EVIDENCE — ITS HISTORY AND POLICIES: AN ORIGINAL MANUSCRIPT by Julius Stone, revised by W A N Wells, Sydney, Butterworths, 1991

In his preface to this book, Andrew Wells explains its unusual history and its purpose. Shortly before Professor Julius Stone's death, Wells was invited to discuss the manuscript of an unpublished work, provisionally entitled *The Modern Law of Evidence*, written by Stone at Harvard 40 years before. Stone acknowledged that it was not a practical proposition to bring his statement of law up to the present. He asked Wells to revise the text so as to produce a study of the law of evidence predominantly concerned with the influence of history and policy in its initial development.

This substantial work (of more than 700 pages) is divided into six parts: (1) The history and principles of rational proof; (2) Facts which may not be proved (remote or prejudicial relevant facts, facts varying a written transaction, the parol evidence rule); (3) Media of proof, including testimonial evidence and the hearsay rule, and documentary evidence; (4) The procedure of adduction of evidence (the availability of witnesses, capacity to testify, and the privileges of witnesses); (5) Introduction and presentation of evidence (order of introduction of evidence as a whole and the examination of a witness); (6) Sufficiency of evidence (the burden of proof, corroboration and complaints). Stone wrote a chapter on Estoppel which Wells has omitted from the book because of the modern view that estoppel is part of the law substantive, not the law adjective. See *Commonwealth of Australia v Verwayen* (1990) 95 ALR 321, per Mason CJ at 332.

The publication of the work is timely. There was recently introduced into the New South Wales Parliament a Bill to amend the law of evidence in substantial respects. The Bill proposes the adoption of most of the recommendations of the recent report of the Australian Law Reform Commission on the topic. If enacted, the Bill will amend the law relating to hearsay evidence fundamentally. This is a controversial proposal on any view. For this reason alone, Stone's work is valuable since it gives us an historical analysis of principle and policy in the hearsay area. As Wells says in his preface, the manuscript "offer[s] to the practising profession (judges included) an abundant source of early material to draw on whenever it [becomes] necessary to deal with a proposed change or extension of judge-made law, or with statutory construction".

The discussion of each principle takes place in the context of a detailed investigation of its history by reference to early case law and text writers. In some areas, Stone takes us into other legal systems by way of contrast and comparison. The significance of social and practical forces at work to justify the policy underlying a legal rule is fully explored. Stone takes considerable care to ensure that his message is conveyed in a way that is clear by taking into account the practicalities of the particular situation. Certainly, students will better understand the rationale, and operation, of the rules of evidence after studying this text. From a student's perspective, there is a temptation to view "adjectival" law as "black letter", where literalism is the main agent at work. This is not so, as Stone demonstrates. Policy considerations have been at the forefront of the development of the rules and principles of evidence: see for example *McKinney v R* (1990) 98 ALR 577.

There is much in this work for advocates also. Stone understands fully the practical necessities which arise in the conduct of a trial. His explanation of the factors to be taken into account in the practicalities of proof will be helpful to practitioners. Two illustrations may be given.

There has recently been a divergence of judicial views with respect to the admissibility of similar fact evidence in civil proceedings. See the discussion by Gummow J in *D F Lyons Pty Ltd v Commonwealth Bank of Australia*, 12 March 1991, unreported. Stone anticipates the debate and puts the controversy in its proper context. He acknowledges that similar facts may be relevant to an issue other than mere propensity, for example, to show intent, motive, system, plan or identity (p230). But he makes the point that in most civil cases, the propensity argument is not involved and the debate "resolves itself into a

question of remoteness or the confusion of issues by the introduction of matters of only remote relevance, together with the operation of the hearsay and opinion rules" (p230).

The second illustration is Stone's explanation of the rationale of the need for opinion evidence to be anchored in appropriate assumptions and not, save in the exceptional case of the observer-expert, to stray into the facts. As Stone puts it, the rule "is not intended to exclude expert opinion based on the facts, but his opinion as to what the facts are" (p442). This question was recently considered by the Full Federal Court in *Arnotts Ltd v Trade Practices Commission* (1990) 97 *ALR* 555 at 588-9.

The book is well presented. Although Stone used footnotes extensively, Wells decided, wisely, I think, to incorporate the footnotes into the text with a view to making the work more easily readable.

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LAW, LIBERTY AND AUSTRALIAN DEMOCRACY by Beth Gaze and Melinda Jones, Sydney, Law Book Company, 1990, 505pp

This is one of a number of books published in 1990 by women lawyers that have made significant contributions to the literature of the law. Others that might be mentioned in the context of concerns within the field of human rights generally are *The Hidden Gender of Law* by Graycar and Morgan, *Women and the Law* by Scutt, *Same Difference: Feminism and Sexual Difference* by Bacchi and *The Liberal Promise: Anti-Discrimination Legislation in Australia* by Thornton (actually published in 1991).

Law, Liberty and Australian Democracy is about the role of law in protecting a wide range of civil and political rights, and contains as well a brief excursion into the field of economic and social rights. Unlike most legal texts on civil liberties, it starts with an extended discussion of political issues and reviews the contributions of Mill, Dworkin and modern democratic theorists such as Mayo and MacCormick (the latter not, incidentally, listed in the useful 13 page bibliography that appears at the front of the book). The discussion may not be long enough for the expert political science student, but would provide a useful introduction to the main concepts for the "pure" law student.

After the opening discussion (contained in part I — 68 pages), the book is divided into three further parts. The first and longest (170 pages) deals with political and democratic rights such as voting rights, the right to public protest and freedom of assembly, the right to criticise the state and the limits on liberty imposed by the state. The second (150 pages) deals with individual rights such as freedom of religion and belief, media and freedom of speech, privacy and the policing of social standards. The third (99 pages) addresses the concept of equality, and in particular the questions of rights in a multicultural society and of economic rights.

It is disappointing that the innovative first part is not more closely linked to the later parts. The later parts contain assessments of the (often unsatisfactory) state of the law, and refer to criteria drawn from Mill, Dworkin, the utilitarians and "liberal democracy", to name the most frequently used. But the criteria used for the assessments are not readily relatable to the discussion in the first part of the bases of democracy and democratic theory. It would have been useful to have for reference in the first part brief descriptions of the elements making up the criteria used later for assessment of the state of the law.

Rather more than half the book is made up of about 140 extracts from books/articles/reports and from cases/statutes (there are slightly more case/statute extracts than book etc extracts). The remainder is interspersed text contributed by the authors (who have

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