



---

January 1957

## Book Reviews

Roy R. Ray

Donald C. Fritch Jr.

James R. Norvell

---

### Recommended Citation

Roy R. Ray et al., *Book Reviews*, 11 Sw L.J. 114 (1957)  
<https://scholar.smu.edu/smulr/vol11/iss1/8>

This Book Review is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## BOOK REVIEWS

ESSAYS ON THE LAW OF EVIDENCE. BY ZELMAN COWEN AND P. B. CARTER. London: Oxford University Press, 1956. Pp. xvii, 278. \$5.60.

This volume is a collection of nine essays on a miscellany of topics in the law of evidence. The specific chapter headings are: Statutory Modification of the Law of Hearsay, Confessions and the Doctrine of Confirmation by Subsequent Facts, Admissibility of Evidence Procured Through Illegal Searches and Seizures, Admissibility of Evidence of Similar Facts - A Re-examination, Some Observations on the Opinion Rule, Admissibility of Criminal Convictions in Subsequent Civil Proceedings, Unsworn Statements by Accused Persons, Compellability and Privileges - Three Problems, and Quantum of Proof - Some Recent Decisions. While there is no indication as to whether individual essays were written by one or the other of the authors instead of jointly, two of the essays were originally published by Mr. Cowen in American law reviews,<sup>1</sup> and one by Mr. Carter in an English review,<sup>2</sup> in substantially the same form. Some of the essays deal with matters which have been the subject of extensive discussion by courts and legal writers. Others concern topics which have received comparatively little attention from either group. For the most part the authors have limited their discussions to British authorities. Of 349 cases cited or discussed only 45 are from the United States and some three-fourths of these are cited in two of the essays.<sup>3</sup> Several of the essays contain no reference to American statutes or decisions. While this is understandable on the part of British and Commonwealth professors it will undoubtedly have the effect of restricting the book's distribution in this country. This is unfortunate because each of the authors is an able scholar and American lawyers could profit from their discussions of evidence problems common to both legal systems.

---

<sup>1</sup> Cowen, *The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions*, 5 VAND. L. REV. 523 (1952). Cowen, *The Admissibility of Criminal Convictions in Subsequent Civil Proceedings*, 40 CALIF. L. REV. 225 (1952).

<sup>2</sup> Carter, *The Admissibility of Evidence of Similar Facts*, 69 LAW Q. REV. 80 (1953); 70 LAW Q. REV. 214 (1954).

<sup>3</sup> Essay II, Confessions and the Doctrine of Confirmation by Subsequent Facts; Essay III, The Admissibility of Evidence Procured Through Illegal Searches and Seizures. 35 of the cases cited are United States Supreme Court decisions, 3 are from Federal Courts of Appeals and 7 from state courts. Of the latter, 6 are in the Essay VI on Admissibility of Criminal Convictions in Subsequent Civil Proceedings.

Within the limits of this review it is not possible to comment on each essay, so the remarks of the reviewer will be restricted to those which appear to have greater interest for us. The first chapter deals mainly with the provisions of the English Evidence Act of 1938 liberalizing the use of hearsay and their interpretation by the courts. The Act is long and detailed and its draftsmanship leaves much to be desired. By way of introduction to their discussion the authors comment on the Massachusetts hearsay statute, the most advanced legislative change in the United States. Strange as it may seem, Lord Maugham, the chief draftsman of the English Act, was unaware of the existence of the Massachusetts statute enacted forty years earlier. Two significant differences are: The Massachusetts statute admits oral hearsay evidence whereas the English Act is limited to written documents. On the other hand the English Act lets in all written hearsay statements where the maker is unavailable as well as where he is called as a witness, while the Massachusetts statute applies only to statements of deceased persons.

The principles underlying the rule excluding improperly induced confessions and their effect upon the doctrine of confirmation by subsequently discovered facts are treated in Chapter II. The authors have a brief review of the law of confessions as enunciated by the United States Supreme Court, and refer to some seventeen leading cases. It was Wigmore's view that the exclusive reason for the exclusion of improperly induced confessions was the danger of receiving false testimony. Others have felt that while this is an ancillary consideration, the predominant motive of the courts has been the protection of the citizen against violations of his privileges by the police.<sup>4</sup> The authors subscribe to this latter view, saying: "If a confession is unreliable this in itself is sufficient cause to exclude it. But if proper police methods—and by this is meant the police methods which a society desires and for which it is willing to pay—are to be maintained, a confession, whether reliable or not, must be excluded if improperly obtained."<sup>5</sup>

The question whether illegality in the means of procuring evidence should affect its admissibility has been the subject of extensive litigation in our state and federal courts, and discussion by legal commentators.<sup>6</sup> It is complicated by constitutional provisions

---

<sup>4</sup> McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEXAS L. REV. 239, 245 (1946).

<sup>5</sup> P. 70.

<sup>6</sup> A selected list of recent legal literature on the subject is found in Ray, *Restrictions on the Use of Illegally Obtained Evidence*, 9 SW. L. J. 434, n. 1 (1955).

the most important of which is the Fourth Amendment to the United States Constitution. By its terms the amendment only declares the illegality of unreasonable searches and seizures, but the United States Supreme Court has held that evidence obtained in violation of its provisions is inadmissible in the federal courts. The state courts are divided on the issue but a majority hold that illegality of the means does not affect the admissibility of the evidence. In contrast with the American experience this question has rarely been presented to the English courts and has received very little attention from English writers. There is, however, substantial authority in the Scottish cases and in such Commonwealth jurisdictions as Canada and South Africa, and some in India and Burma. These are all covered in the discussion which is preceded by a brief review of the United States Supreme Court decisions. The Canadian and Indian cases appear to follow a clear and uniform rule of admissibility. In the Scottish cases, the only ones where the arguments pro and con seem to have been fully presented, the tendency appears toward inadmissibility. The authors argue against any categorical rule of exclusion or admissibility and urge the balancing of the conflicting interests of the citizen and the state in each case.

In the shortest of the essays the authors review the possible justifications of the opinion rule as it is applied in practice by the courts. The dogma that a witness must state facts and cannot give his opinion is meaningless. If strictly applied it would make trials impossible. The difficulty encountered by American courts has been due to their attempts to analyze and apply the rule as formulated. In contrast the English judges have, in practice, given only lip service to the rule. This is shown by the paucity of leading cases. The rule has appeared to work well only because it has been laxly applied. The authors conclude that the rule proposed by the American Law Institute's Model Code of Evidence as a desirable one for our courts is very nearly that which exists in England in practice.<sup>7</sup>

To what extent, if at all, are criminal convictions admissible in subsequent civil cases to prove the facts on which the convictions are based? This question has bedeviled American courts as well as those of the various British jurisdictions. The authors have included a comprehensive treatment of the English authorities and a somewhat brief survey of the decisions in other common law jurisdictions. Courts in the United States have been sharply divided on the question, the decisions ranging all the way from a position of con-

---

<sup>7</sup> Rule 401.

clusive admissibility to total inadmissibility. An intermediate position of prima facie admissibility is approved by some courts and is adopted by the American Law Institute in its Model Code of Evidence. The weight of English authority seems clearly against admissibility. The positions of such Commonwealth jurisdictions as Canada, South Africa and Australia appear uncertain. Probably the most persuasive argument for admitting evidence of a previous conviction in a subsequent civil case as evidence of the facts upon which the conviction was based is the strong probative value it has on such issues. An additional and valid reason is the amount of time which would be saved by the use of such evidence. Against admissibility the only substantial argument is the danger that such evidence may be treated as virtually conclusive. With these conflicting considerations in mind the authors suggest the following rules: (1) A conviction, following a plea of not guilty, and made by a superior court should be admissible. (2) A conviction, following a plea of guilty, should not be admissible. (3) A conviction or finding following a plea of not guilty or a denial, but not made by a superior court, should be admissible only if the judge is satisfied that its admission would be in the interests of justice. (4) In all jury cases in which a conviction is admitted the judge should warn the jury against treating it as conclusive.<sup>8</sup>

An unusual feature of the book is that at the end of several of the essays the authors have added a postscript for the purpose of bringing the subject matter down to date by the inclusion of cases or statutes which appeared after the essay was written and in some instances after the book was in press. The entire volume is a worthwhile addition to the legal literature of evidence and is recommended not only to those in the teaching profession but also to those actively engaged in the practice.

*Roy R. Ray\**

EXPERIENCE UNDER RAILWAY LABOR LEGISLATION. BY  
LEONARD A. LECHT. New York: Columbia University Press,  
1955. Pp. 254.

It is rather puzzling that although the field of railroad labor relations is one of the oldest areas of collective bargaining and labor strife and the oldest subject of federal labor legislation, few

---

<sup>8</sup> Pp. 203, 204.

\*Professor of Law, Southern Methodist University.

people have ever taken the trouble to write about it. Those who have usually confined themselves to two or three dozen pages skimming the subject lightly or focusing on some small facet of it.

Mr. Lecht's work is the first to cover the entire field. It does so completely, concisely, objectively and without the pro-labor or pro-management bias which pervades most earlier writings. Beginning with the first railroad labor legislation in 1888, passed after a decade of violent strikes, he traces and analyzes each of the federal laws and the labor movements they governed, down to 1951.

The first part of the book reviews the early statutes which established procedures for investigation, mediation and voluntary arbitration of disputes between railway carriers and labor organizations, usually known as "brotherhoods." It describes the early use of the "concerted movement," a type of collective bargaining conducted on a regional (later national) basis by several unions acting together. Union demands would be served simultaneously upon all railroads in a large section of the nation, and if they did not capitulate, the lines would be "picked off" one at a time by strikes or threat of strike against individual lines. This effective type of economic pressure forced the carriers similarly to join together in resisting union demands. During this period before World War I there were some regional settlements, some arbitrations and a few strikes. Wages increased and, with special legislation, an eight-hour-day was adopted in the industry.

World War I brought federal control of the railroads and with it generally uniform government-dictated sets of wages and "rules" governing working conditions of the respective railroad crafts. Tribunals were set up to decide grievances arising under those rules. The author mentions the enthusiasm with which the railway unions received government control, looking upon the federal government as no longer a referee but a friend which would grant the unions most of the concessions they were seeking. This feeling, Mr. Lecht later shows, was held by the unions during most of the Roosevelt and Truman administrations.

The Transportation Act of 1920 returned control of the railroads to their owners and at the same time created the "Railroad Labor Board" to pass on all types of labor demands and grievances. That board functioned effectively until 1924 when the operating brotherhoods, for the first time, disregarded a board award and by threat of strike got more than the board had recommended. Similar tactics have been so often and so successfully used since that time par-

ticularly since 1940, that the unions now consider an emergency board report as a "starting point" from which to force a more favorable settlement.

A second portion of the book deals with the Railway Labor Act, which has governed from 1926 to the present, and with collective bargaining under that law until World War II. The 1926 act carried forward the provisions for union recognition, negotiation, mediation and voluntary arbitration of earlier statutes. It authorized the President of the United States to appoint "emergency boards" of three disinterested persons to investigate labor disputes threatening commerce and recommend terms of settlement. It also provided that "adjustment boards" might be established by each carrier and its operating brotherhoods to resolve employee "claims." Such claims usually consist of demands of employees for more pay, often one or more additional full days' pay, based on some contention that under the complicated work rules (sometimes called "featherbed rules") they were required to perform some service which other employees should have done or that they should have been used for certain work which other persons performed. In 1934 an amendment created the present National Railroad Adjustment Board, sitting in Chicago, to pass upon claims of employees of all crafts on all railroads.

Mr. Lecht traces the struggles of the carriers and the unions over wage increases in the boom years of the late 1920's, over wage decreases and unemployment during the depression years, and over wage and rules demands in the post-depression years before the second World War. Also discussed is the ever-growing problem of disposing of employee claims. The National Railroad Adjustment Board was quickly swamped with those cases, and its First Division, which handles cases involving operating employees, has seldom had less than two or three years' backlog of cases.

The third portion of the book deals with the efforts of railway unions during the 1930's and 1940's to secure make-work legislation such as "full-crew" and train limit laws and six-hour-day legislation (generally unsuccessful), legislation and negotiated agreements guaranteeing railroad employees against loss of income following consolidation of railroad facilities (successful), and legislation establishing a separate and unique social security system for railroad employees (most successful).

The fourth group of chapters covers the era of railroad labor relations and collective bargaining since the beginning of World War II. This period has seen little statutory change but many large

national wage and rules movements and several government seizures of the industry. Concerted movements by one or another group of brotherhoods have been going on almost constantly, often two or three at a time. The labor organizations have made annual demands for wage increases and changes in rules, and the railroad managements have countered with proposals designed to limit what they considered "featherbedding" aspects of those rules. This decade was marked, the author points out, by "White House settlements," a procedure whereby the parties were called to the White House after the unions had rejected the recommendations of a Presidential emergency board and threatened to strike anyway, and there the President "recommended" a settlement which almost always contained some additional concessions to the labor organizations.

In an introduction, which is more in the nature of epilogue, the author poses some long-range questions which the future must answer: Are the consequences of a national railroad strike so serious that the government should *impose* settlements on the parties? Since the government already regulates rates and services in the railroad industry, if it also dictates wages and working conditions, what is left of the functions of management? Why has it been the highly skilled, well-paid and supposedly conservative members of the operating brotherhoods who have been responsible for the large majority of rejected emergency board reports and government seizures which have occurred since 1940? Can unions become as powerful as the railway brotherhoods and remain free from public supervision? What should be done about the resistance of the brotherhoods and their members to technological changes which increase efficiency but reduce employment?

Mr. Lecht suggests several measures to remedy the immediate labor problems confronting the industry:

- (1) Keep the government out of railway collective bargaining as much as possible—no White House settlements.
- (2) Make the parties return to real collective bargaining before dispute reaches the stage of emergency board investigation.
- (3) Permit appointment of emergency boards without the formality of strike votes.
- (4) Improve the method of adjudicating employee claims by appointing enough supplemental adjustment boards to clear the backlog of cases, placing time limits on the presentation of claims and the retroactivity of board awards, and permitting the carrier as well as the union and employees to seek a court review of any award. At



present the union and affected employees can, but the railroad cannot, obtain such a review.

(5) Make governmental seizure a tough last resort by giving the government authority to seize strike-threatened railroads, to enjoin strikes, and to make the recommendation of an emergency board binding on both sides until the dispute is settled by agreement of the parties.

Mr. Lecht's book is a valuable contribution to the railroad industry and should become Exhibit No. 1 in every emergency board hearing.

*Donald C. Fitch, Jr.\**

TEXAS LAW OF EVIDENCE. BY CHARLES T. MCCORMICK AND ROY ROBERT RAY, SECOND EDITION BY ROY ROBERT RAY AND WILLIAM F. YOUNG, JR. Kansas City, Mo.: Vernon Law Book Co., 1956. Vol. I, pp. xxxv, 764. Vol. II, pp. xxxv, 886. \$40.00.

The evidence book has always occupied a position of special importance for the trial lawyer. Both he and the trial judge often find it advisable to keep an evidence manual close at hand during the trial of a case. For this reason, among others, the publication of a book on Texas evidence by McCormick and Ray in 1937 was generally hailed with approbation throughout the state. The authors, Professor Charles T. McCormick of the University of Texas School of Law, and Professor Roy Robert Ray of the Southern Methodist University School of Law, achieved their goal of rendering less tedious and cumbersome the trial practice in the Texas courts, while at the same time, clearing the haze surrounding a number of troublesome problems in the field of evidence. The one-volume work was dedicated "to John Henry Wigmore, Master Builder of American Evidence Law," and for the Texas lawyer served as an able and competent introduction to the Wigmore *Commentaries*.

Now, after nineteen years, the Vernon Law Book Company has published the second edition of this valuable Texas work. This new 2-volume edition has been completely revised and edited by Professor Ray and by Professor William F. Young, Jr., of the University of Texas School of Law. The preface to the new edition points out that although the nineteen years elapsing between editions have produced no revolutionary changes in the law of evidence, nevertheless, the

---

\*Member of the firm of Robertson, Jackson, Payne, Lancaster & Walker, Dallas, Texas.

application and interpretation of the mass of evidence rules by trial and appellate courts have made a new edition desirable.

In evaluating the movement and progress made in the evidence field within recent years, it is interesting to note the following from Wigmore's preface to his Third Edition, published two years after McCormick and Ray:

The chief impression, remaining in the Author's mind on the completion of this Edition (1939), is that the state of the law of Evidence . . . is forward-looking . . . The last decade . . . has seen the opening of a new phase in the profession's attitude toward the rules of Evidence, viz. a disposition to reconsider the rules' weaknesses, and a willingness—even a determination—to improve the body of law in every possible part. So that the marked trend of the present period is a forward movement, destined within the coming generation to renovate radically the rules and the practice under the rules.

No one will gainsay that this movement still persists and is a factor which must be reckoned with by the trial practitioner. That new applications of our rules of evidence are developing, along with progress in scientific lines, was recently pointed out by Judge J. Frank Wilson of the Dallas County Criminal District Court, in a paper delivered before the Judicial Section of the State Bar. Judge Wilson also called attention to the fact that these new and novel applications of our rules of evidence are primarily problems for the trial judges and the trial lawyers.

It is against this background of forward-looking development and growth that any evidence treatise must be evaluated today. As a general rule, the busy trial lawyer is interested in knowing what the law is. However, in order to determine this, he must know or have the means of knowing (1) what the reported cases of his jurisdiction say the law is; (2) what the recognized writers and scholars in the field have to say concerning the various rules and their development, and (3) the various lines of cleavage or dispute which have arisen and are now being mooted in our evidence law.

In making all three categories of essential information available, the new edition performs an admirable service. And perhaps what is most important, the classifications are kept separate and apart one from the other, so that only a trick or failure of memory on the part of the reader may confuse him as to what a court says the law is and what some commentator contends the law ought to be.

The plan or pattern of treatment is substantially the same as the First Edition, although some new categories have been added. Because of new materials and the addition of numerous citations and

footnotes indicating source material, the work is printed in two volumes instead of one rather large volume, as was the case of the original edition. Some ten thousand decided cases are cited or referred to, and the volumes are thoroughly indexed. Certain section numbers have been reserved for future materials, and the work will be kept up to date by the use of pocket parts.

Repeated and pertinent references to the American Law Institute's Model Code of Evidence and the Uniform Rules of Evidence drafted by the National Conference of Commissions on Uniform State Laws, are contained for purposes of comparison. Citations to Thayer, Wigmore (3rd Ed.), and other treatises and law review articles are copious. For example, as relating to the general test for receiving opinions of expert witnesses, we find references to the following: Buescher, *Use of Experts by the Courts*, 54 HARV. L. REV. 1105 (1940); Yankwich, *On the Use of Experts*, 26 A.B.A. J. 736 (1940); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952); McCormick, *Science, Experts and the Courts*, 29 TEXAS L. REV. 611 (1951); Morris, *The Role of Expert Testimony in the Trial of Negligence Cases*, 26 TEXAS L. REV. 1, (1947); Maguire & Haahes, *Requisite Proof of Basis for Expert Opinion*, 5 VAND. L. REV. 432 (1952); Fouts, *Medical Experts*, 19 NEB. L. REV. 213 (1940); May, *The Engineer as an Expert Witness*, 13 OKLA. L. REV. 204 (1942); *Experts in Patent Cases*, 22 J. PAT. OFF. SOC'Y. 639 (1940); Stichter, *Use of Exhibits and Expert Testimony*, 8 OHIO ST. L. J. 295 (1942). Such citations as these are invaluable, for where the courts have not definitely spoken, the propositions and reasoning of the commentator may serve to broaden or refine a rule and determine the extent of its application.

Lines of cleavage or differences of opinion among experts, so to speak, are carefully noted and discussed. For example, we find that on the question of the propriety of using evidence to dispute facts judicially noticed, Wigmore, Thayer, Cardozo and Learned Hand are arrayed upon one side against Morgan and Ray on the other. Likewise, it is pointed out that Wigmore, McCormick, Learned Hand and others have urged the propriety of using prior inconsistent statements of a witness as substantive evidence. While this position is contrary to the prevailing view expressed in judicial opinions the practitioner is placed on notice that a change in the prevailing rule is being advocated and that such effort may bear fruit.

The McCormick and Ray treatise on Texas Evidence is now re-

garded by the profession as a work of demonstrated value. As the scientific, economic and political components of modern life advance and change, so also must the examples of the applications of our rules of evidence multiply and thus the adjective law develop and grow. Consequently, the Second Edition, with its plan for current annotations to keep it up to date and fully abreast of the times, will be welcomed as an improved and highly usable addition to the trial lawyer's working library.

*James R. Norvell\**

---

\*Associate Justice, Supreme Court of Texas.