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Book Review: The Principles of Judicial Proof as
Given by Logic, Psychology, and General
Experience and Illustrated in Judicial Trials
compiled by John Henry Wigmore

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lection of other books. This gives the department all of the reported cases of all the courts of last resort of the various states of the Union, and all of the Federal courts, for the past twenty-five years, all the English cases since 1650 down to the present time. Other sets of decisions in the library contain the selected cases of all State Courts, from the beginning down to this time.

BOOK REVIEWS

The Principles of Judicial Proof as given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials. Compiled by John Henry Wigmore, Professor of the Law of Evidence in Northwestern University, author of "A System of Evidence in Trials at Common Law," "A Pocket Code of Evidence," etc. Boston: Little, Brown & Co., 1913. One volume, 1179 pages.

The appearance of another book on the subject of Evidence, by John H. Wigmore, will be welcomed by the bench and bar and students of the Law generally. His general work upon the law of evidence is a monument and has placed him in the van of trained legal thinkers and scholars. It will rank among the works which have produced lasting effect in the development of American jurisprudence, aiding in its reduction to principle scientifically true.

To the present book he has given the title, "The Principles of Judicial Proof as given by Logic, Psychology, and General Experience, and Illustrated by Judicial Trials." Such a careful and ingenious user of words, one who has a very unusual gift, even in the invention of them when desired, must be taken to have intended, by the use of the word proof, the results and not the instruments or means of judicial enquiry, a distinction which he has himself drawn very sharply at the outset. In the introduction he says: "The study of the principles of Evidence, for a lawyer, falls into two distinct parts. One is Proof in the general sense—the part concerned with the ratiocinative process of contentious persuasion—mind to mind, counsel to juror, each partisan seeking to move the mind of the tribunal. The other part is admissibility—the procedural rules devised by the law, and based on litigious experience and tradition, to guard the tribunal (particularly the jury) against erroneous persuasion. Hitherto, the latter has become largest in our formal studies—has, in fact, monopolized them; while the former, virtually ignored, has been left to the chances of later acquisition, casual and empiric, in the course of practice."

The question as to the sufficiency of his evidence to lead the mind of the tribunal to conviction is one of the embarrassments which confront the practitioner at the critical time of every trial. Persuasion has been deemed to be a gift, a mysterious influence flowing from the born pleader to his auditor, and acting as a psychological inhibition upon all impulses antagonistic to the will and vision of the orator, compelling conviction. It has been considered the legitimate province of the orator to bring to bear upon the fact of the transaction his powers of personal influence, so that the most weighty factor in the determination of causes before juries has been, not the two premises of the law and the fact, but the factor-at-large of the personality of the pleader. This is necessarily based, for its force, upon the experience of the jury in emotion and observation, which varies with each jury, each juror, each locality, and each tribunal. For this reason the matter has been left at large in the law of procedure. Is there a common law of Proof? Are there rules to govern the process of Persuasion and Conviction, deduced from general human experience through scientific investigation? Or, is the conclusion from facts only the subject of fugitive and casual impulse flowing from temporary and limited individual experience? If Fact A, Fact B, Fact C be severally proved, can we then say that Fact A *plus* Fact B plus Fact C = Fact X, or Guilt, or Liability?

The results of investigations of the psychologists would seem to offer hypotheses. Perhaps Mr. Wigmore is right in his position (in the introduction) that "there is, and there *must* be, a probative science—the principles of proof—*independent* of the artificial rules of procedure; hence it can be and should be studied." He does not contend that these principles are yet so clear as that they can be called a formulated science. He says: "This science, to be sure, may be as yet imperfectly formulated or even incapable of formulation. But all the more need is there to begin in earnest to investigate and develop it. * * * We must seek to acquire a scientific understanding of the principles of what may be called 'natural' proof—the hitherto neglected process. If we do not do this, history will repeat itself, and we shall find ourselves in the present plight of Continental Europe. * * * Only in recent times, under the influence of modern science, are they beginning to develop a science of proof."

The author calls attention to the fact that the same thought has been in the minds of other scientific thinkers. That is, that proof is subject to the control and guidance of principle as well as the admission of testimony, and that there have been other attempts, more or less praiseworthy. He mentions, among others, Burrill's "A Treatise on Circumstantial Evidence;" Moore's "Facts, or the Weight and Value of Evidence;" Stephens' "The Principles of Judicial Evidence," and Hans

Gross' "Criminal Psychology." He says: "The present work seems to be the first attempt in English, since Bentham, to call attention to the principles of judicial Proof (distinguished from Admissibility) as a whole and as a system. It is therefore tentative. The chief service it aims to fulfill is to emphasize the subject as a science and stimulate its professional study."

It will be noticed that the work is a compilation. It is evidence of the compiler's scholarship that he has not undertaken to lay down substantive rules. The main part of the work consists of extracts from various authorities by way of exposition of topical headings, followed by cases taken from all sources by way of illustration. There is no effort to generalize or to formulate conclusions from the illustrations. The theory of the author is that the student of the subject will receive the greatest benefit through impulse from suggestion to the active exercise of his own powers in induction. He says: "Though most of the topics are introduced or followed (as befits a novel subject) by a brief expository passage, to focus the reader on the possibilities of the topic, yet the main part of the material may and must be used inductively. Some of it merely illustrates; but most of it calls for self-application of the process of analysis and inference. There is a probative moral to every one of the cases; to point out in foot notes the moral as conceived by the compiler would have spoiled the object of the book. The profitable use of the book will be to employ each illustrative case rigidly as a mental exercise somehow bearing on the subject where it is classified. In this field, no one can afford to let another do his thinking for him."

In his general object, the author has been entirely successful. The extracts from authors upon each topic have been admirably selected, and are rich in suggestion to even the casual reader. They constitute a very comprehensive collection of the very best thought upon the principles by which to test the value and weigh the importance of testimony. Such an abundance of exposition is not accessible except in a very large and carefully selected library. Not the least service is that of guide to the literature. There are generous extracts from Munsterberg, Charles C. Moore, Arthur Train, Wills, Francis Wellman, Balzac, Dickens, Pinkerton, Ram, Charles Reade, Sully, Whately, Guy M. Whipple and numerous others.

The illustrative cases consist of anecdotes of personal experience and observation and reported cases. The collocation is suggestive and instructive in the extreme. Here is a wealth of illustration and material for analogy that will be invaluable to every advocate. Both circumstantial and testimonial evidence are covered. Authenticated cases are given which make powerfully interesting reading, even for the layman. As an exercise and drill for the student, they are most carefully arranged and

presented. Most of the great cases of mystery and difficult proof are conveniently collected together and classified for probative moral. Many of the processes of scientific proof cause the imaginings of Sherlock Holmes to pale into commonplace.

The third part presents the author's "*method of solving* a complex mass of evidence in contentious litigation." He says: "The problems in Part III will offer a varied range for testing the practicability of whatever scheme one may devise. But *some* method there ought to be. It seems incredible that advocates can have got along without any through the long period of judicial annals. What is wanted is simple enough in purpose—namely, some method which will enable us to lift into consciousness and to state in words the reasons why a total mass of evidence does or should persuade us to a given conclusion, and why our conclusion would or should have been different or identical if some part of that total mass of evidence had been different. The mind is moved: then can we not explain *why* it is moved? If we can sit down and work out a mathematical equation, why can we not sit down and work out a mental probative equation?"

The crux of the author's proposition is rhetorically presented in these two interrogations. Translated into categorical form, the propositions are: We *know* that the mind *is* moved, therefore we may explain *why* it is moved; and Since we can sit down and work out a mathematical equation, therefore we shall be able to sit down and work out a mental probative equation. That either of these conclusions is true is stoutly denied by philosophers. The problem seems to be one of metaphysics rather than municipal law. The author calls attention to the fact that logicians "have furnished us in plenty with canons of reasoning for specific single inferences; but for a total mass of contentious evidence they have offered no system." He has the courage, however, to take a position in opposition to the most approved authority. For a statement of that opposition, he quotes W. Stanley Jevons: "The theory of probabilities is the very guide of life; hardly can we take a step or make a decision of any kind without correctly or incorrectly making an estimation of probabilities. * * * Attempts to apply the theory of probability to the results of judicial proceedings have proved of little value, simply because the conditions are far too intricate. * * * No mathematical formulas can be framed to express the real conditions. * * * But such failures in no way diminish the truth and beauty of the theory itself; in reality, there is no branch of science in which our symbols can cope with the complexity of nature. * * * The difficulty, in short, is merely relative to our knowledge and skill, and is not absolute or inherent in the subject." And Mr. Wigmore comments upon that abstract as follows: "If anybody could have performed this service for judicial evidence, Jevons was the man to do it. His logical

abacus and logical machine show that he had the keenest appreciation of the possibilities." He finally justifies his attempt by invoking the passage from Locke: "He that will not stir till he infallibly knows that the business he goes about will succeed, will have but little else to do but to sit still and perish."

The book is altogether thoroughly interesting, suggestive, entertaining, and agreeably instructive. The author's thoroughgoing sincerity and directness, coupled with his modesty, add to each of these qualities.

But what is a Mental Probative Equation?

LYMAN CHALKLEY.