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Book Review: Canadian Criminal Evidence, by P. K. McWilliams; The Law of Evidence in Civil Cases, by John Sopinka and Sidney N. Lederman

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BOOK REVIEWS

REVUE DES LIVRES

Canadian Criminal Evidence. By P. K. McWILLIAMS. Agincourt: Canada Law Book Ltd. 1974. Pp. civ, 703. ($40.00)

The Law of Evidence in Civil Cases. By JOHN SOPINKA and SIDNEY N. LEDERMAN. Toronto: Butterworths. 1974. Pp. xxi, 637. ($50.00)

Although their styles differ markedly, in some ways *Canadian Criminal Evidence* and *The Law of Evidence in Civil Cases* complement one another and both will undoubtedly find a place in the libraries of Canadian legal practitioners. Canadian legal writers, with a few notable exceptions, have simply been compilers of cases and marshallers of precedent. McWilliams' *Canadian Criminal Evidence* follows closely this tradition, and can aptly be described as resembling a collection of obscurely related quotations and headnotes arranged vertically. No new insights into the ideologies or social forces that lead to the development of the rules are revealed; no new theories or rationales for particular evidentiary concepts are put forward; no critical analysis of existing doctrine is undertaken; no new developments or directions in Canadian evidence law are suggested; indeed, seldom is a principled or even a factual reconciliation of conflicting case authorities attempted. McWilliams makes no claims that his book was written to achieve any of these purposes. In the preface he states that the book was written to assist the Bench and Bar by providing a convenient reference to and digest of cases on criminal evidence. The book will undoubtedly be of value to those practitioners who are interested in the question "Is there a case on point?" or the more sophisticated "How many?", and who for one reason or another are unable or too lazy to search the digest for evidence cases. It will not be condemned by practising lawyers as academic.

McWilliams collects cases under approximately 1,100 headings and sub-headings, arranged, in terms of the policies that underlie the rules of evidence, in no apparent order. Indeed the book looks very much like an energetic lawyer's note book to which

new materials are added simply by creating a new heading or sub-sub-heading. No attempt is made to integrate the materials into a systematic whole. While this method of organizing the materials makes evidence law appear as a rag-bag containing a multifarious collection of unrelated rules, it will permit a lawyer with an admissibility problem to use a word descriptive of the matter in dispute, for instance, tape recording, certificate, previous conviction, or documents found in possession of the accused, and quickly find some cases dealing with the same matter. The arrangement should be extremely useful to a lawyer who does not know for sure whether he has a problem relating to hearsay, authentication, best evidence, relevancy, opinion testimony, privilege or character evidence. As a repository of references to Canadian criminal cases, *Canadian Criminal Evidence* is likely very nearly definitive, and apparently it was not intended to be anything more than that.

The purpose of the Sopinka and Lederman book on the law of evidence in civil cases is not as modest. The authors assert in their preface that they hope their book "will shed at least some faint ray of light on the subject". Thus presumably they were not content to produce another mere digest of evidence cases. They intended to reconcile and to integrate cases, to state the relation of particular decisions to other holdings upon the point, and to uncover unifying principles in the clutter of decisions on Canadian civil evidence law. In short, one can assume from the preface that they undertook the task of presenting this area of the law as a comprehensible whole. Given the paucity of critical writing on Canadian evidence law upon which the authors had to build,[1] their efforts must be adjudged to be, in large part, a success.

The chapters on hearsay, best evidence and privilege are all developed in a similar manner and are particularly well done. The chapter on hearsay, for instance, begins with a short discussion of the history and rationale of the hearsay rule. A definition of hearsay is proposed and the authors suggest an analysis for viewing hearsay problems which is based on the difficulties of weighing testimonial proof that the rule was intended to minimize. The authors then undertake a careful analysis of each exception

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[1] Indeed the excellent materials prepared by Professor Stanley Schiff of the University of Toronto, entitled Evidence in the Litigation Process, and as yet, unfortunately, unpublished, was the only current Canadian material before this text which treated Canadian evidence law as a unified body of knowledge.

to the hearsay rule that is applicable to civil cases. The discussion of each exception begins with a brief statement of the exception, followed by an analysis, which usually takes into account the results of modern theory, of the reasons given for the exception. The factors that must be present before a declaration qualifies within a particular exception are then individually reviewed and the cases reconciled. Where Canada has borrowed legislation from the United States, notably with respect to the admissibility of business records, the leading American cases are cited and explained. It is a treat to see well-reasoned American cases woven into the text, rather than a line-up of the same tired old English cases. Indeed since Canadian common law rules of evidence are almost identical to the American rules, it is unfortunate that American cases are not cited even more frequently. However, perhaps their absence can be explained as being a concession to the profession which at times does not seem to realize that the United States is a common law jurisdiction,[2] that some of the greatest judges in the common law world have graced its Benches, and that modern English evidentiary jurisprudence, and consequently Canadian jurisprudence, is largely founded upon United States jurisprudence. Indeed, it is rather unfortunately founded on American jurisprudence as it was one hundred years ago, before the brilliant analysis of Thayer, Wigmore, Morgan and others had its effect on the case law.[3] Finally, the authors critically evaluate the hearsay exceptions in terms of the principles presently underlying the rule. Thus not only is case reconciliation undertaken, but also the more challenging task of systematization.

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[2] McWillians, in the preface to his book, states that he did not "hesitate to draw upon many excellent decisions in recent years coming from England and other common law jurisdictions". However, he cites only a handful of American decisions, and then the citation usually follows a quotation from Wigmore, or some other authority, where the author cites the cases cited by that authority.

[3] The most influential English evidence treatise in the late nineteenth and early twentieth century was Taylor on Evidence, the last and 12th edition of which was published in 1931. Taylor in the preface to his first edition stated, "The following work is founded on 'Dr. Greenleaf's American Treatise on the Law of Evidence' ". Indeed so closely did it follow the form and substance of Greenleaf that Thayer felt it should have been called "Taylor's Greenleaf". Thayer, Bedingfield's Case — Declarations as a Part of the Res Gestae, in Legal Essays (1908), p. 207, at p. 210, n. 1. The subsequent editions of Taylor wholly ignored American developments brought about by the writtings of Thayer, Wigmore and others. Consequently, until only very recently English jurisprudence was being premised, in large part, upon an analysis of evidentiary principles developed by an American from American cases decided before 1842.

Undoubtedly, future judicial developments in this area of the law will be influenced by the authors' analysis.

Unfortunately, this high standard of legal analysis is not maintained throughout the book. In places this work too degenerates into a citation of cases strung together under arbitrary headings. Practitioners might find these parts of the book a useful mine out of which to dig cases, but they will not be of much assistance to them in attempting to understand the rules, their inter-relationships, or in constructing creative arguments out of the chaos created by the case authorities. For instance, under the major heading Relevancy are found such disparate subheadings as Collateral Facts, Opinion and Previous Proceedings, none of which have anything more to do with relevancy than any other doctrine of evidence law. Under The Use of Character Evidence to Prove a Fact in Issue, the authors discuss five ways of impeaching the credibility of witnesses. In a chapter called Documents, the principles of evidence that apply to documents are often obscured and confused. Indeed much of the discussion found earlier when the authors are dealing with the hearsay exceptions and the best evidence rule is repeated in a different form in this chapter. Since authentication is the only principle of evidence law that relates to documents and that had not yet been discussed in the book, one might have expected the authors to confine the chapter to this problem.

Given the time and energy that must have gone into producing these books, they undoubtedly deserve a more detailed appraisal than I have thus far given them. However, the urge to make any further remarks about the authors' interpretation of the cases, or the content and organization of their books, is far overshadowed by a sense of despondency evoked by the fact that the books had to be written at all.

When will we be candid enough to admit that like many other legal phenomena the law of evidence is dead? Provincial courts, where over ninety per cent of criminal cases are tried, only function as well as they do because trial judges, often more practical and sensible than their appellate court brothers, have in large part ignored the rules. When an eager counsel presses an objection to exclude evidence most trial judges, again sensibly, perhaps embarrassed by the charade, ignorant of the complications of the rules, or more likely curious about the evidence that counsel is trying to keep out and conscious of their responsibility to make a just determination of the case, admit the evidence subject to the objection. While the drama of the ritual involved in invoking the rule of evidence may entertain the counsel, an

impartial observer would be justified in questioning its practical significance. I am reminded of a conversation with a Provincial Court judge, who by general consensus conducted one of the better courts in the province, in which he remarked that he had been doing justice for twenty years and was proud of the fact he did not know one rule of evidence. The rules are apparently not often applied in civil trials either. The authors of *The Law of Evidence in Civil Cases* justified limiting their book to civil trials on the ground of the "discrimination of rule-application between criminal and civil trials".[4] Presumably they mean the rules are applied even less frequently in civil trials.

In appellate courts the case authorities are so conflicting on most points that they are largely self-cancelling. However, more importantly, as anyone who reads the books under review with an open mind must realize, the whole of what is called the law of evidence is in fact little more than a word game played by lawyers and judges who have become so entrapped into their own jargon that they have forgotten the reasons for the rules and the ultimate objectives of the system. Recourse to such word mongering has too often been, as Mr. Justice Cardozo called recourse to rules of thumb, "a lazy man's expedient for ridding himself of the trouble of thinking and deciding".[5]

Sopinka and Lederman in places gallantly attempt to rationalize the irrational. If their arguments are used by counsel and move a court to adopt a less irrational position on some point of evidence their book will have served a useful purpose. Both of these books could serve a much more significant purpose if, now that the conflicting cases, the artificial categories, and the word games are all before us, they lead us to exhume and perform a post-mortem on the corpse of the law of evidence, and then to rebury it along with its ghost which now haunts us from the grave.

Lawyers often apotheosize the rules of evidence by making indefinite references to ubiquitous rules and cases that supposedly embody the experience and wisdom of the ages.[6] Hopefully one

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[4] P. 3.

[5] Cardozo, What Medicine Can Do for the Law, in Law and Literature and Other Essays (1931), p. 92.

[6] McWilliams in his preface states that the rules have "great strengths" and "have been proved over the years to be the bulwarks of our liberty". He further states that "There is much of the law of evidence which should most assuredly be preserved". P. vi. Sopinka and Lederman, while frankly recognizing the need for reform of the rules of evidence, assert that any legislative reforms "will have to incorporate many of the existing principles". P. ix.

day when one of these lawyers is frantically searching through his *Canadian Criminal Evidence* to see if he can find a case on point some wise and honest judge will lean over and exclaim: "who cares!" He will then decide the fate of the offered proof by making a simple judgment based on the few principles that underlie any rational adjudicative process and that are often obscured in these books beneath a myriad of cases.

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[1] (1884), 14 Q.B.D. 141.

[2] [1956] A.C. 185.