

REVIEW ARTICLE*

Evidence: Its History and Policies by JULIUS STONE revised by WAN WELLS (Australia: Butterworths Pty Ltd, 1991), pp i-xliii + 1-771. Cloth recommended retail price 135.00 (ISBN 0 409 30053 5).

The real question is, what is meant by evidence being 'relevant'? If evidence is otherwise relevant, it is not to be excluded merely because it is prejudicial. Relevant, however, does not necessarily mean 'logically probative'. The real nigger in the wood-pile has been an article by Lucius Stone in the Harvard Law Review of 1932, vol 46, pp 954.

- Sir Lionel Heald, Attorney-General for England and Wales, in submissions before the House of Lords, *Harris v DPP* [1952] AC 694 at 701.

Racism is not Sir Lionel's only sin. Not only does he get Julius Stone's name wrong and go on to misrepresent the Harvard Law Review article,¹ but Sir Lionel also shows a shocking lack of perspicacity of Julius Stone's impact on the law of evidence. Perhaps however, in 1952 Sir Lionel should be forgiven for not anticipating the 1975 House of Lords landmark decision on similar facts, *DPP v Boardman*.² *Boardman* is pure Stone. Julius Stone wrote prolifically on judicial proof and evidentiary matters until his jurisprudential insights drew him beyond evidence law to the unbounded jurisprudential canvas for which he is famous.

The original manuscript for this book was undertaken by Julius Stone over 50 years before the publication of this edition. It was written under the working title of *The Modern Law of Evidence* whilst Julius Stone was at Harvard Law School. The manuscript travelled with the Professor to Australia where he took up the Challis Chair of Jurisprudence and International Law at the University of

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1 For this observation, many thanks to Associate Professor Mark Aronson, Law Faculty, UNSW.

2 [1975] AC 421.

Sydney. Although a substantial manuscript, it remained at little more than first draft stage. It was looked at by Julius Stone spasmodically through the 1940s and its unborn status obviously preyed upon the Professor's mind. In the 1950s and again in the 1970s he showed the manuscript to other eminent scholars with a view to up-dating it to publishable form. The task however was never undertaken.

As further illustration of the way the manuscript gnawed away at the Professor, Zena Sachs, Professor Stone's researcher from 1947 to his death, told me of the extraordinary twist of fate that led to its publication. In 1984, Professor Stone and Miss Sachs were busy packing archival material to send to the National Library. The manuscript was packed also. Professor Stone unpacked it. At the time, he was negotiating with Mr John Waugh of Butterworths regarding *Precedent and Law* (1985). He mentioned the draft and shortly afterwards Mr Waugh introduced the then recently retired Justice of the South Australian Supreme Court, Mr WAN Wells to Professor Stone. This meeting, only months before Professor Stone's death, marked the end of a 40 year search for the means by which the manuscript could be published.

Mr Wells is an author of evidence and advocacy works (in particular, *Evidence and Advocacy*, 1988). He took as his brief the presentation of evidence in an historical context, identifying the legal, social and practical bases for the emergence and growth of the law. The historical emphasis is not limited to the common law. Legislation is traced to its origins, as is the development of Continental evidence and procedural law. Mr Wells was faced with the objective of retaining the essential 'Stone', but with a sometimes incomplete manuscript, and an obviously out-dated common law and legislative background. The manuscript has not been up-dated and this publication remains set in the early 1940s. Mr Wells has largely kept intact the content of the Stone manuscript. At times this meant some careful piecing together of fragments and the use of linking text to replace lost passages. Professor Stone's manuscript has been altered slightly "to improve syntax and general readability".³ Footnotes, which, have been a traditional prerequisite for any Stone publication, have been either deleted or incorporated into the text to ensure an easy read "by sweeps of the eye and mind". Mr Wells should be warmly congratulated for undertaking a superhuman task superbly.

What possible utility could a 1940s evidence law book have in the 1990s? Clearly this is not a publication for a barrister looking up an evidentiary point on the run. Nor is it a text for a student dipping a toe into the law of evidence and procedure for the first time. At a time when codification of the law of evidence seems imminent with Evidence Bills existing in both New South Wales and the Commonwealth, one could question the utility of such a publication. However, as Mr Wells points out in his *Preface*, both barrister and student will at the right time and place benefit from Julius Stone's perceptions.

3 *Preface*, p v, et passim, J Stone & WAN Wells, *Evidence: Its History and Policies*, (1991).

[The manuscript]... represented an orderly marshalling of valuable research work by a great scholar; it offered a concise account of rule and principle up to the Second World War, founded on an historical analysis that was always compelling and often brilliant; it identified and expounded, clearly and incisively, the policies underlying judge-made law and legislative intervention; it offered to the practising profession (judges included) an abundant source of early material to draw on whenever it became necessary to deal with a proposed change or extension of judge-made law, or with statutory construction.⁴

As an academic lawyer formally taught in the modern school of evidence and procedural law, to me this work facilitates an understanding of the historical roots of evidence law in a comprehensive and accessible way that none of the great treatise writers of yester-year have done; a significant achievement considering that Julius Stone was writing when these writers' works were still in daily currency. Professor Stone has gently interwoven his great political and sociological insights whilst masterfully exploring legal doctrine.

Finally, the arrangement of the book foreshadows (when it was written, if not when it was published!) the genius of Stone on categories and structure. One can marvel at the writer's ability to combine, under the rubric of a heading, *Remote or Prejudicial Relevant Fact*, 'consciousness of guilt' conduct;⁵ unduly indecent evidence, jury inspection of 'the person of the accused';⁶ similar facts/propensity evidence; character evidence.

In so many respects Julius Stone was ahead of his time. This is graphically illustrated on the topic of confessional evidence. Those familiar with the High Court of Australia's recent decisions in this area will know that the Court is adopting an increasingly rigorous attitude to confessions obtained in police stations and subsequently challenged as fabrications. A series of decisions culminating with *R v McKinney*⁷ have stressed the need for police to implement audio-visual recording of confessions. Professor Stone, writing 50 years ago, concluded: "Their [ie, confessions] faults... [lie], not so much in themselves as in the possibility of their being inaccurately reported. The law should therefore require more stringent safeguards of accurate reporting whilst relaxing the rule as to the confession itself".⁸ I think Julius Stone can be forgiven for failing to specify the use of audio-visual recording in police stations in the 1930s.

This Review began on the topic of perspicacity. I conclude likewise. In Professor Stone's case however, his abilities to penetrate the law of evidence and procedure are only partly illustrative of his great genius. In truth his mind has informed the judiciary since the 1930s. It stands to reason that he should also have assisted in forming the law as well.

4 *Ibid.*

5 *R v Christie* [1914] AC 545.

6 To verify his claim that he was too deformed to participate in sexual intercourse.

7 (1990-1991) 171 CLR 468.

8 Note 3 *supra* at 359, drawing on Wigmore.