

Litigation — Evidence and Procedure, by M. I. Aronson, N. S. Reaburn and M. S. Weinberg, (Butterworths Pty Ltd, Australia, 1976), pp. i-xi, 1-721. Price \$23.25.

Almost eighty years ago, J. B. Thayer, in scholarly fashion, attempted to separate the study of the law of evidence from matters which properly belonged to the rules of procedure and the substantive law.¹ Such purity of classification is now out of fashion. Law schools in many Australian universities are establishing courses of study which aim at providing the student with a comprehensive grounding in the whole process of litigation.

Litigation — Evidence and Procedure is a pioneering casebook to aid in the teaching of such a course. It provides useful insights into the problems encountered in the conduct of court proceedings both civil and criminal, and the steps are dealt with as far as is possible in the order in which they will usually have to be tackled. Detailed reference is made to legislative provisions of New South Wales, but there is a table of comparative provisions from other States at the end of each chapter. Case law is generally well chosen from a wide variety of jurisdictions, including the United States.

All casebooks have the disadvantage that they do not help the student to become practised in distilling from a reported case so much as he may be able to obtain to help in the solution of a particular problem; the distillation process is undertaken by the editor. In this book, the abbreviation of cases is often taken to extremes, so that what appears from its heading to be an extract from a reported decision is frequently nothing more than the authors' summary of the *ratio decidendi* of that decision.² At least one of such summaries is incomprehensible.³ Between the extracted cases there is a good deal of pertinent comment, in which some penetrating questions are asked, and other cases are cited as supporting propositions which are stated in the text. The book would be improved if the authors' summaries of cases were incorporated into the text in this manner and the space thus created were used to lengthen the extracts from some of the more important cases.⁴

A few other minor matters could be remedied in a second edition. The use of paragraph numbers rather than page numbers in the index, table of contents and tables of cases makes the book difficult to use for reference purposes; paragraph numbers are not printed at the top of each page, and the system of numbering paragraphs is complex. Cross-references could be added in some areas.⁵ A single table of cases with the cases extracted printed in heavy type would be a desirable alteration and a table of statutes would be a useful addition.

This book will not, by itself, meet the criticisms to which the authors refer in their preface that courses in evidence and procedure are remote, unreal and dry. To teach the rules of evidence and procedure to students who have had no experience of their application is always a difficult task. However, in conjunction with imaginative teaching, well-planned visits to courts, and an examination of specimen court documents, the book will go far towards awakening in students an awareness and understanding of the litigation process. That it is published is a positive step in the training of professional lawyers in an academic environment.

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¹ Thayer J. B., *A Preliminary Treatise on Evidence at the Common Law*, (Boston, 1898).

² See in particular 688-92.

³ *Kornjaca v. Steel Mains Pty Ltd*, [1974] 1 N.S.W.L.R. 343, referred to at 36.

⁴ E.g. *R. v. Kelleher*, (1974) 4 A.L.R. 450, noted at 552, and *Rumping v. D.P.P.*, [1962] C.A.R. 398, not extracted at all, although it appears in the table of cases extracted.

⁵ E.g. the reference to *D.P.P. v. Kilbourne*, [1973] 1 All E.R., 453, at 530 does not indicate that an extract of the case may be found at 543-4, and the reference at 691 to *R. v. Ratten*, [1971] V.R. 87, does not indicate the presence of an extract of that case at 702-4.

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Discretionary Trusts, by I. J. Hardingham and R. Baxt, (Butterworths Pty Ltd, Australia, 1975), pp. i-xxvii, 1-235. Price \$15.00.

One of the most unusual phenomena in commercial life in the past 10 years has been the growth in the use of discretionary trusts, especially in Australia, although experience elsewhere in the United Kingdom and the United States, where their use has been somewhat extraordinary, suggests that perhaps there will be many more developments in the future in Australia.

Trusts and settlements for more than 100 years have been high on the list of arrangements to retain and redistribute wealth within families. Whilst at times they have formed the basis of commercial undertakings, since the turn of the century settlements tended to diminish in popularity particularly because of the convenience which was offered by the limited liability company and ease of incorporation. But, with greater restrictions being imposed on the use and conduct of limited liability companies as well as ever-increasing revenue burdens, it was not surprising to see planners and their advisers returning to the use of trusts, especially discretionary trusts, as a means by which some of the restrictions could be eliminated or modified. At the same time, trusts have tended to give rise to considerable fiscal advantages if used in the most appropriate way.

Two major developments assisted in the return to popularity of trusts, especially discretionary trusts. The passing of the Perpetuities and Accumulations Act or its equivalent in Victoria, Western Australia, Queensland, U.K. and New Zealand has enabled many of the inconveniences of the old rules of remoteness of vesting and accumulations to be avoided or eliminated. Trusts became more flexible as the period of their existence could be measured with certainty otherwise than by reference to a life in being or another's death.

The second factor was the decision of *McPhail v. Doulton*¹ in which the House of Lords determined that a discretionary trust could not be invalid by reason of the trustees being unable to draw a list of all the eligible beneficiaries at any given time. Rather it was sufficient if it were possible for the trustees to be able to determine at any time if any particular person was or was not eligible to receive a share of the trust property.

The decision in *McPhail v. Doulton* has led to a greater freedom in the description of beneficiaries in deeds of settlements and more particularly those containing discretionary trusts. However, until now the practitioner has lacked a definitive work to which he would resort for assistance in drawing and interpreting discretionary trust deeds. This void has been filled by Dr I. J. Hardingham and Professor R. Baxt with their book *Discretionary Trusts*. This book is the result of the authors rewriting and adding to an original thesis of the firstnamed author.

As may be expected, the important decision of *McPhail v. Doulton* occupies the authors in the early chapters. That decision and the earlier decision of the House of Lords in *Re Gulbenkian*² is discussed and examined in depth. Additionally, the authors consider the earlier development by the courts of the principles of certainty of objects. This examination makes it evident that equity's creature or child, the trust, has not in the 20th century completed its development but it is developing not only in logical manner but it also accommodating to the changing requirements of a modern society.

The clear enunciation of the principles emanating from the judgment in *McPhail v. Doulton*, especially in chapter 3 and the discussion on the question of permitting a mere power to arise out of an invalid trust power, is illustrative of the depth of research undertaken in the production of this work.

The authors have made a detailed analysis of the nature of the various rights of discretionary objects and the duty of trustees with respect to such objects. Their examination of the problems inherent in the general invalidity arising by reason of the object of the trust not being described with precision so as to be invalid by

¹ [1971] A.C. 424.

² [1970] A.C. 508.