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# Book Reviews

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# BOOK REVIEWS

THE FIFTH AMENDMENT TODAY. By Erwin N. Griswold. Cambridge, Mass.: Harvard University Press. Pp. vi, 82. $0.50

In an age characterized by political inquisitions, loyalty purges, condemnation by inquisition, expurgatory oaths, and other instruments of modern cruelty devised by sick men in a sick society it is refreshing to read Dean Griswold's little book which is a defense of traditional constitutional guarantees equally applicable to subversives of the right or of the left. Each of the three chapters was composed and delivered as a speech, and they have been reproduced without substantial changes. In the first chapter which deals with the self-incrimination clause of the Fifth Amendment the author traces the development of the principle that no one is bound to accuse himself from its origins in English law to its inclusion in the Virginia Bill of Rights and the Bill of Rights of the Federal Constitution. Characterizing the privilege against self-incrimination as "one of the great landmarks in man's struggle to make himself civilized," Dean Griswold proceeds to evaluate the privilege as a device for the protection of the innocent and to furnish illustrations in which the innocent may justifiably have recourse to the constitutional right to refuse to answer questions without at all implying guilt of crime.

In the second chapter Dean Griswold treats the concepts of law of the land and due process of law as evolved from Magna Carta and applies them to the conduct of congressional investigating committees. Although he regards some recent congressional investigations as denials of due process of law, the author is convinced that the responsibility for the proper conduct of congressional investigations is clearly in Congress collectively and in every member thereof individually. Accordingly, he suggests a solution to the problem of investigative procedure by the enactment of statutes to the adoption of rules of procedure which would keep legislative investigations "wholly consistent with our basic and deeply felt notions of due process of law." Specifically, he recommends the elimination of the one-man investigating committee in proceedings where a witness appears involuntarily, action by the whole committee in the issue of subpoenas, the guarantee of representation by counsel, prevention of publicity of evidence except that produced in open hearings, protection of witnesses against the contrivances of television and news cameras and recording equipment, and finally, the suppression of those investigations the basic purpose of which is to expose people. As a sanction to these require-

ments the author recommends the exemption of witnesses from testifying unless these procedures are met.

In the final chapter the author returns to the self-incrimination clause and relates it to such factors as the nature of the question asked and the nature of the forum or tribunal in which the question is asked. When questions are aimed at the probing of men's minds by legislative inquisitions which unlike courts or administrative agencies are bound by no procedure the author finds further justification on the part of witnesses to refuse to answer.

Altogether Dean Griswold has produced a little volume in language that most can understand and on basic assumptions with which no thoughtful person aware of the basic rights and traditions of Anglo-American legal procedure and the threats to them can take exception. The book should be required reading for those minute women who invoke superficial traditions to destroy ancient liberties, those vigilant men who constitute themselves as custodians of patriotism and security to spy upon and inform about their fellow citizens, and above all members of Congress in the hope that they will curb some of their more happy headline hunters.

ROBERT J. HARRIS*

HANDBOOK OF THE LAW OF EVIDENCE. By Charles T. McCormick. St. Paul: West Publishing Co., 1954, pp. xxviii, 774.

The purpose of this book, as stated by Professor McCormick, "is to give the student a preliminary view of some of the important areas [of evidence], and to furnish the lawyer or the judge with a starting point on some of his evidence problems." He has "attempted not only to picture the existing practice in respect to the topics considered but also where the rules seem defective to give [his] views as to the changes needed for the better administration of justice." "As keys to further research" he has provided "references to the legal periodicals, the digests and encyclopedias, the Uniform Rules, and above all to the Wigmore treatise." This purpose he has fulfilled in ample measure. His discussion of the defects and the needed remedies is full and forceful. His references to key sources are adequate. As to the legal periodical literature and Wigmore's treatise, he does not hesitate to express disagreement with the various authors including the recognized master of the subject. All this means that Professor McCormick has done the kind of first rate job that his brethren in the law teaching profession have come to expect of him. Students, teachers and practitioners will find his discussions stimulating, whether or not they

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agree with his conclusions. The practitioner may well study them with profit; he can check them against current decisions, for the author's citations make the book an excellent case finder.

This review might well end here, but the prospective reader should be informed in more detail of the content of the treatise; and the reviewer will hardly meet expectations if he does not indicate his opinion upon some of the problems presented in the text.

The book, which contains 37 chapters, opens with suggestions to the student for discovering relevant evidential materials, both with and without resort to the court, and for preparing them for trial. Four chapters deal with the examination of witnesses, including their impeachment and rehabilitation, with some suggestions as to tactics. The sixth chapter covers the procedure for offering and excluding evidence. Herein is a brief exposition of the respective functions of judge and jury in determining issues of fact upon which the admissibility of offered evidence depends. An interesting section, "Fighting Fire with Fire," sets forth the various views as to the effect of the reception of inadmissible evidence upon the adversary's right to meet it with evidence having the same or a like infirmity.

Competency and privilege of witnesses and privileged communications take the next nine chapters. The author would class as privileged all matters which are excludable principally on grounds of social policy rather than because of lack of trustworthiness. This causes him to add to the usual category of privileges the following: improperly induced confessions, illegally obtained evidence, offers of compromise, evidence of subsequent repairs, and statements made within the scope of the agency or employment by one agent or servant to another or to the principal or master. In dealing with the usual privileges he approves the English ruling as to marital communications, which makes the privilege cease with the dissolution of the marriage by death or divorce; his discussion of the lawyer-client privilege as applied to reports of accidents made by employees to employers or to representatives of liability insurance companies, and his treatment of the questions raised in and by *Hickman v. Taylor*[1] are very helpful; the privilege against self-incrimination he thinks should be limited and he strongly disapproves the decision in *Counselman v. Hitchcock*.[2] Like most teachers and commentators he condemns the creation of any physician-patient privilege. In the chapter on Confessions he makes a careful study of the decisions holding the use of a coerced confession in a criminal case to be a violation of the due process clause of the Fourteenth Amendment. Under the topic of Governmental Secrets he considers the privileges of grand jurors but not those, if any, of petit jurors.

1. 329 U. S. 495 (1947).
2. 142 U. S. 547 (1892).

In Chapters 16 to 20, entitled "Relevancy and its Counterweights: Time, Prejudice, Confusion and Surprise," we find the author agreeing with Thayer in discarding the term "legal relevancy" as contrasted with logical relevancy; we meet the familiar problems and conflicts of views as to evidence of character and habit and of similar happenings and transactions, and we read a sensible exposition of the futility of attempts to frame and enforce rules designed to keep jurors ignorant as to whether a defendant charged with negligent injury to another carries liability insurance. The chapter on Experimental and Scientific Evidence is outstanding and furnishes ample references to legal and non-legal literature as well as to pertinent judicial decisions.

Two chapters cover the authentication of writings and the so-called Best Evidence Rule. Chapter 24 presents the author's views on the Parol Evidence Rule, which emphasize its purpose of preventing jurors from disregarding the agreement as written so as to relieve the dishonest or mistaken litigant from the enforcement of what has turned out to be a bad bargain. References to Williston, Wigmore and Corbin enable the reader to judge for himself the extent to which this emphasis is approved by other distinguished commentators. If, as the courts declare, the objective of the rule is to afford the parties to the transaction assurance of its stability by reducing its terms to writing, it would certainly be difficult to find another rule the objective of which may be so easily defeated by legal devices readily available to the crooked or crafty litigant.

In the ten chapters devoted to the hearsay rule and its exceptions the author agrees with most commentators in classifying reported testimony and admissions as hearsay, but, unlike them, he includes also memoranda of past recollected, which Thayer described as artificial refreshment of memory and Wigmore calls past recollection recorded. His treatment of the more important exceptions is adequate, and he continues to exert his influence to have contemporaneous statements entitled to reception in evidence equally with spontaneous statements. His suggestions for proposed liberalizing legislation deserve very careful consideration, and it is to be hoped that his optimism as to the future of this segment of the subject is justified. The book closes with chapters on Presumptions and Burden of Proof, and Judicial Notice.

On the whole Professor McCormick's discussion of the problems on the solution of which judges and commentators have disagreed is so adequate, though brief, and his conclusions are so close to those which I should have reached that comment would not be worth while. There are a few topics, however, as to which an expression of my opinion may be warranted.

1. I should have liked to have his views as to the test for admissibility of hearsay which the modern decisions seem to be setting up. He points out the verbal insistence of the courts upon oath and opportunity for cross-examination as the controlling requisites, but he persuasively argues for a revaluation of cross-examination as an instrument for the discovery of the truth in a litigated case. In each exception to the hearsay rule he notes the circumstances which are deemed sufficient to distinguish the evidence from ordinary hearsay —circumstances which are often said to constitute a guaranty of trustworthiness, but which usually could at most serve only as a subjective stimulus to truth-telling in place of an oath, and in many instances indicate only a lack of motive or opportunity to falsify. I gather that he is inclined to agree with the judges in *Wright v. Tatham*,[3] that the fundamental reason for exclusion is distrust of the capacity of jurors to put a fair value upon hearsay; and that under our adversary system this means that a party has the right not to be exposed to the risk which their lack of capacity would create.

If this is so, then his treatment of the division of function between judge and jury on questions preliminary to the admissibility of hearsay seems somewhat inadequate. This theory of exclusion requires that the jurors shall be given only such materials for decision as in the opinion of the judge they can fairly evaluate. The usual generalization, accepted by Wigmore, that all questions of fact preliminary to the admissibility of evidence are to be answered by the judge, is both inaccurate and misleading. Its application where the objection is based on conditional relevancy; the refusal of many, if not most, American courts to apply it where the preliminary question is identical with an ultimate question for the jury; its total abandonment by the New York courts in dealing with Confessions and its modification in some other states in all criminal cases—these and related problems growing out of them, the consideration of which reach the very roots of the exclusionary rule, need ventilation, and an exposition of Professor McCormick's views, though brief, would have been helpful to those teachers and students and those judges and lawyers who are interested in attempting to make our law of evidence an instrument for rational investigation of disputes of fact.

2. As to burden of proof and presumptions I regret that he did not develop at some length (a) his briefly stated opinion, that the burden of going forward with evidence has much more practical importance than the burden of persuasion, and (b) his oblique implication, that the dogma that the latter burden never shifts, if properly understood, would be harmless if not meaningless. As every trial lawyer fully realizes, in order to make proper preparation, counsel must know

3. 5 Clark & Finnelly 670 (1838).

in advance of trial upon what issue or issues he must be the first to offer evidence sufficient to get to the jury. On the other hand, neither counsel nor judge need determine which party must carry the burden of persuasion until the evidence is closed, for only then will counsel have to frame his final argument and the judge determine the final content of his instructions. Professor McCormick expresses no strong dissent, if any, from the arbitrary rule that the burden of persuasion is fixed by the pleadings. He does not, so far as I could observe, discuss the effect of this rule if combined in application with the rules, supported by both Thayer and Wigmore, that the sole function of a presumption is to fix the burden of going forward with evidence sufficient to justify a finding of the non-existence of the presumed fact and that the burden of persuasion never shifts. Of course, he disagrees with the Thayer-Wigmore view as to the effect of a presumption, and this, I suggest, should affect his attitude toward using the pleadings as a basis for allocating the burden of persuasion.

Whatever may have been true as to the coincidence of burden of pleading and burden of persuasion in the days when each issue had to be evolved by assertion and denial, it is certain that the burdens were not coincident in the later development of the common law action of trespass on the case and actions which grew out of it. It never was, and is not now, true under the Codes, which cut off the pleadings with the reply or with the answer, for many issues have to be tried which are not disclosed in the pleadings. Under the most modern system, the pleadings are of minor importance in defining the issues for trial. Consequently, any rule as to the allocation of the burden of persuasion based upon the notion that the issues are revealed by the pleadings should be abandoned.

Furthermore the Thayer-Wigmore concept of the operation of a presumption entirely disregards the reasons which govern the allocation of the burden of persuasion. Most modern courts agree with Wigmore that there is no controlling *a priori* test, but that the allocation is governed by considerations of fairness, convenience and policy as disclosed in judicial experience. If so, it is absurd to fix the burden upon the hypothetical situation posed in the pleadings, instead of the situation disclosed by the evidence—the situation with which the jury or other trier of fact has to deal. Otherwise, if the trier's mind is in equilibrium upon the issue, the party who should win on the evidence which leaves the trier unconvinced must lose because the pleadings set forth an inconsistent non-existent state of fact. Thus where a plaintiff's allegation that he is the legitimate son of *X* is met by a denial, he has the burden of persuading the trier to find that such is the case, for the trier knows nothing about the relationship between the plaintiff and *X* or any other person. When it be-

comes established in the case that X was the legal husband of W at the time of the conception and birth of plaintiff and that she is his mother, the situation with which the trier is to deal in considering evidence bearing on plaintiff's legitimacy is entirely different, and the considerations which justified placing the burden on plaintiff are no longer applicable, and to treat the case as if they were still applicable is patently irrational. The burden of persuasion should be fixed in the light of the situation as it is at the time the case is submitted to the trier. If this is done, obviously the burden once placed will never shift.

3. In some respects I cannot go along with the author's classification of privileged communications. His arguments to support his contention that an improperly induced confession is excluded because considerations of social policy outweigh those which demand the use of all available reliable evidence in the determination of any single controversy leave me unconvinced. If the hearsay rule rests upon the theory that the jury is unable to evaluate fairly the excluded utterance, that reason seems to me applicable to an improperly induced confession. The Court said in *Warickshall's Case*[4] that such a confession "comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it." No doubt many an inadmissible confession is true; likewise, there is no doubt that many an inadmissible hearsay statement is true. The consideration that jurors are likely to put an improper value upon an improperly induced confession will justify making it an exception to the rule which admits against a party evidence of any relevant conduct on his part, whether or not it has any indicium of verity. The exclusion on the basis of unreliability is in accord with the numerous decisions which receive evidence of matter shown by the testimony to have been found as a result of an improperly induced confession. A goodly number also admit those parts of the confession thus corroborated, and Wigmore approves the statutory rule in Texas that admits the whole of the confession on the ground that the corroboration overcomes the likelihood of its falsity.

Again, I should hestitate to accept the concept that relevant statements made by one agent or servant to another or to his principal or master within the scope of the agency or employment are privileged. Certainly they have guaranties of trustworthiness and certainly they fall without the doctrine of *respondeat superior*, which has its justification in social policy. But where both the principal or master and the agent or servant are competent and compellable as witnesses to the matter which the statements concern, there is little or no reason in policy for creating or recognizing a privilege. Such statements, if

4. Leach's Crown Cas., 248 (1783).

they are entries in the regular course of business, are admissible wherever relevant; the same is true if they fall within any other recognized exception to the hearsay rule. Many hearsay statements having equally cogent elements of verity are excluded simply because they do not meet the requirements of any recognized exception.

4. When Professor McCormick and I were laboring together with others on the American Law Institute *Model Code of Evidence*, I should have agreed generally with his views upon the privilege against self-incrimination. I should have questioned the desirability of the result in *Counselman v. Hitchcock*.[5] I still think that an accused who is fairly charged with an offense, who is represented by able counsel, who is tried in open court in public by a fairly chosen jury, who is protected against the use of improperly induced confessions, and is entitled to confrontation by the witnesses against him, should have no privilege to refuse to answer any relevant questions put to him at the trial, and that his refusal to do so should be the basis of any reasonable inference against him. But only so long as these safeguards are furnished in fact as well as in form. What has happened abroad in public trials conducted with all the requisite formalities, and what has happened in this country in administrative proceedings where the result is not punishment for crime but one which carries consequences much worse than those which ordinarily follow conviction of a felony, give me pause. What may happen in times of crisis, when jurors almost invariably reflect the prejudices of the community, when too many trial judges are not vigilant to protect the accused from unfair tactics of overzealous prosecutors; what may be done by conscientious men who believe that the prime function of government when its very existence seems to them to be attacked is self-preservation regardless of individual rights—these make me fearful of any limitation of the privilege, and I welcome the decisions of the Supreme Court which seem to extend its protection. I believe the Justices to be wise who look behind the facade and see that the purpose of a question harmless on its face may have for its objective the disclosure of facts which will be evidence of one of the now numerous statutory crimes quite unconnected with the offense charged. I welcome too the decisions which hold the privilege applicable to the questioning of suspected persons by the police, who in fact are thereby conducting official investigations and assuming the functions of the early committing magistrates in England. So far from contracting the scope of the privilege, I should extend it to cover every situation where the dangers which justify its persistence are present.

By expressing dissent from some of the views of Professor McCormick I do not intend to imply that they are unreasonable or

5. Note 2, *supra*.

that they detract from the value of his treatise. In saying that a fuller discussion of some of the problems would have been desirable, I do not desire to suggest that he did not have sound practical reasons for the abbreviated treatment. While I do not mean to leave the impression that I accept without qualification the portions of the text upon which I have not commented, I end by reasserting the opinion expressed in the first paragraph of this review. It is a first class work.

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