THE LAW OF EVIDENCE: PRESENT AND FUTURE

The Law of Evidence. By SIDNEY L. PHIPSON. Eighth Edition by ROLAND BURROWS. London: Sweet & Maxwell. 1942. Pp. clxxxviii, 770.

There can be little doubt that Phipson on Evidence is the best book now in print in England on the extremely important and practical subject with which it deals. The fact that the present volume marks the eighth edition bears ample testimony to this conclusion, and indeed the mere convenience of the full citation of authorities with their various fact situations in two parallel columns, one listing evidence which has been held admissible and the other evidence held inadmissible under various related headings is alone bound to place the book high in the estimation of the practitioner who, under our existing law of evidence must frequently be forced to search for a case "on all fours." Mr. Burrows' work on the latest edition of this standard book has fulfilled the expectations which earlier editions had deservedly created in the minds of the profession. The new Evidence Act 1938 — Lord Maugham's Act — receives a chapter to itself, thus bringing the entire number of chapters to forty-nine. The profession will no doubt continue to find the present volume as helpful as past volumes in providing ample authority to prove that almost anything is inadmissible. At the same time, it will provide as little comfort intellectually as we have become accustomed to in the subject as currently treated.

While a review of such a well known book as Phipson might very well have ended here, this reviewer can not resist the temptation, in part encouraged by some of Mr. Burrows' own comments in the preface, and to a still greater extent prompted by a thorough rereading of Phipson, undertaken for purposes of this review, to make certain observations regarding the current treatment of evidence both by the courts and more particularly, perhaps, by text writers. For, despite the high place which the present book holds amongst practitioners' literature, the reviewer found a reading of the present book depressing and discouraging. Depressing, because there seemed to be an endless piling of authority upon authority, of isolated case upon isolated case, of countless distinctions of cases from other cases, of distinctions which this reader, at any rate, could not understand and concerning which the author and his editor offered no solace. Discouraging, because while the subject of evidence might appear to have as its object the "due ascertainment of truth in the

administration of justice," to use the words of Mr. Burrows in his preface, the bulk of the volume seemed concerned rather with the problem of preventing the ascertainment of truth by the application of technical rules which bore no sign of internal consistency, and the justification of which seemed to lie in cloudy generalizations unsupported by experience. The results of the application of these rules seem to merit well all the harsh things that have been said by the laymen about the administration of justice.

True, Mr. Burrows in his preface apparently felt somewhat the same for he spoke rather disparagingly of the principles of evidence and indicated that it was a matter "for serious consideration whether . . . . . the subject . . . . . ought not to be reconsidered with a view to securing that it shall better conduce to the only object that justifies its existence, viz. the due ascertainment of the truth in the administration of justice." With this view one can sympathize, although one would have expected from an editor imbued with the futility of much of the subject about which he was writing something more suggestive as to the manner in which dead wood could be cleared out rather than a mere collection of decayed timbers which are offered as the substance of an existing repository of rational thought.

Perhaps this reviewer approached the present book under an influence which was not designed to make him sympathetic. For some time past he has had the opportunity of following the work of the American Law Institute so far as it was concerned with drafting a Code of Evidence.[1] Into this Code has gone the labour of judges, practitioners and professors of law who have devoted their lifetime to a study of the subject. With the work of Thayer and Wigmore on Evidence as a background, works which have never been equalled or even remotely approached by any other writer on the subject in common law countries, it should not have been surprising to find that within a comparatively short compass the guiding principles of the law of evidence could be set out in a manner that would truly disclose a desire to achieve what should be, at any rate, the purpose of a law of evidence, namely the introduction of all logically relevant evidence without sacrificing any fundamental policy of the law which may be of more importance than the ascertainment of truth.

[1] See Morgan, *Comments on the Proposed Code of Evidence of the American Law Institute* (1942), 4 Can. Bar Rev. 271.

Such an approach must fundamentally be based on vesting in the judge an extremely wide discretion. Such a discretion may perhaps be admitted in practice, although books like Phipson disclose that the past history of this part of the law has been to treat evidence in the same manner as the law of real property — to categorize and classify rigidly and to develop those categories sometimes, one would be tempted to say, merely for the sake of mediæval logic. If common sense, used in this field to denote what a reasonable man would consider as something normally of probative value, rebelled against too rigid categories, there was always the normal legal method of making a new category in which one could classify anew what he could not force into another mold. Hence, we have that sprawling category of *res gesta* of which Phipson makes much. *Res gesta* merits not only a special chapter, but is constantly referred to in chapter after chapter, dealing with other categories, as a kind of forlorn hope for the man seeking law which should be tried if all else fails. This is quite understandable, for a mere glance at those cases which have come up under *res gesta* indicates that it can mean all things to all men. The present edition retains a most amazing and confusing mass of fact situations in which this *res gesta* doctrine has been held to permit the introduction of evidence which at times looks like hearsay—and *is* hearsay—and which same evidence at other times is described not as hearsay but as original evidence. This very collection of fact situations itself is so confusing in its scope as almost to demand that a reader cease thinking before he go mad.

And yet, it may be queried if all these cases represent anything more or anything less than attempts by courts to exercise a discretion in admitting what seemed normally relevant to a fact in issue, while attempting to give effect to their understanding of the underlying policies of many rules of exclusion which on the surface would seem automatically to demand that the evidence be rejected. Only in this way can one sympathize with the mental torture involved in the confused treatment of the many exceptions, for example, to the hearsay rule. And if this be so, should we not recognize, reconsider and enunciate just what the underlying objections to the reception of evidence may be, leaving a wide discretion in the court so that if those considerations have been taken into account the discretion should not be interfered with. Surely this would be sounder than the present rigid and time-consuming process of searching for a form of words to cover up a logical process and, possibly,

excluding in the result evidence that any sane man would act on in the conduct of his own affairs.

And should this not be the guiding principle of evidence? Many would deny it apparently, for only this last year, the leader of a political party in one of our Parliaments decried any attempt to ameliorate the law rejecting hearsay in the courts, although in the same breath he admitted that people outside courts acted on it regularly and properly, in the sense that they could frequently get no better. Why courts should be considered as more stupid than any other human agency is difficult to understand, and we have no doubt that even in wartime decisions involving the lives of thousands are every day taken of necessity, as well as good sense, on hearsay in one form or another, and this without reference to artificial rule.

This piling up of precedent, each more complicated than the one before, is well illustrated in those cases dealing with the proof of "Similar Facts".[2] Here the language of the criminal cases of relevancy to prove "system"; to rebut defences of accident, etc.; to show a state of mind, and so forth, is familiar but overwhelming in its verbiage. And do these cases demonstrate anything more than an insistence that such evidence should not be used to show a mere "disposition" or "character" to do an act in issue, but that it is admissible for almost every other purpose? And if so, why not say so, leaving a wide power in the trial judge to exclude such evidence even when not offered merely to show "disposition" if its probative value is slight. It is a pleasure to find that the American Law Institute in their suggested Code has done so.[3] If adopted, surely this can clear out a vast amount of case-citing which frequently ends—if it is not cited for that purpose in the beginning—in complete obfuscation of the true issues. It is true that the reception of such evidence must be carefully and minutely scrutinized in light of the undue prejudice it is likely to cause, but at the same time what nonsensical results we reach when we reject this and allow accused persons to be examined as to past convictions.[4] At the present time it all becomes a matter of rubric rather than reason; of rule rather than principle; of categories and precedent rather than logic and fairness.

As to hearsay, Phipson portrays accurately — Indeed too accurately — the confusion and professional thought concerning that. Dying declarations allowed in criminal cases and rejected

[2] Phipson, c. XI.
[3] Morgan, *op. cit.*
[4] See 12 Can. Bar Rev. 519; 18 Can. Bar Rev. 808.

in civil cases; fine lines drawn as to declarations in the course of duty; declarations of deceased persons allowed for various reasons in testamentary cases, and rejected in others because counsel or the court could not find a proper category of supporting reasons. But why go on? Everyone is willing to admit there are exceptions. No one, I presume, is willing to argue that hearsay of all kinds and conditions should be admitted. But can we not get some fundamental doctrine which, within limits of wide discretion, can point the way to courts becoming rational bodies rather than mechanistic word-jugglers, and in which the word hearsay as an objection has some basis in reality, in the sense that it is truly prejudicial rather than of probative value.

Lord Maugham's Act of 1938 did make what some, no doubt, considered "wide strides", in admitting certain affidavits and other written statements by parties not called as witnesses. While a concession to the view that *some* hearsay is permissible (a view already abundantly proved in the case law) it is another niggling exception. To show how it is likely to be treated, see the present edition of Phipson. True, a chapter is devoted to it — even though this reviewer confesses that to him it was not a particularly happy chapter from the point of view of lucidity. But see the later chapters on "Declarations Against Interest," "Declarations in the Course of Duty" and "Declarations as to Public Rights." No attempt is made to integrate the new statutory "exception", but in each case the old judge-made rules are set out in full with, in each chapter, a small footnote to the effect that "evidence not admissible on this principle may be admissible under the Evidence Act, 1938." Instead of one exception we now must consider two. This is typical of a piece-meal, nibbling, approach to a subject that can only be made into a coherent and sensible whole by recasting or at least restating the aims, objectives and underlying policies in a manner that will not prevent expansion as new situations arise, and will not transform an intelligent search for truth — so far as truth can be ascertained for the practical purpose of decision — into a game of legal dialectics.

Space does not permit an examination critical or otherwise of the sweeping manner in which the American Law Institute has dealt with this problem.[5] Suffice it to say that it appears so reasonable, simple, and at the same time sufficiently limited as to provide protection against abuse, that it is sure to run

[5] See Morgan, *op. cit.*

into opposition from a profession which has been nurtured on the indigestible diet served in the standard text books, and to whom anything less highly seasoned with high-sounding phrases will appear as the removal of its sustaining force. Indeed there may be truth in this. At one time there was an outcry in the profession at the thought of abolishing the prolix and redundant conveyances which were the unattainable and incomprehensible charms of the priestly legal cult, which, said the cult, rightly could not, and indeed should not be understood by the public. Certainly no one save a lawyer can understand the law of evidence, and in the opinion of this writer no lawyer, even though he may admit to understanding that law, could never explain it. No English book has yet attempted it and the day it is attempted that day we may look forward to a sincere movement for its simplification.

It is perhaps not fair to criticize books like Phipson (indeed the criticism made here is not so much with the books as with the apparent desire of the profession to continue the system which supports the books) for their piling of precedent upon precedent without presenting a simple underlying philosophy of the problems of proof, for Phipson does attempt, in short statements of principle at the beginning of each chapter, to keep a thread. It is not the fault of text-writers who, after all, are writing for the practising profession, that they give the profession what it wants rather than what it should have. But even so, the amazing number of trees presented does make the woods become dim at times.

A further indication that the English texts have not really come to grips with evidence as a rational problem of proof, is shown by the fact that large parts of Phipson are occupied with substantive questions of law — when an offer is accepted by mail; what a railway must do to limit liability; discussions (misleadng because necessarily incomplete) of liabi ity in tort on the "theory" that a man is taken to intend the natural consequences of his act. Such problems depend for their solution on entirely different considerations than can possibly be relevant to questions of proof and should be eliminated.

At the same time, strangely enough, we do complain of the "simple" treatment in English books like Phipson, of many things which are far from simple, and which are only so considered because they are in truth so difficult that it has been easier to maintain the illusion of simplicity by refusing to admit the difficulty. Probably the best illustration of this phenomenon

occurs in connection with burden of proof. Phipson's treatment of this subject is, to this reviewer at least, not only barren, but confusing. Having formally made the distinction between the two senses in which burden of proof is used, what follows he apparently relates to the burden of adducing evidence, although at times it seems quite clear he is referring to his "burden on the pleadings". Even then, he fails completely to show how presumptions operate or should be dealt with relative to either question.[6]

Throughout the book the author and the editor use presumption interchangeably for "inference." (One illustration is on p. 188, where it is stated that "no adverse presumption" is to be drawn from failure to waive a personal privilege. Clearly a jury can and does draw inferences, more or less cogent, and this certainly applies to a failure of an accused to testify. On this account many persons believe that, like any other piece of evidence from which inferences can be drawn, such failure to testify should be open to the fullest discussion and comment. Of course in such case an accused should not be subjected to the unfair practice of examination on past offences. Most defence lawyers would agree but prosecutors probably would not. The reason is not hard to seek.) Strangely enough, when discussing *res ipsa loquitur* (in five lines) Phipson uses the proper term "inference" as applied to the situation, but the statements in the text are applicable to presumptions which *call* for evidence. The treatment of this topic is negligible, and is indicative of the casual manner in which burden of proof in general and presumptions in particular are considered as almost self-explanatory.

On these two subjects a vast amount of literature has appeared in the United States,[7] and recently Evatt J. in the High Court of Australia dealt with *res ipsa* in a manner that is both illuminating and helpful, whether one accepts his conclusions or not.[8] Phipson, however, despite the fact that the best work in Evidence for over fifty years has been done in the United States, ignores all extra-judicial writing as well as judicial writings other than English. This phenomenon, which this reviewer has grown weary of "regretting", is fast disappearing

[6] See, *e.g.*, p. 30 regarding wills and capacity where no reference is made to *Sutton* v. *Sadler* (1857), 3 C.B.N.S., 87.

[7] See 9 Wigmore, Evidence, 3rd ed., sec. 2490 for a list of some of the leading articles. Professor Morgan in particular has devoted his attention to this subject. See his articles, *Some Observations Concerning Presumptions*, 44 Harv. L.R. 906; *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L.R. 59.

[8] See *Davis* v. *Bunn* (1936), 56 Comm. L.R. 246.

not only in text-book writing but in judicial opinions themselves in England. Certainly in a subject so badly in need of rationalization and classification one might have expected more attention to be given to jurisdictions which do not feel bound to repeat the errors and accept the quaint premises of our forefathers.

While the foregoing remarks may appear to indicate that this reviewer has a fairly low opinion of Phipson such is not the case. As stated at the outset, the rambling observations here set out were prompted by a reading of that book. Such a reading supported a very real fear, already entertained, that unless the judicial system is given an opportunity of proceeding to discover truth unhampered by the dead weight of a body of rules, so inconsistent with each other and so riddled by exceptions that the problem of "to admit or not to admit" frequently becomes in very truth *the* question for the court, we shall lose much more ground than we have at present to bodies who act as rational human beings in solving controversies. That administrative tribunals are frequently liberated expressly from the "rules of evidence" is not alone something for the legal profession to inveigh against. It is a call to put those rules in such condition that any fair-minded person will both understand them and desire to abide by them. Such a task cannot be done by amendments like that of Lord Maugham, nor by tinkering with the various sections of our legislation concerning proof of specific documents. The method in which our legislation has, in the past, dealt with specific situations, has led some people to believe that a complete legislative overhaul of the whole subject would result in a Code which attempted to catalogue all conceivable situations and hence sterilize further development. In view of the fact that this is the very error to be remedied in the judicial development of the subject it should be made clear that any legislative reform must deal with broad principles only, leaving ample scope for judicial discretion in the application of those principles. Of course it can be said that this would merely result in building up new categories of judicial discretion; and so it probably would. As a matter of discretion, however, such categories might be a safe and useful guide for the weak judge while, being recognized discretion, they should not deter the strong judge.

Phipson has served the profession well in supplying in as convenient and accessible form as our present law of evidence permits, the ammunition which can be used to prevent the

reception of relevant evidence and the queer and illogical devices for meeting such attacks on admissibility. The very fact of its perfection as an exposition of our existing system should serve the profession in reaching a new and sounder method of judicial proof. Naturally there will be those who today, as did Blackstone in his day, consider the present state of the common law as the acme of perfection, and there will be those who, while grudgingly admitting that some things might be improved will be fearful of making the situation worse, and certainly no better, by a major operation. If, however, courts are to continue to command respect and preserve those things for which courts exist, there should be no policy of intellectual appeasement in a matter of so fundamental importance. Courage, common sense and sanity enough to retain the proved values of the past while recognizing the practical needs of the present are essential. Time will prove whether of the law it can be said it gave too little and too late.

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