

# EVIDENCE

## *Cases and Materials*

DAVID W. LOUISELL

JOHN KAPLAN

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*University Casebook Series*

**CASES AND MATERIALS**  
**ON**  
**EVIDENCE**

By

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## PREFACE

Many of us feel that the time is ripe for a casebook to revolutionize the teaching of evidence, a casebook which breaks completely new ground and restructures in the light of present knowledge all the many technical and sometimes antiquated rules which have bedeviled law students for generations. This is not such a book.

The problem has been that evidence is at least a three-fold study. First it is a course for the future lawyer or lawmaker in the rules which govern and by and large will continue to govern our trial processes. Second it is a course in applied epistemology—how we attempt to make decisions about past events. Finally it is a course in a major area of the legal culture. Since each “breakthrough” that we have attempted turned out to neglect at least one of these facets we have ended up for the most part with the tried and true form used by all of the present-day casebooks.

One might ask then what justification we have for adding another casebook to the prestigious ones already on the market. Our answer is simply that we prefer our own organization and contents.

Evidence has always been one of the curriculum’s meaty, analytical courses—a fascinating series of brain-twizzlers—and the tug to hang on to that value is strong. Indeed, the pressures of the new science, as well as re-examination of some of the old principles such as that against self-incrimination, enjoin an analysis even keener than yesterday’s. Yet the law teacher dare not forget that mostly it is practitioners he is trying to educate. We are told by knowledgeable men who look out across the Bench that the average trial practitioner’s comprehension of the rules of evidence is woefully deficient. And so the ever-multiplying and fragmenting informational mass cannot be neglected.

We have attempted to omit the non-essential and in some cases even the peripheral. By the time he comes to evidence, the student must know the essentials of the adversary system; there is no time for a rehashing of first year procedure. Moreover, we have remitted the parole evidence rule to contracts and reduced the anciently broad but currently narrow area of competency of witnesses to a chapter containing only two cases, a reading and several statutes. Such condensations have made possible innovations such as the Chapter on Eye-Witness Identification and more than the usual attention to the evidential problems often associated with criminal procedure.

We have not, however, tried to pretend that the hearsay rule and its exceptions can be made simple, short or sweet. We are convinced that mastery of the concept of hearsay is vital and as a result we have chosen to take it up as early as we feel possible—after a brief introduction to that aspect of relevance which underlies all problems of admissibility. Elsewhere, when subject matter, although important, is relatively easy, we have been content with textual material in lieu of cases, to save student and teacher time; not so with hard problems like the nature of hearsay. And where the better vehicles for dis-



## PREFACE

cussion of these hard problems are in the older cases, we have not shunned them for their vintage. Of course, our devotion to hearsay as one of the supreme curricular challenges to the mental gymnast as well as to the trial lawyer has not led us to equate intellectual enchantment with social utility; hence our section on the somewhat pedestrian but vitally important Business Records exception and our section on The Future of Hearsay.

We have given much more attention to the privileges of confidential communication and self-incrimination than did the teachers of the past generation, who tended to deprecate them. Practical need in today's litigious world dictates this liberality. But happily, in our judgment, that need accompanies an opportunity for deeper analysis and more creative thinking. The privileges, for those who will dig deeply, are pregnant with meaning and social significance.

Throughout the casebook we have tried to keep three major viewpoints in mind. First, there is the viewpoint of the trial lawyer and trial judge, for whom evidence must be a matter not only of intellectual mastery but of instinctive knack. The trial of a lawsuit is not akin to the writing of an appellate brief. Many more evidence problems are settled forever almost instantaneously in the trial arena than are finally disposed of by appellate opinion. The practitioner must be able ultimately to marshal on appeal all relevant historical, analytical and policy factors. But immediately—before the moving finger writes—he must be able to synthesize them in the appropriate objection, motion or offer of proof. We have attempted to help by selecting opinions which, as frequently as possible, realistically present the trial court scene. (Here and there we have even included blocks of verbatim transcript.) We have also stressed some of the harder ethical problems of the advocate in the adversary system—problems which are especially urgent today because of the law explosion, the poverty program and the development of constitutional doctrine protective of the defendant in criminal cases.

Second, there is the viewpoint of the appellate court, with its obligation of over-all systemization, rationalization and orderly structuring. How many of its pronouncements are of the essence of an ordered scheme? How many are accidents of history? Of jury trial? Of adversariness? How can the adversary advocate most wisely select the road to deserved victory, and the vehicle that will take him there? How can the conscientious appellate judge most effectively write the principles that will guarantee victory to him who should win?

Third, and predictably, there is the viewpoint of the multi-eyed reformer and jurisprudent, who has one eye for jury trial, another for judge trial; one on the administrative process, another on arbitration. He is the eternal skeptic, always comparing, asking *why* and *how better*? We have let him take us up the mountain for sweeping glances at the comparative scene, and perhaps tomorrow's far vistas, but we will not let him forget that the practitioner must march down again for the trial of his lawsuits today in the United States. But

## PREFACE

if the student is led into the most basic speculations, even to inquire about the continuing worth of the adversary system itself in today's scientific and technological world—well, that too is a purpose of law teaching.

We have tried to keep abreast of the latest relevant developments in scientific and demonstrative evidence, as well as the latest opinions—especially in the constitutional areas. We have partially succumbed to the trend to codification by printing, almost with each issue considered, a relevant statutory or rules provision. After some labor with the question of what set of rules to use we chose those of California, whose new Evidence Code, made effective in 1967 after years of debate by the Law Revision Commission, proceeded from Uniform Rules thinking but with many important changes. We chose the California Evidence Code not by the majority vote of the two California authors and not in an effort to produce a regional casebook—the most cursory look at the table of contents dispels any such notion—but because this Code mirrors the most current “practical” thinking in the realm of evidence. The California Code—at least until the Federal project is complete—will probably be the model not only for most future codifications of the law of evidence but for the decision of many questions of first impression all over the nation. Moreover, at least in the area of confidential communications, the California codification is so thorough and comprehensive that our selections permit an experimenter to try teaching solely or principally from the statutes.

For all our attempts to be progressive, the reader may in one respect think himself confronted by a throwback to the original casebook concept. The detailed editors' notes and queries of recent years are largely missing here. We hope they will not be missed—by and large they were neglected by advanced law students; no matter how competent their authors, the notes could not, in their short space, do an adequate job; finally, they attempted to direct too closely the thinking of students, already over-directed by the editor's selection of cases, text and article excerpts. In the place of such notes we cite, at the end of the subdivisions, a selection of worthwhile collateral reading.

We express our appreciation to our colleagues in evidence for their never-failing willingness to help: particularly Ronan Degnan and Arthur Sherry at Berkeley and John P. Heinz at Northwestern. Moreover, several students have contributed to this project in ways too significant to be ignored. They are Bernard H. Meyers, Christopher Mueller and Ronald F. Angell of Boalt Hall, Thomas W. Scheuneman of the Northwestern University School of Law and Dan Brooks, Emory Ireland and Michael Young of the Stanford University Law School.

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# TABLE OF CASES

Cases printed in roman type are reported as the text of this volume. Cases printed in *italic type* are found in the footnotes and text. References are to pages.

- 
- Adams v. District of Columbia, 393  
 Adams v. The New York Central R. Co., 266  
 Adkins v. Brett, 214  
 Albertson v. Subversive Activities Control Board, 847  
 Allen v. McLain, 431  
 Ando v. Woodberry, 452  
 Anstine v. McWilliams, 1054  
  
*Barber v. Page*, 106  
 Barmore v. Safety Cas. Co., 528  
 Baroda State Bank v. Peck, 1028  
*Berger v. State of New York*, 1118  
 Bridges v. State, 76  
 Brown v. Board of Education of Topeka, 951  
*Bruton v. United States*, 150  
 Buck v. State, 86  
 Busse, In re Estate of, 702  
  
 Carbo v. United States, 144, 406  
 Caudillo v. United States, 1168  
 Chadwick v. Fonner, 157  
 Christian v. United States, 443  
 City and County of San Francisco v. Superior Court, 677, 749  
*City of. See under name of city.*  
 Clark v. State, 708  
 Cleghorn v. New York Central & H. R. R. Co., 421  
 Coles v. Harsch, 523  
 Columbia & Puget Sound R. Co. v. Hawthorne, 457  
 Commonwealth v. Castellana, 386  
 Commonwealth v. Holden, 554  
 Commonwealth v. Knapp, 66  
 Commonwealth v. Perry, 181  
 Conley v. Mervis, 488  
*Coplon v. United States*, 665  
 Corke v. Corke and Cooke, 68  
 Cummings v. Illinois Cent. R. Co., 189  
  
 Daggett v. Atchison, Topeka and Santa Fe Ry. Co., 467  
 Dallas County v. Commercial Union Assur. Co., Ltd., 351  
 Davidson v. Cornell, 243  
 Deaver v. Hickox, 559  
 Demasi v. Whitney Trust & Savings Bank, 177  
 Dennis v. United States, 955, 1003  
 D. I. Chadbourne, Inc. v. Superior Court, 691  
 Du Bois v. Larke, 154  
  
 Dubonowski v. Howard Savings Institution, 460  
 Duncan v. Clarke, 1022  
 Dyer v. MacDougall, 1126  
  
 Esser v. Brophrey, 437  
  
*Ficht v. Niedert Motor Service, Inc.*, 564  
 Firlotte v. Jessee, 6  
*Fontaine v. California*, 844  
 Foster v. Agri-Chem, Inc., 1201  
  
*Gardner v. Broderick*, 906  
 Garford Trucking Corp. v. Mann, 219  
*George Campbell Painting Corp. v. Reid*, 851  
 Gerald v. Champlin, 320  
 Giancana v. Johnson, 981  
 G. M. McKelvey Co. v. General Cas. Co. of America, 158  
 Graham v. Pennsylvania Co., 542  
 Greatbreaks v. United States, 538  
 Griffin v. California, 841, 877  
 Granewald v. United States, 836  
  
 Handell v. New York Rapid Transit Corp., 195  
 Hanson v. Johnson, 75  
 Harlot v. Harlot, 1  
 Herzig v. Swift & Co., 1033  
 Hickey v. Kansas City Southern Ry. Co., 462  
 Higgins v. Los Angeles Gas & Electric Co., 967  
 Hill v. Skinner, 1013  
 Hinds v. John Hancock Mut. Life Ins. Co., 1141  
 Hinds v. Johnson, 245  
*Hoffa v. United States*, 1119  
 Holberg v. McDonald, 413  
 Houston Oxygen Co., Inc. v. Davis, 211  
  
 Ingram v. McCuiston, 583  
 Irvin v. State, 79  
  
 Jones v. Bradley, 1202  
 Jones v. Superior Court of Nevada County, 874  
 Johnson v. Lutz, 271  
 Johnson v. United States, 815  
  
 Katz v. United States, 1110  
*Keegan v. Green Giant Co.*, 1050  
 Kinsey v. State, 259  
 Knapp v. State, 19

# TABLE OF CASES

- Korch v. Indemnity Ins. Co. of North America, 1057  
 Kusior v. Silver, 1155
- Langenfelder v. Thompson, 609  
 Larkin v. Nassau Electric R. Co., 526  
 Liberty Chair Co. v. Crawford, 1037  
 Lohsen v. Lawson, 1209  
 Lopez v. United States, 1104, 1119  
 Luck v. United States, 511
- McClain v. The Anderson Free Press, 172  
 McCray v. Illinois, 993  
 McGraw v. Horn, 160  
 Malloy v. Hogan, 802  
 Mancari v. Frank P. Smith, Inc., 1045  
 Mapp v. Ohio, 1069  
 Marchetti v. United States, 911  
 Mathis v. United States, 874  
 Menard v. Cashman, 71  
 Meyers v. United States, 1034  
 Michelson v. United States, 368  
 Miller v. Pillsbury, 564  
 Miranda v. Arizona, 888  
 Moffitt v. Connecticut Co., 423  
 Mohr v. Schultz, 323  
 Monarch Ins. Co. of Ohio v. Spach, 355  
 Monier v. Chamberlain, 701  
 Moore v. Atlanta Transit System, Inc., 344  
 Murphy v. Waterfront Comm'n of New York Harbor, 832  
 Murphy Auto Parts Co. v. Ball, 205  
 Mutual Life Ins. Co. of New York v. Hillmon, 221
- Nardone v. United States, 1099  
 New York Life Ins. Co. v. Taylor, 290  
 Newman v. Larsen, 457  
 Nicketta v. National Tea Co., 926  
 Norfolk & W. Ry. Co. v. Henderson, 1203  
 Northern Pacific R. Co. v. Umlin, 242  
 Nowack v. Metropolitan St. Ry. Co., 131  
 Nuttall v. Reading Co., 238
- Olmstead v. United States, 1118  
 On Lee v. United States, 1119  
 Osborn v. United States, 1119
- Palmer v. Hoffman, 282  
 Pawlowski v. Eskofski, 119  
 Pederson v. Dumouchel, 583  
 People v. Alcalde, 231  
 People v. Barnhart, 62  
 People v. Bastian, 506  
 People v. Burns, 1214  
 People v. Capon, 1246  
 People v. Collins, 33  
 People v. Combes, 883  
 People v. Crenshaw, 1265  
 People v. Crooks, 619  
 People v. Ellis, 900, 906, 1198  
 People v. Gould, 251  
 People v. Horodecki, 1227  
 People v. Huston, 405
- People v. Johnson, 534  
 People v. Kohlmeier, 289  
 People v. Loar, 1266, 1275  
 People v. Massey, 403  
 People v. Melski, 778  
 People v. Mieczko, 120  
 People v. Sarzano, 183  
 People v. Sorge, 494  
 People v. Spriggs, 163  
 People v. Sudduth, 900  
 People v. Talle, 229  
 People v. Williams, 1195  
 People v. Zavala, 1198  
 Pointer v. Texas, 359  
 Polakoff v. Hill, 135  
 Prudential Trust Co. v. Hayes, 422
- Radiant Burners, Inc. v. American Gas Ass'n, 680  
 Randa v. Bear, 738  
 Rathbun v. Humphrey Co., 432  
 Rathbun v. United States, 1102  
 Reed v. McCord, 115  
 Reina v. United States, 829  
 Ritter v. Coca-Cola Co. (Kenosha-Racine) Inc., 247  
 Roberson v. State, 389  
 Robitaille v. Netoco Community Theaters of North Attleboro, 428  
 Rogers v. United States, 822  
 Roviario v. United States, 988  
 Rudzinski v. Warner Theatres, Inc., 137  
 Ruth v. Fenchel, 632  
 Rutten v. Investors Life Ins. Co. of Iowa, 744  
 Ryan v. Metropolitan Life Ins. Co., 1136  
 Ryder, In re, 718
- Sanchez v. Waldrup, 564  
 Sanitation Ass'n v. Commissioner, 906  
 Sawyer v. Arnold Shoe, 44  
 Schindler v. Royal Ins. Co., 457  
 Schmerber v. California, 896  
 Schulze v. Raynec, 674  
 Scott v. Spanjer Bros., Inc., 642  
 Shanks v. State, 1182  
 Shepard v. United States, 226  
 Shimabukuro v. Nagayama, 264  
 Sibron v. State of New York, 1119  
 Silverman v. United States, 1118  
 Simmons v. United States, 826  
 Smith v. Rapid Transit, Inc., 46  
 Smith v. State, 84  
 Smith v. State of Illinois, 486  
 Soles v. State, 185  
 Spevack v. Klein, 906  
 State v. Baker, 1189  
 State v. Clarkson, 535  
 State v. District Court of Fourth Judicial District, 921  
 State v. English, 51  
 State v. Lawrence, 929  
 State v. Marion County Criminal Court, 883  
 State v. Olson, 883  
 State v. Olwell, 712



## TABLE OF CASES

- State v. Oswalt, 502  
 State v. Thomson, 444  
 State v. Thorp, 553  
 State v. Valdez, 1174  
 State v. Watson, 572  
 State v. Williams, 517  
 Subramaniam v. Public Prosecutor, 72  
  
 Taylor v. Sheldon, 665  
 Taylorville, City of v. Stafford, 430  
*Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 457  
 Thomas v. State, 77  
 Thompson v. Manhattan Ry. Co., 61  
 Tillotson v. Boughner, 671  
 Tobin v. United States R. R. Retirement Board, 1142  
 Tolomeo v. Harmony Short Line Motor Transp. Co., 486  
 Transport Indem. Co. v. Seib, 316  
 Travelers Fire Ins. Co. v. Wright, 99  
 Trook v. Sagert, 125  
  
*Union Paint & Varnish Co. v. Dean*, 4  
 United States v. Alker, 117  
 United States v. Bowman, 790  
 United States v. Boyer, 515  
 United States v. De Sisto, 254  
 United States v. Dovico, 165  
  
 United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage, 82  
 United States v. Judson, 866  
 United States v. New York Foreign Trade Zone Operators, Inc., 302  
 United States v. Pugliese, 504  
 United States v. Reynolds, 974  
 United States v. Rhodes, 74  
 United States v. Romano, 1163  
 United States v. Schneiderman, 550  
 United States v. Wade, 900, 1279  
 University of Illinois v. Spalding, 1050  
  
 Walder v. United States, 1097  
 Warden, Maryland Penitentiary v. Hayden, 1086  
 Webster Groves, City of v. Quick, 92  
 White's Will, In re, 107  
 Williams v. Alexander, 312  
*Wong Sun v. United States*, 1118  
 Wright v. Doe d. Tatham, 58  
 Wright v. McKee, 411  
 Wyatt v. United States, 773  
  
 Yates v. Bair Transport, Inc., 275, 285  
 Yecny v. Eclipse Fuel Engineering Co., 1199  
  
 Zucker v. Whitridge, 416