

BOOK REVIEWS

Handbook of the Law of Evidence. By John J. McKelvey. Fifth Edition. St. Paul: West Publishing Co., 1944. Pp. xxiv, 814. \$5.00.

This is the only one of the West Publishing Company Hornbook Series yet to reach a fifth edition. Its first edition was published in 1897. There are now thirty-seven hornbooks in the series; twenty-five are in first edition; eight in second; two in third; one in fourth; and only this book is in fifth edition.

The author is John J. McKelvey of the New York bar, who also wrote the prior four editions of the book. Mr. McKelvey is a very scholarly lawyer. He was born in 1863 and was, in 1887, the first editor-in-chief of the *Harvard Law Review*. His professional contributions to his generation have been great. Thousands of young men have had their first contact with the law of evidence from this book and Mr. McKelvey's casebook. It therefore comes with ill-grace for anyone to criticize these books.

But no objective observer can escape the conclusion that the law of evidence is today in some confusion. Much (if not most) of this confusion is obviously due to the text writers and the law schools. God pity the poor boys who have to practice law with what they learn about evidence from even the best law schools! This indictment may be confirmed from any graduate of the last twenty-five years who has tried cases.

Perhaps this law-school lag is due to the pre-eminence of Wigmore in the field of Evidence for the past forty years. His merits were so great as to discourage competition. He committed himself to a position on practically all questions in his first edition in 1904, and thereafter never made an objective examination of the cases. In recent years the subject of Evidence has usually been assigned to the youngest professor in any law school, and he did well if he read all of Wigmore and a few law review articles.¹ He had no time or stomach for research on the modern law. The law of Evidence in the period from 1900 to 1944 is thus almost unexplored.

One of the peculiarities of the law of Evidence in the United States is that it is always in course of change and it changes without leaving landmarks. Any case more than twenty-five years old is thus strongly suspect. And any single case, such as is printed in a casebook, gives a false impression of the law; it is necessary to examine the chain of cases of which that case is a part.

Mr. McKelvey in his introduction to this book rather favors the adoption of the Code of Evidence of the American Law Institute. It seems to this reviewer that such adoption would only add to the confusion. The law professors who drew the code had a powerful ulterior motive. They had to drag the horse around to a street that they could spell. The alternative was the task of examining some 200,000 cases and restating the results. The materials of their profession had got away from them. It availed them nothing to snicker at the courts. That was like a professor of anatomy deriding the malformations found in a cadaver.

There are cited in this book some 5,400 cases or about one case out of every forty on the subject. The dates of the cases are not given except in rare instances. Many of the cases are English. Few of the citations are to cases decided in the last twenty-five

¹ See Hutchins, *Education for Freedom* 10 (1943).

years.² Such a selection of cases cannot fail to give a distorted picture of the present-day law of evidence. On the only spot on which this reviewer is able to measure the extent of this distortion it exists in a substantial degree. The chapter on opinion evidence³ would give any student quite a false impression of the present law on this subject in Illinois⁴ and, I strongly suspect, of the law in any other state.

The law of Evidence in the United States fairly screams for re-examination and re-statement. Those who undertake that task will find McKelvey on *Evidence* of real value. It is of course an elementary work. It discusses only the main branches of the subject. It does not purport to detail the twigs and leaves of the tree. Its emphasis is upon the historical development of the law. But a lifetime of research by an industrious, scholarly lawyer has gone into it.

WILLARD L. KING*

Liberty and the Press. By Philip Kinsley. Chicago: The Chicago Tribune, 1944. Pp. xi, 99. \$2.00.

In order to get down to the business of reviewing this book, it is necessary to fight one's way, so to speak, through the psychological road blocks and tank traps that Col. McCormick, consciously or not, sets up. It may be that he has Chicago so well schooled in his particular type of egomania—or should we say Chicagolandomania?—that these obstacles to a reasonable objectivity are not apparent to Chicagoans.

I happen to come from St. Louis and to work for the *St. Louis Post-Dispatch*, and I must confess that there is, in our provincial community, a small mental reservation to the legend under the box-car type that daily chugs its way across Page 1 of the *Chicago Tribune*, whether the news warrants an eight-column banner line or not. I refer, of course, to the line, "The World's Greatest Newspaper."

I say, a small mental reservation. Knowing Chicago to be a wholesomely vulgar city, I presume to say that this legend produces, among those who know and love newspapers, a belly-laugh.

The book I have before me is in this same McCormick-*Tribune* bully-boy tradition. It is written by a *Tribune* man about *Tribune* accomplishments. It is subtitled: "A history of the *Chicago Tribune's* fight to preserve a free press for the American people." It is published by the *Chicago Tribune*. And on the back page of the blurb sheet, lest anyone miss the point, appears this placard: "How and why the *Chicago Tribune* has spent \$3,000,000 fighting for the freedom of the press—told for the first time in one book." Hear, hear! if the Colonel will forgive a British touch.

A number of causes are described in the book, which, incidentally, is written in the tired manner of an old rewrite man who has to fill a couple of columns for the 2:00 a.m. edition under the lash of an underpaid night editor.

In 1916, the *Tribune* ran an editorial whose text is not reprinted in Mr. Kinsley's book, but whose caption was "Ford Is an Anarchist." Ford brought a plain old-fashioned libel suit against the *Tribune* for \$1,000,000. Libel suits are always, of course, brought for fancy figures. The *Tribune* spent \$300,000 (one-tenth of that back page

² On a typical fifty pages there are 384 citations, of which 17 are to English cases and 26 are to cases decided since 1918. The remainder are largely citations to cases decided before 1900.

³ Pp. 319-79.

⁴ See King and Pillinger, *A Study of Law of Opinion Evidence in Illinois* (1942).

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