BOOK REVIEWS

Cases and Materials on Evidence, by H. J. Glasbeek, B.A.; LL.B. (Hons.); J.D. (Chicago); (Butterworths Pty. Ltd., Australia, 1974), pp.i-xix, 1-464, Recommended Australian Price $17.50, ISBN 0 409 43640 2.

Professor Glasbeek has produced an original and stimulating casebook. In the compilation of any such collection there will always be differences of opinion as to what should go in and what should be left out. As he explains in the preface, Professor Glasbeek has elected to omit any discussion of how evidence of the contents of documents is to be offered, and also any discussion of *res judicata* and issue estoppel. One could not quarrel with such a decision, in view of the generous mass of material that has been included, which the author says can be dealt with in fifty teaching hours, but which would leave little time to spare out of such an allocation.

The work is arranged in four parts, a General Introduction, including a chapter on Relevance; Part Two, which consists of two chapters, one dealing with character evidence and one with similar fact evidence; Part Three, 'Witnesses' Testimony as a Medium of Proof'; and Part Four, 'Fact Finding'. Under Part Three there are chapters on Competence and Compellability, Examination of Witnesses, Evidence which may be Excluded because it is Privileged and because of Public Policy, Opinion Evidence, Hearsay Evidence, and Exceptions to the Hearsay Rule. Under Part Four there are chapters on Burden of Proof, Presumptions and Corroboration. There is a Table of Cases, a Table of Statutes and an Index, but no Bibliography.

So far as I could judge, the coverage of the topics dealt with by the author is comprehensive, and I found few occasions on which I would have suggested the inclusion of other material. Extracts are given from English and Australian cases, and from articles and other texts, including some American sources, and there are frequent references to American cases. The extracts are knitted together with the author's comments, and the text is interspersed with notes and questions for consideration by the student or the teacher. The author's approach is not merely that of a teacher of the law as it is. Underlying the whole book is an obviously critical attitude towards the adversary system and its attendant rules, such as the hearsay rule, designed to exclude material thought not to be fit for the ears of a jury. Indeed I found myself wondering at times whether this critical approach had not led the author to frame his questions for discussion in such tendentious terms that the student would be inhibited from taking a view contrary to that apparently held by the author. Consider, for example, this question on page 104: 'As a matter of judicial technique, do you approve of the Victorian Court's approach which dismisses, without reason, the *dicta* of three High Court judges by reliance on a non-binding statement of an English court?' But Professor Glasbeek is an able and dedicated teacher, and perhaps I have underrated his subtlety. Certainly, the effect which this question had on me was to send me to the cases — after reading them my answer to the question was an emphatic 'yes'.

The discussion of Relevance is brief, and the author explains this by saying that he prefers merely to note the kinds of criteria which are consciously or unconsciously applied in drawing the demarcation line between relevant and irrelevant evidence, and then, after only a few examples, to proceed to deal with two major rules of evidence where the balancing out that is undertaken is more graphically illustrated, namely, the rules dealing with character evidence and similar fact evidence (see the Preface, pp. v and vi). The difficulty about this approach is that it gives in-

sufficient emphasis to what Stephen regarded as a necessary rule of exclusion, that proof could not be given of a fact which rendered the existence or non-existence of a fact in issue probable merely by reason of its general resemblance thereto (see the judgment of Evatt J. in *Martin v. Osborne*.[1]) If there were no such rule, in a case in which the defendant was accused of cutting a corner, evidence could be given that a hundred cars had been observed rounding that corner, and that ninety of them had cut it. It is my view that unless these underlying principles of relevance and admissibility are clearly grasped by the student, the discussion of similar facts is extremely difficult, and for this reason I would have liked to see some further treatment of the topic, perhaps with appropriate extracts from *Martin v. Osborne* and Stephen's Digest. In the future, any discussion of similar facts will have to take account of the important decision in *D.P.P. v. Boardman*[2] which unfortunately appeared too late for inclusion in this book. Another area in which I would have liked to see a somewhat different treatment is that of expert evidence. The author includes extracts from *Clark v. Ryan*[3] and *Weal v. Bottom*[4] and asks a number of questions, but there are many more that could have been asked (is it true, for example, that a man cannot become an expert by examining hearsay descriptions of events,[5] and can a man only be an expert in some 'organised branch of knowledge', as Menzies J. said in both these cases?). Again, the real problem posed by *Weal v. Bottom*, with its suggestion that the evidence there given was not expert evidence but evidence of fact, is that if it were merely evidence of what happened in other similar cases it would fall foul of the rule of exclusion enunciated by Stephen, to which I have referred above.

The author's treatment of State privilege is, I feel, unnecessarily prolonged. The decision of the House of Lords in *Conway v. Rimmer*[6] is given three lines on page 223, while passages from the Court of Appeal decision, which was reversed by their Lordships, are quoted *verbatim*. The long and convincing analysis by the Victorian Full Court in *Bruce v. Waldron*[7] occupies five and a half pages of the text, and while it and the witticisms of the Court of Appeal make interesting reading, it hardly seems necessary, now that the House of Lords has finally put to rest the dubious propositions of *Duncan v. Cammell Laird*,[8] to spend so much time showing why that case was wrongly decided.

One or two errors or inaccuracies should be noted. In *R. v. Gray*,[9] noted at page 142, the accused did not admit his guilt on the *voir dire*. He admitted that he had been invited to read over the record of interview, and when at the trial proper he denied this, his statement on the *voir dire* was allowed to be proved. But the court in that case said that the accused on the *voir dire* had a privilege against self-incrimination, and in the later case of *R. v. Toner*[10] the judge expressly warned the accused that he could take the objection. Section 399 proviso (b) of the Victorian Crimes Act allows the judge to comment on the failure of the accused to give evidence in the case there mentioned; the statement on page 95 is therefore too absolute. In *Helton v. Allen*[11] what was challenged was the right of the defendant to share in the estate of the deceased, not his right to be executor; nor do I think it is correct to say, as the author does at page 255, that the High Court suggested that a mere taint (as opposed to established guilt) might disqualify a man from the kind of claim that Helton was making. On page 135 it is stated that the rest of the

[1] (1936) 55 C.L.R. 367, 383.
[2] [1974] 3 All E.R. 887.
[3] (1960) 103 C.L.R. 486.
[4] (1966) 40 A.L.J.R. 436.
[5] (1960) 103 C.L.R. 486, 508 *per* Windeyer J.
[6] [1968] 1 All E.R. 874.
[7] [1963] V.R. 3.
[8] [1942] A.C. 624.
[9] [1965] Qd.R. 373.
[10] [1966] Q.W.N. 44.
[11] (1940) 63 C.L.R. 691.

Court in *Bugg v. Day*[12] agreed with Latham C.J. and Dixon J. But on the point of principle, those two judges were not in agreement — Latham C.J. thought that prior convictions could always be proved as going to the credit of a witness in a civil case, whereas Dixon J. thought that at common law a conviction could not be used for this purpose unless the offence was of such a nature as to weaken confidence in his credibility. The other judges agreed with Latham C.J.

On the typographical side the book is disappointing. The difference in type size between the author's text and the extracts is not great enough to enable the reader to recognise at once where one ends and the other begins. On page 327, the author's comments have been set in the wrong font, though it is clear from the context that it is not part of the preceding extract. I was unable to discover the system behind the numbering of paragraphs and found it a distraction when reading the book, trying to work out what the system was. Thus paragraph [6.50] consists of one line ('Questions and Notes') and paragraph [6.63] of two, while other paragraphs run for several pages. Some extracts from cases are allotted several paragraphs, and at other times one or only part of one. Questions are not separated from notes and comments. Sometimes they are given small Roman numerals, at other times they are incorporated in the text. References are made to sources that are not adequately identified, *e.g.* on page 256 there is a reference to the 'Uniform Rules', which one gathers from a reference earlier in the book is to the Uniform Rules of Evidence of the American Bar Association. The proof reading has been carelessly done — I noted more than twenty errors, most of them relatively unimportant, but annoying if one wants to quote the extracts that have been copied into the text. Specific examples are 'patentably' for 'patently' on page 81, 'by' for 'but' on page 109, 'containing' for 'contained' on page 173, 'reach' for 'read' on page 216, 'patrol' for 'parol' on page 260, 'interest' for 'context' on page 295, 'as' for 'or' on page 326, line 11, and 'if' for 'of' on page 330, line 24. On page 16 there is an example of P suing D which contains unexplained references to A and B, which seem to be alternative titles for P and D. On page 137, part of counsel's argument is included without any indication of its origin. These defects were all picked up merely by checking passages that appeared to be doubtful in the course of reading the text. Unfortunately they tend to make one distrustful of passages that on their face do not arouse suspicion. Despite the distractions, I found the book stimulating, and it is to be hoped that in the next edition more attention will be given to the arrangement of the text and the printing, to make it a fully acceptable working text, as it deserves to be.

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[12] (1949) 79 C.L.R. 442.

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Trade Practices and Consumer Protection: A Guide to the Trade Practices Act 1974 for Businessmen and Their Advisers, by G. O. Taperell, R. B. Vermeesch, and D. J. Harland, (Butterworths Pty. Ltd., Australia, 1974), pp. i-xi, 1-274 Recommended Australian Price $9.00; ISBN O 409 38103 9.

The federal Trade Practices Act 1974 is likely to have a more powerful impact on business activity in Australia than any other legislation hitherto enacted, whether at national or at state level. Apart from Part X, which re-enacts previous legislation relating to overseas cargo shipping, the Act has two broad objectives, namely to control restrictive trade practices adversely affecting the public interest and to protect the consumer against a range of unfair trade practices. The newly-established Trade Practices Commission, which is responsible for administration and enforcement of the Act, is already showing its teeth with a challenge to oil companies to justify their exclusive contracts with service stations.

The appearance of this new publication is therefore most timely. The authors modestly say that the book is designed primarily for the layman, though they express the belief that it will be of assistance to the lawyer. It is in fact a work of remarkably high quality which will be found invaluable by the practitioner. The achievement of the authors is all the more creditable in that they were able to reach publication within months of the Royal Assent.

The heart of the Trade Practices Act consists of Parts IV and V. The former, departing from the case by case approach of the prior legislation, draws its inspiration from American anti-trust legislation rather than the less punitive fair trading statutes of the United Kingdom. It is made an offence to enter into or give effect to any contract, arrangement or understanding in restraint of trade, except through the gateways permitted by the Act. Monopolies, exclusive dealing arrangements, resale price maintenance and price discrimination are all brought within the ambit of the Act, as are mergers likely to have the effect of substantially lessening competition in a market for goods or services. Infringement of this Part of the Act attracts a penalty of up to $250,000 for a corporation and $50,000 in the case of any other person. Part V outlaws a number of unfair consumer trade practices (false or misleading conduct, bait advertising, referral selling, pyramid sales, and the like), provides for regulations prescribing minimum product safety and information standards and, in the civil law area, establishes a range of implied terms in favour of the consumer who is a party to a supply transaction, these being modelled closely on the United Kingdom Supply of Goods (Implied Terms) Act 1973, and capable of exclusion only in the conditions specified in the statutory provisions.

In describing the background to the Act, the authors provide a concise but valuable insight into the constitutional law issues involved. To the reader coming fresh from a country without a written constitution and with a unitary system of legislation, the drafting devices utilised in the Act appear at first sight strange, not to say bizarre. For example, numerous provisions are expressed to be confined to dealings entered into by corporations, but s. 6(2)(h) provides that subject to certain exceptions the Act is to have effect as if a reference to a corporation included a reference to a person not being a corporation. It is only after further perusal, aided by the penetrating comments of Messrs. Taperell, Vermeesch and Harland, that one comes to appreciate the subtle ingenuity of the Parliamentary draftsman, who (improving on a well-known commercial law technique by which a series of ever-narrowing restrictive covenants is set out in a service contract in the hope that if one is struck down as too wide, the next in line will succeed) has selected a number of ingredients attracting the legislative power of the federal Parliament (corporations, inter-state trade, *etc.*), combining these in such a way that if any part of the statutory provisions is declared unconstitutional, the combinations produced by s. 6(2) and the operative sections will substantially secure the impact of the vitiated provisions, even if the boundaries of these become redefined.