living".[11] He must have cheered the recent utterance of Lord Radcliffe that

> No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another, but I do think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.[12]

Noble words these, uttered, alas, in dissent. The decision of the majority in *Lister* v. *Romford Ice Co. Ltd.*[13] allowing the employer's insurer indemnity from the negligent employee rejected in dramatic fashion an opportunity to further the cause of loss distribution in favour of ancient assumptions about the efficacy of personal liability as a potion for the prevention of negligence. Such a decision and the sheer magnitude of the task prompt doubts as to whether it is possible, without massive legislative intervention, to equip the common law to deal satisfactorily with our injury-prone-mechanised-society. Whatever the processes by which the law of torts is to be better adapted to modern life the Fleming text offers, for all those interested, perceptive and provocative counsel on the problems that fill this area of the law with so much of fascination and frustration.

W. N. PEDRICK *

Essays on the Law of Evidence, by Zelman Cowen, Professor of Public Law in the University of Melbourne, and P. B. Carter, Fellow of Wadham College, Oxford. Oxford, Clarendon Press, 1956. xx and 278 pp. with Index. (£2/19/3 in Australia).

This collection of essays on a miscellany of topical questions in the law of evidence amply fulfils the authors' expressed hope of providing a supplement to the treatment of the topics by the recognised authorities on the subject: the need for the text writers to cover the ground denies to them the opportunity of isolating especially interesting or intricate topics which the essay form provides. The bulk of the matter contained in the nine essays in this volume has previously appeared in the form of articles or notes in the *Law Quarterly Review*, *Modern Law Review* and other legal periodicals. The collaboration between the authors has gone to the extent of a joint adoption of views hitherto expressed by the one or the other alone.

For the most part the treatment of the subjects is purely expository, and the practising lawyer will appreciate the empirical approach to their subjects which the authors have adopted; there is little sign of a preconcieved structure to which the case law is made to conform: the cases which are rejected by the authors as unsound earn that condemnation mainly because of their incompatibility with the weight of authority. The only occasion on which this approach is in danger of being abandoned is in the elaboration of Mr. Carter's ambitious attempt to rationalise the law relating to evidence of similar facts by reference to the notion of "propensity", where, in an effort to embrace all binding decisions within one complex formula concepts are employed (such as that of a propensity to keep on knowing) which seem foreign to the language of the common law. This criticism, however, verges on the captious: the book as a whole is a source of most valuable reference material on all the topics dealt with, the more so because of the attention paid to the decisions of the common law jurisdictions

[11] At p. 11.
[12] *Lister* v. *Romford Ice Co. Ltd.* (1957) All E.R. 125, 142.
[13] *Ibid.*

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of the British Commonwealth and of the United States; particularly noteworthy in this connection is the place given throughout to decisions of the High Court of Australia and the thorough review in the seventh essay of the New South Wales authorities dealing with the probative effect of unsworn statements.

The first essay is a commentary upon the piecemeal attempts at statutory reform of the hearsay rule, particularly those embodied in sections 1 and 2 of the United Kingdom Evidence Act 1938[1] reproduced in section 14B of the Evidence Act 1898-1954[2] in New South Wales. Of some of the unsystematic common law exceptions haphazardly engrafted on to the hearsay rule, e.g., declarations of deceased persons, public documents, *res gesta*, the authors have harsh things to say; in both their scope and their basis they are regrettably obscure. "A cursory glance at some of the established common law exceptions to the rule is enough to show how unsatisfactory has been the development of this branch of the law. The arbitrary and absurd limitations which are imposed on some of the exceptions, as well as the curiously uncertain basis of others, make it abundantly clear that the case for statutory reform of the hearsay rule is very strong."[3]

The statutory reform which has taken place has not, however, succeeded in quieting all criticism. The authors find the drafting of the sections far from happy and cite *Bowskill* v. *Dawson*[4] as an example of the anomalous results which ensue from the loose wording of that part of Section 1 which confers a discretion to dispense with production of original documents. For the most part, however, the authors are preoccupied not with exposing anomalies but with elucidating from the cases what the statutory provisions really mean; it is inevitable that this annotation to the Act makes somewhat disjointed reading since the authors limit themselves to such observations on the meaning of the sections as the cases which happen to have been decided entitle them to make. Emphasis is given to those cases such as *Jarman* v. *Lambert & Cooke (Contractors) Ltd.*[5] which recognise the necessity for rethinking the whole law of hearsay to which the statutory reform has given rise: through them the long-term effects of the revolution which the statutes have wrought to the common law became most discernible.

In the second essay the rule of exclusion of improperly induced confessions is discussed and the view is strongly advanced that the likelihood of falsity is far from being the paramount reason for excluding them. This is contrary to the opinion expressed by Wigmore who took the test in every case to be "whether the inducement was such that there was any fair risk of a false confession"[6]. There is, however, a considerable body of judicial opinion which proceeds on the assumption that, whatever the possibility of truth, there are certain standards of police practice which must be observed; confessions which are obtained in violation of these standards are to be rejected. The authors express their support for the rules excluding evidence both of the improperly obtained confession and of facts discovered as a result of improperly obtained confessions, by stating the policy underlying them thus:

> If it is not possible, and we do not believe it to be possible, to control police practices in the matter of obtaining confessions by penal sanctions imposed directly on the police themselves, we have to ask whether society is the better for insisting on certain standards of police practice even at the cost of allowing some guilty persons to escape, or whether conviction of the guilty ought to be of paramount importance in all cases . . . It is our opinion

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[1] Evidence Act (1935) 1 & 2 Geo. 6, c. 28.
[2] Evidence Act (1898-1954) Act No. 11 of 1898—Act No. 35 of 1954.
[3] At 5. [4] (1954) 1 Q.B. 288. [5] (1951) 2 K.B. 937.
[6] *Evidence* (3 ed. 1940) 252. See also the analysis of these conflicting views in (1956) 72 *L.Q.R.* 209.

> that in a stable and comparatively law-abiding community such as our own it is better that a few guilty men and women should go unpunished than that the encroachments of the police state should be tolerated or accepted[7].

This is an expression of opinion with which a lawyer would find it hard to disagree although little unanimity could be expected on defining the exact point at which an "encroachment" begins.

A kindred topic is that dealt with in the third essay, namely the admissibility of evidence procured through illegal searches and seizures. Here too there may be found in the cases a requirement of conformity to fair police practices as a criterion of admissibility although a survey of Commonwealth decisions discloses no more than a tendency towards inadmissibility and does not yield any general rule. Academic readers will doubtless share the authors' disappointment that in *Kuruma* v. *The Queen*[8] the Privy Council decided in favour of admissibility without discussing the many aspects of this intricate problem.

To digest the views of the authors on the most perplexing topic of the admissibility of similar fact evidence which provides the subject matter for the fourth essay will not be attempted. Employing terminology (particularly the notion of "propensity") which leaves undisguised their indebtedness to Professor Julius Stone,[9] and accepting the results but rejecting the reasoning in much the case law on the subject, they formulate a set of propositions which make admissible all evidence of similar facts which is logically probative, subject at all times to an overriding discretion in the trial judge in a criminal trial to exclude evidence thus rendered admissible if its reception would operate unfairly against the accused. It may be questioned whether or not this limitation on the type of case in which this discretion may be exercised is justifiable:[10] it possibly proceeds on the false assumption that all non-criminal trials are non-jury trials.

The authors next review possible justifications for the rule which purports to exclude opinion evidence; they find that as commonly formulated it is devoid of meaning and has appeared to work only because it has been laxly applied. They stigmatise as "nonsense" the attempts to make it work by extending the categories of non-expert testimony which constitute exceptions to it.

> One thing emerges clearly: all statements partially based upon inference have never been, are not, and cannot be, excluded. The most that can be said is that some inferences if made by a witness are objectionable. Evidence based on an inference or inferences of this sort is for the purposes of the law of evidence called opinion. Evidence which is not based on such an inference is for the purposes of the law of evidence called fact.[11]

Having thus exposed the terminological weakness of the rule in its orthodox form, the authors offer the generalisation that when opinion evidence is excluded it is because its admission would not be sufficiently helpful to the jury in the performance of its task to justify the *pro tanto* delegation of that task to the witness, which such admission would involve.

In the sixth essay there is an examination of the question how far, if at all, criminal convictions are admissible in subsequent proceedings to prove the facts on which the convictions are based. Inevitably, the Court of Appeal decision in *Hollington* v. *F. Hewthorn & Co.*[12] comes in for a good deal of criticism; the several grounds for exclusion relied on by Goddard, L. J. are individually

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[7] At 70. This view is echoed in R. W. Baker's article, "Confessions and Improperly Obtained Evidence" (1956) 30 *A.L.J.* 59.

[8] (1955) A.C. 197. See the discussion of this case in (1955) 33 *Can. Bar Rev.* 721, 984, 1111.

[9] See Julius Stone, "The Rule of Exclusion of Similar Fact Evidence" (1932) 46 *Harv. L. R.* 954.

[10] See Note (1954) 28 *A.L.J.* 161 [11] At 165. [12] (1943) K.B. 587.

questioned and although it is conceded that the weight of English authority is against admissibility the older cases are distinguished as turning on considerations which with the removal of many of the old evidentiary disqualifications, no longer possess any validity. A consideration which does retain some validity in New South Wales where juries in civil actions are still the rule is the danger of a previous conviction being treated in practice as virtually conclusive. The disinclination of Sachs, J. in *Ingram* v. *Ingram*[13] to extend the operation of *Hollington* v. *F. Hewthorn & Co.* does suggest, however, that in England the views of the authors might command some support.

Essay Seven is a survey of the cases and statutory provision bearing on three questions relating to the right of an accused person to make an unsworn statement: At what time in the trial may such a statement be made? Is an accused represented by counsel entitled to make an unsworn statement ? Is such a statement evidence of the facts alleged in it ? The answers which the cases yield to these queries are in some cases a little surprising. In the process of reaching them the authors pose a further question which they do not presume to answer: In view of the right which every accused now has of testifying on oath and being represented by counsel is there any justification for the retention of the accused's right to make an unsworn statement at all?

In the eighth essay the authors deal with the re-enactment in the United Kingdom of the privilege in regard to answers concerning adultery[14] and the new statutory rule on evidence of marital intercourse. Lastly there is a discussion of some recent decisions on the *quantum* of proof in criminal and matrimonial cases. The authors preface it by a brief exposition of the terms they employ including some observations on the distinction between the legal and the tactical burden of proof. This distinction is useful in drawing attention to the somewhat obvious fact that the answer to the question whether the proponent of an issue has so far adduced sufficient evidence to prove it cannot be expected to be the same at every stage in the trial; as a matter of logic it is of doubtful validity since it would be inconsistent with the concept of a burden of proof of an issue to suggest that in the course of a trial it may bifurcate and simultaneously rest on different parties. The discussion of the proper definition of the criminal standard is brief and is mainly concerned with the problem of reconciling all that was said by Lord Goddard, C.J. in *R.* v. *Kritz*[16] and in *R.* v. *Hepworth*[17] with all that his Lordship said in *R.* v. *Summers*.[18] The authors strongly resist any attempt to substitute for the phrase "proof beyond reasonable doubt" any other description of the criminal burden. Then, turning to a discussion of the *quantum* of proof in matrimonial causes, the authors produce the best piece of logical analysis in the book to expose the weaknesses of Denning, L. J.'s famous *dicta* in *Bater* v. *Bater*[19]. Having decided that the two traditional standards of proof are by no means really the same, the writers ask which of the two, or, if neither, what other standard, is the one peculiarly applicable in matrimonial causes. As a matter of construction of s. 4 of the English Matrimonial Causes Act, 1950[20] they feel that the legislature intended the standard to be set so high that it could not profitably be distinguished from the common law criminal standard, and would have asserted with confidence that the House of Lords virtually laid down this rule in *Preston-Jones* v. *Preston-Jones*[21] were it not for the fact that a different interpretation has subsequently been placed upon that decision by the High Court of Australia and the Supreme Court of Canada. The decisions of these Courts they then proceed to examine and having charged Kitto and Taylor, JJ. in *Watts* v. *Watts*[22] with committing the same fallacy as

[13] (1956) P. 390. [14] *Cf.* Matrimonial Causes Act, 1899 (N.S.W.) s.79.
[15] *Cf.* Evidence Act, 1898-1954 (N.S.W.), s. 141. [16] (1949) 33 C.A.R. 169.
[17] (1955) 2 Q.B. 600. [18] (1952) 36 C.A.R. 14. [19] (1951) P. 35, at 37.
[20] *Cf.* Matrimonial Clauses Act, 1899 (N.S.W.), s. 19(1).
[21] (1951) A.C. 391. [22] (1953) 89 C.L.R. 200.

Denning L.J. in *Bater v. Bater*[23] of correlating the standard of proof of a fact with the gravity of the consequences which flow from such proof, conclude that since it is agreed on all hands that the standard of proof in matrimonial causes is a high one the continued refusal of the Judges of the High Court to accept in terms the equation of this standard to the criminal standard is not of great importance.

As a whole these essays invite two generalisations. The first is that bad history makes bad law: in several different contexts[24] the authors show how the law of evidence has been marred in its development by the amount of bad history which has been written into judgments and perpetuated by the doctrine of *stare decisis*. The second is that as our law develops the fewer become the restraints on the admission of logically relevant evidence: perhaps this is not surprising with the gradual disappearance of the civil jury to guard against the frailties of which much of the old law excluding similar fact evidence, opinion evidence, evidence of criminal convictions and the like was evolved. Although in the nature of things they can never coincide, the scientific and the legal methods of proof seem to be separated by a gap which is steadily narrowing.

PHILIP JEFFREY*

The Civil Law System, Cases and Materials by A. T. von Mehren. New York: Prentice-Hall, 1957. xxii + 922 pp. (£4/19/0 in Australia.)

The title of this book is misleading; it would be better described as "Five Standard Topics of Comparative Law in Search of a Teacher." In fact the book does not give an account of a system at all but gives very ample materials for the examination of certain well-known segments of foreign (in this case French and German) law commonly investigated on a comparative basis. These segments include, of course, the differences arising from the historical backgrounds of the common and civil law systems, the way in which the separation of powers has been affected by the growth of administrative law, the changes imposed upon theories of tortious liability by the development of the automobile and of machinery generally, the concept of a contractual obligation and the function of judicial precedent. These five topics form the main sections of the book and it must be said at the outset that they are not all given equal treatment; indeed the section on contract (the most extensive and at times the most wearisome of the book) covers 355 pages, some four-ninths of the whole. By contrast, the last section on judicial precedent, of 33 pages, is little more than a merger of two papers originally published in 1953 and 1954 and previously combined in a condensed form in 1956.[1] Of the three remaining sections, there can be no doubt that the most stimulating is that on Torts (123 pages), of which the greater part is concerned with the effects of the industrial revolution. Here the author shows very clearly how the French courts juggled skilfully with Article 1384 of the Civil Code so as to produce an alleviation from the burden of proof, which would normally lie on the injured plaintiff, in cases where the defendant had under his care some machinery or an automobile.

Yet even here, even in connection with this most informative section, one may well query the advantages to be gained from a heavy accumulation of materials. There can be no doubt that the average student will not be certain how far he can give credence to foreign case law in preference to the juristic writing or *vice versa*, and it is submitted that the author could have more

[23] *Supra* n.17.

[24] E.g., pp. 3, 43, 159.

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[1] (1952-53) 22 *Revista Juridica de la Univ. de Puerto Rico* 235; (1954) 1 *Festschrift Fur E. Rabel* 67; (1956) 5 *Am. J. Comp. Law* 197.