Masthead Logo

DePaul Law Review

Volume 4
Issue 2 *Spring-Summer 1955*

Article 24

McCormick: Handbook of the Law of Evidence

Jeremiah Buckley

titioner who may become interested in a federal tax case, the book is useful as it contains a combination of fact and advice as well as instructions on tactics and the elements of procedure.

WARREN J. CAREY*

* Lecturer, De Paul University College of Law.

Handbook of the Law of Evidence. By CHARLES T. MCCORMICK. St. Paul, Minn.: West Publishing Co., 1954. Pp. xxxvii, 774. $10.00.

The first problem that confronts the reviewer in considering this work is: Is it a text, a treatise or an encyclopedia? The difference between the three is not merely one of degree, but of kind. A text, I conceive, to be a work which lays down general principles, supported by the rationale of the rule, exemplified by a few outstanding cases, and distinguished from exceptions to the rule. A treatise is not limited to exemplification, but searches into the causes and origin of the rule, with a critique of its rationale, necessity or effectiveness, and with a prognosis of its future development. An encyclopedia is a storehouse of accumulated cases in which the rule was applied, rejected or modified. A text is designed for the beginning student; a treatise is designed both for the advanced student and the practioner; an encyclopedia is of primary utility to the practioner. I would say the present book stands about mid-way between a text and a treatise, with perhaps a slight tipping of the scales in favor of a treatise. It combines the simplicity of a text without the philosophical exhaustiveness of a treatise.

Proficiency in evidence is not a matter of rote; it is largely a matter of *instinct.* We do not *learn* evidence in the same way we learn the mechanics of corporations, future interests and negotiable paper. We *re-act* to evidence, unconsciously and instantaneously, like we re-act to language. Indeed, the study of evidence is like the study of a foreign language. We labor the grammar of the science, with its plethora of rules, exceptions, and exceptions to the exceptions, but we cannot say we know the language until we unconsciously speak its idiom. None of us can remember when we did not speak our native tongue. And yet, we learned it in an extraordinarily short time by pure repetition, aided, of course, by that mysterious function of the human mind we call the logical faculty.

It is likewise with the study of evidence. The writer of a grammatically correct, and rhetorically well-balanced sentence, might have great difficulty in parsing it. He is guided by instinct, rather than by rule. No student can complete the ordinary law school course in evidence without being left in the most bewildering and desperate confusion. His grammar has left him stuttering rather than talking. And yet, the teacher might have labored hard to dispel confusion, to regulate chaos, and to translate instinct into rationale. No experienced teacher need worry about this appalling result. While the term is one of distinct opprobrium, all mental training is a species of brain-washing. If the teacher has religiously drilled on fundamentals, they will remain, even though temporarily obscured by the effluvia of conflicting details. Six months in a court-room, handling even the most trivial cases, will dredge up the basic tenets of the science.

And now, lest this become an essay rather than a review, on to McCormick and his "Handbook of Evidence."

First, as to the mechanical set-up of the book as a whole: in this volume of 774 pages, McCormick first gives us an over-all skeleton outline of his general subject matter, which is then broken down into specific topics in his table of contents. A study of these gives the blue-print and specifications of his approach. The pages are in double columns, with about half the space devoted to foot-note references to authoritative treatises and citations of English and American cases. The citations are usually edited with brief

statements of fact showing the pertinency of the point and very frequently amplified with quotations from the decisions. At the end of the book a table of cases, covering 48 pages, is followed by a carefully compiled topical index.

Second: In the discussion of any major rule, McCormick usually treats (1) its historical back-ground and development; (2) the statement of the rule today with its variations and subdivisions; (3) the application of the rule to specific instances cited in the foot-notes; (4) the criticisms of the rule, with very often conflicting arguments for or against the rule as it presently stands; (5) proposed changes or re-drafts of the rule by statutes, rules or codes. Thus, with the aid of the index, the student, trial man or brief maker can, with this book alone, get a good start in the research of most basic evidentiary rules, and with the aid of the foot-notes, get examples of its variations and modifications.

Third, as to the arrangement of topics: I confess myself biased to the point of bigotry on the matter of arrangement. I have a deep-seated and not wholly unwarranted suspicion that re-arrangement of topics conceals a publisher's racket,—that new books on old subjects, like Christmas turkey in January, depend upon form rather than substance, for acceptance. This is not true of McCormick's book, though I do not particularly like his arrangement in some matters of detail. To my mind, order gives each thing view and helps define its function. Therefore, when he treats examination of witnesses before competency, competency before relevancy, relevancy before the issues and burden of proof, and all of them before facts excluded from the field of evidence by judicial notice, when I think logic would dictate the exact opposite, my innate orthodoxy suffers a shock. I am willing to concede, however, that topical arrangement is not solely a matter of logic, that the elements of perspective, emphasis and personal taste might be involved, as so often happens when two housewives disagree on the exact spot on the wall where grandfather's picture is to hang.

In the handling of his topics, McCormick makes an immediate plunge into the morass of examination. There is a good deal of justification for this. First, it is the one field where the rules of evidence are most commonly and most exactingly applied. Second, the initial enthusiasm of the student may be utilized to carry him over an extremely technical subject; and third, he gets his first real taste of what it is to be a lawyer, as, for example, when he is called upon in the classroom to lay a foundation, by a series of questions, for impeachment by self-contradiction. Within the general subject of examination, McCormick quite properly includes many subsidiary topics, such as the competency of *testimony* as distinct from the competency of *witnesses*, the various privileged communications, expert and opinion evidence, and refreshing present recollection. In this latter connection, however, instead of discussing the cognate topic of proving a record of past recollection, McCormick jumps 476 pages and treats past recollection under the hearsay exceptions. With this classification I definitely disagree, both on practical and theoretical grounds. Courtroom experience has taught me that while the difference between present and past recollection is quite clear, they are more commonly confused in the trial of a case than probably any other two concepts. The medical expert reading from a hospital record is rarely stopped by an objection, and yet two minutes of cross-examination (which may be indulged in immediately and before the witness continues his testimony) might easily show that he is not actually "refreshing" his recollection, and usually no attempt is made to qualify the record under the past recollection rule. Further, a record of past recollection, properly qualified, is in no sense hearsay, but is direct evidence. Therefore, the two topics should be considered together under the general subject of examination.

After a discussion of the general rules relating to Cross-examination, McCormick devotes a few pages, heavily documented in the foot-notes, to that most fascinating subject of all,—cross-examination, considered as an *art*. The student is warned against the

many dangers in cross-examination, including taking Hollywood as a guide, all of which might be summarized in the time-tested admonition, "Don't ever ask a question on cross-examination, the answer to which you do not know." When you shoot in the dark, the bullet might ricochet. Alertness and imagination are important in the trial, but they are much more important in the investigative stage. Success in the cross-examination of a witness, like success in a military campaign, usually results from careful preparation, and but rarely from sporadic flashes of genius.

McCormick's sections on writings, including the topics of authentication, the best evidence rule, and the parol evidence rule, are uniformly excellent. I could wish he had extended his comments on interpretation to include a fuller treatment of that most prolific source of all interpretative evidence,—the interpretation of wills. Considerations of space, and the fact that the subject could more properly be treated in a work on wills, probably accounts for the skimpy treatment. Interestingly enough, and contrary to McCormick's usual proclivities, we find no proposed rule or code relating to writings. Could its absence arise from the fact that if a writing suggests difficulties of interpretation, a rule might do likewise?

McCormick seems to condone the use of *res gestae*, at least he handles the shibboleth very gingerly. He admits the vagueness and imprecision of the term, and cites the witty comment of Judge Bleckley in *Cox v. State*, 64 Ga. 374, 410 (1879):

> The difficulty of formulating a description of the *res gestae* which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a numerous family.

McCormick, however, seems to think the time has not yet come to get rid of the expression, when he says, page 587:

> Manifestly, too, the very vagueness of the term has been beneficial, as making it easier to widen the application of the doctrine into new fields. Perhaps the time has now come when this policy of widening admissibility will be even better served by striving for a clearer analysis of the different classes of evidence coming in under the phrase *res gestae* and of the justifying reasons for the admission of each class, as a basis for pointing out the need for further liberalization. If so, we could well jettison the ancient phrase, with due acknowledgement that it has well served its era in the evolution of the law of evidence.

It seems to me the ultimate result of McCormick's dictum would be to do away with all exclusionary rules, and reduce all evidence to the one rule of *relevancy*. This is the one rule that now, quite properly, governs the detective or investigator of facts, as distinct from the *trier* of facts. But, there are other rights and policies that intervene between the facts and the trier, that are of such importance in the eyes of the law as to be preserved even at the expense of concealing certain facts. The exclusionary rules, in the main, are well-founded, and do not, except in rare cases, prevent adequate proof of an issue. Further, even within Judge Bleckley's nebulous, composite family portrait, many members may be definitely identified by ear-marks peculiar to each, so that the magic formula of *res gestae* is no longer required as an open sesame to the admissibility of evidence. The history of the doctrine of *res gestae*, it seems to me, has been one of progressive contraction whereby the area of "vagueness and imprecision" has been gradually reduced. If I read McCormick right, he would reverse that process and use *res gestae* to throw open new and unexplored areas of imprecision.

McCormick has a penchant for statutory rules. With this I do not agree. I am not convinced that statutory changes solve more problems than they create. The generality of language in which a rule is necessarily expressed, leads to obscurity of meaning. The result is a plethora of new cases attempting to define the rule in its application to new facts. In spite of the contributions of modern science and psychology, the diversity of human motives and conduct is very far from reduction to mathematical formulae.

The rules of evidence, developed from the hit and miss system of trial and error incident to adversary proceedings, are subject to variation and re-adaptation to new cases as experience proves necessary. In their ultimate resolution, the process is necessarily slow but thus far, it has not worked so badly. I feel we should be equally slow to cast that process aside for the supposed panacea of a formulated rule, which, no matter how buttressed it may be by experience, must by its very nature, be largely *a priori*. The simplicity of code revisions may be deceiving, and as a means of "arriving at the truth," I am cynical enough to believe that, at least in the field of evidence, they leave Pilate's question still unanswered.

I think it would be well if every trial practioner read at least one book on evidence each year—a book that presents the entire subject within reasonable compass. The longer treatises can best be used for reference and amplification. I believe this should be done in addition to the occasional job of briefing a point of evidence for use in court. Research on specific points is a necessary part of the handling of litigation, but a hundred briefs do not add up to a comprehensive grasp of the subject as a whole. The rules of evidence are so interwoven that the pattern cannot be seen by following individual threads. McCormick's book is comprehensive, but not to the point of being burdensome. His style is clear and flowing, his phraseology is simple, coherent, connected and balanced and singularly free both from that professional jargon and legalistic stodginess that is not only the curse of so much "legal" writing, but so often serves merely as an ostentatious cloak to a complete vacuity of ideas. I found a great deal of pleasure in going over it, and indeed, lingered on some parts longer than time would afford. Whether you read it or use it for reference, it is an extremely handy tool in the workshop of the lawyer.

JEREMIAH BUCKLEY*

* Professor of Law, De Paul University College of Law.

Preface to Jurisprudence—Text and Cases. By ORVILL C. SNYDER. Indianapolis: Bobbs-Merrill Co., Inc., 1954. Pp. xxvi, 882. $10.00.

It is not easy to assay a casebook about jurisprudence. The subject is so mercurial and the possible approaches to the inquiry so numerous that analysis of the book becomes largely subjective. The author of *Preface to Jurisprudence* makes the task doubly hard. He informs us in the Foreword that his book was "prepared for use in courses in jurisprudence especially in law schools, but also in political science departments of colleges and universities." He also expresses the hope that lawyers and judges may find the book useful. By directing his material at two groups who are unequal in experience with, and comprehension of, the law—lawyers and students—Professor Snyder may have tried to accomplish too much.

The author's approach to the subject however is entirely satisfactory. It is to examine the meanings of such words as law, state, sovereignty, legislative, judicial, executive, proof, right, liability, duty, power, privilege, immunity, property, thing and person; words which are as common as their meanings are obscure. He develops the study along traditional lines, introducing each subject with searching text analysis and then illustrating how each idea affects law by ample use of case material and examples.

The book is large and possesses several virtues of a technical nature which add greatly to its effectiveness. For instance, the cases used are uniformly interesting and current, while the table of contents is one of the most complete ever seen in a casebook and would make an excellent outline of the material contained in the book.

That the author has compiled a casebook which is scholarly and complete cannot be doubted. With such attributes he can expect to attract those members of the bar who