

the Divorce Act.¹² He argues that a child of the marriage should include a person over the age of sixteen who is still a charge of the parent for reasons other than "illness". On 18th October 1972, the Supreme Court of Canada in the case of *Jackson v. Jackson* decided that "children of the marriage" can include a person over the age of sixteen who is still a charge of a parent for certain educational reasons.¹³ Likewise in Professor Cullity's chapter on Matrimonial Property, he notes that few westernised legal systems have been able to wholeheartedly embrace either community of property ideas or, at the other extreme, strict separation of property within a marriage.¹⁴ He suggests various compromises; and we have recently seen Lord Denning in the English Court of Appeal trying to nurture one of those compromises.¹⁵ Lord Denning suggested that judicial discretion under the English Matrimonial Proceedings and Property Act should begin with a presumption that a wife is entitled to one-third of both the spouses' joint income and capital assets. Fault should only be relevant where it is "both obvious and gross".

However, no textbook can be perfect prophecy — especially in an area such as family law which is so dependent upon fickle social mores, *Volksgeist*, or the will of the people.¹⁶ Accordingly, my criticism is that these two volumes, a massive investment, have no publicised system for updating, such as a pocket supplement. A yearly disposable pocket publication with brief notes or references to recent outstanding cases would in my opinion be an admirable addition.

Most of the chapters refer expressly or by footnote to relevant provincial legislation thereby giving the book a multiprovincial perspective. It contains both a table of cases and a subject index.

Apart from its sale price, this book is indeed a welcome addition to Canadian legal literature on family law.

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STUDIES IN CANADIAN CRIMINAL EVIDENCE

Edited by Roger E. Salhany and Robert J. Carter (Butterworths: Toronto), 1972; 393 pp.

Traditionally, there has been something of a dearth of Canadian legal writing in the area of the law of Evidence. Hence, this "oasis" in a virtual

12. See MacDougall's discussion pp. 347 to 352.

13. [1973] 29 D.L.R. (3d) 641.

14. pp. 271 to 281.

15. The Times Law Report 8th February 1973, *Wachtel v. Wachtel* on appeal from the order of Mr. Justice Ormrod [1973] 2 W.L.R. 84.

16. And complex constitutional issues. The difficult question of whether a court, acting under the Divorce Act, can make a maintenance order at a time other than "upon granting a decree nisi of divorce" is presently before the Supreme Court of Canada. *Zacks v. Zacks* on appeal from British Columbia Court of Appeal [1972] 6 R.F.L. 364 (B.C.C.A.). This case will substantially effect the discussion on pp. 354-356.

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desert must be met with glad hearts and should be given serious consideration by all who are learning or are practising in the law.

As is the case in the other volumes of the Butterworth Legal Study Series,¹ the persons to whom credit must be given for producing the book are not authors in the true sense; rather, they have collected a series of articles by well-known Canadian legal personalities. In this instance, each contributor has directed his efforts towards one specific area of the law of Canadian Criminal Evidence. The purpose of this approach, which is declared in the preface to the book, deserves special note:

"We hoped that by placing a lesser burden in volume on each person, the quality of each article would be improved. In addition, the variety of contributors, we hoped, would illustrate differences in approach in each of the subjects."²

The list of contributors reads like a veritable "Who's Who" in the Canadian legal community: Mr. Justice Samuel Freedman, (Chief Justice of Manitoba), "Admissions and Confessions"; Mr. Justice A. E. Branca, (B.C. Court of Appeal), "Corroboration"; Arthur Maloney, Q.C., "Opinion Evidence"; The Honourable E. P. Hart, (lately of the Ontario Supreme Court and presently of the Law Reform Commission of Canada), "Character Evidence"; Clay M. Powell, (author of "Bail Reform" and presently counsel with the Federal Department of Justice in Ontario), "Documentary Evidence"; Mr. Justice Edson Haines, (of the Ontario Supreme Court), "Future of the Law of Evidence — the Right to Remain Silent"; Mr. Justice Antoine Rivard, (of the Quebec Court of Queen's Bench), "The Functions of Judge, Jury and Counsel". And the list goes on.

By the very nature of the book, it is difficult to level criticism or award praise in any sort of general manner. As a consequence, points of worth or critical remarks made in this review are not intended to extend any further than the confines of the particular chapter in question.

In what appears to be the most exhaustive chapter as far as case law is concerned, Mr. Justice A. E. Branca has carefully and meticulously examined the law of corroboration in criminal matters. The treatment of the subject is more than adequate and borders on the repetitious.³ Upon first reading this chapter, this reviewer felt that perhaps the treatment of the subject was somewhat too lengthy.⁴ However, upon further consideration, it appears that perhaps the other contributors have not dealt with their topics in sufficient detail.⁵

1. Which presently number five.

2. At page "V".

3. In at least one instance, the same passage from a particular decision is quoted twice within the space of three pages (see page 195, 198 — *Vigeante v. R.*).

4. This chapter is more than double the size of any other chapter, save one.

5. As is noted *infra*, this appears to be the only substantial criticism of the book.

On the other hand, the Honourable E. P. Hart's article concerning "Character Evidence" has attempted to avoid laying out the "hard law" by means of a similar case-law approach. Mr. Hart has quite obviously been considerably influenced by the research of the "Law of Evidence Project", a group effort committed to reforming the law of evidence under the auspices of the Law Reform Commission of Canada.⁶ While his chapter is somewhat weak on case law, Mr. Justice Hart researches back to such sources as Hansard's Debating Reports of 1885 to 1906,⁷ and "The 1879 Royal Commission on Indictable Offences", in an effort to determine the true legislative intent underlying such areas as the highly controversial Section 12 of the Canada Evidence Act. In this regard, Mr. Hart has provided the reader with some highly illuminating and somewhat myth-shattering material. Nonetheless, his white-wash of the case law has left some areas clearly in want: the issue of the existence of a judicial discretion to disallow questions concerning prior convictions must surely merit more analysis than a mere passing reference to two decisions.⁸ In addition to neglecting to discuss whether the discretion is statutory or inherent in nature, the learned author has failed to even mention the 1970 decision of the Supreme Court of Canada in *R. v. Wray*⁹ wherein the entire issue of judicial discretion was discussed in detail. Nevertheless, Mr. Justice Hart appears more interested in discussing his views as to what the law should be — not what it presently is. Within these terms of reference, the work has succeeded quite admirably.

Clay Powell, in writing a chapter on Documentary Evidence, has produced a well digested, very readable contribution — as far as it goes. He does, however, miss several interesting and important points. Unfortunately, this tends to detract from the overall presentation of his work. For example, Mr. Powell briefly explores the series of cases which have arisen in regard to the exclusion of photographic evidence on the basis of prejudice to the accused. Nonetheless, what is unquestionably the leading case in the area — *Draper v. Jacklyn*¹⁰ — is entirely omitted.¹¹ In addition, Mr. Powell's treatment of the subject tends to read somewhat like a series of case headnotes. While the pertinent case extracts and principles are properly quoted, little rationalization of the cases is attempted and few general principles are deduced from the case law presented.

Two somewhat antagonistic — but very illuminating views are pre-

6. 1972-73.

7. At p.p. 275-277.

8. At page 288.

9. (1970) citation.

10. (1969) citation.

11. At p.p. 318-320.

sented in the chapter entitled "Future of the Law of Evidence — the Right to Remain Silent — Two Views". Mr. Justice Haines, in adopting what may be described as the more conservative approach, proposes that as a result of the various judicial obstacles to conviction, "the criminal is living in a golden age."¹² On the other side of the coin, Arthur Maloney, Q.C., in noting what he maintains to be an imbalance in the scales of criminal justice, asserts that:

"While we search for solutions, I prefer that history judge our time and our institutions in terms of our concern for the protection of civil liberties, constitutional rights and individual freedom, rather than in terms of our unrestrained pursuit of transgressors."¹³

One of the more well-balanced and authoritative works contained in this book is that written by Mr. Justice S. Freedman, of the Manitoba Court of Appeal. His treatment of the law of admissions and confessions is nothing short of excellent. Carefully combining policy considerations with hard case law, His Lordship has produced a jurisprudential gem. Unafraid to indicate his own personal inclinations toward a particular development in the law, a note of pride can be found, when, in commenting on a Supreme Court decision which overwhelmingly adopted his own dissenting opinion at the provincial appeal level,¹⁴ he states:

"The judgment must be regarded as a milestone in the development of the criminal law."¹⁵

Nevertheless, what appears to be the book's most prominent flaw is most pronounced in this particular work. While the issues dealt with are handled extremely well, certain specific areas of importance are entirely omitted. In this instance, the controversial "Rule in *St. Lawrence*" and the "fruit of the poisonous tree" doctrine were not mentioned.¹⁶

In conclusion, it should be stated that whatever shortcomings this book displays, its overall excellence should not be minimized. It generally displays flowing prose and has been printed in readably large type. The contributors represent the cream of Canadian lawyers, and their respective viewpoints represent the spectrum of Canadian legal thought. While the rather exorbitant price (\$32.50) may present a difficulty for certain hungry law students, the legal community as a whole cannot help but benefit from the production of this excellent "study" of Canadian Criminal Evidence.

B. A. MacFARLANE*

12. At page 327.

13. At page 347.

14. *Piche v. R.*

15. At page 123.

16. Although the author expressly noted that certain important points were being omitted.

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