An Introduction to Evidence: By G. D. Nokes, LL.D., of the Middle Temple and South-Eastern Circuit, Barrister-at-Law; Reader in English Law in the University of London. London: Sweet & Maxwell Limited. 1952. vii and 415 pp. (index 12 pp.) £2/9/6 in Australia.

If Dr. Nokes had not said in his Preface that he had practised at the bar, sat upon the bench of an appellate court in an Indian State and taught and examined students in the law of evidence, this book would itself provide evidence, cogent if not conclusive, that its author was preaching what he had practised.

He wrote the book, he says, because it seemed "there was room for a book which provided some historical and theoretical background". The history is for the most part kept in the background. But present rules and illustrations thereof, justifications and the critical comments of learned persons become mingled. Theorising is sometimes halted by practical experience, as when the limits of relevance are found to be at the stage when the judge enquires of counsel: "Is it really necessary to go into all this?"

The author does not concern himself only with main rules and principles. He explains proceedings before and at trial, the pleadings, even counsel's advice on evidence, notices to produce, discovery of documents, subpoenas, the order of addresses at the trial, examination and cross-examination, views, etc. One cannot help wondering whether it was really necessary to go into all this. The law of evidence is a forensic matter. What a practising lawyer needs to know is what is admissible and what is not. He needs to know it so that he may lead evidence by proper questions, cross-examine intelligently, object on the spur of the moment, and know why he objects, and when it is wise to object, and when not. Much of this can never be properly learnt except from practical experience. The rules of evidence presuppose a knowledge of the course of a trial. But in a very short work on evidence some knowledge must be assumed and the more knowledge that is assumed of other matters the more room there is for the law of evidence and its history and theory.

This book is called an "Introduction to Evidence"; and it obviously is intended for students. But some of the debatable theory and commentary on the categories adopted by other authors may be not only superfluous but confusing. For the post-graduate scholar, on the other hand, the book is unnecessarily encumbered with elementary matters. But there is a wide range of interesting references, especially to periodical and other literature apart from reports of cases.

The book is concerned with the English law of evidence applied in English courts. But in various parts of the British Commonwealth courts are still hammering away at, and shaping more perfectly, the rules of evidence in purely common law forms. Perhaps, therefore, it is not merely the pride and prejudice of a denizen of such parts that causes the comment that the author might have looked at the work of craftsmen outside England.[1] Australia, for example, has done more than be the *locus in quo* of the Makins' felonies.

Lord Campbell[2] said that "in no department does English talent appear to

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[1] There are some slight, but entertaining, references to the author's Oriental experience. In a recondite footnote on page 252 it is said that in "non-Christian countries" the abuses of dying declarations, which Stephen noted, have not disappeared. Reference to the passage in Stephen's *History of the Criminal Law* shows that mortally wounded natives of the Punjab were said, in his time, to incriminate their enemies, since "a man at the point of death can have no possible motive for telling the truth." And on page 116 there is the interesting statement that "the practice of the plaintiff calling the defendant as his witness, and cross-examining him as hostile, and vice versa, was much favoured in certain parts of India; its advantages are usually negligible and its disadvantages considerable."

[2] *Lives of the Chief Justices* (1857), 274.

such disadvantage as in legal literature; and we have gone from bad to worse in proportion as methods and refinement have advanced elsewhere. Bracton's work . . . written in the reign of Henry III is (with the exception of Blackstone's Commentaries) more artistically comprised and much pleasanter to read than any law book written by any Englishman down to the end of the reign of George III." Lord Campbell, extravagant in both criticism and praise, thought that English legal literature had been redeemed by *Abbott on Shipping*! However this may be, there have, since the reign of George III, been many authors, Maitland pre-eminent, who put English law books in the realm of literature. Dr. Nokes is not one of these. He avoids pretentious nomenclature. He generally uses plain words in their ordinary meanings, apart, that is, from his addiction to "adduction", and his use of "deduction", when logicians might say that "induction" was correct and other people that "inference" would be better. But the plain words do not always make the sense plain. More careful and critical reading after writing would have got rid of some confusing sentences.[3]

But an author can fairly feel aggrieved if all that is said of his book is that he did not write a different sort of book in a different way. What Dr. Nokes has done is this: He has dealt with the subjects he has chosen in a manner which led him to say in the Preface "the arrangement of various topics may prove unexpected." He is not a pilgrim who treads well-beaten paths to worship at old shrines; neither is he an explorer who clears a track for himself. Yet he does make a rather new map.

Part One of the book is entitled Preliminary. It has four chapters: Nature of Judicial Evidence, Sources of Evidence, Evidence and Procedure, and Special Means of Establishing Facts. The first chapter deals with the meaning of evidence, the relation between evidence and argument, with some remarks upon reasoning and advocacy as elements in argument; and then there are comments and explanations concerning familiar classifications of evidence, such as direct and circumstantial, primary and secondary, personal and real, and so forth. Some parts of this chapter may seem to some readers to be elaborations of the obvious. But many writers on evidence start in much the same way. Chapter II is a brief historical sketch. After some slight and rather far-fetched references to Greeks and Hebrews, Hindus and Egyptians, we come to England from the Middle Ages to the seventeenth century. There was little real law of evidence then, and three pages suffice to explain why. What is said about the gradual separation of witnesses and jurors is said accurately and tersely. Perhaps something more might have been said of witnesses and procedure in the Courts Spiritual. The next part of the chapter contains an interesting list and short descriptions of English works on evidence from Gilbert's treatise published in 1726 onwards. There is no general account of the legislative reforms of the nineteenth century. But Lord Denman's and Lord Brougham's Acts are mentioned later in the section dealing with competence and compellability; and throughout the book the historical background is appropriately explained in appropriate places.

Chapter III deals with some matters of practice and procedure. The func-

[3] For example: "Hearsay. There are exceptions to the general rule in respect of complaints, dying declarations and depositions of absent witnesses, in addition to confessions." (Page 14.) And what exactly would an uninformed reader take this to mean: "The terms of the (without prejudice) negotiations may not be disclosed, though the only question left in dispute is one of costs, unless both parties consent to waive the privilege; or any term is unrelated to the merits of the dispute; or the terms are subject to a threat of legal proceedings, the threat being a cause of action in patent law; or the settlement has to be enforced." ? (Page 159.) And a student might be misled by this: "The discharge of the burden of proof by the defendant, when the plaintiff has begun, or by the accused in the majority of prosecutions, throws a further burden on the plaintiff or prosecutor if the latter is to succeed. He must rebut the evidence for the defence." (Page 387).

tions of judge and jury respectively are carefully explained.[4] This may not be altogether necessary. But it is important for students to realise from the outset that the explanation of many rules of evidence is that they are by-products of trial by jury.

Chapter IV deals with formal admissions, judicial notice and presumptions. The curious topic of the notice which judges should take of matters of common knowledge is somewhat slightly discussed; and the illustrations are scanty and strangely chosen. It is, no doubt, helpful to know that courts may ascertain the days of the months by other almanacs than that attached to the Book of Common Prayer; and to be reminded that in 1916 judges recognised that the streets of London were dangerous to bicyclists; and that, since 1868, they have been aware that money has depreciated in value. As for presumptions of fact, they are an old battle-ground for academic logicians. But some of the controversies are arid. Here and elsewhere in the book one feels that there is a danger of substance getting lost in dialectics, semantics and questions of classification. There seems little to be gained from noting differences in the use of words by different people. But, unfortunately, attempts to explain abstract concepts, which do not need and are often scarcely susceptible of explanation, by words which are themselves chameleons, has become a besetting sin. Analysis of "reasonable doubt" and "satisfaction", for example, has got us into sad tangles.[5]

Part two, called Admissibility of Facts, starts with a chapter called Relevance. It is here that one might expect to find some clearly expressed basic theory. Something like Best's statement[6] that "facts which come in question in courts of justice are inquired into and determined in precisely the same way as doubtful or disputed facts are inquired into and determined by mankind in general, except so far as positive law has interposed artificial rules, to secure impartiality and accuracy of decisions, or to exclude collateral mischiefs likely to result from investigation"—or Wigmore's two axioms:[7] "None but facts having natural probative value are admissible" . . . "All facts having natural probative value are admissible, unless some specific rule forbids." The second axiom expresses the truth that legal proof, though it has peculiar rules of its own, does not intend to vary without cause from what is generally accepted in the natural processes of life; and that of such variations some vindication may in theory always be demanded. But Dr. Nokes seems to leave his student rather uncertain of what should be his faith. He is told there is a distinction between "logical relevance" and "legal relevance".

Chapter VI deals with Similar Facts—an important topic, which gets sixteen pages, but seems to deserve more. When the book was written the judgments of the Court of Criminal Appeal in *R. v Hall*[8] *and R. v Harris*[9] had not been delivered; the former is noted in the addenda. If the author had thought fit to examine Australian reports he would have found some useful illustrations and thought-provoking judgments for this chapter.[10]

The other chapters in Part Two are called Character and Convictions, Opinion, Privilege, Estoppel, and Extrinsic Facts. The matter is, for the most

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[4] But the statement (pages 33 and 44) that the judge has to determine, as a question of law, "is there any reasonable evidence" to support an allegation, seems unhappily expressed; the question is rather "is there any evidence from which it could reasonably be inferred that . . . "

[5] See (1952) 68 *Law Q. Rev.* 315.

[6] *Evidence* (11 ed.) 2.

[7] *Evidence* (3 ed.), sections 9, 10.

[8] (1952) 1 K.B. 302.

[9] (1952) 1 K.B. 309.

[10] For example, *Martin v Osborne* (1936), 55 C.L.R. 367 and other cases referred to by Mr. E. C. McHugh in (1949) 22 *Australian Law Journal* 502, 551.

part, familiar, although the treatment and arrangement are somewhat novel. Part Three is called Admissibility of Hearsay. Here again the matter is mostly familiar. The author has sought to elucidate by a table the differences in the rules concerning the various classes of admissible declarations of deceased persons. Part Four, called Means of Proof, deals mainly with procedural matters. Part Five is called Adduction and Assessment. Both words seem uncongenial. We have for so long spoken of "weighing" evidence, and so many juries have been directed on the onus of proof by references to metaphorical scales, that "assessment of cogency" sounds as jargon. This part begins with a chapter on The Burden of Proof. Here, perhaps more than anywhere else, precision in expression is required. But in some passages it is lacking.[11]

The burden of proof of insanity is dealt with. The author notes that it is now clear, since *Sodeman's Case*,[12] that the burden on the accused to prove a defence of insanity does not require that he do so beyond reasonable doubt. But are the author's suggestions (on page 377) of the reasons why the burden is on the accused convincing? They do not seem to square with the rule in probate suits, where it is for the party propounding the will to prove the testator competent if his sanity be disputed. Why, in mere theory, should not the jury acquit the prisoner if they are reasonably doubtful of his sanity at the time of the act? In parts of the United States this view has been accepted; and its correctness in principle was recognised by Anglin J. in the Supreme Court of Canada in *Clarke's Case*.[13] The House of Lords in *Woolmington's Case*[14] recognised the break in the golden thread. It is amply justifiable in the public interest. It seems better to recognise this than to try to rationalise it.

The standard of proof of adultery required in matrimonial cases is briefly discussed (page 393). Incidentally, for those who find a logical difficulty in the very idea of two standards of *proof*, the expression "standards of persuasion", which Sir Owen Dixon has used, may be helpful. The House of Lords' decision in *Preston-Jones v Preston-Jones*[15] is, of course, referred to as concluding the question of the standard in matrimonial causes. But a reference might have been made to the views of the High Court of Australia in *Briginshaw v Briginshaw*[16] and *Wright v Wright*,[17] especially as they have now been supported by the Supreme Court of Canada in *Smith v Smith and Smedman*.[18]

In the last chapter, on Cogency, the author refers among other things to attempts to gauge probability in terms of mathematics. And he soundly rejects the whole idea (page 410). Indeed, although he does not say so, *Bates v Bates*[19]

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[11] For example, on page 384: "When the plaintiff has adduced all his evidence, in an attempt to discharge the burden of proof which lies upon him, the burden shifts to the defence." This is qualified in the next sentence; but then comes this statement: "Though an accused person need not go into the witness box, it is usually desirable for him to give evidence in his own defence. In such cases he assumes a burden, however light." And on page 391: "Subject to the exceptions already noted, the burden on the accused is to prove neither innocence nor even a reasonable doubt of guilt; but to provide material which may give rise to a reasonable doubt in the minds of the jury." What is meant by saying the accused does not have to prove a doubt; and that the accused has to "provide material" ? The author refers to *R. v Schama and Abramovitch*, (1914) 11 C.A.R. 45, and *Woolmington's Case*, (1935) A.C. 462, yet surely the meaning of those decisions is clear.

[12] *Sodeman v The King* (1936) 2 All E.R. 1138.

[13] *Clarke v The King* (1921) 61 S.C.R. 608.

[14] *Woolmington v Director of Public Prosecutions* (1935) A.C. 462.

[15] (1951) A.C. 391.

[16] (1938) 60 C.L.R. 336.

[17] (1948) 77 C.L.R. 191.

[18] (1952) 3 D.L.R. 449.

[19] (1951) P. 35.

is a troublesome decision, not only because Lord Justice Denning's judgment might be taken as suggesting that there are more than two standards of persuasion known to the law, but also because it may seem to countenance the notion that after evidence has been weighed its weight can be stated in figures. Strange results can follow if counsel in cross-examination is permitted to ask a witness such a question as: "If you are not one hundred per cent certain, what percentage of certainty do you feel?" And this has occurred!

The author says "the ascertainment of probability by the assessment of judicial evidence is not an exact process, even when the tribunal consists of a judge alone." He does not consider at length whether all the rules of exclusion, particularly those affecting character and confessions, do to-day assist tribunals to come to correct conclusions. Some of those rules served a humanitarian, but not a logical, purpose in the days when the criminal law was savage in its punishments. In New South Wales the judge is prohibited from commenting to the jury on the fact that an accused does not give evidence. One Chairman of a Quarter Sessions, who found this restriction irksome, is said to have told the jury: "Gentlemen, you are all presumed to know all the law; but, in case you have forgotten any of it, I am going to read to you a part of a public Act of Parliament"; and he then read to them the section prohibiting him from referring to the accused not giving evidence.

That story may not be true. And it is perhaps not relevant. What is relevant is to say that this is an interesting book to supplement, but certainly not to supplant, more familiar works on evidence. It could be made a better book by careful revision, and one may hope it will get this and appear in a second edition.

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A NOTE FROM

THE GENERAL EDITOR

The Editorial Committee offers this first number of the Sydney Law Review to law students and the legal profession with a mixture of feelings in which much trepidation struggles with some pride. My aim and that of my colleagues has been to integrate the production of a scholarly Review into our own law teaching. In substantial part the Student Editors, in their third or final years, have been responsible for the contents of this first issue, other than the leading articles. The pride felt by the Committee is primarily for the diligence and enterprise with which most of the Student Editors applied themselves to new tasks, and in the patience with which they received the constant importunities of an impatient General Editor. To them, above all, but also to my colleagues on the Editorial Committee and to the student Law Society of the Faculty, who took the initiative in founding the Review, my own warm tribute must be paid.

Whether this youngest Law Review can find a place among its stalwart and distinguished contemporaries is a different question, on which the Committee must inevitably feel more of trepidation than of pride. It is hoped that the second and third issues of the Review, to complete Volume I, will appear in the course of the academic years 1953-1954. The second issue will be privileged to publish an important article by Lord Wright on s. 92 of the Australian Constitution, a critical section to whose judicial exegesis that learned writer has in the past contributed so much. It is hoped, too, to include a further study of various types of equitable jurisdiction, here introduced by the leading articles of Sir Raymond Evershed and Mr. Woelper. An authoritative statement of the surviving pre-Judicature system of law and equity in New South Wales may well be of interest to overseas as well

as Australian lawyers. And efforts will continue to make the Comment, Legislation, Case Law and Book Review section of interest to overseas as well as Australian lawyers.

These are aspirations of the Sydney Law Review to be tested by its power of survival in the crowded world of legal literature. The Editorial Committee can but design it for survival and send it forth to the test, by commending it to those who are interested in the ever-expanding traditions of the Anglo-American common law.

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BOOKS RECEIVED

(For review in a later issue)

L. Oppenheim, *International Law, A Treatise.* Vol. II, Disputes, War and Neutrality, 7th edition by H. Lauterpacht, 1952. Longmans, Green and Co., London.

H. S. Nicholas, *The Australian Constitution.* 2nd edition, 1952. Law Book Company of Australasia Ltd.

Pollock, *Law of Torts.* 15th edition by P. A. Landon, 1952. London, Stevens & Sons Limited. Law Book Company of Australasia, Limited.

J. H. C. Morris, *Cases on Private International Law.* 2nd edition, 1951. Oxford University Press.

G. W. Paton (ed.), *The British Commonwealth—The Development of its Laws and Constitutions.* Vol. II, *The Commonwealth of Australia.* 1952. London, Stevens & Sons Ltd. Law Book Co. of Australasia Ltd.

SOME OTHER RECENT BOOKS

Now available in Australia

Halsbury, *Laws of England,* 3 ed. 1952, vol. 1 (£4/15/0).

Hewitt, *Control of Delegated Legislation,* 1953 (£2/8/6).

Jennings and Young, *Constitutional Laws of the Commonwealth,* 1952 (£3/3/0).

Joske, *Laws of Marriage and Divorce in Australia,* 3 ed., 1952 (£7).

Else-Mitchell, ed., *Essays on the Australian Constitution,* 1952 (£2/2/0).

Mackenzie, *Practice in Divorce,* 6 ed., by Treatt, St. John and Mahoney, 1952 (£6/17/6).

Mazengarb, *Negligence on the Highways,* 2 ed. 1952 (£3/5/0).

Paton, *Bailment in the Common Law,* 1952 (£5/5/0).

Williams, *Wills and Forms of Wills,* 2 vols., 1952 (£9/5/0).

Winfield, *Select Legal Essays,* 1952 (£2/12/6).

Winfield, *Law of Quasi-Contract,* 1952 (£1/18/9).