entitled to expect and the volume of the litigation seems to demand. Roulston has here made some way to redress the balance. What he has written should be of interest to many aside from those who work within the machinery of Criminal Justice—to those with concern for Criminal Justice. Regrettably the only other work on our N.S.W. Criminal Law is the practice book which in its nature is likely to be of service only to lawyers. The venture deserves such success as to require future editions.

I cannot let go without a Parthian shot at the spelling. Most unfortunately the Professor has been ill-served by his proof-reader. There is an irritating number of mis-spellings and I will never believe that the Judges of the Queen's Bench were *summonsed* to the House of Lords to deliberate upon *M'Naughten* or *McNaghten* or *M'Naghten*.

WALTER LEWER*

Cases and Materials on Evidence, by H. J. Glasbeek, Sydney, Butterworths Pty. Ltd., 1974, xix + 464 pp. $17.50 (paperback).

Professor Glasbeek explains the purposes of his book as follows:

> Until fairly recently Australian law schools have treated the law of evidence as a set of black letter rules that must be taught to students who aspire to practise law. It has frequently been spoken of as a technical subject which the various Law Institutes and Societies require to be taught but which has no inherent academic merit.
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> Today the feeling is different. Evidence has become a subject which is attracting academics in much the same way as the new "socially relevant" options do. This is no doubt largely due to the fact that the trial process itself has become the subject of heated debate and much empirical analysis. Inevitably attention has been focused on the rules which govern the fact-finding role of the trial process. My interest having been so aroused I have come to believe that a serious study of the law of evidence tells us much more about the nature of the legal system than does an equally profound examination of one of the so-called substantial [*sc.* substantive] law subjects.
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> This book of cases and materials seeks to reflect this belief. The cases and materials selected reveal the basic rules of evidence for it must never be forgotten that evidentiary rules must be known in a way that, say, torts' rules need not be known: the rules of evidence are to be invoked by counsel who will often not have

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> much time to search their memories, let alone a library. Hence, an attempt has been made to collect those cases and statutes which clearly state the specific rules. At the same time the cases and materials used are those which point to tensions, actual and potential, which exist in the law, which detract from the likelihood of achieving the stated aims of certain rules, which point to the inadequacies of the adversary system itself, and so forth.[1]

This passage provokes several comments. First, Professor Glasbeek may be thought guilty of creating a straw man only to destroy him. Who regards evidence as no more than "black letter rules" or "a technical subject"? Some practitioners may do so, but Professor Glasbeek's literary predecessors, and, one assumes, those they have been read by and have influenced, are for the most part not of this class. The subject of evidence first took on coherent form in the time of Bentham, who more than anyone else attacked the detailed rules which then formed it. Admittedly, Bentham's *Rationale of Judicial Evidence* had little effect. But *Taylor* and *Best,* the great English books of the mid-nineteenth century, which held sway until the 1930's, are free of the taint alleged, and remain of the first interest for a modern practitioner or theorist. The first edition of Wigmore was published in 1904. The subject since that date in America has transcended black letter rules, and the work has had great influence on Anglo-Australian law teachers. It is true that the period in which Phipson dominated the English law was not an inquiring one, but the first edition of Cross appeared in 1958. These books, after all, remain the fundamental means through which lawyers apprehend the subject. So Professor Glasbeek's claim to originality of method is not convincing.

Secondly, how much "empirical analysis" has the trial process been subjected to in fact? None at all, to judge from references in the body of Professor Glasbeek's book. The behaviour of actual juries has in fact been examined in America (see Kalven and Zeisel, *The American Jury*)[2] and work has been done with mock juries in England (see e.g. McCabe and Purves, *The Jury at Work*[3] and Cornish[3a]). Beyond that there is much informed anecdotage, and a little of this appears in Professor Glasbeek's book. It is in fact very difficult to analyse trials empirically, partly because of the need for secrecy in jury deliberations, partly because of the need to disrupt trials generally as little as possible; and it is in any event obviously expensive.

Thirdly, in spite of Professor Glasbeek's hopes to the contrary, this reader has grave doubts as to whether those coming to the subject fresh would in fact grasp the basic rules, irrational or anomalous though

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[1] H. J. Glasbeek, *Cases and Materials on Evidence,* Butterworths Sydney, 1974, Preface p. v.

[2] H. Kalven and H. Zeisel, *The American Jury* (Little, Brown and Co., Boston, 1966).

[3] S. McCabe, *The Jury at Work* (Basil Blackwell, Oxford, 1972).

[3a] [1973] Crim. L.R. 208.

they may be, from Professor Glasbeek's book. It would seem that a student must spend some time with Cross or some other text book to discover them. This is partly because the law of evidence tends not to be made up of a relatively small number of "great cases", in which the law is magisterially and completely stated, but much more of a mass of brief decisions given with some speed by criminal appellate courts and even briefer rulings given immediately evidence is tendered during trials. Even where a basic principle is asserted in a leading case, the law in practice has sometimes drifted so far from it that a bald statement of both the principle and the technical qualifications surrounding it is needed. Further, the method by which Professor Glasbeek tends to extract cases raises some problems. He tends to give the whole of a case, with large chunks of examination and cross-examination. In itself this has much obvious merit, but it does make it much harder for the tyro to disentangle basic rules from elaboration and error.

The final cavil concerns the claim that a study of the law of evidence tells us more about the nature of the legal system than a study of other subjects. This is one among a number of similarly mysterious and portentous remarks scattered throughout the book; it seems to be suggested that there is something bogus, or even evil, about the system. Magistrates and judges sitting as triers of fact who have to listen to evidence to determine whether it is admissible and then ignore it if it is inadmissible "frequently say that this causes them no problem. Do you think that can be true?"[4] "It seems that the adversary system will not enable us to be sure that witnesses are not lying"[5] (for most cases an unconvincing statement, particularly when it is followed by (an admittedly critical) reference to such unreliable methods as hypnosis, lie detectors and truth drugs). "After you have studied the application of the [opinion] rule you may wish to formulate it as follows: Opinion evidence is to be excluded (unless it is admissible!)."[6] "The hypocrisy of the right to silence."[7] In connection with the different standards of proof in criminal and civil cases, Professor Glasbeek suggests that "a very cynical visitor from another system [might] possibly ask whether the trial system . . . is not an elegant pretence which enables us to let the parties feel they have participated in the fact-finding process, thereby making the finding acceptable to them, while all the time the system is not unduly worried about whether or not the true facts are found".[8] To at least one reader, these passages, and others like them, are little better than colour supplement radicalism. The problem is that Professor Glasbeek never tells the reader — or shows him — how our system is fundamentally defective and what would be better; and he tends to

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[4] *Glasbeek, op. cit.* p 1.

[5] *Id.* p. 89.

[6] *Id.* p. 239.

[7] *Id.* p. 361.

[8] *Id.* p. 388.

exaggerate the difficulty of finding rules in the system, however unmeritorious as rules they may be.

What Professor Glasbeek does with great skill is to reveal in detail the anomaly, technicality and self-contradiction of much of the present law. This is not a task that is here being done for the first time, but it is well done. This is where the book's merits really lie, and it is regretted that Professor Glasbeek did not concentrate more on this task and less on vague innuendo. Evidence attracts interest for reasons other than those of the " 'socially relevant' options"; some of them are related to Professor Glasbeek's demonstration of the relation of the law to such values as internal consistency, clarity, ease of practical application and capacity to assist in discovering facts.

The book has certain necessary omissions — real evidence, documentary evidence, *res judicata*, and issue estoppel. The exclusion of documentary evidence, in particular, may be regretted. One can understand the constraints of space and money which led to its exclusion, but it is a subject on which little is written, and on which there is a variety of views among practitioners. (See the range expressed in Glass (ed.) *Seminars on Evidence.*[9]) Although it is a subject on which at present practitioners must have greater authority than others because to a significant extent it is a matter of practice, comprehension of it by a reader would have been greatly enhanced with the benefit of Professor Glasbeek's analysis.

There are some issues arising from the subjects which are treated which seem to need more discussion. These include problems of divisibility of character;[10] the satisfactoriness of the decision in *R.* v. *Hammond*;[11] permitting proof at the main trial of the accused's admissions on the *voir dire*;[12] the admissibility of involuntary confessions confirmed by subsequently discovered facts;[13] and the different position adopted in Scotland on illegally obtained evidence and the misleading account of it quoted from *Kuruma* v. *R.*[14]

There is sometimes a disproportion in the treatment of particular topics. The subject of dying declarations receives 8½ pages; it is interesting and easy to make critical observations about, but it is of trivial practical importance and has few implications for general principle. On the other hand such matters of immense importance in practice and in principle as corroboration, confessions and admissions receive respectively 15, 16½ and 6½ pages. There is rather little in the way of references to cases and secondary literature for the abler student.

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[9] H. Glass (ed.), *Seminars on Evidence* (1970), pp. 3-21, 90-111 and 126-138.

[10] *Glasbeek, op. cit.* p. 42.

[11] *R.* v. *Hammond* [1941] 3 All E.R. 318.

[12] *Glasbeek, op. cit.* p. 142.

[13] *Id.* p. 234.

[14] *Kuruma* v. *R.* [1955] A.C. 197 at 235-38.

This book is not a model of its kind at the formal level. There are many proof-reading errors, a few incomplete cross-references, some inconsistencies in citation. Professor Glasbeek's style would not always satisfy the purist.

In sum, Professor Glasbeek has not in this book proved his belief that a study of evidence reveals more about our legal system than a study of other subjects. What he has done is offer a substantially convincing and penetrating critique of the law within the terms of the present doctrines.

J. D. HEYDON*

Discretionary Trusts, by I. J. Hardingham and R. Baxt, Australia, Butterworths Pty. Ltd., 1975, 1 + 235 pp. (inc. index). $15.00.

The authors of this treatise are to be congratulated on producing an admirably comprehensive treatment of discretionary trusts, a subject which is nowadays very *a la mode* because of the manifold advantages which such trusts afford in estate planning.

After a short introductory chapter (pp. 1 - 4), the authors discuss the nature of the discretionary trust (Chapter 2). In this treatment of this aspect of the topic, there are no surprises. The authority of *McPhail* v. *Doulton*[1] is recognised — and, realistically, it would be odd if it were not. Three points might, however, require comment. The first concerns the assertion constantly made that the existence of an express trust in default of appointment always betokens a mere power rather than a trust power. This is said to be an "undisputed proposition" (p. 6), and both principle and authority would suggest that this is so. However, it overlooks the rather bizarre decision of the High Court in *Antill-Pockley* v. *Perpetual Trustee Co. Limited.*[2] (Perhaps wisely; the remarks of Gibbs, J. in that case are best forgotten, although Stephen, J. did join in them.) The second is that the authors are surely correct in rejecting the theory that the absence of an express trust in default of appointment is *prima facie* evidence of a trust in favour of the objects of the power. The third arises from the theory asserted but not argued by the authors, that, in the case of a mere power as distinct from a trust power, no object of the power can compel the holder of the power to perform his undoubted duty to consider whether or not to distribute, and if so to whom; no authority is cited in favour of the theory, and in principle it

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[1] [1971] A.C. 424.

[2] (1974) 48 A.L.J.R. 488.