EVIDENCE

Cases and Materials

DAVID W. LOUISELL
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ON

EVIDENCE

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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 knowledgable 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 parol 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-

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 marshall 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

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.

DAVID W. LOUISELL
JOHN KAPLAN
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July, 1968

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