

1943

## Questions and Answers

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# Questions and Answers

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In fitting tribute to the passing of a great scholar, John H. Wigmore, dean emeritus of Northwestern University's Law School, many pages of this *Journal* will be devoted to his life and work. His ideals and principles will long be remembered in the literature of the law and the questions are legion which this great teacher has answered in the countless pages of his writings. Now is an opportunity in these brief pages of *Questions and Answers* to describe in the Dean's own words his scholarly reply to several questions of interest to our readers.

*Question 1:* What is the importance of Evidence in worldly affairs?

*Answer:*

The Dean replies in *A Students' Textbook of the Law of Evidence*:<sup>2</sup> "That which you hear me tell, you'll swear you see, there is such unity in the proofs," says the Third Gentleman in "The Winter's Tale," when he brings news of the incredible climax of that drama. In Shakespeare's plays the words 'proof' and 'prove' occur some three hundred and fifty times. Many parts of his plots turn upon the unreliability of evidence, both testimonial and circumstantial,—Othello, for instance."

"The great dramatist here reflected (as always) one of the notable traits of daily human experience,—the importance of evidence ('proof,' as he called it) in determining the fate of affairs. Whether in domestic or commercial or national or international affairs, no day passes without basing some action consciously upon evidence. And of all the disputes and discords and dissensions and differences that today prevail anywhere, might we not almost say that three quarters of them would disappear if the parties could take an equal view of the evidence on which they rely, and could thus agree upon the underlying facts?"

"All this is said simply as a reminder that Evidence is not merely a subject for courts and lawyers and juries. It is a universal field of thought, and the use of it in courts of justice is only one phase."

*Question 2:* What were the objectives the Dean had in mind in writing his classic treatise on Evidence?

*Answer:*

"In the Ninth Book of the Analects of the Confucian Sage this saying is recorded: The Master said: 'There are some persons with whom we may pursue our studies in common, yet we shall find them unable to progress to general principles. Or, if they attain to principles, we shall find them unable to accept a common understanding of them. Or, if they reach this common understanding, we find them unable to use the principles with us in their applications.' This saying comes true, often enough, for our profes-

<sup>1</sup>Director of Research and Information, Northwestern University Traffic Institute, Evanston, Illinois. Associate Editor of the *JOURNAL*.

<sup>2</sup>Preface, vii.

sion of the law. Certainly it is verified in the law of Evidence. There was a stage in the history of its thought (and not so long ago) when it was seldom perceived to involve a system of general principles. When this perception came, in time, hardly any two writers were found to agree on the analysis and grouping of the system; and, sometimes, not even on the statement of the same principle. And today, as always, the chief practical difficulty in the law of Evidence lies in the application of it,—in distinguishing the bearings of different principles upon the same evidential fact.”

“The particular aspiration of this Treatise is, first, to expound the Anglo-American law of Evidence as a system of reasoned principles and rules; secondly, to deal with the apparently warring mass of judicial precedents as the consistent product of these principles and rules; and thirdly, to furnish all the materials for ascertaining the present state of the law in the half a hundred independent American jurisdictions.”<sup>3</sup>

*Question 3:* Has circumstantial or testimonial evidence the more persuasive value?

*Answer:*

The question has long been argued (and for good reasons) whether circumstantial evidence or the testimony of witnesses exerts the most telling force in judicial trials. Assuredly it is a point of interest to participants in the legal process. In his evaluation of the question, the Dean replies: “The rules of Admissibility have nothing to say concerning the weight of evidence when once admitted. The relative weight of circumstantial and testimonial evidence, therefore, does not present itself in this place. Indeed, it can be said that there are no rules, in our system of Evidence, prescribing for the jury the precise effect of any general or special class of evidence. So far as logic and psychology assist us, their conclusions show that it is out of the question to make a general assertion ascribing greater weight to one class or to the other. The probative effect of one or more pieces of either sort of evidence depends upon considerations too complex. Science can only point out that each class has its own special dangers and its special advantages.”<sup>4</sup>

*Question 4:* Does intent commonly exist as a separate proposition for proof?

*Answer:*

Inclusion of intent as an element of crime is familiar in so many of the statutory definitions of offenses. What it is and whether or not it must be proved separately from other elements are matters of important interest. This is Dean Wigmore’s explanation: “The notion of Intent, in crimes, may be also, in a broad sense, that of ultimate purpose or object, but it is regarded simply as a state of mind co-existing with the act, and is of a conglomerate nature peculiar to itself. Thus, when A shoots a pistol whose ball strikes X, A’s state of mind as he shot may have been that he was pulling the trigger of a pistol whose ball would (a) strike a tree, (b) strike Z, (c) strike a person, X, who was about to assault A himself. The criminal law tells us whether either of these states of mind is criminal; but it does not need to generalize in one phrase or term the exact nature of all possible criminal states of mind; it merely defines the criminal state of mind essen-

<sup>3</sup>From the Preface to the First Edition of his *A Treatise on the Anglo-Saxon System of Evidence in Trials at Common Law*, xiii.

<sup>4</sup>Vol. 1, ch. 111, sec. 26 of his *Treatise*.

tial for each respective crime. The idea of criminal Intent, then, usually partakes of deliberateness, knowledge, object, and the like; its absence is often indicated by the ideas of mistake, good faith, reasonable belief, and the like. So far as evidence of it is concerned, the evidence of emotion, of knowledge, or of design has a bearing only so far as emotion, or knowledge, or design enter by the criminal law as constituents of criminal Intent. In other words, there is no special evidence of Intent (with the exception to be mentioned) apart from evidence of emotion, of knowledge, of design. If those elements affect criminal intent (as they usually do), then whatever evidence would serve to prove those elements would be receivable, but no new or peculiar principle of evidence would be involved. . . In short, *Intent as a separate proposition for proof does not commonly exist.* Knowledge, emotion, and design are distinct from each other, and have more or less distinct modes of proof. But as Intent is constituted of one or more of these as ingredients, it forms no separate title of proof; for each of the ingredients is to be proved in the way proper to itself.”<sup>5</sup>

*Question 5:* In the event disclosures made in an illegal confession lead to the discovery of facts showing guilt, why is it that the illegal confession cannot then be admitted, and conversely, why is it that evidence gained through an inadmissible confession is admissible?

*Answer:*

The circumstances referred to in the question have brought innumerable headaches to enforcement officials. The assumption could be made logically that since the found facts verified the confession, that this in itself should be sufficient to overcome taint of illegality. However, the Dean, in his usually clear manner explains why an illegally obtained confession remains inadmissible despite such findings: “There is however apparently an explanation for it. In the case of a confession of stealing goods and their subsequent discovery as described (almost the only situation over which this question arises), there is just one hypothesis on which the jury may stop short of believing the confession after this confirmation, namely, the accused may know of the stealing and of the place of hiding, but he may still *not* be the thief. Now we may determine to ignore the improbability of the latter consequence, but we cannot ignore the former. That his confession of stealing is true may be hard to avoid, but that he knew where the stolen goods were (and must have been in some way ‘privy to the felony,’ in Serjeant East’s phrase) is impossible to avoid. We shall admit, then, what as rational beings we are obliged to admit, but we shall stubbornly draw the line there; that seems to be the rationale of the above distinction. The result is, that so far as the discovery shows that the person knew where the stolen goods were, we are to hear about it; but we are to hear nothing more.”<sup>6</sup>

And in respect as to why the facts discovered in consequence of an illegal confession are admissible, the Dean has this descriptive reply: “It was once contended that the impropriety of the inducement to the confession tainted the facts discovered in consequence of it, and that they also, as well as the confession, should remain inadmissible. Such a doctrine needs

<sup>5</sup>Vol. 1, ch. X, sec. 242 of his *Treatise*. The one element which is distinct from those described above and may have to be shown by different evidence, as the Dean further states, is that of deliberateness or willfulness,—the negative of inadvertence, accident.

<sup>6</sup>Vol. 11, ch. XXVIII, sec. 858 of his *Treatise*.

only to be stated to expose its equal lack of logic, principle, and expediency. It was fortunately repudiated at the outset in an opinion which leaves nothing to be said."<sup>7</sup>

*Question 6:* Facts as to the bad character of the defendant appear as prime evidence in a case. Why is it, then, that courts are rigid in excluding evidence of particular bad acts to show the defendant's character?

*Answer:*

The Dean's reply is this: "It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charges, any or all of which may be mere fabrications. These reasons of Auxiliary Policy . . . directed to prevent the risks of reaching verdicts through insufficient evidence, have operated to exclude that which is in itself relevant."<sup>8</sup>

<sup>7</sup>Vol. 11, XXVIII, sec. 859 of his *Treatise*.

<sup>8</sup>Vol. 1, ch. IX, sec. 194 of his *Treatise*.

#### CONSERVATION OF SCHOLARLY JOURNALS

The American Library Association created in 1941 the *Committee on Aid to Libraries in War Areas*, headed by John R. Russell, the Librarian of the University of Rochester. The Committee is faced with serious problems and hopes that American scholars and scientists will be of considerable aid in the solution of one of them.

One of the most difficult tasks in library reconstruction after the first World War was that of completing foreign institutional sets of American scholarly, scientific, and technical periodicals. The attempt to avoid a duplication of that situation is now the concern of the Committee.

Many sets of journals will be broken by the financial inability of the institutions to renew subscriptions. As far as possible they will be completed from a stock of periodicals being purchased by the Committee. Many more will have been broken through mail difficulties and loss of shipments, while still other sets will have disappeared in the destruction of libraries. The eventual demand is impossible to estimate, but requests received by the Committee already indicate that it will be enormous.

Owing to the paper shortage attempts are being made to collect old periodicals for pulp. The Committee hopes to enlist the cooperation of subscribers to this JOURNAL in preventing the sacrifice of this type of material to the pulp demand. It is scarcely necessary to mention the appreciation of foreign institutions and scholars for this activity.

Questions concerning the project or the Committee's interest in particular periodicals should be directed to Dorothy J. Comins, Executive Assistant to the *Committee on Aid to Libraries in War Areas*, Library of Congress Annex, Study 251, Washington, 25, D. C.