BOOK REVIEWS

SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA, EVIDENCE

TORONTO: RICHARD DE BOO LIMITED. 1955. PP. xiii, 342, ($12.50)

Some of the lectures in this series of seventeen lectures on Evidence by prominent members of the Ontario bar would not be considered great contributions to the scholarship of the law. But in this work-a-day world where not every lawyer can be a law professor there is a real need for instruction in the work-a-day practices that are largely taken for granted by experienced practitioners. Until very recently the learning of these practices was left to the haphazard chance of articled clerkship and the young lawyer was frequently without adequate training. These lectures, of the variety which Mr. Edson Haines Q.C., calls, in his talk on Examination for Discovery (pp. 23-45), "how-to-do-it" lectures, will go a long way to supplement the proper content of a university law school's course in evidence in those provinces, other than Quebec and Ontario, where reliance is still placed on the unimproved (and barren) land of articled clerkship.

It would be wrong, however, to suggest that all the lectures are on this lesser level of "practicality" or that the "practical" lectures contain not even the seeds of wholesome academic thought. In fact, the element of academic thought present in such a "how-to-do-it" lecture as Mr. Haines' own, is sufficient to demonstrate the futility of separating the academic from the practical. Mr. Haines tells us how he explains the adversary system to his clients so as to help them overcome the fear of the unknown and thus to make them less nervous witnesses. It is, unfortunately, a rather oversimplified statement compelled by the limits of time and space, but he does suggest, as if it were significant, that "a lawsuit is [not] a scientific enquiry into the truth." Of course it is not, because the scientific method has very little to offer in the task of enquiring into what happened in a dispute over the facts. When our sense of values dictates that some protection be given to the disputing individuals, it is doubtful whether science could find any fairer and more effective method of enquiring into the truth than the common law trial. Admittedly, where the adversary character of the procedure is pressed to the extreme, some of the exclusionary rules of evidence unquestionably result in distortions of the truth.

For example, Dean Wright, in his estimable lecture on *Res Ipsa Loquitur*, dismisses as "unwarranted", on the "existing principles of the adversary system", Judge Frankfurter's view that a trial judge should have called a witness on his own motion in order to have all available evidence. Frankfurter

J. refused to believe that a trial was a game of blindman's buff. He was, in my opinion, quite right, and somehow I feel that Dean Wright would agree that the "existing principles" might better have been described as court of appeal authority awaiting clarification in the Supreme Court of Canada.[1]

It is abundantly apparent from the lecture titles that the "how-to-do-it" element varies greatly, from such "practical" topics as Preliminary Hearings (by G. Arthur Martin Q.C., pp. 1-21), Identification Procedures and Police Line-Ups (by Charles L. Dubin Q.C. pp. 329-342), Cross Examination (by Joseph Sedgwick Q.C., pp. 199-214) to such "academic" matters as the Hearsay Rule (by J. J. Robinette, Q.C. pp. 279-306) and, by the same contributor, Circumstantial Evidence (pp. 307-312).

In addition to the "practical lectures", Dean Wright and Professor J. Desmond Morton (as he now is) present two most interesting "academic" lectures, Dean Wright (pp. 103-36) on *Res Ipsa Loquitur* (a Latin phrase now running a close second to Res Gestae as the most meaningless and misleading Latin tag in the common law) and Professor Morton on Presumptions (pp. 137-153). In the short space of a review it is impossible to comment on all the contributions, but it would be hard to find a more qualified display of contemporary forensic talent in Canada, and the young lawyer will find much of immediate value from the "how-to-do-it" lectures as well as stimulation of a different character provided by Dean Wright and Professor Morton.

This volume of lectures is the second of two major pieces of writing in the law of Evidence in Canada. The other, of course, is Dr. MacRae's contribution to the Canadian Encyclopedic Digest, recently revised by Messrs Auld and Morawetz. It is of some importance, I think, that both Dr. MacRae and his successors, and the committee in charge of the Osgoode lectures, have excluded from the subject of evidence the topic of judicial notice. The C.E.D. relegates the topic to three pages (671-3 in Vol. 10) under the title Trials without even a cross reference from the title Evidence. Apparently the editors revising the second edition plan to follow this classification. Canadian

[1]Contrast Rule 105 (d) of the Model Code of Evidence which permits the trial judge the privilege of calling a witness of his own motion. And contrast Professor Morgan, himself a staunch supporter of the adversary system, in *Some Problems of Proof Under the Anglo-American System of Litigation* (1956) at p. 128: "We must concede that the trial is a proceeding not for the discovery of truth as such, but for the establishment of a basis of fact for the adjustment of a dispute between litigants. Still it must never be forgotten that its prime objective is to have that basis as close an approximation to the truth as is practicable. The emphasis upon the protection of the adversary and the fact that the result is binding only upon the parties and their privies have tended to make this objective seem of secondary importance . . . It cannot be too emphatically asserted that such a beclouding of the objective is an abandonment of the fundamental principle of the adversary system, namely, that each adversary because of his interest will be keen to discover and present materials showing the strength of his position and the weakness of his opponent's, so that the truth will emerge to the perception of the impartial tribunal."

lawyers who depend on standard works like the C.E.D., or lectures by such qualified persons as the Osgoode volume here reviewed might be forgiven if they never learned that judicial notice is not only a main branch of the law of evidence, but also a most difficult branch. It is, of course, treated, all too briefly, in standard English works, and Wigmore gives it due place in his monumental treatise. But since Wigmore's third edition in 1940 Professor Kenneth Culp Davis has carried the analysis much farther and the subject can be said to have made important strides forward in terms of basic legal analysis in the past fifteen years.[2] This review is not the place to expound Professor Davis' theory at length, but it is clear that judicial notice is an ambiguous concept, and its clarification could lead to better briefs (factums) in our courts and a better understanding of a court's use of extra record material.

In his introduction to these lectures on Evidence, Mr. Cyril Carson, Q.C., says, of an unsuccessful attempt to introduce the London Resolutions in evidence before the Privy Council in a constitutional case, "their Lordships . . . thus ran no risk of something that was inadmissible in law having some unconscious effect upon their decision upon the merits of the case." (p. xiii). One can easily imagine a judge having already read the London Resolutions long before he reached the bench, and having already formed some idea of their relation to the British North American Act. Is it better to reject the "evidence" of the London Resolutions and have the judge unconsciously affected by previous reading, or should we accept the matter as one of which judicial notice might be taken but insist that intelligent discussion be heard from the opposing parties? If the latter view is accepted, then the whole question of how and when matters might be judicially noticed will have to be reexamined. This task still faces our academic scholars in the law of evidence.

J. B. MILNER.

[2]See particularly Davis, *Administrative Law* (1951) pp. 487-497, on "Legislative and Adjudicative Facts."

AN INTRODUCTION TO EVIDENCE

By G. D. Nokes, LL.D.

SECOND EDITION. LONDON: SWEET & MAXWELL LIMITED, TORONTO: THE CARSWELL COMPANY LTD. 1956. PP. xxxvl, 480 ($7.25)

This is the second edition of a work first published in 1952. Both editions have been the subject of deservedly complimentary reviews in the Canadian Bar Review.[1]

The new edition has been necessitated by a number of new cases (numbering between 250 and 275 if one can judge from the Table of Cases) which have been decided in the British Isles since the first edition was published.

While the general plan of the book has been retained almost unaltered, the text has been expanded by more than fifty pages.

The various subjects are treated in an order different from the order followed by Phipson. The author proceeds from the origin of the various methods of proof to their application in court. The preliminary part of the book is devoted to the nature and sources of evidence and special means of establishing facts. Admissibility of Facts and Admissibility of Hearsay comprise parts *II* and *III*. Then follows Means of Proof and the fifth part deals with the Burden of Proof and with Cogency.

The conclusions are supported by reference to jurisprudence, to authors both English and American, and to articles in legal periodicals including several articles published in the Canadian Bar Review. I was unable to find any reference to Canadian cases (unless decided by the Privy Council) and all the jurisprudence appears to be English, Scottish or Irish.

The book is a happy combination of the theoretical and the practical. It is not designed for use by the practicing advocate in Court, as is Phipson or Cockle, nor is it of much utility to a Quebec lawyer or student. It does however contain a clear and concise exposition of the general principles of the law of evidence in England.

GEORGE S. CHALLIES.

[1](1952) 30 Can. Bar Rev. 759 (André Nadeau) and (1956) 34 Can. Bar Rev. 871 (J. B. Morton).

CHAPTERS IN HISTORY OF FRENCH LAW

by Walter S. Johnson Q.C. L.L.D.

PUBLISHED: THE LAW FACULTY OF McGILL UNIVERSITY. MIMEOGRAPH FORM. 1957. PP. 295. ($5.00)

Mr. Walter Johnson, dans l'introduction de son ouvrage, souligne avec raison que le but recherché par lui est de permettre à l'étudiant canadien de langne anglaise de se familiariser dans sa propre langne avec l'esprit des institutions du droit français qui sont à la base du droit de la Province de Québec.

Mr. Walter S. Johnson était qualifié à plus d'un titre pour ce faire. Tout d'abord son éducation et sa culture générale, puis sa connaissance et son admiration pour les institutions françaises, enfin le fait d'avoir vécu toute sa vie dans cette province de langue française, ce qui lui a permis plus qu'à tout autre de saisir l'esprit des institutions québecoises.

Sans doute, tous les chapitres présentés n'ont-ils pas la même portée. Il faut remercier Monsieur Walter S. Johnson d'avoir au moins tenté de synthétiser les complications de ce damier juridique, politique et économique qu'ont constitué les périodes féodales et le moyen-âge.

Un auteur qui n'aurait pas eu cette tournure d'esprit se serait perdu dans d'infinis détails en traitant les aspects des institutions de la période Gallo-Romaine, et de la période Franque.

Monsieur Walter S. Johnson a su élaguer pour les étudiants et dégager les traits fondamentaux des institutions durant ces périodes bouleversées et complexes. On a l'impression que son livre a su rendre ce sens de la continuité historique des institutions françaises malgré les hachures et les événements de l'histoire pure.

L'ouvrage de Monsieur Walter S. Johnson est certainement pour l'étudiant de langue et de formation anglaise un précieux atout.

LOUIS BAUDOUIN*

*Professeur à la Faculté de Droit de l'Université McGill, Montréal.

LES "LEÇONS DE DROIT CIVIL" Tôme 2

MM. H. L. and J. Mazeaud

EDITION MONTCHRESTIEN, PARIS. 1956. PP. 1378.

Le deuxième volume des leçons de Droit Civil est consacré d'une part à la théorie générale des obligations, formation des obligations, formation des contrats, leur interprétation, et à celle de la responsabilité civile délictuelle et contractuelle ainsi qu'à l'exécution des obligations.

Il traite d'autre part des droits réels principaux, droit de propriété, possession, accession, et des modes d'acquisition de ces droits.

Les auteurs sont restés fidèles à la méthode employée dans le premier volume et qui leur était d'ailleurs en partie dictée par la récente réforme de l'enseignement du droit en France. Chaque leçon est donc assortie d'un sommaire de la leçon proprement dite et de lectures ou d'extraits de décisions judiciaires sur le sujet traité.

Il faut rendre hommage aux auteurs d'avoir su donner dans la partie théorique sur les obligations des extraits d'articles qui donnent matière à réflexion chez l'étudiant. Il faut en effet habituer l'étudiant à raisonner et non simplement à apprendre les articles du Code. Les auteurs ont consacré un certain nombre de leçons aux définitions et aux classifications des contrats. C'est là une chose essentielle, car, les unes et les autres créént ou devraient créer dans l'esprit de tout étudiant cette sorte de réflexe juridique qui lui permet de retrouver dans son esprit en face de tel ou tel contrat les caractéristiques fondamentales de celui-ci.

Demeurés fidèles à la notion de la cause, les auteurs y consacrent des pages pleines de clarté et précision dans une matière demeurée souvent obscure et toujours controversée. Ils montrent notamment comment certains droits étrangers tel le droit allemand, suisse ou polonais qui ont rejeté la cause comme condition de formation dans certains nombres d'actes juridiques, ont dû affirmer le principe d'interdépendance des obligations nées du contrat synallagmatique que précisément la notion de cause renferme.

La discussion sans doute trop brève, mais fort bien venue, sur l'engagement unilatéral de volonté est intéressante à consulter.

C'est surtout dans le domaine de la responsabilité civile délictuelle et contractuelle que les auteurs sont passés maîtres dans l'art de l'exposition. Ayant déjà affirmé leur doctrine dans leur important traité de la responsabilité civile délictuelle et contractuelle, ils ont su ramasser en une excellente synthèse de

quelque trois cents pages les principes généraux de la responsabilité civile française, qui, pour tout juriste sont une source d'enrichissement intellectuel.

Il faut signaler également les leçons consacrées à la propriété et à la possession, matières difficiles, pleines de subtilité, dont ils ont su avec la même précision faire des pages attachantes.

LOUIS BAUDOUIN*

*Professeur à la Faculté de Droit de l'Université McGill, Montréal.