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THE NATURE OF PROOF

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THE NATURE OF PROOF

THE PRINCIPLES OF JUDICIAL PROOF. By *John Henry Wigmore*. Boston: Little, Brown and Co. 1931. Pp. xix, 1056. \$10.

The author's critical study in connection with the writing of his monumental treatise on Evidence led him to believe that the probative value of evidence was, or at least in the long run would be, more important than the technical rules of admissibility. Accordingly, in 1913, he produced a volume upon the Principles of Judicial Proof. The latter was indeed a courageous undertaking because the relevant knowledge was scattered, inadequate, and often misleading. Nec-

⁶ P. 258.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Pp. 214-215.

¹⁰ P. 215.

¹¹ P. 360.

essarily there was involved the problem of how humans think — a matter then, and for that matter, still, imperfectly understood. The solution of this problem of necessity rests in considerable measure upon psychology, and the science of psychology had hardly made its beginning. The book under review is a second edition of the 1913 work.

The general approach is substantially the same as in the earlier edition. Part I deals with the general principles of proof applicable to all evidence. Here the author draws heavily on the formal logic of Sedgwick — proof is shown generally to take the method of induction with occasional deductive forms. A diagrammatic scheme is set forth to indicate the ways in which proponent's facts are established — (1) assertion, (2) corroboration, (3) rivalry. Facts established, or groups thereof, become probative facts for more ultimate propositions so that the proof chart resembles a family tree bearing squares, circles, and triangles, distinguishing the above-mentioned categories in their circumstantial, testimonial, or real evidence, forms. The writer recommends the step process of reduction of evidence to more and more ultimate propositions because of the inability of the human mind to consider a large number of ideas at one time. It is not psychologically true that the mind generally arrives at a conclusion by long and detailed steps of reasoning. These processes are confined to the highly voluntary and trained procedures of the scientific and legal mind. Even in science and law, as under everyday conditions, the mind proceeds suddenly to its conclusions unless inhibited by painstaking effort. Nevertheless, the author's method is extremely useful to the lawyer in two regards: first in the gathering and selection of the evidence, and second, in the presentation and advocacy of the case.

Part II deals with circumstantial evidence, which is distinguished from testimonial evidence in that the latter involves merely the trustworthiness of the witness' assertions while the former concerns the drawing of inferences from the assertions upon the basis of the known facts of chemistry, medicine, mechanics, and other fields of knowledge and human experience. It is here that Professor Wigmore is most modern, particularly in his descriptions of the sciences of fingerprints and ballistics. One could go on and treat other branches of science, such as blood-grouping, which the author merely mentions (p. 189), yet it is impossible even to sketch briefly the state of all the special knowledge which may be concerned in judicial trials. Doubtless the author is wise in the limitations which he has imposed upon himself. A reader cannot help but admire the vivid and pertinent illustrations of matters discussed, both in this and other portions of the book. Whether these illustrations are the fruit of the author ferreting in famous trials material, or, as they frequently are, the author's own brain children, they are apt, interesting and convincing. Professor Wigmore is to be commended for his generosity in quoting other writers in the body of his texts. References to older as well as later authorities make the work virtually one of the history of human thought upon the subject.

Part III deals with testimonial evidence. The general approach is to discover ways and means of testing the reliability of witnesses. After showing that the number of witnesses as to a given point is seldom a determining factor, the author proceeds to treat the traits which affect the probative value of testimony — race, age, sex, sanity, character, temperament, emotion, and experi-

ence. Then perception, recollection, and narration are discussed, followed by the scientific and forensic methods of detecting testimonial error. Part IV, dealing with real evidence or autoptic preference, is brief and chiefly devoted to an explanation of the dangers connected with the maxim that seeing is believing.

The last part of the book proper is a collection of nine cases for analysis, of which the first three are analyzed by the author according to a narrative method which he suggests is simpler to use than the chart method which he explains and uses in the earlier portions of the book. These nine cases are extremely well chosen, and a list of additional trials for analysis is contained in the appendix.

Professor Wigmore insists that to prevent confusion the subject of probative value of evidence must be considered apart from questions of admissibility. At the start he announces his intention of refraining from discussion of the latter in the body of the book, and he observes this resolution almost perfectly. To the lawyer reader this absence of even footnote material in the body of the book on the comparison of the science and the technical rules of evidence is perhaps a disappointment, which the author seeks to appease in the first part of the appendix.

The volume deserves attention as the basis of a law school course in Proof such as Professor Wigmore has given for many years, and which has not been attempted by others largely because of their real or imagined incompetence to deal with the subject. For the purpose of such a course the second edition is a great improvement over the first because of its superior form and arrangement. This factor also makes the book better adapted for members of the legal profession, though they may well treasure the first edition as a source book of valuable famous trials material, omitted from the second. But it is not alone to the legal profession that the work has an appeal. Workers in many other fields will profit by its reading. Professor Wigmore devotes portions of the appendix to phases of interest to historians and detectives. And moreover, the whole book is stimulating to psychologists, opening up a vista of work to be done. It is provocative of a much-needed liaison between psychology and law.

Does our present state of knowledge enable us to treat judicial proof as a science rather than as an art? The reviewers hazard the opinion that a scientific description of the principles of proof should deal more realistically with the minds of the triers than Mr. Wigmore has done. In the main, he is either silent as to this side of the picture, or he postulates brains functioning with the logic of Sedgwick and the psychology of Sully. That such minds ever existed, much less are commonly found on the bench or in the jury box, is seriously questioned by the reviewers. This suggestion is much easier to make than to follow. It is here offered only for the purpose of calling attention to the difficulties which the author encounters in his undertaking. One hesitates to criticize the work further lest reader and author alike be led, erroneously, to underestimate the reviewer's appreciation of the book's extraordinary merits. It is somewhat disappointing, however, that the author has not followed the evolution of psychology in general, in its bearing upon the law, to the extent that he has followed specific experimental literature bearing upon problems of evidence. The mass of material upon personality, its laws of balance, and their bearing upon the reliability of evidence, is barely touched upon, while the

significance of the intelligence-testing movement, especially as it relates to the validity of testing, is practically ignored. It would seem relevant to raise more particularly, in a treatise of this kind, the problem of responsibility of both witnesses and triers as determined by measurable levels of intelligence. No one, probably, would doubt but that justice is guaranteed through the medium of intelligence. As difficult as the task undoubtedly is, those interested in the law and in psychology should join forces to devise some practical means of safeguarding that medium in the evaluation of testimony, in the conduct of advocacy, and in the selection of juries. In this connection Professor Wigmore's book is a pioneer effort and a classic.

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