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Handbook of the Law of Evidence (Book Review)

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could, if it wished, either add to or subtract from the national grades for the purpose of determining admissibility in a local jurisdiction.⁷

To this major recommendation for the establishment of a national bar examination, this reviewer respectfully takes exception. The analogy made in this matter to the medical and accountancy professions seems far-fetched. Law, we know, has its variants not only in the area of statutory law, but also in the wider field of the common law. If the purpose of bar examinations is to select and license those deemed competent to advise clients as to their rights and obligations in a specific jurisdiction, it would seem that the examinations should, in a large measure, be shaped with a view of the governing law of that jurisdiction. Optional supplementation of a nationally administered bar examination with a sprinkling of some aspects of local law seems, to this reviewer, inadequate.

A nationally administered bar examination may achieve economy and efficiency, but these are not the sum total of the desiderata for determining capacity to practice law.

LOUIS PRASHKER.*



HANDBOOK OF THE LAW OF EVIDENCE. By John Evarts Tracy. New York: Prentice-Hall, Inc., 1952. Pp. v, 382. \$5.35.

A critique is essentially an evaluation of an effort in terms of its objectives. The objectives of this Handbook are, according to its preface, to serve as a text or as collateral reading for law students; to fill "the needs of the young attorney who must have in his library some book on evidence but who cannot yet afford to purchase one of the exhaustive works; . . . to serve the interests of the busy trial attorney, as a refresher before going into court, or for quick investigation of a problem arising in the middle of a trial"; indeed, as the author declares: "In writing this book I have endeavored to place myself in the position of the reader, whoever he may be."¹

This, of course, is no slight undertaking and it is, perhaps, unremarkable that it does not quite succeed. The needs and capacities of the undergraduate law student on the one hand, and the requirements of "the busy trial attorney" on the other, are so divergent as not likely to be served effectively by the same effort. A pedagogical text is a device for developing intellectual powers. Its materials are arranged to accommodate the student's developing comprehension and skill. It should be discursive, repetitive, argumentative and provocative.² A professional manual is primarily a source of information, organized to provide easy access to the information sought. It should be comprehensive, com-

⁷ P. 459.

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¹ TRACY, HANDBOOK OF THE LAW OF EVIDENCE p. v (1952).

² A model, by which all writers of law student texts might well be guided, is MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW (1947).

pendious, expository, and authoritative. The techniques, traditions and policies of Anglo-American jurisprudence are the law student's concern. The practicing lawyer engaged in a "quick investigation of a problem arising in the middle of a trial" seeks precise information concerning the pertinent legislative authority and judicial precedents of a particular jurisdiction.³

In the arrangement of topics this Handbook reflects the author's endeavor to be guided by the needs of the reader "whoever he may be." At the outset the introductory chapter, containing one and a half pages devoted to the History of the Anglo-American Law of Evidence, a brief classification of evidence and a briefer definition of terms, was apparently intended for the novice. The very next chapter (Chapter I) entitled "How to Use Judicial Admissions in Trials" is manifestly addressed to the professional reader, its utility to the student of evidence at the threshold of his study being doubtful.

A similar ambivalence characterizes the author's style and choice of content. His tone is personal, the approach informal; a new topic is often introduced by a question and answer with an illustrative problem; continuity being emphasized by references to what has preceded and what is to follow; all appropriate to a teaching medium. Thus the subject of presumptions begins: "As we have seen before, the question of the burden of proof is often affected by what the law calls 'presumptions.' What is a presumption? It is more than an ordinary inference, it is an inference to which the law applies certain legal consequences."⁴ Then follows an exemplifying problem. Throughout this pedagogical development of topics there are frequent references to trial tactics, procedural devices and helpful hints of the "How to ——" variety.

Some of these practical tips may appear to the law student to be out of context and therefore not very helpful. For example, on the subject of authenticating documents for introduction into evidence, the author, having explained that a reply written to an earlier letter may therefore be self-authenticating, cautions the trial lawyer, that since the original of the first letter is probably in the hands of the opponent a notice to produce must be served upon him to render secondary evidence of its contents admissible under the best evidence rule.⁵ The reader who is unacquainted with a notice to produce and who has yet to study the best evidence rule is instructed by a footnote to "see page 80."

Many of these practical suggestions are quite sensible and may indeed prove useful in the middle of a trial to the lawyer who faces a problem for which Professor Tracy offers a solution. To cite an instance, the many phases of the problem of laying a foundation for secondary evidence are well illustrated including the one "where the attorney for the proponent has failed to serve a notice to produce, owing to poor preparation of his case . . . Is the situation hopeless? No; . . . the proponent can call to the stand both the opponent and his attorney and ask each whether he has the document in court."⁶

³ A typical and popular exposition of local law (New York) is RICHARDSON, *THE LAW OF EVIDENCE* (7th ed. 1948).

⁴ TRACY, *op. cit. supra* note 1, at 29.

⁵ *Id.* at 68.

⁶ *Id.* at 83.

Other trial tips are less enlightening, as for example: "The ordinary child is a great weaver of romances. He may often relate something he has read in a story as a personal experience. His story should be searched for its truth before he is called to the stand. If he is a witness for the opponent, he should be skillfully cross-examined."⁷ Child and adult witnesses do not differ greatly in this respect leaving only the problems: How to check the witness' story for accuracy and how to cross-examine skillfully.

Confining a "treatise" on the law of evidence to one small volume compels an economy of expression. Brevity of exposition is likely to result in mere dogmatic recitals of precepts. Thus vicarious admissions by privies in title are treated in this summary fashion: "The admissions of a grantor of property are admissible against a grantee claiming under him. The only limitation on the application of this rule is the logical one that the admission must have been made during the grantor's ownership of the property."⁸ The complexities in the application of this rule to issues involving title to real property caused by the parol evidence rule and title recording acts are ignored, and no mention is made of the New York rule by which such admissions are limited to cases involving real property.⁹

In the endeavor to cover the subject the author sometimes resorts to a mere categorical listing of numbered propositions with examples. Thus in treating the rule that in a criminal prosecution evidence of other crimes committed by the accused is not admissible to prove his criminal disposition but may be offered for any other relevant purpose, the author lists and illustrates, as if they were exclusive, the more common relevant purposes of motive, intent, mistake (absence of), identity and common scheme or plan.¹⁰ Of the last he says only: "An act that is a crime may appear in some ways to be entirely innocent—for example, a confidence game. To show that it is not innocent, but a concerted scheme or plan to commit a criminal act, evidence may be offered of other crimes of the same sort committed by the accused, or more than one distinct crime, all parts of the same scheme."¹¹ In the example given the only relevant purpose is to show the accused's criminal *intent* or *absence of mistake* and is appropriate only to those other categories. Evidence of other crimes committed by an accused evincing a common design is relevant

⁷ *Id.* at 126. On the other hand in the very next paragraph there appears this sage advice: "Caution should also be used in preparing the child witness for his examination. An experienced attorney will not ordinarily call a witness to the stand unless he has first thoroughly gone over with him the story he is to tell the court and jury and has prepared him for cross-examination to which he may be subjected. But it is not safe to do this too thoroughly with a child witness, for if he is asked on cross-examination 'Why did you say so-and-so?,' he is likely to reply 'Because Mr. Blank told me to.'"

⁸ *Id.* at 240.

⁹ *Paige v. Cagwin*, 7 Hill 361 (N. Y. 1843).

¹⁰ Law students commonly identify this subject as the "MIMIC" rule, the term being derived from the initial letters of the words describing these five instances. In fact Professor Tracy lists a sixth: means of accomplishment of the crime charged. In any case, students tend to memorize these categories without comprehension.

¹¹ TRACY, *op. cit. supra* note 1, at 333.

to prove that the criminal *act* for which he is on trial, being the product of such design, was in fact committed by him, and not merely to evidence the *intent* with which it was committed.¹²

Conciseness in exposition may account for many statements that are misleading¹³ or border on the erroneous.¹⁴ But constrictions of space do not explain outright errors of concept, expression¹⁵ and typography.¹⁶ Twenty-four pages are devoted to the parol evidence rule, yet the author is content to treat the proceeding for reformation of a written transaction on the ground of mistake as an "exception" to the parol evidence rule, saying: "These are fundamental powers of a Court of Equity, and powers that could not be exercised without a violation of the parol evidence rule, for in nearly every case the evidence on which the relief is granted is the oral testimony of witnesses (sic) to the facts on which the decree is based."¹⁷ Since Professor Tracy concedes that the rule of integration is one of substantive law it would have been consistent and correct to acknowledge that parol evidence admitted to avoid a

¹² An apt illustration is *People v. Duffy*, 212 N. Y. 57, 105 N. E. 839 (1914), where evidence, that the accused, a police sergeant, had "shaken down" other gambling house proprietors named on a list the defendant had obtained from his predecessor, was admissible to prove his extortion upon complainant, whose name was included on the list.

¹³ *E.g.*, TRACY, *op. cit. supra* note 1, at 239: "As each member of a conspiracy is liable for the acts of every other conspirator, the admission of a coconspirator may be received to affect the proof against the others. The same logic makes admissible the admission of one joint tort-feasor against another." Of course the admissions of one joint tort-feasor are admissible against another only as he was authorized to make such admission for the other. So only the admissions by a conspirator made in furtherance of the conspiracy are admissible against his co-conspirators.

¹⁴ *E.g.*, *id.* at 35. "A man disappears. After waiting a reasonable number of years, less than seven, his wife remarries. Later the missing husband turns up. Is the wife guilty of bigamy? At common law, where there is only a seven years rule, she is; . . ." *But cf.* *Regina v. Tolson*, 23 Q. B. D. 168 (1889).

¹⁵ *E.g.*, in discussing the problem of determining, in a telegraphed communication, which is the original document under the best evidence rule, the author says: "In the sending of this message was the telegraph company the agent of the sender or of the addressee? If of the addressee, the original will be the message filed at the sending office; *if of the sender, the original will be the message delivered to the addressee.*" But in the next paragraph he states: "If it has been determined, by applying the principles of substantive law, *that the telegraph company was the agent of the sender the original telegram will be the one delivered to the telegraph company by the sender.*" *Id.* at 76 (emphasis added).

¹⁶ Typographical errors, as everyone knows, are caused by gremlins, over which the writer exercises little control; but errors abounding in the citations lead to the suspicion that they were found in the original manuscript. A spot check of some dozen case citations disclosed errors in the page numbers of two: footnote 49, page 53 and footnote 92, page 150; and misspelled case titles in three: footnote 16, page 26; footnote 35, page 106; footnote 61, page 241. Though a reviewer is not a proof reader, other typographical errors were noted on pages 5, 70, 78, 97, 257 and 320.

¹⁷ TRACY, *op. cit. supra* note 1, at 97.

voidable writing is not an exception to the rule and is admitted in any appropriate proceeding.¹⁸

A more serious misconception is the view that the admissibility of parol evidence to vary or contradict the terms of a written receipt is a "relaxation of the parol evidence rule . . . adopted by the courts, again in their exercise of good sense."¹⁹ Since the rule applies only to valid written transactions which effect intended changes in jural relations and since a mere receipt is not such a transaction the admission of evidence to contradict the terms of a written receipt is not a "relaxation of the parol evidence rule."

In an otherwise instructive chapter on "Use of Evidence Illegally Obtained" Professor Tracy's adoption of Dean Wigmore's classification of limitations upon the federal rule excluding evidence seized in violation of the Fourth Amendment to the United States Constitution leads to the statement: "Again until 1948 it was very generally held that a warrantless search and seizure of contraband is not within the rule [of exclusion]."²⁰ The authority cited for this proposition is *Carroll v. United States*²¹ wherein the Supreme Court held that a search of a motor vehicle for illegally possessed liquor, upon probable cause but without a warrant, was not a violation of the Fourth Amendment. This case is of course not authority for the proposition stated, nor, apparently, is there any authority for this view. Dean Wigmore cited none.²² On the contrary, there have been numerous reversals of convictions obtained by evidence of illegally seized contraband.²³ Professor Tracy adds that in 1948 the *Trupiano* case overruled the *Carroll* case and "that line of decisions." This likewise is incorrect. In the *Trupiano* case²⁴ the Supreme Court merely ruled that a search without a warrant though incidental to a lawful arrest was illegal where a search warrant could have been obtained. Finally the decision in *United States v. Jeffers*²⁵ renders erroneous the statement: "A warrantless search and seizure upon premises *not owned* or possessed by the party-defendant is not within the rule."²⁶ (*italics in original*).

¹⁸ 32 C. J. S. 938, which Professor Tracy cites as his authority, in fact states: "Parol evidence is, as a general rule, admissible for the purpose of showing that by reason of a mistake a written instrument does not truly express the intention of the parties, mistake being always recognized as one of the grounds of equity jurisdiction; and, while many authorities declare that evidence of mistake is admissible only in equity and not in a court of law, this rule is by no means universal, and there are many cases in the books, especially since the tendency has grown up to obliterate the sharp distinctions between law and equity, in which parol evidence has been held admissible to show a mistake in reducing the agreement to writing irrespective of the form of the action and whether it is in fact an action at law or a suit in equity. Where due to an overestimation of the quantity of goods purchased, the buyer paid more than the amount due, in an action to recover the overpayment, the parol evidence rule does not apply. . ."

¹⁹ TRACY, *op. cit. supra* note 1, at 101.

²⁰ *Id.* at 348.

²¹ 267 U. S. 132 (1924).

²² 8 WIGMORE, EVIDENCE §2184(a) (3d ed. 1940).

²³ *E.g.*, *Agnello v. United States*, 269 U. S. 20 (1925).

²⁴ *Trupiano v. United States*, 334 U. S. 699 (1948).

²⁵ 342 U. S. 48 (1951).

²⁶ TRACY, *op. cit. supra* note 1, at 348.

Incidentally, in this same chapter, three and one-half pages are devoted to the subject of wiretapping and judicial interpretations of the Federal Communications Act²⁷ without a mention of state statutes²⁸ authorizing wire-tapping or the conflict in state and federal decisions resulting.²⁹

Careless diction probably accounts for the declaration that a witness may testify "that a person's character is good or bad"³⁰ for in the same chapter in arguing that opinion evidence of character should be admitted, Professor Tracy acknowledges "but few courts are willing to do so."³¹

The author's personal opinions are expressed vigorously and often. If his criticisms of prevailing authority are of little use to the practitioner searching for judicial precedents they should have pedagogical value to the student. His favorite target is any rule which permits parol testimony in contradiction of the terms of a writing. Thus the rule that parol evidence is admissible to prove that a writing purporting to be a contract was intended to be a sham only, the author calls "socially unjustifiable, in that it encourages men to make sham contracts to deceive third parties or to assert (an?) incredible defense to actions on written contracts otherwise indefensible."; and he asks "Why cannot the courts simply say, 'We will shut our ears to any story that asserts, as a defense to a written contract, a claim that it was entered into only to deceive someone, whether the person deceived be a party to the cause or not?'"³² To this question there are, of course, several answers; first, that the victim usually has a cause of action in deceit for any harm he may have sustained; second, since both parties to the sham contract are equally guilty the law should not aid either party;³³ third, that it will not discourage a party from entering into a sham contract to enforce it at his instance; and fourth, whether the defense that the contract is a sham is incredible only the triers of the fact can determine after considering the evidence.

In the same vein Professor Tracy criticizes the rule that a merger clause in a written contract, stipulating that no representations have been made other than those appearing in the instrument, shall not bar parol evidence of fraud in the inducement or execution of the writing. He complains: "The rule announced by the Court permits a party who has no apparent defense to an obligation to devise a defense by making up a story in the hope that it will be believed by the trier of fact . . . Such a rule encourages perjury and is *not* wholesome."³⁴ (*italics in original*). He ignores the other side of the

²⁷ 47 U. S. C. § 605.

²⁸ *E.g.*, N. Y. CONST. Art. I, § 12; N. Y. CODE CRIM. PROC. § 813(a).

²⁹ See, *e.g.*, Matter of Harlem Check Cashing Corp. v. Bell, 296 N. Y. 15, 68 N. E. 2d 854 (1946).

³⁰ TRACY, *op. cit. supra* note 1, at 202.

³¹ *Id.* at 205.

³² *Id.* at 109.

³³ However, to protect bank depositors, the court in Mount Vernon Trust Co. v. Bergoff, 272 N. Y. 192, 5 N. E. 2d 196 (1936) held: "Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced." *Id.* at 196, 5 N. E. 2d at 197.

³⁴ TRACY, *op. cit. supra* note 1, at 100.

argument stated by the New York Court of Appeals: "A rogue cannot protect himself from liability for his fraud by inserting a printed clause in his contract."³⁵

Not content with criticizing general doctrine the author troubles to take issue, at length, with particular judicial opinions, apparently selected for that purpose, and often to good effect; but in several instances only to expose his own misconstruction of the facts or misconception of the law. In the chapter entitled "Witnesses,"³⁶ on the subject of the admissibility in evidence of a witness' record of a past recollection, he illustrates the problem of the memorandum whose truth depends on the testimony of more than one witness by a case³⁷ in which the plaintiff was permitted to prove the number of logs delivered to the defendant by the tally kept by one of plaintiff's employees of the count called to him by a co-worker, both in the regular course of plaintiff's business. No mention is made of the fact that the admissibility of the memorandum is an exception to the hearsay rule as an entry made in the regular course of a business. Indeed the hearsay rule and its exceptions are not treated until two chapters later.³⁸ Then citing the case of *Peck v. Valentine*,³⁹ where the count by one witness and the memorandum by another were not made in the regular course of business wherefore the memorandum was held to be inadmissible hearsay, the author declares: "It is strange that some courts have been so confused . . . Such a decision was altogether erroneous if one thinks the problem through."⁴⁰ In the footnote he adds, "Fortunately this decision was almost completely overruled in a later case, *Mayer v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905. The court makes a weak attempt at reconciling the decisions." In fact the *Mayer* case, involving two memoranda, one which was, and one which was not, admissible as an entry made in the regular course of a business, is in complete harmony with *Peck* decision.⁴¹

³⁵ *Ernst Iron Works v. Duralith Corp.*, 270 N. Y. 165, 169, 200 N. E. 683, 684 (1936).

³⁶ Chapter 7.

³⁷ *Harwood v. Mulry*, 8 Gray 250 (Mass. 1857).

³⁸ Chapter 9.

³⁹ 94 N. Y. 569 (1884).

⁴⁰ TRACY, *op. cit. supra* note 1, at 183.

⁴¹ It is passing strange that Professor Tracy, who is a member of the New York Bar and who has engaged in active practice in that state for many years, should misstate the local decisional and enacted law in several instances. Thus on page 351, footnote 21, he states: "In New York the unreasonable search and seizure prohibition is by statute rather than in the Constitution." In fact, the statutory immunity from unlawful search and seizure was incorporated in the New York Constitution (Article I, section 12) in 1938.

On page 181, footnote 151, after referring to the requirement that a witness' recollection be exhausted before his past recorded recollection may be admitted, the author says, "This rule, originally known as the 'New York' rule, is no longer the rule in New York. *People v. Weinberger*, 239 N. Y. 307, 146 N. E. 434." In that case the court reversed a conviction for presenting an obscene play because the trial court had excluded, on an erroneous ground, a script which had been compared with the play by the witness, whose

Ironically, in the chapter on "Hearsay," on the subject of "Spontaneous Exclamations," he does cite a case wherein the notation by a police officer of the license number of an automobile, reported to him by a spectator several minutes after an accident, was admitted, though the entry was not made in the regular course of a business.⁴² What that case does *not* illustrate is a "spontaneous exclamation" admissible under that exception of the hearsay rule.

In explaining the admissibility of utterances forming the verbal part of an act under the hearsay rule, the author digests three cases solely for the purpose of demonstrating their fallacious application of the verbal act doctrine.⁴³ Cases properly applying the doctrine are merely cited in the footnotes. One of the cases⁴⁴ criticized by the author is, in fact, an excellent exemplification of the rule that evidence of the words accompanying an act otherwise relevant, which give the act its legal significance, is admissible. In the action between a landlord and his tenant's mortgagee on the issue whether certain corn seized by the latter was the property of the former, after uncontroverted evidence that the tenant had contracted to pay two-fifths of his corn crop as rent, the court allowed testimony that when the tenant was about through husking the corn he pointed to a crib of the corn in question and said to the landlord, "Mr. Hanson, Here is your corn for this year. . . . This belongs to you Mr. Hanson." The relevant acts were of course the delivery of the property to the landlord by setting it apart, by identifying it as the landlord's property and the landlord's acceptance and receipt by acquiescence. Without the tenant's words, or other such manifestation of intent, title to the corn would not pass. Emphasizing his misconception of a "verbal act" Professor Tracy argues that the testimony should have been admitted as a vicarious admission by a predecessor of the mortgagee in title without recognizing that in the case of an admission the truth of the statement is in issue and a jury may find the fact untrue though it find that the statement was made.

These critical analyses of individual cases would have been more appropriate in a casebook or a law teacher's class notes. But perhaps this Handbook

recollection of the actual performance had not been expressly exhausted, the court saying: "Under such circumstances the exclusion constitutes error even if the evidence was not at the time competent, since it could be made so." The court then added: "A rule of evidence should not be permitted to become a mere fetish; the evidence offered would unquestionably be competent if a few preliminary questions had been asked of the witness as to his present recollection; the asking of these questions would have been useless and could have elicited no answers that would have helped the jury. The transcript represents a record of the witness' past memory of the play more reliable as evidence than testimony based upon his present memory could possibly be . . . especially since no suggestion was made that the usual formal questions should first be asked." *Id.* at 313, 146 N. E. at 435. It is submitted that in New York a witness' present recollection must still prove to be inadequate to qualify his recorded past recollection in evidence.

⁴² *Chalmers v. Anthony*, 8 N. J. Misc., 151 Atl. 549 (1930). *Cf.* *Johnson v. Lutz*, 253 N. Y. 124, 170 N. E. 517 (1930).

⁴³ *TRACY*, *op. cit. supra* note 1, at 183.

⁴⁴ *Hanson v. Johnson*, 161 Minn. 229, 201 N. W. 322 (1924).

is Professor Tracy's old lecture notes, revised and edited for current publication. Regardless, the stated purpose which the work most successfully fulfills is to supply "the needs of the young attorney who must have in his library some book on evidence but who cannot yet afford to purchase one of the exhaustive works."

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