Book Review

AUSTRALIAN EVIDENCE by A L C Ligertwood, Butterworths (Adelaide), 1988, xliii+443pp

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EVIDENCE AND ADVOCACY by W A N Wells, Butterworths (Adelaide), 1988, viii+327pp

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These two products of South Australian scholarship have different stated aims and aspirations but overlap to a degree in subject-matter. It is a useful and interesting process, therefore, to consider them together.

Ligertwood's work, *Australian Evidence*, is conventional in that it seeks to treat the familiar topics in the law of evidence as taught in the university law schools. Where it differs from a work such as *Cross on Evidence*, which deals with these topics in relatively discrete pigeon holes, is in its attempt to provide a conceptual perspective for the law of evidence. Ligertwood perceives and seeks to fill a theoretical lacuna in modern evidence scholarship. His thesis is "that the rules of evidence exist principally to ensure the discovery of facts by application of *natural rules of proof* through the medium of the *common law adversary trial*" (p xi) [emphasis added]. The book's structure seeks to accommodate this theoretical thrust.

The first part of the work (chs 2-4) focuses on "the natural principles of fact discovery" and the evidentiary rules which are said to derive from those principles. These include the fundamental notion of relevance, the rules relating to the admissibility of character evidence and to corroboration. The second part of the work (chs 5-8) focuses on the adversary system and discusses, under the rubric of access to information, various privileges which may be claimed to restrict the availability of otherwise relevant information; incidents of the adversary context such as the necessity of making out a case to answer, burdens of proof and the role of judicial notice; the presentation of evidence and, in particular, the oral tradition; and, finally, as an aspect of that tradition, the basic prohibition and various exceptions which have developed in relation to hearsay evidence.

Though Ligertwood's concern is to elucidate "the natural rules of proof", he makes the concession that, in their application, these rules require a degree of intuition which may only be gained by experience and that "this book cannot, and does not, seek to provide that experience" (p xi). That observation must apply to any legal text, but Ligertwood's concession is particularly well made in the context of the law of evidence, being adjectival in its nature and practical in its conception and everyday application.

In this context, it is appropriate to pause and consider *Evidence and Advocacy*, a work by W A N Wells, formerly a justice of the South Australian Supreme Court. This is, by no means, a conventional evidence text. Indeed it proceeds on the assumption that its readers are "already reasonably acquainted with the principles and rules of evidence" (p59). It is a work of "advice and suggestions", principally directed to junior counsel and drawn from Wells' experience, both at the bar and on the bench. While experience and intuition cannot be taught, they are qualities which can, perhaps, be shared. In this light, it can be seen that *Evidence and Advocacy* provides a very useful complement to *Australian Evidence*.

In line with his stated approach, Wells eschews what he calls the "didacticism of text writers" (though this is not a characteristic of Ligertwood's work) and adopts "the freer mode of lecturer or adviser" (p v). This style is generally successful, given the book's aims, though the tone is, at times, irritatingly and unnecessarily sententious.

Evidence and Advocacy contains a strong personal flavour. In so far as the first two chapters, entitled "Education and Training" and "Personal Philosophy", propound common sense, they do so very much through Wells' eyes and reflect his own social values and mores. Wells does not apologise for this and, though some readers will find the message of these early chapters obvious, otiose and even condescending, on the whole the sentiments expressed are sound, well-intentioned and clearly stated.

The major contribution, in this reviewer's mind, of *Evidence and Advocacy* is its sound practical counsel on the mechanics and progress of a case (chs 5 and 11-18). Wells' splendid discussion of techniques and strategies is not cluttered by reference to case law and legislative provisions relating, for example, to hostile witnesses or juvenile testimony. As has been said, much of the substantive law of evidence is assumed. The chapters contain clear and practical sub-headings which recognise the fact that each trial depends very much on its own facts and *dramatis personae*. Thus, in his chapter "Examination-in-Chief", Wells identifies thirteen different types of witnesses and recommends ways in which counsel should react to those differences and adapt his or her approach.

If a theoretical perspective is to be detected in a work which has its chief appeal in its practical advice, the thesis of *Evidence and Advocacy* is that there exists in the law of evidence one grand principle and one grand precept. In short, the grand principle is relevance and the grand precept is in the identification of the use that is to be made of that relevant evidence in the trial process. Wells' work carries, in this context, two interesting chapters on "Res Gestae" and what Wells calls "This Hearsay Business" in which the author, through a series of examples drawn from cases, deftly summarised in an Appendix to the work, argues that these two traditionally elusive areas can best be understood by reference to Wells' one grand principle and one grand precept.

Ligertwood's treatment of hearsay is also of interest. He argues for a narrow construction of the hearsay prohibition, stating that this construction would accommodate some of "the tension between upholding a procedural system on the one hand and receiving all reliable information on the other" (p334). Ligertwood's exposition is clearly underpinned by his theoretical concerns, discussed above. The chapter (pp332-416) must, of course, be revised in light of the landmark decision of the High Court in *R v Walton* (1989) 166 CLJ 283, especially the judgment of Mason CJ which has attracted support in the joint judgment of Gaudron and McHugh JJ in *R v Benz* (1989) 168 CLR 110 at 143-4. The significance of the Chief Justice's decision, in particular, has generated lively academic discussion. For example, S Odgers, "*Walton v The Queen — Hearsay Revolution*" (1989) 13 *Crim LJ* 201 (1989); C Tapper, "Hillman Rediscovered and Lord St Leonards Resurrected", 106 *LQR* 441 (1990).

The High Court, as Colin Tapper acknowledged in his Preface to the sixth edition of *Cross on Evidence* (1985), has "made an outstanding contribution to the subject [of evidence] in recent years". In the period since Tapper wrote, that contribution has been even more extensive. In addition to the hearsay decisions noted above, the High Court has made other significant contributions, most notably perhaps in the field of similar fact evidence. Some of the cases are discussed in 106 *LQR* 199 (1990). Thus, as is the fate of every legal text, Ligertwood's work is already in need of updating and revision in important areas. Clearly a distinctly Australian law of evidence is emerging, as the title of Ligertwood's work appropriately suggests. The quality of *Australian Evidence* is such that a new edition is already eagerly awaited and the learned author's analysis of the High Court's latest decisions keenly anticipated. Wells' work, on the other hand, because of its nature, is better suited to stand the test of time in its current edition. Both works are recommended and, as has been said, complement each other in a fashion which will be useful to both law students and litigation practitioners.

ANDREW S BELL