BOOK REVIEWS

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. By John Henry Wigmore. In five volumes. Boston, Little, Brown & Company, 1923. pp. lxxxvi, 1140; xxxvi, 1069; xxxiv, 1002; xxxii, 972; xxx, 1141.

The publication of the first edition of this epoch-making work in 1904-1905 put at the disposal of the legal profession the most exhaustive, scientific and scholarly treatise ever written upon the subject of evidence. It is no cyclopaedic text-book with a jumble of conflicting statements, supported by bare citation of cases. On the contrary, each doctrine is subjected to a critical and illuminating examination from the viewpoints of history, reason, policy and authority. Copious quotations from opinions of courts, legal scholars and philosophers lend force and interest to the discussion; and the author makes clear his own views, taking care, where necessary, to distinguish them from the rules applied by contemporary tribunals. In spite of its novel arrangement and its frequently unusual terminology, it has achieved the place its great merit deserves in the esteem of the bench and bar. The law teacher, the practising lawyer, the trial judge, the court of last resort may disagree with Mr. Wigmore, but they cannot afford to ignore the results of his industry and scholarship. And the reports of the appellate courts since 1905 demonstrate to what a remarkable extent this greatest authority upon the subject has aided in the exposition of the law as it was and is, and in making it what it ought to be. But no matter how well any work on any procedural topic may be done, it will need revision after a period of nearly twenty years. Consequently, the profession has been impatiently awaiting a second edition of Wigmore on Evidence.

A worth-while new edition of any law book should contain a revision of the text so as to reflect the changes required by new decisions and statutes and to include necessary additions; a thorough re-examination, in the light of further study and of recent judicial opinion, of doctrines previously advanced; citation of important cases decided since the prior edition; and a collection of pertinent statutes.

That Mr. Wigmore has revised his text is shown by changes in phraseology and by quotations from very recent opinions of courts and of writers on legal subjects, in many sections. In some of these, a change in personal opinion is indicated; and frequently a new trend in judicial thought is pointed out. The following paragraphs have been added:

Rules of Evidence before Industrial Commissions, Public Utilities Commissions, and other Administrative Officials (secs. 4a-4c); Rules of Evidence in Admiralty Courts, Military Courts, Juvenile Courts, Commercial Courts (sec. 4d); Rules of Evidence before Arbitrators, Clubs, Fraternities, etc. (sec. 4e); Rules of Evidence in Social Case-Work (sec. 4g); Altering the Rules of Evidence by Contract (sec. 7a); Tags, Signs, Number-Plates, as evidence of Identity of Automobiles, Railroad-Cars, etc. (sec. 150a); Finger-Prints and Footmarks as evidence of Identity (secs. 151a, 414, 415); Physiological Traits as evidence of Paternity (sec. 165); Convictions of Crime, used against an Accused under the English Act of 1898 (sec. 194a); Insane Belief, as shown by Facts told to the Party (secs. 262, 263); Other Offences as evidence of Intent in Sale or Prescription of Drugs and Narcotics (sec. 368); Other Utterances as evidence of Intent in Treason, Sedition, or Conspiracy (secs. 369, 370, 465); Method of securing Unbiased Experts (secs. 563, 2484); Wife's Testimony in Desertion Cases (secs. 617, 2239); Adoptive Parent's Testimony to Adoptive Child's Age (sec. 667);

Information obtained by Dictagraph (sec. 669); Expert Witness reading a Prepared Report (secs. 740, 787, 1385); Moving-Picture Photographs in Evidence (sec. 798); Continuous Interrogation under Arrest ("Sweat-box," "Third Degree") (sec. 851); Psychological Testimony to Deficiencies of Testimonial Capacity to Observe or Remember (secs. 935, 990); Producing the Original of a Registered Title (secs. 1225, 1647); Records and Certificates of Vital Statistics (secs. 1336, 1644); Records of Indian Tribal Blood in Land Titles (sec. 1347); Certificates of Chemical Analysis of Foods and Fertilizers (secs. 1352, 1674); Interpreters for Alien Witnesses (sec. 1393); Reputation to evidence Recognition of Illegitimate Child (sec. 1606); Reputation to evidence Keeping a Place for Illegal Sale of Liquor or Drugs (sec. 1620); Certificates of Service in Army and Navy (sec. 1675a); Hospital Records (sec. 1707); Common Carrier's Records of Liquor Transported (sec. 1708); Discovery of Premises and Chattels in Criminal Cases, Exhumation of Corpse, etc. (secs. 1863, 2194, 2224); Corroborating a Claimant of Prior Invention of a Patent (sec. 2065a); Producing Eye-Witnesses of a Personal Injury (sec. 2081a); Producing Medical Testimony in Malpractice Cases (sec. 2090); Evidence obtained by Illegal Search for Liquor, etc. (sec. 2184); Compelling Depositions for Use in Another State (sec. 2195); Witness' Exemption from Liability to Arrest (sec. 2195); Witness' Privilege not to Disclose Premises, Chattels, etc. (sec. 2216); Privilege against Self-Crimination for Books and Reports (Motorists, Druggists, etc.) required by law to be made (secs. 2259c, 2259d); Witness' Immunity from Self-Crimination (sec. 2282); Privilege for Communications to State Prosecutor (sec. 2375); Privilege for Communications to Judge, Conciliator, etc. (sec. 2376); Privilege for Business Reports (Taxes, Industrial Accidents, etc.) (sec. 2377); Privilege for Physician's Certificate of Death (sec. 2385a); Parol Evidence of Agreement to Treat Copy as Original (sec. 2449); Burden of Proof of Ownership of Automobile (sec. 2510a).

Of the foregoing but few require notice. Most of them merely indicate the author's well-known alertness to discover very modern applications of settled rules, and the possible effect of newly established truths in other branches of science upon the administration of justice in the courts. The first three, however, demand a word of warning. They must be read with the title of the treatise in mind. As material supporting Mr. Wigmore's contentions that the common law rules of evidence are, conceivably, not absolutely essential to the ascertainment of truth and that, in the absence of the jury, most of them could be disregarded without serious damage to the cause of justice, they are excellently done. But should the reader expect to find these subjects so thoroughly developed as to make the text a complete guide to practice before the tribunals in question, he will be disappointed. The fifth is done in the author's best fashion.

In section 2184 Mr. Wigmore elaborates the views which he formerly expressed concerning the admissibility of evidence obtained in violation of the Fourth Amendment. With his characteristic vigor he denounces the now prevailing rule as due to "misguided sentimentality," and attempts to link it in some indirect and indefinite way with the invocation of that Amendment during the war by the "misguided pacifistic or semi-pro-German interests." But can these decisions of the Courts be attributed to sentiment? Is it not rather a question of policy, the answer to which must be based upon unascertained data? Is the exclusion of such evidence the practicable method of enforcing the Fourth Amendment? If so, is it more important that the Fourth Amendment be enforced than that Government officials be permitted to use the easiest method of securing convictions for violations of various statutes, and particularly of the Volstead Act? Surely these questions can be answered without an appeal to sentiment, and the judges are as likely to guess right as the author, inasmuch as both judges and author must reach their conclusions without accurate data based upon experience. In some-

what similar manner objection may be taken to the criticism in section 851 of the exclusion of confessions obtained by the "sweat box" or "third degree" method. The courts are confronted with a very practical problem. Rarely do the police use physical violence or direct threats of bodily harm to extract confessions; but devices of more refined cruelty, having much greater tendency than threats of violence to "make a confession, irrespective of its truth, more desirable than silence with its contingencies," are constantly employed. And the judges know it, despite published statements of prominent chiefs of police to the contrary. And until legislative action makes such interrogation by the police unnecessary or impossible by substituting for it, as Mr. Wigmore suggests, interrogation by an examining magistrate, the exclusionary rule may as properly be attributed to a realization of the facts as to an ignoring of them.

It is to be regretted that the author has not either in section 5 or in book II given the profession the benefit of his opinion upon the vexed problem, whether burden of proof should be governed by those rules which ordinarily govern procedure or by those which ordinarily govern substance. And it would have been much more satisfactory had he inserted a section dealing with the application of the ordinary rules of evidence to proof of preliminary matters necessary to enable the judge to rule upon the admissibility of evidence, instead of contenting himself with an incidental statement in section 1385 to the effect that they do not apply. Section 49 could well have been spared to make room for one of his scholarly discussions of either of these topics.

No doubt Mr. Wigmore has given all the doctrines advanced in his first edition a much more thorough re-examination than the new work on its face indicates. Frequent references in the footnotes to discussions in legal periodicals and elsewhere, wherein the writers disagree with his treatment of specific topics, denote that he must have considered them only to reject them. And in some instances he has modified his former opinions. His theory of presumptions and their effect upon the burden of proof he has retained; nor has he made any reference to the enlightening article upon the subject in (1920) 68 U. PA. L. REV. 307-321 by Professor Francis H. Bohlen. If all the courts would adopt Mr. Wigmore's theory, they would find it logical and easy of application. A presumption would affect only the burden of going forward; it could have no effect upon the risk of non-persuasion. It would be beautifully simple. Unfortunately many courts have allowed their ideas of expediency and policy to overbalance their regard for the simple and logical, and have given certain presumptions a very definite effect upon the risk of non-persuasion. Professor Bohlen's article deals with the considerations of expediency and policy which have impelled such courts to this result; and his views cannot be ignored in any critical examination of the subject. Obviously, there is nothing inherent in the nature of a presumption which prevents it from influencing the risk of non-persuasion or from making it shift during the course of a trial from one party to the other. This entire topic needs such a complete and exact reconsideration as Mr. Wigmore is well qualified to make; and it is a disappointment not to find it accomplished in this new edition.

Again, in his treatment of the parol evidence rule he adheres, without modification or elaboration, to his analysis of the cases which admit and give operative effect to oral agreements that certain writings shall not be binding upon the parties until the happening of a condition; and he completely overlooks a searching criticism of this analysis by Professor Arthur L. Corbin in (1919) 28 YALE LAW JOURNAL, 764-768. Such a challenge of the very basis of this portion of the discussion ought not to have been passed unnoticed.

The present edition cites some 15,000 additional cases, and brings the pertinent statutory law up to date. The collection of statutes alone would justify the new edition. Application of the ordinary tests shows the present table of cases

to be adequate and accurate; and "the list of statutes cited" will be of great assistance, especially to the local practitioner. Other practical mechanical improvements have been made in typography and arrangement. It is a pity that the work is not provided with a comprehensive index. An index of topics is furnished, but it is not sufficiently detailed to meet the needs of the busy lawyer.

Perhaps this review has expected too much of Mr. Wigmore. Had anyone else prepared this second edition, it would have accorded him unalloyed praise for patient, scholarly, accurate workmanship, and would have called upon his head unmixed blessings for having furnished the profession an up-to-date edition worthy of the original masterpiece. And there is no intention of giving the impression that the work is seriously defective. Its virtues so far outnumber its faults as to make the latter seem almost negligible. It is so far superior to any other treatise on the subject that comparison is impracticable. It is by all odds the best, if not the only real, authority on the law of Evidence.

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Hispanic-American Relations with the United States. By William Spencer Robertson. Carnegie Endowment for International Peace. New York, Oxford University Press, American Branch, 1923. pp. xii, 470.

The book gives a review, from an Anglo-American viewpoint, of the different forms in which the United States influences the political, commercial, industrial, educational and scientific life of Spanish-America. The topic of these relations has been so long obscured by misrepresentations that a rectification seems necessary to remove one of the obstacles to the Spanish-American peoples raising their living standard and their productive and consuming capacity. To do this is to render a service intended to bring about the most fruitful dealings of the United States with the countries of the South, even though that service is cloaked in the language of unpleasant truths.

The misunderstanding comes from both sides: from the Anglo-Americans, on the one hand, by looking with contempt upon whatever originates in Spain, and on the other hand, by exaggerating the qualities of their public men as if they were superhuman beings, above the level of the saints of the Church, who in many cases were originally great sinners, and by exaggerating the merits of their institutions so that they appear not as the outgrowth of circumstances, but as a divine invention of superhuman minds creating by themselves and maintaining the prosperity of this country, a doctrine which can and must be applied everywhere, irrespective of circumstances. The Spanish-Americans, in turn, either blinded by the wonders of those exaggerations, are unable to use their own judgment and only worship the people of the North, despise their own and make awkward obnoxious imitations; or, preferring flattery with its personal benefit to truth with its social healthfulness, refrain from uttering their inner thoughts; or, if moved by political or financial purposes, make the most emphatic praises of the Anglo-American men and institutions; their words are quoted with fruition by Anglo-American writers, and so the evil grows manifoldedly.

Sometimes an angry voice of criticism is raised in Spanish-America against the United States, but anger does not help any purpose. An honest but critical writer seldom has a forum. What we badly need is facts and equanimity to face the conclusions of sound common sense.

The author repeats the old list of charges against the rule of Spain in America: commercial monopoly and religious intolerance, without giving her credit for the unsurpassed wisdom and ideals of her laws and methods of government of her

colonies. He should have said in fairness that commercial monopoly was a universal colonial policy of those times, less strictly enforced by Spain than by England; and that intolerance of any kind exists in all the countries of the world where the conflict of opinions among large portions of the people has not shown scepticism.

As the author says, the influence of the United States is evident in Spanish-America, among other facts, by the imitation of its political constitution. But for any person of scientific training law is either the outgrowth of life, contributing to the happiness of the people, or a distortion of life with subsequent endless sufferings. An imitated constitution is a destructive lie inlaid in the heart of a country, and Anglo-American writers, with their political experience, should warn other countries against such a blunder.

Let us take the case of Mexico: In order to imitate the United States, Mexican law makers created the childish fiction that some geographic subdivisions of their country, which so far was a unit, were sovereign states that entered into a federal pact. The first effect of this was to give Texas an opportunity to secede from Mexico, claiming her fictitious sovereignty, which fact ultimately brought a war of conquest waged by the United States, in which Mexico lost more than half her territory. The lack of majority in the population of India has rendered England unable to organize there a democracy. Mexico under similar circumstances proclaimed a democratic government, seeking to imitate the United States. But Mexico has only seen anarchy or monarchies of revolutionary origin; democracy is there a mere word without any other meaning than irresponsibility or tyranny; the people are thus kept restless, impoverished, incapacitated to contribute morally or financially to the prosperity of this continent. This can also be said of other Spanish-American countries of similar social composition.

The effects of the Monroe Doctrine are then studied by the author. Facts again are essential.

"With governments whose independence," said President Monroe, "we have acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, *by any European power,* in any other light than as the manifestation of an unfriendly disposition towards the United States." This unrestricted statement was soon limited by declaring that the United States would be neutral in the struggles between the European mother countries and their revolted colonies of America, even though the United States had acknowledged their independence. This limitation practically saved the United States all the responsibilities of Monroe's unqualified declaration. Had Spain at that time not been so weakened by her wars with Napoleon, or her colonies not so determined to fight for their independence, the Monroe Doctrine would have been meaningless, as the United States did not contribute to that independence. In 1824 Argentina asked whether the Monroe declaration would bind the United States to help in case a European power was assisting an American country waging war against another country of this continent. Secretary Clay in 1828 answered that only the Congress could decide in such a case; a declaration which was tantamount to denying that the President had any power to commit the country to the defence of any international doctrine. In 1829 Spain sent an army to reconquer Mexico; the army was defeated by Mexico without any help. Spain recovered several islands along the coast of Peru, until Peruvian and Chilean forces, after many years, expelled the Spaniards. In 1838 France bombarded and occupied Vera Cruz. In none of these cases was the Monroe Doctrine mentioned.

In 1862 Napoleon III, with the avowed purpose of checking the influence of the United States in America, and believing the secession of the South from the Union was a *fait accompli,* planned to make Mexico a strong buffer State by helping the conservatives. A French army was sent to Mexico, and the United

States, far from invoking the Monroe Doctrine, allowed General Forey to buy mules and wagons in New Orleans, thus violating the neutrality against Mexico, and the Monroe Doctrine. Napoleon met with strong opposition in his own country; he soon realized the financial difficulties of the venture when, in April, 1866, a loan badly needed by the Mexican Empire hardly succeeded with Napoleon's recommendation; the political situation of Europe grew complicated, and finally the basis of the whole Napoleonic scheme failed by the triumph of the American Union against the South. Then Napoleon ordered his troops not to advance any further in Northern Mexico. Later the American government sent to France a note showing dissatisfaction with her intervention in Mexico, and Napoleon made public his decision to withdraw his troops, fixing the year 1867 for leaving Mexico. Secretary Seward acquiesced in this delay; had he shown more appreciation of the sacrifices of Mexican soldiers opposing an enterprise directed against the United States, the loss of thousands of Mexican lives and millions of Mexican money during two years could have been spared, as Generals Sheridan and Butterfield among other Americans declared at that time.

In 1884 Venezuela asked the assistance of the United States to recover a large part of her territory invaded by England. Eleven years later President Cleveland appointed a commission to investigate the facts. England, at that time politically embarrassed, consented to arbitrate, the result being that most of her conquest was sanctified and the Monroe Doctrine overlooked.

Venezuela, again, after refusing to submit to arbitration some claims of Germany and England, saw her ports blockaded by those countries. The United States interfered, and Venezuela agreed to arbitrate the case.

These precedents and the fact that the Monroe Doctrine was not mentioned in the Versailles treaty, but vaguely alluded to as "local understandings" called for a statement of its real meaning, which Secretary Hughes made before the American Bar Association. According to his declaration, the Monroe Doctrine concerns only the United States and its protection, even though the other countries of America may eventually derive benefit or detriment thereby, as they could for instance from a tariff law. Considering the Monroe Doctrine this way, it contains nothing new; all the countries of the world have always claimed the right to protect themselves. The peculiarity of the Monroe Doctrine, so understood, lies in the weakness of the Spanish-American countries, which allows the United States to protect itself not only against actual invasions of her territory, but against the possibility of one, and this notwithstanding she invades the sovereignty of other countries of this continent (case of Magdalena Bay), and not only against dangers to her territorial integrity, but in cases of mere nuisances which may disturb one part of her people (cases of Haiti and Santo Domingo). What is meant in each case by nuisance? Only the White House has the definition.

Secretary Hughes, to calm the natural apprehensions of the Spanish-American countries, added that there is nothing aggressive in the Doctrine, and I think that those countries may believe he is right, as long at least as they behave as good children in the opinion of the American government, or until they have dreadnoughts enough to support their own definition of the word nuisance.

The economic effects of the political influence of the United States on her sister republics are generally overlooked, though they are the more important. European investors consider the Monroe Doctrine as an obstacle to collect from debtor Spanish-American countries; this means that those countries have to pay a higher rate of interest, thus contributing their money for the support of a doctrine which does not concern them and for an undefined protection that they do not demand. This in the long run means American monopoly of the money market in the continent and its consequences for the economic independence of Spanish-America. On the other hand, unscrupulous politicians of Spanish-America construe the Monroe Doctrine as a protection against any interference

of the European countries in behalf of their citizens; thus the moral curb for those politicians, which that interference used to be, has disappeared; they feel at liberty to seize and destroy foreign and native property without their own fellow citizens being able to charge them with unpatriotic discrimination (case of the Mexican revolution of 1913-16). After the country is laid waste in a way that only irresponsibility can explain, the bill for damages is presented by other nations, including the United States, and peaceful destituted people have to pay for that unwelcome protection given to their spoilers.

How can a people so impoverished be a valuable element in the economic life of the Western Hemisphere?

Important remarks could be made on those parts of the book dealing with commerce and education, but they would require larger space than is permissible in a review.

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A Guide to the Study of the History of English Law and Procedure. By Clarence C. Crawford. Toronto, Carswell & Company, 1923. pp. viii, 83.

"This guide was prepared in the first instance to serve as an outline of lectures and library reading"—so reads the prefatory note. In no spirit of disparagement we may say that in its final form it still remains, in its principal characteristics, what it was in the first instance.

There are twelve main divisional headings, of which the first four are devoted to a general survey of constitutional and legal history, while the other eight are concerned more directly with definite subjects of substantive law and procedure—persons, property, tort, crime, and contract. The method followed in each section is the same—a topical outline, usually with direct references to text-writers or cases or statutes accompanying the topic, followed by a bibliography. As to the latter the statement in the preface is correct—"while the bibliographies are not exhaustive, they will serve as a guide to (much of) the best literature on the subject." The topical outlines and the references therein contained are even less exhaustive than the bibliographies. Obviously no attempt has been made to go into anything like detail in regard to the points involved. To have done so would have required many times the space which Professor Crawford has allowed himself. It is this lack of detail which must inevitably limit the usefulness of the book to lawyers and law teachers. But the very evident care and industry which has produced this volume can hardly fail to make it, within the limits which it has chosen for itself, a reliable guide for those whose interest and concern is not on the side of technical details, but on the broader and more general points of constitutional and legal history.

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BOOKS RECEIVED

Labour Supply and Regulation. By Humbert Wolfe. New York, Oxford University Press, American Branch, 1923. pp. xii, 442.

Losses of Life Caused by War. By Samuel Dumas and K. O. Vedel-Petersen. New York, Oxford University Press, American Branch, 1923. pp. 191.

Outlines of Historical Jurisprudence. Vol. II. *The Greek City.* By Sir Paul Vinogradoff. New York, Oxford University Press, American Branch, 1922. pp. x, 316.