

A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW. By John Henry Wigmore. Boston: Little, Brown and Company, 1940. 3d ed. 10 vols. \$100.00.

SOME years ago President Hutchins of Chicago taught the course on Evidence at the Yale Law School. That was before his mordant wit had learned to serve an attitude which is habitually reverential towards some things. But even then, by common report among his students, it was his dictum that "the sun of Evidence rises and sets in Wigmore." And we found it so, although mostly from that fragmentary use so characteristic of law students and practitioners which is probably more unjust to this great work than to any other law treatise. A fuller knowledge has brought to this reviewer only deeper respect.

The preeminence of the *Treatise on the Anglo-American System of Evidence in Trials at Common Law*, not only in its field but in all the literature of the law, was apparent from the first. Professor Beale's appraisal of the original edition¹ is now a matter of history. As early as 1912 Professor Gifford of Columbia was told "by one of the staff of a great law library in New York that the book was called for by practitioners 'more than all other works on Evidence put together.'"² The passage of 35 years has brought forth more than its fair share of legal writing but Dean Wigmore's name has never been dimmed by comparison. What challenge there is to pre-eminence has come as a claim to share an acknowledged honor. The present edition is a worthy sequel to its forerunners.

Many of the factors which have made this book great have been amply noticed elsewhere.³ In the law, at least, no work could attain first rank without considerable excellence in organization of material; in the faculty of logical analysis and reasoning; in clarity of exposition. But here there is much more. First of all there is an attitude of mind which forever examines the rules of Evidence—whether generalized into broad principles or broken down into minute directions—in the light of the way they serve ultimate human needs. It is a common enough thing for such an objective to be professed. But at the hands of legal authors, at any rate, two things are likely to happen to it. It may be propitiated by clichés. And it may be lost to sight in a maze of legalistic ratiocination. This has been especially true of treatises. Yet here is a treatise singularly marked by painstaking treatment of detail which does not share the common failing. Here is an author who knows with unrivalled intimacy every tree in the wood and yet has never for one moment lost sight of the forest. Throughout the original work ran a strain of the finest kind of reforming zeal, an example of the best ethical and moral tradition to be found in the law. Neither advancing years nor great technical learning has impaired this zeal or narrowed the broad outlook which has accompanied it. The author stands in rare contrast to a point

1. Beale, Book Review (1905) 18 HARV. L. REV. 478.

2. Gifford, Book Review (1924) 24 COL. L. REV. 440.

3. See, for example, Beale, Book Review (1905) 18 HARV. L. REV. 478; Chafee, Book Review (1924) 37 HARV. L. REV. 513; Hastings, Book Review (1924) 18 ILL. L. REV. 347; Wilson, *I Confess An Obligation* (1940) 26 CURN. L. Q. 101; G. F. James, *Contribution of Wigmore to the Law of Evidence* (1940) 8 U. OF CHI. L. REV. 78.

of view bred from narrower professional scholarship which he has so aptly described:

"For this particular question, the greater risk of danger, and the greater need of education, seems to be in the fallacy of the technical (as opposed to the popular) view, viz. the assumption that the jury-trial system of Evidence is the only safe system that can be tolerated, and therefore that it must be imposed equally on administrative tribunals. This assumption permeates the judicial opinions. It is attributable to the narrow experience of the trial lawyers who have become judges. The inveterate habit of mind cannot easily be altered when the judicial function comes to be exercised. It eulogizes reverently the mint, anise, and cummin of every detail of the system. It enshrines with sanctity each exception to an exception to an exception of a rule. It scans the findings to detect a slip in the practice, and when found it fervently dwells on the particular virtues of the violated rule. In short, it acts upon the assumption that no truth ever has been or ever can be discovered, in human controversy, except by the rigid employment of the jury-trial rules."⁴

The substantive excellence of the work is inextricably interwoven with the presentation of the substance. The framework of today's principles of proof and evidence is given against a rich historical background, and all is treated in a style clear, pungent, interesting. Throughout are to be found well-chosen excerpts from commentators, critics, and courts expounding rules and their reasons. That, of course, is not unusual except that the quality of choice is high. Rarer among authors, and more interesting, is the extensive use of transcripts of proceedings and narratives showing the actual operation of the law of Evidence, the relation of theory to reality. These take a wide range in point of source and of time, and have been kept well up to date in each edition. The net result is a tool of far more value than any other work on Evidence to the student or trial lawyer whose interest is confined to acquiring practical professional competence; although its use may require something more in the way of time and pains. Anyone whose interest transcends (though it may also include) the purely practical will find no better storehouse of all those things which have lent a cultural and professional flavor to the practice of the law: the tracing of institutions and ideas; revealing incidents from the lives of great men in the law; passages from its great scenes; examples of skillful advocacy and of the best professional conduct.

Thorough agreement with everything in a book is never required of a reviewer—indeed one might suppose the opposite requirement was sometimes imposed. With others, I find disappointing omissions,⁵ and sources for dis-

4. This passage, first appearing in the second edition (I:31), is to be found on page 37 of the first volume. The attitude depicted finds remarkable parallel in "The cold, not to say inhuman, treatment which the infant Code received from the New York judges." Winslow, J., in *McArthur v. Moffet*, 143 Wis. 564, 567, 128 N. W. 445 (1910). For an example see opinion of Selden, J., in *Reubens v. Joel*, 13 N. Y. 488 (1856).

5. Some of these are ably pointed out in Morgan, Book Review (1940) 20 B. U. L. REV. 776.

agreement in the present work but frankly these seem so trivial in estimating a thing of this magnitude and value as to deserve no mention here.

After all, the sun of Evidence does pretty much "rise and set in Wigmore," in a way that can scarcely be said of any other subject or any other work. May not this point a moral to the teacher of Evidence? Perhaps we should do well to require the whole treatise to be read in assignments by the class (the question of library facilities would be serious but not everywhere insurmountable). This would supplant the need for any materials consisting largely of appellate court opinions. But materials could be collected consisting chiefly of transcripts of testimony in the trial courts. Class discussion could be directed specifically to the questions which these materials would raise. This would introduce into the curriculum something approaching a clinical technique for the study of law at a point where it would do most good, and the reading of Wigmore would make the course a vehicle for imparting an attitude which may be of far more value to the lawyers of the morrow than the myopia which a narrow technical competence so often fosters.

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THE MACHINERY OF JUSTICE IN ENGLAND. By R. M. Jackson. Cambridge: The University Press, 1940. Pp. 342. \$3.75.

THE author is a solicitor and a lecturer in law at Cambridge University, where he offers an introductory course on the courts and lawyers of England. His aim with this book is to write a description of the British law system, colored very little by recital of a glorious past or glee in the legal pageantry of today, but flavored by criticism and suggestions of reform. The result is a conscientious and methodical book, indeed, a brief encyclopedia of the ways and means of litigation in England. His comments, rather measured and always kept as a minor chord, incline to the tone currently prevailing in American law schools, with its antagonism to formalism, its leaning to social legislation, and its enthusiasm for administrative law. The result is a sturdy, sober book, full of British lamps to light American footsteps.

After a swift sketch of the history of the modern bench and bar, the author describes the mechanism for civil litigation. The "County Courts" handle minor causes, using about four hundred benches with sixty judges. Theirs is the real burden. Then the "High Court" at London, with its three divisions and thirty judges, conducts a small quantity of bigger business. Then come the review tribunals, chiefly the Court of Appeal with nine judges pretty constantly employed, and the House of Lords with about the same number more or less available. There is also a chapter on arbitrations as a resort for arriving at business settlements. On the criminal side the book outlines the magistrates' preliminary hearings for major crimes, their final determination of minor ones, and the authority over serious crimes given to the

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