Well and Truly Tried, by Enid Campbell and Louis Waller assisted by Gretchen Kewley, Sydney, The Law Book Company Limited, 1982, xxxvi + 307 pp. $39.50.

This book consists of a collection of essays published to honour the contribution to legal scholarship made by Sir Richard Eggleston. The book is said to be one of the series *Monash Studies in Law*. I must confess to not having been conscious of the existence of the series before reading the book, nor was I told by this book the names of any others in the series.

The book consists of ten essays. I will say a word or two about each except for the first, it being a brief biography of the book's honorand.

The second essay, "The Increasing Vulnerability of the Presumption of Legitimacy: An Historical Survey", was written by the Honourable J. J. Bray, A.C., Q.C., formerly Chief Justice of South Australia. Its purpose, as its author says, "is an historical survey of changing legal doctrine, not a guide to current law" (p. 29). While legitimacy may have lost much of its importance in modern times, nevertheless, paternity, as the author says (pp. 11-12),

> . . . still remains of considerable importance. New statutes provide for declarations of paternity to be made and these provisions almost certainly include . . . the adulterous paternity of the child of a married woman. Moreover the question of paternity may well be of decisive importance in a custody case, particularly when the wife claims that the husband or former husband is not the father of the child. It is relevant to the question of maintenance of the child in a variety of contexts. And of course it is still relevant to disputes about inheritance, especially when the estate of a deceased husband or former husband is in issue and it is claimed that the child of his widow or former wife is not his.

Naturally an understanding of current law is assisted by an understanding of the history of the legal doctrine.

I have one small quibble with the author. He refers (p. 25) to the rule that if there is sexual intercourse with the husband during the period of conception, the presumption of legitimacy is conclusive, despite contemporaneous acts of intercourse with other men. He later says (p. 27) that this rule has found its way into the criminal law, assisting an accused charged with incest with his wife's daughter, conceived while the wife was married to someone else. He then hypothesises the case where the husband charged with incest with the wife's daughter might have to be convicted by the application of the presumption, even if the girl was really the child of an adulterer. This, he says, (p. 27):

> . . . is hardly to be endured. It would even be worse if the presumption of legitimacy in such a case had to be rebutted beyond reasonable doubt. But at this point the presumption of legitimacy would conflict with the presumption of innocence and presumably they would cancel each other out and the matter be left at large.

With respect, it will not do to solve this problem by talk of conflicting presumptions cancelling each other out, because, of course, the so-called presumption of innocence is not a presumption at all. It is merely a misleading way of referring to the rule that the prosecution bears the burden of persuasion in a criminal case.

At pp. 33-34 the author refers to the interesting problem which arises when a child is conceived while the mother is married to one husband and is born after she has married another. In such case, does the presumption of legitimacy apply so as to provide the child with two fathers? No, says the author, one husband or the other must be chosen. In the absence of any other evidence to assist in reaching a conclusion he thinks the court would hold the first husband to be the father although he points out that Voet thinks Roman-Dutch Law would prefer the second husband. One need not travel so far afield to find this latter preference being expressed. It has also been expressed in some American jurisdictions: see *Zachmann* v. *Zachmann*[1] and *Bower* v. *Graham*.[2]

The author of the third essay, "Principles of Evidence and Administrative Tribunals", is Professor Enid Campbell, O.B.E., Sir Isaac Isaacs Professor of Law at Monash University and one of the editors of the book. The principal questions said by her to be explored in her essay are: first, the effect of a statutory provision expressly exempting a tribunal from a duty to apply the rules of judicial evidence and, secondly, the extent to which tribunals are bound by such rules in the absence of such provision. That these are in fact the principal questions explored in the essay was not apparent to me; I thought instead that the essay was principally concerned with judicial review of administrative fact-finding, also admittedly an important issue.

Among the interesting areas of judicial evidence the application of which to tribunals is discussed by the author is that of privilege. She does not however advert to one problem in this area I find especially interesting — the question whether a person whose conduct is the subject of proceedings before the tribunal and on whom the tribunal may visit a detriment if certain conduct by him be established can be compelled to participate testimonially in the tribunal's proceedings. This problem may also be expressed as the problem of whether the non-compellability of the accused extends to an "accused" in an administrative, rather than a traditional criminal, proceeding. As one would expect, the problem has been the subject of an extensive discussion in America. However, discussion elsewhere is practically non-existent. An exception is *R.* v. *Pantelidis*.[3]

The fourth essay was written by P. B. Carter, a Fellow of Wadham College, Oxford University. It deals with the topic of judicial notice. I read

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[1] (1903) 66 N.E. 256.
[2] (1920) 225 S.W. 978.
[3] [1943] 1 D.L.R. 569.

it with interest, as one would anything written on evidence by its author, but I was somewhat disappointed to note the omission from it of any reference to one of the most important judicial notice cases of recent times. I refer to the judgment of Weatherston, J. of the Ontario High Court in *Miles* v. *Marshall*.[4] The relevant scope note in the report, reproduced in its entirety, is as follows, "Evidence — Judicial Notice — Court may take judicial notice that a horse is usually longer than a cow".

Professor D. W. Elliott of the University of Newcastle-upon-Tyne wrote the fifth essay, "Lie-Detector Evidence: Lessons from the American Experience". Among its other virtues, this essay was written in an entertaining style, but I regret that I must take issue with Professor Elliott on one matter. He begins his essay by referring to the fact (as he thinks) that outside of America there is "virtually nothing" in the way of commentary on the lie-detector and by describing this "silence in the rest of the common law world" as "positively eerie". Can it be that Professor Elliott considers New South Wales not to be part of the common law world? Its Privacy Committee published a report on lie-detectors in 1979, which report led to the introduction of a bill in the New South Wales Parliament in 1980. That bill was admittedly not proceeded with, but this year the Parliament did enact legislation implementing the Committee's recommendations, namely, the Lie Detectors Act, No. 62 of 1983. One gathers that Professor Elliott would find the provisions of this statute perfectly satisfactory.

"Expediency and Truth-finding in the Modern Law of Evidence" is the title of the sixth essay, written by the Honourable Mr. Justice Fox of the Federal Court. It concerns itself with various respects in which court procedure including the rules of evidence may be said to be antithetical to the ascertainment in litigation of historical truth. Included is a discussion of the rule that a judge may not himself call witnesses (p. 172). There has recently been movement on this front in New South Wales, to which it may be useful to refer here. First there were the remarks made by Hope and Mahoney, JJ.A. in the civil appeal of *Bassett* v. *Host*.[5] Then more importantly there was the decision of the Court of Criminal Appeal in *R.* v. *Damic*.[6] In that case Street, C.J. with whom Slattery and Miles, JJ. concurred held that in N.S.W. a judge presiding at a criminal trial has the power of his own motion to call a witness, regardless of the attitude of the parties. (He does not, however, have the power to require the Crown to call a witness.) When the judge does call a witness the accused must be afforded an unrestricted right of cross-examination, while the extent of the Crown's cross-examination is a matter for the judge's discretion.

Unless this statement of New South Wales law be rejected later by the High Court, it represents a most welcome introduction of certainty and rationality into this area and one which places greater weight than formerly on the truth-finding function of litigation.

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[4] (1975) 55 D.L.R. (3d) 664.
[5] [1982] 1 N.S.W.L.R. 206, 207, 213.
[6] [1982] 2 N.S.W.L.R. 750.

Both the seventh essay and the ninth are concerned with aspects of the topic of similar fact evidence. The seventh is entitled "Proof and Prejudice"; its author is Colin Tapper, a Fellow of Magdalen College and All Souls Reader in Law at Oxford University. The ninth is entitled "Multiple Counts and Similar Fact Evidence" and is by Mark Weinberg, Reader in Law at the University of Melbourne.

Someone has said that the fact that the results of so many similar fact evidence cases are correct in spite of the language used to justify them is a tribute to the power of common sense over the forms of legal reasoning. Tapper illustrates once again the truth of this statement, showing along the way that American judges are no less fallible than Anglo-Australian ones in this regard. Undoubtedly his clear exposition of the issues involved in the area will be ignored by the judges just as much as have been those of his worthy predecessors.

One recent decision of which the author is critical is that of the Full Court of the Victorian Supreme Court in *R.* v. *Chee.*[7] It may be noted that in *Perry* v. *The Queen*[8] both Gibbs, C.J.[9] and Wilson, J.[10] were also critical of *Chee.*

Weinberg's essay I found the most interesting in the book, dealing as it does with a topic about which I had not seen any academic discussion previously — the application of the similar fact evidence rules in the context of multiple count indictments. The essay is written with the author's usual clarity and perceptiveness.

The eighth essay is "The Rationalist Tradition of Evidence Scholarship" by William Twining, Professor of Law at the University of Warwick. It is unlike any other essay in the book. I will say nothing more about it than that it consists in the main of an interesting brief survey of some of the highlights of the intellectual history of the trans-Atlantic study of the law of evidence.

The last essay in the book is "Placing the Burden of Proof", by C. R. Williams, Senior Lecturer in Law at Monash University. It travels once again down some well-trodden paths in the thicket that is burdens of proof.

As can be seen even from the brief descriptions given above, the essays in this book cover a broad range of evidence topics. Naturally not all essays were of equal interest to me, but each contained at least something that made its reading well worth while. Those who enjoy thoughtful discussion of the law of evidence will not be disappointed by this book.

LESLIE KATZ*

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[7] [1980] V.R. 303.
[8] (1982) 57 A.L.J.R. 110.
[9] *Id.* at 113.
[10] *Id.* at 121.
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