the law the learned author bewails the indifference of judges to judicial science, saying: What they [the judges] respect is mere precedent,—a prior decision, and the latest decision. This respect is, in turn, sensed by the authors. What ought to be a genuine juristic treatise is degraded to a mere collection of precedents,—preceded by sentences beginning "Some courts, indeed hold, etc." and "It has been decided, however, on the contrary, etc." The judges often measure a treatise by its value as a digest. By thus setting a standard of valuation, they disparage the careful, helpful thinker and encourage the mere compiler. The progressive development of the law by analysis and construction is stifled.<sup>3</sup>

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<sup>1</sup> A Treatise on the Anglo-American System of Evidence. By John Henry Wigmore. 3d ed. 10 vols. Boston: Little Brown & Co., 1940. Pp. xcii, 7324. \$100.00.

<sup>2</sup> The story is told of an eminent Harvard professor of English literature, who had no advanced degree. He used to explain that he could not go up for a Ph.D. because no other man was competent to examine him.

<sup>3</sup> I, 243. All references are to the third edition of Wigmore on Evidence unless otherwise indicated.

Yet Dean Wigmore has himself sensed, and to some extent been influenced by this respect for mere precedent. In the preface to the first edition, repeated in the third, he states:

The particular aspiration of this treatise is, first, to expound the Anglo-American law of Evidence as a system of reasoned principles and rules; secondly, to deal with the apparently warring mass of judicial precedents as the consistent product of these principles and rules; and, thirdly, to furnish all the materials for ascertaining the present state of the law in the half a hundred American jurisdictions.<sup>4</sup>

The third of these stated objectives obviously could not be attained without paying considerable respect to prior decisions and to the latest of them. The one hundred and seventy page table of cases in the first edition in 1905, swollen to more than four hundred pages in 1940, shows the importance of these considerations. Some fifty thousand cases are not necessary to the exposition of the law of evidence as a system of reasoned principles; nor, if the cases really are the consistent produce of principle, would it be necessary to cite fifty thousand in order to demonstrate this consistency. Only to furnish all the materials for ascertaining the present state of the law in every American jurisdiction is such a wealth of citation even useful.

This is not to say that Dean Wigmore has ever descended to mere compilation. Analysis of principle rather than marshalling of precedent is the characteristic feature of his work. But once included, precedent as such has necessarily occupied tremendous space. The result in 1905 was a treatise more than thirty-six hundred pages long. In 1940 it runs more than sixty-five hundred pages, exclusive of indices and tables. There is one great defect in a book of such length,—that few will ever read it as a book, from beginning to end. Discouraged by its bulk, practitioners and students will naturally use it as a reference work in the sense that an encyclopedia is a reference work, turning to and examining only the particular section directly relevant to some immediate problem. But a *system* of reasoned principles and rules is such because of the relation of its parts. Any part, wrenched from context and frame to be considered alone, loses much of its force. Where the perfection and interdependent strength of the system might carry almost the impact of self-evident truth, each isolated principle can depend only on the prestige of the author or upon the precedents, directly in point, by which it can be supported. Of the two, habits of legal thought greatly emphasize support by precedent. Thus can a work not only conceived, but executed, as a genuine juristic treatise be degraded in use to a mere compilation.

<sup>4</sup> I, xiii.

When one is dealing with a mere collection of precedents at best, there is no harm. Such collections are extremely useful and need not be criticized because they are not more. It is unfortunate for the magnificent analysis, organization and criticism of a Wigmore largely to be smothered by the weight of citation and compilation which they are required to carry. A shorter treatise, written by Wigmore and designed for only the first of the three stated aspirations of his ten-volume set, might accomplish the one in less than a thousand pages. For the first time we would have a scholarly analysis and synthesis of the principles and rules of evidence in a form in which they could and really might be studied by judges and lawyers as a whole rather than ad hoc. Assuming continuance of our present law of evidence, without sweeping changes, such a text might vastly improve its administration.<sup>5</sup> Some one else, whose powers limit him to such a task, could write the great cyclopedic digest of evidence cases.

But Dean Wigmore chose, thirty-five years ago, to combine the systematic and critical text with the digest, and anyone who has read earlier editions or now has the patience to read nine large volumes will find how superlatively well he has performed both tasks. The chief changes in the current edition are the incorporation of material from the old 1934 supplement into regular text, the extension of annotation down to date, and the expansion or re-writing of certain sections to cover developments in the law and perhaps in one case—section 1400 on the future of the hearsay rule—to express changes in the author's own views. The organization of material is that of earlier editions, intricate, but necessarily so, the intricacies arising from the subject-matter. Evidence presents a feature not uncommon in the law—a structure of basic principles and a structure of specific rules which do not entirely coincide. The basic principles are few in number, and on them all rational rules must depend.<sup>6</sup> But case law grows rather

<sup>5</sup> As they stand, the first four or five hundred pages of volume I of the present treatise come as close as anything to the desired text, but are naturally incomplete because not written to stand alone. Wigmore's students' edition is all rule without critique, and his *Science of Judicial Proof*, a fascinating work, does not purport to be an evidence text. No other author since the unwieldy Bentham has approximated such a treatment of the whole subject of evidence, although Thayer supplied it for certain topics in his *Preliminary Treatise*.

<sup>6</sup> All possible reasons for refusing to listen to evidence reduce to four, the policies of avoiding undue prejudice, unfair surprise, and confusion of issues, which Wigmore treats as controlling in dealing with "circumstantial evidence," and the policy of preferring better or primary evidence to worse or secondary, which Wigmore deprecates. Following Thayer, Wigmore criticizes the best evidence principle as "nothing more than a loose and shifting name for various specific rules. Each of these stands on its own basis of principle, and each of them has its own history, independent of the phrase" (§ 1173). Yet in § 8c and again at §§ 1845-63 and §§1904-13 Wigmore grants respectful treatment to the three principles of prejudice and confusion, though he states that they result in but two main rules (§ 8c). If there is no "best evidence

by the accumulation of specific rules for the treatment of recurrent factual situations than by the orderly exposition of basic principles and development of their implications. The specific rules are related in terms of the similarity of the factual situations they cover. A given rule may rest on one or more of the basic evidentiary principles, and a single principle supports several factually dissimilar rules. When the systematizer of legal truth turns his hand to the subject he then seeks Dean Wigmore's second stated objective, "to deal with this apparently warring mass of judicial precedents as the consistent product of these principles and rules." The results is a two-dimensional outline, sometimes treating the principles as the basic thread, with cross reference to particular rules sanctioned by precedent,<sup>7</sup> but more often treating the particular rules as basic, while justifying them in terms of more general principles.<sup>8</sup> The reason for—indeed, the necessity of—such an organization is clear when one works through the entire ten-volume set, though at times the frequent use of cross-reference must irritate the busy practitioner.

The only criticism which can fairly be directed at Dean Wigmore's demonstration of the mutual consistency of the specific evidentiary rules, and of their dependence upon principle, is that at times it is a little too good. Almost every rule and almost every orthodox application of a rule<sup>9</sup> finds some support, though it may at the same time be subjected to criticism. For example, the coercion argument is put forward, apparently seriously, as the best available justification for the rule against impeaching one's own witness.<sup>10</sup> The argument proves too much, since one can as well or better coerce an opponent's witness as one's own. Apparently Wigmore urges it because it can be used to justify the narrowest application of the rule, but it would seem better, especially after his scholarly exposition of the historical basis for the rule against attacking one's own

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rule" save the one requiring the production of documentary originals, the preference for the more immediate source of evidence, not as a rule but as a basic policy, influences as well the hearsay rule, the occasional requirement of attesting witnesses if available, the occasional requirement of eye-witnesses if any exist, and the opinion rule in its legitimate application.

<sup>7</sup> §§ 1845-63, dealing with unfair surprise; §§ 1904-13 dealing with the confusion of issues.

<sup>8</sup> For only a single example, the particular "circumstantial evidence" rules, §§ 51-465, organized completely on factual similarities, almost like the Negligence Compensation Cases Annotated, with its Common Sense Index. The difficulty is not a new one. Compare the similar double treatment in Starkie. See Starkie, Evidence 10-14 (1834).

<sup>9</sup> Except the opinion rule, which he goes equally far to oppose.

<sup>10</sup> § 899. In § 8c the author does state flatly that the rule against impeaching one's own witness should be abolished. But this fact would probably escape the attention of an advocate or judge seeking Wigmore's views on the subject where it is principally discussed.

witness, showing a background unrelated to any modern policy, to have dismissed the rule itself as a mere historical anomaly without support in principle.

At best, one tendency of a careful, well-written and all-inclusive treatise in any field of the law is to freeze or embalm the principles there expounded and to make changes in the future a little more difficult. Although he can point out the better of competing rules sanctioned by authority, the major task of the legal scholar has always been to uncover unifying principles in precedent and to build a system of rules out of a clutter of decisions. In a sense the rules do not exist until the scholar—who may be an author, a lecturer or a judge with a liking for learning and abstraction—states them as such. Then they gain a sanctity which may protect them from improvement even though they be attacked in the very moment they are first expressed.

In discussing the history of the rules, Dean Wigmore points out the paucity of systematic treatments of evidence in the eighteenth century, and the dominance of the "best evidence" doctrine, which "tended to preserve a general consciousness of the supposed [sic] simplicity and narrowness of compass of the law of evidence."<sup>11</sup> Yet it was in the eighteenth and in the first quarter of the nineteenth century that the law of evidence retained its early flexibility while growing to meet all reasonable demands upon it. As late as 1824 the scope and limits of the hearsay rule and its exceptions were vague; for example, Starkie (who placed opposition to hearsay largely on the best evidence doctrine which Wigmore follows Thayer in disparaging) could consider the rule as possibly inapplicable to any statement by a person since deceased who had opportunity to observe and no known reason to deceive. But in the next half century treatises and judicial abstractions multiplied; this possibility was rejected, though with regret.<sup>12</sup> And only four years later Lord Blackburn could say in the House of Lords: "I base my judgment on this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible."<sup>13</sup> "There was now indeed a system of evidence consciously and fully realized." Legal science had grown, with not altogether happy results.

The gain most commonly supposed to result from the growth of legal science is certainty in the administration of the law. Dean Wigmore speaks with enthusiasm of the state of the law in the mid-nineteenth century in

<sup>11</sup> § 8 (4).

<sup>12</sup> *Sugden v. Lord St. Leonards*, 1 P.D. 154, 240 (1876).

<sup>13</sup> *Sturla v. Freccia*, 5 A.C. 623, 647 (1880).

the United States, when perfection was all but accomplished.<sup>14</sup> Then came the new states, more supreme courts, each with equal claim to authority, and again all was confusion. To meet this situation, Dean Wigmore urges, "The greatest judicial service that can be rendered today is to keep the line of precedents clear and *inflexible in each jurisdiction.*"<sup>15</sup> He applies the same criterion in evaluating specific rules, as where he commends the test of "collateral" matters, by disproof of which witnesses may not be discredited, given in *Attorney-General v. Hitchcock*,<sup>16</sup> saying that it is "the only test in vogue that has the qualities of a true test—definiteness, concreteness and ease of application."<sup>17</sup> Yet what are the advantages of definiteness and clarity in evidentiary rules which would warrant selection of preferable rules on this basis and even justify what might be the worse rule in some of the states so that the local line of precedents may be kept "inflexible"?

In the law of real property and of commercial transactions, definite rules of substantive law permit honest men to plan their affairs so as to avoid dispute, and at times these same rules indicate so clearly the probable outcome of dispute that litigation may be avoided. Only in the most exceptional cases, as in connection with the generally unpopular rule against testimony by interested persons against a decedent's estate, will the law of evidence give determinative aid in forecasting the result of litigation. It is doubtful that any honest man relies upon rules of evidence, except the so-called "parol evidence rule," in the conduct of his affairs. It is only in discouraging fruitless appeals and in avoiding finicky reversals and unnecessary new trials that practical gain can be expected from increased clarity and inflexibility. But here there is another and far more promising prospect for improvement, which Wigmore elsewhere urges.<sup>18</sup> Accept the rule on appeal that no decision may be reversed for error in the admission of evidence unless it plainly appears that the appellant was—not may have been, but was—injured by the alleged error and successful appeals based on such errors alone would be almost unknown. The law of evidence could then be designed for the trial and not the appellate court, eliminating the last effective argument in favor of rigid and minute exclusionary rules, with their fancied certainty of appli-

<sup>14</sup> § 8 (7).

<sup>15</sup> § 987. Italics added.

<sup>16</sup> 1 Exch. 91 (1847). The test of *Attorney-General v. Hitchcock*, that a witness can be discredited by disproof of part of his story only where the discrediting evidence is independently relevant, unless it be applied so loosely as to lose its clarity as a test, is too narrow. How would the case of *Suzanna v. the Elders* be handled under this rule?

<sup>17</sup> § 1003.

<sup>18</sup> § 8c. Cf. §§ 16, 1005.

cation.<sup>19</sup> If such a principle could be established for jury trials and non-jury trials alike, we might think with wistful admiration of the seventeenth century, before the days of the great treatises in the field, before there was a system of evidence, consciously realized, and when such broad generalizations as the best evidence doctrine tended to preserve a consciousness of the supposed simplicity of the law. Such longings for a simpler day are probably as vain here as elsewhere. A fully developed, highly complicated and technical body of law concerning evidence arose long before the first edition of Wigmore's treatise in 1905. Having this inheritance, certainly we are fortunate in having a Wigmore to expound it, even though the very skill and precision of his presentation may have some tendency to perpetuate the system.

Turning to a more particular consideration of topics, one disappointment in the third edition is the treatment of admissions. Having made some concession to Morgan's criticisms in his second edition, Wigmore now stands his ground, in a thoroughly untenable position. Having conceded that it would be preposterous for anyone to object to the use of his own statements against himself because he had had no opportunity to cross-examine himself, and that this had something to do with the use of party admissions as evidence (clearly indicating that an exception to the hearsay rule is involved), Dean Wigmore insists that at least an analogy to the self-contradiction of a witness is involved, and that the contradiction between the party's past statement and his present position at trial is at least one ground for permitting the past statement to be used against him.<sup>20</sup> Morgan has demonstrated<sup>21</sup> and Wigmore has conceded<sup>22</sup> that the self-contradiction theory of admissions alone is not enough. On the contrary, it adds nothing whatever to Morgan's explanation of the uselessness of cross-examination. It should therefore have been discarded, on the basic principle of science which prefers the simple explanation to the complicated one, the single to the double. Moreover, while the contradiction theory is merely harmless but annoying embroidery when one deals with admissions of the party himself, once one turns to vicarious admissions it makes positive trouble. The application of Morgan's suggestion—the use-

<sup>19</sup> This is of course not unlike the rule commonly applied to appeals from cases tried without jury. Those particularly doubtful of the average intelligence of jurors would feel better if this rule were accompanied, in jury cases, by one letting the trial judge advise the jury on the evidence, as Wigmore suggests in this connection. Both suggestions are in accord with Rules 8-10, Am. L. Inst., Code of Evidence (Tentative Draft No. 1, 1940).

<sup>20</sup> § 1048.

<sup>21</sup> Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L. J. 355 (1921).

<sup>22</sup> § 1048 n. 1, in both the second and third editions.

lessness of self-cross-examination—to vicarious admissions would restrict them sharply. It would be preposterous for the defendant in a personal injury or in an ejectment suit to protest at the use of his prior statements, saying that they were not made under oath, were probably false, represented an inadequate appreciation of the problem, or the like. If any of these things be true—if there be any helpful fact which he could have brought out by cross-questioning himself immediately after the admission was made—let him now take the stand and offer his explanation. But a very different position is that of the defendant railroad whose conductor has made damaging admissions about a wreck, or of the defendant landowner whose predecessor in title has admitted him out of court. Every defect which ordinarily weakens or discredits hearsay testimony is or may be present here.<sup>23</sup> The speaker may have been lying—lying in his own interest at the time of the statement. He may have been misinformed, or speaking without having had adequate opportunity for observation. If the uselessness of cross-examination be our basis for using admissions generally, most vicarious admissions should be excluded, unless the vicarious admitter is put on the stand. But because the inconsistency theory is meaningless in terms of probative value of evidence, it can be stretched indefinitely. Under Wigmore's "substantive law" test,<sup>24</sup> the vicarious admitter need not be offered for cross-examination; by some mystic process his words have become the words of the party litigant. But no such metamorphosis has given the party litigant the vicarious admitter's power to explain those words. If the exclusionary rules are to bear any relation to the probative value of the evidence tested by them, vicarious admissions constitute a startling gap in the hearsay rule. Nor is it any answer to list cases in which vicarious admissions would obviously aid the search for truth.<sup>25</sup> Horrible examples of misleading admissions could as easily be conceived and enumerated. Such illustrations, pro and con, could equally be devised for any species of inadmissible hearsay. I do not defend the hearsay rule as presently enforced—far from it.<sup>26</sup> If it is to be re-written and largely abolished by direct assault, so much the better. But, attempting to keep on one level of discourse at a time, if we assume a hearsay rule,

<sup>23</sup> In fact, additional defects may appear, since the opinion rule, and even the more basic rule excluding a witness' legal opinion, are often held inapplicable to a party's admissions. Wigmore relies upon his theory of inconsistency to assert that the rule waiving the requirement of personal knowledge in case of admissions is the better. § 1053.

<sup>24</sup> § 1077 et seq.

<sup>25</sup> § 1080a.

<sup>26</sup> See James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 Ill. L. Rev. 788 (1940).

vicarious admissions as approved by Dean Wigmore are an indefensible anomaly.

The opinion rule, singled out by Wigmore as the one rule entirely without sense—"never anything but a futile historical error,"<sup>27</sup>—seems to this reviewer to deserve somewhat less cavalier treatment. No one would defend the extremes with which it has been applied, but this can be said of almost every rule of evidence. And as surely as the others it contains its kernel of truth. It is desirable, in evaluating the testimony of a witness, to determine to what extent it represents the witness' recollection of immediate perception and to what extent it represents either his inference and conclusions from observation or his reliance upon the statements of others. To the extent that the witness' statement is found to rest upon his acceptance of the statements of others, problems of hearsay are revealed; it may at least be said that generally it is preferable to call the person upon whose actual observation we rely. To the extent that the witness' statement is found to rest upon inference from observation, rather than to recount the observation itself, it would seem preferable to require that the witness recount his actual observations and let the jury, with the advantage of having heard all other testimony in the case, form its own opinion as to the accuracy of the inference.<sup>28</sup> Where for some reason it is impossible for the witness effectively to recount his actual observation, or where the witness is more skilled than the jury in drawing the just inference, exceptions should and do exist. This seems as solid a core of good sense as possessed by any of the exclusionary rules. It may be objected that the opinion rule is nevertheless unnecessary, since cross-examination will disclose any imperfection in the basis of a witness' assertions. Yet the check of cross-examination would be hardly adequate to the actual problem of a trial. An unfounded opinion having been expressed on direct examination, its effect must be dissipated promptly or it may never be. The objection or motion to strike, requiring the witness at once to go behind his statement of opinion to reveal its basis, is a practical necessity in many cases. Although it would make little difference whether the opinion itself went in or out, once its basis was fully revealed, revelation of its basis may be vital. In cases where it is impossible to go behind the opinion to probe its supports, the policy of the rule excluding opinion is most apparent. Thus Dean Wigmore asserts that on principle the opinion rule can have no

<sup>27</sup> § 8c.

<sup>28</sup> Of course in strict analysis no line can be drawn between observation and inference. Nevertheless, there is a working distinction, perfectly adequate in most cases which arise.

application to dying declarations.<sup>29</sup> But is this true? The dying declaration at best is among the least reliable of admissible hearsay, since there is a guaranty of sorts against wilful falsity, but none against error in observation and interpretation of data. If there is any merit in the general principle requiring of a witness testimonial capacity and knowledge, the opinion rule serves as a valuable corrective to the several hearsay exceptions, and particularly to dying declarations.

Various other topics could supply meat for discussion. Treating testimonial knowledge of witnesses as a subject distinct both from hearsay and from opinion seems to this reviewer a most sterile refinement. Other views as to the reason for limiting use of leading questions and scope of cross-examination might be urged. A single remark on the use of prior self-contradiction seems highly questionable, and much could be said, both in theory and in practice, for treating "past recollection recorded" as a hearsay exception. Limitations of time and space prevent embarking upon these controversies. Above all, no reasonable limits would permit a section by section appraisal of the many topics on which Dean Wigmore leaves nothing to be desired, no more to be said. These form the bulk of ten long volumes, as Wigmore's analysis and organization form the very structure of the law of evidence today. The critic can only say, here is the authoritative text—perhaps the greatest modern legal treatise—bigger and better than ever.

<sup>29</sup> § 1447.