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I Confess an Obligation

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It is a commonplace statement if not a platitude that in a normal life one makes only a few really close friends, meets only a few positively stimulating teachers and discovers only a few truly great books. To each of these he owes a peculiarly definite obligation, which sometimes is not even recognized and which all too often is not acknowledged. One may properly hesitate to classify his friends, and may be reluctant to differentiate between his teachers, but there is no such close personal element in one's judgment of books.

To John Henry Wigmore and his treatise on *Evidence*,[1] I owe a profound debt. It was never my privilege to sit in his classes, and personal associations have not gone beyond occasional contacts, but his writings, and particularly this treatise, have had a profound effect upon my capacity as a student of law and as a teacher. They have opened new vistas and have set new intellectual horizons not only in the fields of procedure, but in substantive law as well. The most of what I know about Evidence and much that I know about law in general must be credited to him. The writings of Roscoe Pound alone have placed me under a precisely similar intellectual debt. As a callow, and, as it now appears to me, a woefully ignorant novitiate in law teaching it was my lot to assume the course in Evidence. At that time I read the four volumes of the first edition of this treatise from cover to cover, and found it both stimulating and enlightening. Indeed it was a liberal reeducation in law. Small wonder, then, that my sense of obligation has grown with the years which brought forth a second edition in five volumes in 1923, a one-volume supplement in 1934 and now the third edition in ten volumes. If my sense of gratitude to Professor Wigmore shall seem to color my evaluation of this new work it will not be surprising nor shall I regret it. Certainly I do not apologize for it.

I. THE FIRST EDITION

My experience with this treatise in its first two editions was under the most favorable conditions. During most of those years I was using Pro-

[1] A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA. (First edition, four volumes, 1904-5; Second edition, five volumes, 1923; Supplement, one volume, 1934). Third edition. Ten volumes, 1940. Little, Brown and Company, Boston. pp. (in gross) ccx, 7322; §§ approximately 2400 (*viz.*, Vol. I, pp. xcii, 722, §§ 1-218; II, pp. xxx, 813, §§ 219-686; III, pp. xxviii, 740, §§ 687-1046; IV, pp. xxviii, 731, §§ 1048-1357; V, pp. xxviii, 864, §§ 1360-1684; VI, pp. xxvi, 609, §§ 1690-1913; VII, pp. xxvi, 665, §§ 1917-2169; VIII, pp. xxvi, 850, §§ 2175-2369; IX, pp. xxvi, 615, §§ 2400-2597; X, pp. v. 713—Index).

fessor Wigmore's *Cases on Evidence,* in which the classification of material was precisely like that of the treatise. From time to time I tried other case books, but sooner or later returned to the one which was keyed to his treatise. With the increase in familiarity which thus resulted, my admiration for the work increased, and with it my respect for and appreciation of the broad and deep scholarship which underlay this really great work—a scholarship which transcended the technical field of Evidence and levied tribute upon all fields of law, upon natural science, upon psychology and seemingly upon all fields of human knowledge.

It was no small task which was outlined in the preface of that first edition. No previous writer had attempted to deal with the problems of Evidence upon so comprehensive a scale. "Mr. Tutt" had not yet uttered his sardonic aphorism, but he might at that time have said regarding much of the field of Evidence: "Nobody knows what the law is or is likely to be until he has occasion to use it; then he discovers that there is no proposition so absurd that there is not some authority to support it." James Bradley Thayer had made a momentous start in the direction of a reasoned ordering of the heterogeneous rules that formed this body of law. Professor Wigmore had himself served as editor in the production of the sixteenth edition of Greenleaf, and had learned, first hand, of the shortcomings of existing texts and treatises. Accepting the work of Thayer, incomplete but stimulating as it was, Professor Wigmore set out in the first edition to do three things: (1) to reduce the law of Evidence to a set of *reasoned* rules and principles; (2) to interrelate these rules by placing them in a logically systematized scheme; (3) to classify, so far as possible, the existing precedents, to show the state of the law in each of half a hundred jurisdictions. Here was a Herculean task. That it could be performed in the five years which elapsed between the appearance of the sixteenth edition of Greenleaf, in 1899, and the publication of this new treatise in 1904 is a tribute to the energy, diligence and scholarship which were to mark each of the succeeding forty years.

Of the first of these endeavors it was said in the preface of 1904: "If we are to save the law for a living future, if it is to remain manageable amidst the spawning mass of rulings and statutes which tend to clog its simplicity, we must rescue these reasonings from forgetfulness. A main attempt, therefore in the following pages and in the preparation of them, has been to search out and to emphasize the accepted reasons for each rule." This, it was said, could easily be done by culling out and setting forth the most carefully reasoned and lucidly stated passages in judicial opinions. Another author might not have considered this task to be so simple or so easy. This

job, though admirably done, has never quite succeeded in overcoming the preference of many lawyers for the barren statement of concise rules. Indeed, there are those who even today complain of having to "wade through" so much preliminary material "to find out what the law really is." Such persons simply fail to recognize that in these statements lie a liberal education, not merely with reference to the problems of proof but in respect of the law as a whole. Emphasis should not be placed upon their lack of realization but upon the fact that a far greater number of other readers have found enlightenment and understanding in these explanations.

The second of these undertakings was the most vital and the hardest of the three. A clear understanding of the interrelation between the rules and principles of Evidence is a *sine qua non* in their effective use. No person can hope to be efficient without it. No teacher can do his job without it. No one can attain it without very considerable "mental perspiration." To bring order out of the chaos of this welter of scattered decisions was a challenging task. Professor Wigmore succeeded as none of his predecessors had, but in so doing he devised a forbiddingly complex classification which dismays the beginner and repels the practitioner who wishes to find the law at a glance. This is not to be taken as proof that the classification was bad but only as evidence of the almost unutterable complexity of the field. My own experience has satisfied me that the mastery of this classification is worth more than the effort which it costs. The returns are not only an understanding of the purposes and function of legal proof, but a wider knowledge of the substantive law which is reflected in and finds expression through these rules. It is only through some thorough system of cross references and cross indexing that the operation of overlapping and sometimes conflicting rules may be understood, and their chamelon-like character made tolerable. No classification of the rules of Evidence can ever hope to anticipate all the turns of thought that may occur to each practitioner. No classification can be so universally satisfactory as to escape criticism. There were no accepted catch-words by which each rule might be recognized. There was no universal terminology. It seemed necessary to coin new terms, and this also has been criticized by those who failed to sense the difficulties inherent in this trail-blazing process. There are, of course, other possible classifications, but none has yet appeared which is equally accurate, or which has fewer short-comings.

The third task—that of collecting and classifying the decisions in each jurisdiction under the appropriate rule—was one which called for much more than the assembling of digest slips. This job called for a careful reading and a critical analysis of each case. That reading and that analysis

seem to have been given. Small wonder, then, that no claim was made that accurate completeness was attained. As the successive editions have appeared, my wonder has grown at the mass of material which has been assembled. This, together with the addition of new subject matter, accounts for the growth of this treatise from four volumes to ten. There are *ten* volumes in the third edition only because fewer volumes would not do the job. This is *not* one of those sets which have grown through the device of larger print, wider margins and thicker paper, to be sold upon the basis of physical size rather than intellectual content.

II. The Second Edition and Supplement of 1934

The five volumes of the second edition of 1923 displayed the same exacting scholarship which marked the first. This was no perfunctory task. Every section was reexamined. New sections were added. Old ones were expanded or were amended to meet the changes produced by the new wine of the later decisions and statutes. Topics which had gained in importance were moved from the footnotes to the text. The topical index was revised. This complete overhauling produced no change in general style or character. This essential tool of the craft was merely given a keener edge and a more accurate adjustment. There was, however, a highly important advance in this second edition, for in it Professor Wigmore brought into his footnotes references to and material from his notable book on *The Principles of Judicial Proof*.[2]

This material is invaluable. Without it only half the problem of judicial proof is presented. Any lawyer of experience knows that his job is only half done when his evidence has been admitted. There still remains the matter of persuasion of judge or jury or both. He knows that it is utterly footless to answer the question, "Is this proof properly admissible?", if he does not also ask himself, "Just what will it be worth in persuasiveness?". It is no answer to this claim of importance to say that other writers in other books on Evidence have been content to deal only with problems of admissibility. It is no answer to say that the persuasiveness of given kinds of proof is best learned upon the firing line of the actual trial. Perhaps so, but to argue that there is therefore no value in preliminary training in thinking of and working in such problems in advance of trial, is to argue that in an army there should be no target practice; that the way to teach a soldier to shoot efficiently is to give him a gun and send him into battle. Traditionally, our treatises did just half a job, and, traditionally, too many teachers of Evidence

[2]First edition in 1913; second edition, 1931; third edition, *sub. nom.* The Science of Judicial Proof, 1937.

seem to have done the same. Treatises may continue, for convenience, to dissociate the two fields, but no teacher who hopes to aid his students to reach a real understanding of the technique of judicial proof dare do so. Neither can the lawyer who hopes to win his case. To the lawyer of long experience and acquired skill a discussion of the problem of persuasion obviously is less valuable than it is to the tyro, but even the veteran may profit by suggestion. It is of real interest to note that here and there a few psychologists today are interested in the how and why of evidential persuasion, and are bringing their techniques to bear upon this, which is the more important phase of our problem of proof, but even experienced psychologists have been astonished by the sweep of material which Professor Wigmore has made available in this collateral form.

The supplemental volume, published in 1934, contained much new material, set up many new sections and, with its index, it filled more than 1400 pages. For this bulk the author offered this apology: "It is a pity that this supplement has had to be so large. But if Legislators will continue to legislate, and if Judges still refuse to justify with jejunity their judgments, shall not authors continue assiduously to amass and to annotate these luciferous lucubrations for the benefit of the Bar so long as the Bar incumbently bears this burden?"

This last question poses the dilemma which the writer of any general treatise on procedure must face. Until there shall be some complete unification of and uniformity in our procedure (and who is so fatuous as to expect this in any near future?) there will always be the problem of the law of the specific jurisdiction. Can the writer of a book on procedure limit his discussion to general theory, and leave it to the writers of "local" books to develop the law of the given jurisdiction? Surely he can, but certainly he knows that many of these local books do little more than perpetuate local error, since the writer is not compelled to hold up the rule of his own state against the background of the decisions and statutes of other jurisdictions. Obviously, the general treatise, like the general digest, has its place in our scheme of things. To hold that place it, too, must aim at completeness, and to attain completeness it necessarily attains very considerable bulk. The ideal treatise must also do some things which the mere digest cannot. It must tell us not only what a given decision held, but also must state the relation of that decision to other holdings upon the point. It must tell us not only the rule, but must also disclose the reasoning which supposedly supports it. It can not even stop there. It must evaluate that reasoning as good or bad. Professor Wigmore need not have apologized for the bulk of the 1934 Supplement. Neither is apology due because of the expansion of his material

into the ten volumes of this third edition. The task could not have been so well done in less compass.

III. The Third Edition

If memory serves me correctly, there is somewhere in the first edition of this treatise a statement which was at the time something less than a prediction and something more than a pious hope. As I remember it the statement was to the effect that the next few years would see a trend away from fixed, if not arbitrary, rules of exclusion, in the direction of free and rational proof. The trend did not materialize, for the fifty new topics in the second edition and the seventy which were added by the 1934 Supplement were in the main only new and special applications of already accepted rules. When we read in the preface to the third edition that by contrast with former conditions the law of Evidence is forward-looking, we may be excused if, with the failure of the earlier prediction in mind, we pause to examine this statement. First we note that Professor Wigmore speaks of the process as going on, not as something expected or ardently hoped for. He says:

> "The last decade, however, has seen the opening of a new phase in the profession's attitude toward the rules of Evidence, viz. a disposition to reconsider the rules' weaknesses and a willingness—even a determination—to improve that body of the law in every possible part. So the marked trend of the period is a forward movement, destined with the coming generation to renovate radically the rules and the practice under the rules."

The ferments which seem to be producing this much-to-be-desired evolution are found in court decisions, in statutes, in Bar Association studies, in law review articles. One who has followed these things will readily agree that there has been a marked change in thought-coloration. For this we may be thankful without seeking to decide what agency was most potent in producing it. We may, indeed, be upon the point of realization of a considerable reform, but we must not be too optimistic.

> "Nevertheless this improvement is bound to come but slowly; first, because it is difficult to change the mental attitude of the thousands of judges and practitioners in whose brain-coils these rules are now imbedded; secondly, because most of the general rules of Evidence have a solid core of fundamental merit—their great contribution to the world's system of justice—and no one has discovered any sure way of separating the solid core from its needless adhesions; and thirdly, because the best rules in the world will be ineffective unless the Bench and Bar are capable and willing to use them in the right spirit."

But there is a new and growing compulsion which is operating upon this

inertia. Regulatory commissions have spawned with startling rapidity and in startling numbers. The exclusionary rules of Evidence were framed to fit jury trials. They were greatly relaxed in hearings before the Chancellor and to almost an equal degree in law cases tried to the court without a jury. The common law rules of jury-Evidence do not meet the needs and are not in accord with the spirit of these new tribunals. Thayer said that these were "not to be admired nor easily found intelligible except as a product of the jury system."

The problems of Evidence before the regulatory commissions and other administrative bodies are today in a state of confusion and incoherence. Here we find that tangled mass of rules which is characteristic of any transitional period. The administrative tribunals have as yet developed no system to take the place of the jury-trial system of Evidence. The functions of the traditional courts in matters of review have not yet been settled. It is obvious that we should not cast aside the accumulated experience gained from weighing evidence in jury trials. It is equally obvious that dry formalism should not be permitted to hamper free administration. (Pages 25 to 159 of Volume I in the third edition present a masterly analysis of this problem, with suggestions which should give any reader a better understanding of, and perhaps a different attitude toward the functions of these administrative agencies).

I cannot do better than to present certain quotations drawn from here and there in those pages, as illustrative of the position of the author:

> "The jury-trial system of Evidence-rules cannot be imposed upon administrative tribunals *without imposing the lawyers also upon them;* and this would be the heaviest calamity."
>
> "No one can wish that the petty snarling contentiousness over technicalities of trial tactics, so typical of jury-trial, should be transferred to the administrative tribunals, and yet, how can the system be transferred without transferring the only persons who can use it?"
>
> "The complex mass of Evidence-rules cannot be applied except by technically trained lawyers, and, furthermore, many of these technical lawyers will belong to the over-technical type."
>
> "To impose the mass of Evidence-rules on administrative tribunals will inevitably mean the imposition also of the handicap of a professional body of lawyers to conduct the practice."
>
> "The functional theory of administration has done great things for the world in all times. The formal theory of administration, in contrast, is today too much admired."

Let us make it clear that in the present statement we are not concerned with the question whether we should have as many regulatory boards and com-

missions and committees as we now have.[3] Nor are we concerned with the efficiency, accuracy and fairness of the techniques of such bodies, except as we consider how far the fear of such bodies, whether proper or improper, operates to prevent a fair judgment of their success in weighing evidence and thereby approximating truth.

Take the illustration used at page 42 in Volume I of this third edition.[4] When the American Bar Association submitted a questionnaire in which was asked the question "Should Administrative tribunals adhere to the hearsay rule?" the answers were about evenly divided between yes and no. The comment on this vote was in part: "It is possible that the reason for this reluctance is the conviction that the personnel of the tribunals is not as yet capable or experienced enough to determine the proper probative effect that should be given to hearsay statements." There may be several other explanations. One in particular might be considered, namely, that it is quite possible that we have become so inured to and desensitized to the shortcomings and errors inherent in the jury-Evidence system that we have ceased in a considerable measure to react to them, whereas we may now be hypersensitive to the findings of tribunals whose very newness tends to make us distrust them.

We are here interested in all of these things only as they bear upon the question of possible reforms in the mass of jury-Evidence rules. Procedural reforms seem to come only when some effective rival system is set up. If the traditional Evidence-rules are to be modified by some process of intellectual osmosis, or absorption which shall turn the experience of the Administrative bodies to the profit of all litigants, the first step must be the development of successful and trust-inducing techniques by those bodies. This means that order will to some degree have come out of the chaos we now have. When and if such order comes, the very weight of the numbers of the regulatory bodies cannot fail to have its reformative effect upon trial-Evidence. In such a process it is to be hoped that the Administrative process will profit by borrowing from the present Evidence-rules those things which are

[3]From another source we quote: "No one seems to know how many Federal commissions and agencies exist. Congressmen have guessed at 130. The American Bar Association says 115. The learned Committee on Administrative Management appointed by the President some time back was not definite."

Professor Wigmore classifies the fact finding bodies or processes which are not strictly amenable to the rules of Evidence applicable to jury trials under the following general heads: (1) Administrative Tribunals; (2) Admiralty Courts; (3) Private Arbitrators; (4) Social Case Work; (5) Labor Arbitration Agreements; (6) Fraternal Insurance Associations; (7) Codes of Commercial and Professional Ethics; (8) Congressional Proceedings, including Impeachment Trials and Hearings before Congressional Committees; (9) Appellate Courts; (10) International Arbitral Tribunals; (11) Historical Inquiries.

[4]There quoting from 24 A. B. A. J. at p. 429 (March 5, 1938).

good and which form a truly solid core in the body of existing law. Whether such a reform will come lies in the laps of the gods. The present writer makes no prediction.

Neither may we speak with any confidence of the points at which such relaxation will come. There seems to be every reason to expect something positive to happen to the Hearsay Rule, for, at this writing, our regulatory bodies seem to be accepting hearsay testimony with freedom, if not with abandon. Any one familiar with the rules of Evidence will know how the prohibition against hearsay has been nibbled away by successively created exceptions, but always under circumstances in which the court could claim that there was a substantial substitute for the safeguards of personal appearance on the stand, testimony under oath, and the tests of cross-examination. This process was slow and piecemeal and each step was tested before it was taken. We may well question, in the light of this experience, whether we may safely throw down all of the protective barriers and with safety repose full confidence and trust in the unhampered and variable discretion of local boards and of individual examiners. The long experience of our trial courts seems to offer satisfactory pragmatic proof that some fairly uniform standards of admission are essential if we are to obviate the substantial dangers present in an unhampered reception of hearsay testimony. There are still certain serious questions regarding some of the exceptions to the Hearsay Rule as applied in our courts. When two open-minded, liberal, accurate scholars like Professor Edmund M. Morgan and Professor Wigmore fail to agree, others may well take notice of their friendly but vigorous dissonance.

It will be remembered that in his first edition Mr. Wigmore took the position that the extra-judicial statement of a party to the action, when it was offered in proof, was not subject to the requirements of the Hearsay Rule. His position was that the basis for the admission of such statements lay in the fact that they raised doubts regarding the position which the party had assumed in the case in hand. Under this interpretation such statements would not have the effect of affirmative proof of the facts stated in them, but would serve only to impeach the claim then being urged, by raising the question when, if at all, the party was telling the truth. The assimilation to the impeachment of the witness by showing his contradictory statements, made extra-judicially, was obvious. Professor Morgan in 1921 attacked this analysis[5] and demonstrated that such party-statements were actually being used as affirmative proof. The persuasion of this argument led Mr. Wigmore to accept its conclusions and to rewrite Section 1048 in the second edition and to treat such party-admissions as an added exception to the

[5] *Admissions as an Exception to the Hearsay Rule* (1921) 30 YALE L. J. 355.

Hearsay Rule. To do this, Professor Wigmore was then compelled to indicate wherein there was to be found that safeguard against error which the rule required. It was found in the privilege and the opportunity accorded the party himself to take the stand, there to correct, explain or amplify his reported statement.

There was and is no such agreement as to a second article by Professor Morgan,[6] as an examination of Sections 1080 and 1080a will disclose. The question here concerns those vicarious party-admissions which may have been made by a former owner while in possession of property, which are offered against the interest which the present owner is seeking to claim or protect. Again we have the same question. Are these subject to the limitation that they operate only to raise doubts regarding the position taken by the party or do they fall under the ban of the Hearsay Rule? It is obvious that there is no possibility that any agency or other right to speak for the present holder can by any stretch of the imagination be read into the situation. They cannot be called party-admissions. How shall they be treated? Professor Morgan argued that we are seeking the truth and that we cannot within the spirit of the rule open the door to testimony, which will have the effect of affirmative proof, if that testimony is not subject to cross-examination or if we do not have some satisfactory substituted guarantee of truth. He said that it was well enough to hold the party himself to account for his own statements, as there is no need to provide *him* with further safeguards, since he was the keeper of his own tongue, and always has the privilege of taking the stand. But it is quite another thing to make a successor in title the guarantor of the veracity of his predecessor in interest. Further, the rule as it is applied is illogical in that it limits the admissible statements of such predecessor to those made while he was in possession of the property. Professor Morgan insists that there is no adequate collateral guarantee and concludes that such statements must be treated as unmitigated hearsay and that as such they ought to be excluded.

Professor Wigmore's reply, as we understand it, is this. To have probative worth, evidence need not be offered as affirmative proof of some fact. It is enough if it serves to raise a doubt. He argues that while the rule admitting such statements is a procedural application of the principle that one ordinarily cannot transfer a better title than he himself has, and that while the linking of substantive principles with procedure may mean the transfer of petty distinctions which have no bearing on testimonial value, this risk does not necessarily condemn the rule which permits such statements to be offered. Further, there is no need for a further guarantee of

[6] *The Rationale of Vicarious Admission* (1929) 42 HARV. L. REV. 461.

truth than already exists in the very situation itself. Such statements are more likely to be true than the ones which would subsequently be made by the former owner if he were haled into court and placed on the witness stand. This sort of statement is commonly relied upon in everyday life when we are seeking to establish some external fact. We know from our experience that it has worthy probative value, therefore added safeguards are not needed. The only thing really necessary is to show that the present holder stands in the same position as the declarant did when the statement was made. Here we have an out and out issue of fact, as to which there is little to guide us to a solution save only our own intuitive deductions.

At some risk, I venture to say that what we really have here are nothing more than basically different reactions to the Hearsay Rule. Professor Morgan is cautious and reluctant to see it further weakened. He would prefer to stick to the requirement that hearsay is to be excluded unless there is shown to the courts some effective collateral guarantee of a rather definite nature. On the other hand, Professor Wigmore is definitely liberal. He says that what the Hearsay Rule needs is not a more stringent prevention of its violation but an intelligent and elastic relaxation of its application, "and this is one of the places where that relaxation can best be granted, in view of the commonly useful service of this class of evidence."

It is one thing to affect a man's property interests, it is quite another to bind him personally. If the effect of this testimony were the latter, there would be, as a matter of abstract logic, a greater reason to agree with Professor Morgan. As stated above, the question is one of fact, as to which our regulatory bodies now offer us a very good testing ground. Those bodies are dealing with property rights of such magnitude that the values affected by the rule in question seem small in comparison. Add to this, the fact that the numerous exceptions to the Hearsay Rule, by their very recognition, point to a needed elasticity in its application, and the fact that there seems to be no available experience which tends to show that such statements are not reasonably reliable, and the result seems to be, at least for the moment, to be more favorable to the position taken by Professor Wigmore. Recognizing that an adherence to previously announced policy may compel us to adopt the position taken by Professor Morgan, the present writer believes that that policy is now facing such a challenge that one may well hesitate to insist upon strict adherence to it, provided that our departure from it shall be intelligent and shall continually be tested by further experience.

At another point we find Professor Wigmore attempting to push the law of Evidence forward, to make it accord with changed and changing circumstances. This attempt will be found in Section 1368a, which deals with the

proof of public documents. Professor Wigmore points out that the statement of Chief Justice Marshall attained no vogue. Marshall said "We think that on general principles of law a copy given by a public officer, whose duty it is to keep the original, ought to be given in evidence."[7] The common law implied in every public official the authority to keep a record of his doings, but, except in a few instances, it did not imply any authority to keep a report or a return or a certificate of such record. This was an unimportant omission in England where there was but a single jurisdiction and where all judicial records were centralized in a single depository under the control of the Chancellor. But in a complex community like the United States, with its fifty jurisdictions, each having one or more courts of record, with a multiplicity of state and county offices, and with the multiplying demands for the use of their records, returns and certificates, a problem has arisen which widely transcends the limits of the original principle. Mechanical facilities have so improved that the technical safeguards of trustworthiness, suited to a simple organization, are no longer needed. Rapid and easy communication and travel make it possible to resolve doubts and check against errors or to secure the personal presence of the official if that be necessary. Photostatic and other methods of copying, improved systems of filing and improved methods of protecting and preserving public records make them easily accessible and reasonably easy to verify.

Changed conditions make it safe and imperative to relax our rules, but such statutes as have been enacted are loaded with petty and meticulous requirements. There is need to recognize that official duty is a sufficient guaranty of authenticity, and a declaration of broad policy should take the place of these restricting statutes.

In this section we are offered an outlined statement of the policy which should underlie such enactments and a model statute or court rule designed to effect the desired reform.

Beginning with Section 2490 a series of sections now deal with Presumptions and Their Effect Upon the Burden of Proof. For a long time, even Professor Wigmore side-stepped this issue. Now, while many of us are still nibbling at the edges of the problem, he boldly wades into the heart of the question and, seizing upon the fast-developing pre-trial practice offers us an analysis, which, if it is not a solution of all the woes in this field, obviates many of our difficulties and brings rationality to a subject which has long needed it. This is the first thoroughgoing attempt at reform in this much-tortured phase of Evidence law. The sections must be read to appreciate the value of the proposals they offer. Attention is called particularly to Section 2498a.

[7]United States v. Percheman, 7 Pet. 51, 86, 8 L. ed. 587 (U. S. 1833).

But there must be an end to a book review, even when the limitations of space are generous. The instances which have been cited will serve to indicate the open-mindedness of the author and the forward look of this treatise. Further, a work of marked personality cannot be subjected to any cheese-paring, trifle-weighing analysis, for that would obscure the essential character of the thing. This treatise in all its editions has had marked personality; it is more than a repository of great scholarship; it is not merely the work of Professor Wigmore, it is John Henry Wigmore himself. As I have tried to evaluate it, there has come to mind the thrill which, as a boy, I enjoyed when I first read an account of the yacht race around the Isle of Wight, in 1851, which won the trophy since known as the "America's Cup." As I remember it, the *America* defeated fourteen yachts of the Royal Yacht Squadron, and was so far in the lead of the nearest competitor that when it was announced that "The *America* wins!" and the question was asked "What is second?", the answer came: "There is no second." Those same words serve me now. *Wigmore is first; there is no second!*