



E V I D E N C E  
IN  
TRIALS AT COMMON LAW

by  
JOHN HENRY WIGMORE

*In Ten Volumes*

VOLUME IA

Revised by  
PETER TILLERS



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**EVIDENCE**  
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**VOLUME IA**



PART I: RELEVANCY

Chapter 3. General Theory of Relevancy

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## I. KINDS OF EVIDENTIARY FACTS

§24. **Classification of evidentiary facts; real evidence, or autoptic proference, distinguished.** There are two possible modes of proceeding for the purpose of producing persuasion on the part of the tribunal as to the proposition at issue. The first is by the presentation of the thing itself as to which persuasion is desired. The second is the presentation of some independent fact by inference from which the persuasion is to be produced. Instances of the first are the production of a bloodstained knife, the exhibition of an injured limb, the viewing of premises by the jury, or the production of a document. The second falls further into two classes. The distinction between the two classes depends on whether the basis of inference is the assertion of a human being as to the existence of the thing in issue or the basis of the inference is any other fact; the one class is termed "testimonial," or "direct," evidence, the other "circumstantial," or "indirect," evidence.

The first class of evidence above mentioned has been termed "immediate," or "direct," real evidence.<sup>1</sup> "Thus," says Mr. Best,<sup>2</sup> "where an offence or contempt is committed in presence of a tribunal,<sup>3</sup> it has direct real evidence of the fact. So formerly, on an appeal of mayhem, the court would in some cases inspect the wound, in order to see whether it were a mayhem or not. . . . Immediate Real Evidence is where the thing which is the source of the evidence is present to the senses of the tribunal." A preferable term is "autoptic proference";<sup>4</sup> this term avoids the fallacy of attributing an evidential quality to that which is in fact nothing more or less than the thing itself.

With reference to this mode of producing persuasion no question of relevancy arises.<sup>5</sup> "Res ipsa loquitur" — the thing proves or disproves itself.

§24. 1 Jeremy Bentham, in his *Treatise on Judicial Evidence* 12 (Dumont trans. 1825), used "real evidence" to mean the inferences from a "res"; this of course is a different usage. Cf. Nokes, *Real Evidence*, 65 *Law Q. Rev.* 57, 57-58 (1949) (discussing distinction between evidence "personal and real"; interesting remarks on the history of the distinction, which was first made by Bentham; some authors gave little significance to the distinction: "[I]t is notorious that Stephen found real evidence so indigestible that he deliberately excluded it from his English and Indian codes; . . . his reason for omitting the 'material objects' so well known to the Indian criminal courts [was] that a third class of evidence would involve needless intricacy, as the condition of material things is usually proved by oral evidence") (footnotes omitted)).

2 Best on Evidence §§196, 197 (Chamberlayne ed. 1893).

3 The theory that "direct contempt" involves immediate apprehension of the contemptuous act itself and does not involve any inference by the judge has been used to explain why rules of evidence are not

used in summary contempt proceedings. The contemporary rationale for distinctive treatment of summary contempt proceedings, however, probably rests on a different basis. See *Harris v. United States*, 381 U.S. 167 (1965), *overruling Brown v. United States*, 359 U.S. 41 (1959) (summary contempt still said to involve actual misbehavior before the court, but use of summary procedure under Fed. R. Civ. P. 42(a) is not permissible if speedy punishment is unnecessary to vindicate the court's dignity and authority). See generally §4(4b) *supra*.

4 The propriety of these various terms is further examined in dealing with that mode of proof. See §1150 *infra*.

5 Wigmore briefly further elaborates on this view in the text below and in notes 6 and 7 *infra*. The view that at some point there is some form of immediate sense perception that involves no inference is characteristic of many strands of British empiricist theorizing and philosophizing. Judging by the frequency of Wigmore's reliance on figures such as Bentham, Mill, and Alfred Sidgwick (an admirer of Mill's theory of logic), Wigmore's views of the nature of

sense perception was shaped by such empiricist epistemology. It is not possible, in this revision of Wigmore's Treatise, to examine systematically the validity of this empiricist tenet or to set forth in any complete way the various views that have been expressed on the tenet. Nonetheless, it should be observed that the hypothesis of an act of immediate sense perception must at least be regarded as problematic and, in any event, that the hypothesis involves subsidiary hypotheses and considerations of much greater number and complexity than the brief remarks by Wigmore would suggest. Some hint of the considerable difficulties generated by a belief in autoptic proference is given by Wigmore's concession (see note 7 *infra*) that real evidence may be used circumstantially. (How often will it happen that the (present?) existence of a thing will in itself be the matter in issue? As Wigmore himself admits, perhaps only rarely, if ever.) Further difficulties are suggested by Wigmore's admission (see note 6 *infra*) that a distinction—which he regards as illegitimate, for all practical purposes—may be drawn between the apprehension of the physical thing and the judgment by the observer or trier of fact that the thing exists. (Even if one perceives things in some direct way, is it not possible to make an error of judgment about what is perceived? If the answer is yes, is it not fair to say that the drawing of the conclusion as to what is perceived involves, among other things, an inferential process? And is it not the case that this inferential process is something more than a mere psychological fact, for is it not true that it is sometimes possible to revise an inference as to what has been perceived by, for example, reflecting on the initial conclusion that the existence of a thing has been perceived? If there is doubt that these questions should be answered affirmatively, is it not at least clear that an affirmative answer is required when the fact in issue is the question of whether there exists—or whether one has perceived the existence of—a human bloodstain on a piece of cloth? See further discussion in this note *infra*).

For our own part, we incline to the view that there is no such thing as "direct apprehension" of any matter that may in some way directly and conclusively resolve any question as to the existence or nonexistence of some matter of fact and we therefore believe that Wigmore erred in claiming that there is such a thing as autoptic proference that involves neither a logical nor an inferential process. We are not alone in our view. Today there are few respectable students of empirical knowledge who would be willing to venture the opinion that there is anything like "immediate perception" or "immediate apprehension" of the existence

or nonexistence of some thing. There *are* still observers who still insist that sense data or perceptions (somehow given to the human organism) are the basis of all reliable human knowledge of matters of fact, but there are few observers who would be willing to say, in the fashion of Wigmore, that the question of the existence or nonexistence of a thing is somehow automatically and decisively proved by the thing itself. There is a general consensus that the statement "there is a brown chair before me" is not a report of an object directly apprehended by the senses but is an inferred conclusion. This latter view seems to rest on at least two premises. There is, first of all, the widespread conviction that our senses can err and thus deceive us. There is no such thing as certainty with respect to things we observe in the world; there are, at best, degrees of probability. There is, second, another conviction, less frequently articulated, that the observing organism always, in principle, organizes the information it collects and assembles it in some particular way; it is never the case that an object outside the observer simply imprints its character on the observer. The observer has a character or makeup that transforms or constitutes sense impressions in some fashion. See Langer, *Philosophy in a New Key* 89-91 (3d ed. 1957) ("Our merest sense-experience is a process of *formulation* [original emphasis]. The world that actually meets our senses is not a world of 'things,' about which we are invited to discover facts as soon as we have codified the necessary language to do so; the world of pure sensation is so complex, so fluid and full, that sheer sensitivity to stimuli would only encounter . . . 'a blooming, buzzing confusion'"); Northrop, *Epistemic Correlations and Operational Definitions, in The Logic of the Sciences and the Humanities* 119 (1971; reprint of first edition of 1947) (our knowledge that a chair stands before us is the product of an "epistemic correlation" by which we are led from our perception of a two-dimensional patch of color to the conclusion that a three-dimensional chair stands before us; the epistemic correlations are not themselves directly observed; we cannot see a thing such as a chair directly); Piaget, *Psychology and Epistemology* ch. 4 (Rosin trans. 1971) (chapter entitled *The Myth of the Sensorial Origin of Scientific Knowledge*; 'knowledge never stems from sensation alone but from what actions adds to this fact'; "we no longer believe in . . . 'elementary' and preliminary sensations"; further: "When I perceive a house, I do not first see the color of a tile, the height of a chimney and the rest, and finally the house! I immediately see the house as gestalt and then analyze it in detail"; "perception never acts alone"; "perception itself does not con-



sist in a mere recording of sensorial data but includes an active organization in which decisions and preferences intervene"; the "fundamental vice" of an empirical interpretation of knowledge is "to forget the activity of the subject"; Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. Pa. L. Rev. 1083, 1085 & n.3 (1975) (though recognizing generally the existence of objective facts, the author states that "an element of subjectivity suffuses even such psychological activities as perception. The latter has been shown to be far from a passive registration of stimuli: it depends on interests, previous habits, even on the creative act of grasping structures, thus implying a degree of inferential construction"); Quine, *Two Dogmas of Empiricism*, in *From a Logical Point of View* 38 (3d ed. 1980) ("The most naive view of the relation [between a statement and the experiences that contribute to or detract from its confirmation] is that it is one of direct report. This is called *radical reductionism*. Every meaningful statement is held to be translatable into a statement (true or false) about immediate experience. Radical reductionism, in one form or another, well antedates the verification theory of meaning explicitly so called. Thus Locke and Hume held that every idea must either originate directly in sense experience or else be compounded of ideas thus originating"). (original emphasis). Cf. Morgan, *Basic Problems of Evidence* 190 (1961) ("[S]o-called real evidence is conclusive as to its own existence. . . . But it is not to say that the real evidence is ordinarily conclusive proof of an ultimate issue"); Steinbruner, *The Cybernetic Theory of Decision* 94 (1974) ("even in the simplest of operations, such as the perception of speech, the full mental apparatus is brought to bear," and "even the simplest of perceptions do apparently require memory capacity and the capacity to perform inductive inferences"). But cf. Steinbruner, *The Cybernetic Theory of Decision* 101 (1974) (speaking of Freud's reality principle, Steinbruner opines: "[The reality principle] quite simply asserts that the human mind is in contact with its environment, that stable, important features of the environment impose themselves quite reliably on the mind. In other words, the operations of the mind are in important ways constrained by reality. This thesis has very complicated philosophical overtones; for, as the history of epistemology makes clear, it is very difficult to give a coherent logical account of this proposition. But however difficult it might be to analyze the notion of reality and the process by which it is recorded, it is quite clear that it happens. The human mind does perceive things and in many instances gets it right. . . . The reality principle is certainly not all one

needs to know about the mind, but it is an indispensable element of any analysis").

Wigmore's view of real proof (autoptic preference) was criticized in Michael & Adler, *Real Proof*, 5 Vand. L. Rev. 344 (1954), where the authors said that real proof "always involves an inference" (5 Vand. L. Rev. at 347 n.11). Although Michael and Adler criticized Learned Hand for saying in *United States v. Petrone*, 185 F.2d 334, 336 (2d Cir. 1950), that facts are always conclusions, they made a distinction between real evidence and real proof; while saying that "real evidence" involves "only an act of sensible apprehension" without any "logical process" and without "any step of conscious inference or reasoning" (5 Vand. L. Rev. at 349), they maintained that "evidence by itself is always insufficient to resolve an issue of fact. A process of inference . . . must intervene. That this must be the case would not require mention were it not sometimes said that there is no process of real proof, no proof in which a proposition of real evidence is a probans" Michael & Adler, *The Trial of an Issue of Fact* (pt. 7), 34 Colum. L. Rev. 1224, 1263-1269 (1934). Michael and Adler asserted that lawsuits have to do not with "facts" but with so-called propositions of fact or, perhaps more simply and understandably, with questions about the proper interpretation of "facts" in the form of "real evidence." Hence, their extended and complete criticism of Wigmore holds:

"It has been said by Wigmore that there is real evidence but no real proof, that is, no characteristic step or proof in which a proposition of real evidence is employed probatively. To defend this position, one would have to maintain that things are always precisely as they appear to be, in which case, of course, there would be no distinction between a proposition of real evidence and its proximate probandum" (5 Vand. L. Rev. at 357-358).

The issue in a case is always not how a thing appears to the jury but, rather, its true character (which might, of course, be the question of its appearance to someone else at another time). Thus, they said, there must be "real proof," and a "step of real proof is always an inference from knowledge of what appears to be the case in some respect to knowledge of what is actually the case" (5 Vand. L. Rev. at 356).

As the analysis by Michael and Adler illustrates, there are respectable twentieth century theorists who maintain that immediate sense perception is in some way the necessary foundation of all reliable human knowledge of matters of fact. (A. J. Ayer and Bertrand Russell are two additional examples of subscribers to this general view). In all cases, however, proponents of