BOOK REVIEWS

STUDIES IN CANADIAN CRIMINAL EVIDENCE

By Roger E. Salhany and Robert J. Carter.
Toronto: Butterworths 1972. Pp. 367.

Occasionally a superior text is produced on the subject of Criminal Evidence in Canada. This is one of the rare occasions and makes it one of the more readable and instructive works on the subject to appear in this country. The "Canadian content" as promised by its title is adhered to. It is both an in depth and critical study of the Canadian evidentiary rules. But it is also a practical and up-to-date work. The subjects covered include the Hearsay Rule and its Exceptions, Admissions and Confessions, Burdens of Proof and Presumptions, Opinion Evidence, Identification Evidence, Character Evidence, Documentary Evidence and Corroboration. Aside from the editors themselves, the contributors include Mr. Justice Freedman, Mr. Justice E. P. Hartt, Mr. Justice Branca, Arthur Maloney, Q.C., the Honourable Antoine Rivard and Clay Powell.

The editors felt that rather than write a textbook on the complete law of evidence, they would cover what they felt were the more important areas in the field of evidence in a criminal trial. The book, published as part of the Canadian Legal Studies Series, should be highly recommended reading for practitioners and students of the Criminal Law.

Speaking on the rationale for the Hearsay Rule, Salhany reminds us that the reasons most frequently given for the exclusion of hearsay is that the testimony of the third person is not given under oath and that there is no opportunity to test by cross-examination the maker of the statement. But even if the witness is testifying as to something that a third person said under oath, it would still be hearsay and inadmissible. Would not the reason be in that case for the exclusion of such evidence, the fact that the demeanor of the witness who gave the evidence in the first instance cannot be observed? Judges and lawyers realize how important is the demeanor of witnesses on the stand.

One of the most important aspects to be covered in the book concerns the right of the accused to remain silent, or generally, the privilege against self-incrimination. It has been considered as the golden thread that runs through the Criminal Justice System. Arthur Maloney and Paul Tomlinson tell us in their essay that this privilege "has been one of the few decencies that the law has afforded the accused person since the 1700's". This right, like most rights or liberties, was not easily won. To many, it may (or may not) come as a surprise that this rule has now been criticized and challenged. One of the proponents for abolishing the privilege against self incrimination, the Honourable Mr. Justice Haines of the Supreme Court of Ontario, sets forth his reasons in the tenth chapter of the book. But if the reasons given by Mr. Justice Haines to maintain his thesis (The Criminal is Living in a Golden Age) appear at first sight to have some logical support, the rebuttal provided by Maloney and Tomlinson, in the writers' opinion, utterly destroys the

arguments by the learned Justice. Perhaps those who would abolish the rule should be mindful of the following as quoted at 337:

> The days of closed courts are gone, but the rule has remained since as one of those precious freedoms that recognize the practical limits of ever-increasing governmental power. It is one of the clearly defined rules that Harris B. Steinberg, former president of the National Association of Defence Lawyers in Criminal Cases, indicated benefited the victim, the judge, the witnesses, the jurors and every last citizen in the country, when he wrote:
>
> 'Any one of them may change roles in the new case tomorrow and the only assurance any of us has that he will not be a victim of injustice at some time in the future is to keep pure that ancient system of adversary advocacy so painfully wrung from tyrants over so long a period of history.'

But in fairness to Mr. Justice Haines, he recognizes the need for penal reform when he poses the question:

> Are we today clinging to the right to remain silent because of what we do to men and women found guilty. If so we are doing exactly what the judges did in medieval times when they developed the rule—to protect the offender from undeserving cruelty. In that event the law must wait on the reform of the correction services. Perhaps the changes must come together. Within 30 years we will be ashamed of what we do today to those we convict of crime as today we are ashamed of our burning of witches.

But the necessity of preserving the privilege of the accused to remain silent takes on new dimensions and urgency when we consider Judge Graburn's excellent article on Burdens of Proof and Presumptions. Speaking of the presumption of innocence, Judge Graburn says quite categorically that the presumption is only of operative significance at the time of arraignment at trial. In practice, and despite our protestations to the contrary, the learned Judge is right, and the concept is frightening. We are very fond of saying that a man is innocent until proven guilty. But here is what the learned Judge has to say:

> There is clearly no pre-trial presumption of innocence from a practical point of view. The late Henry H. Bull, Q.C., who ranked among the foremost of Canadian prosecutors, described the presumption of innocence at the pre-trial stage as wholly fictitious. Paraphrasing his writing, the thrust of his position was that the peace officer who arrested the defendant does not presume his innocence; nor the peace officer who deposes in an information that he has reasonable and probable grounds to believe that the defendant has committed an offence; nor the Justice of the Peace who issues a warrant or summons for the purposes of compelling the defendant's attendance in court; nor the victim of the offence who can identify the defendant; nor the gaoler; nor the justice presiding at the preliminary inquiry under Part 15 of the Criminal Code who, where there is any doubt, is obliged by the authorities to resolve it in favour of the Crown; nor the Grand Jury.
>
> During the investigative phase of the criminal process compulsory fingerprinting and photographing under the Identification of Criminals Act is inimical to any presumption of innocence.
>
> Even at trial there are both physical and conceptual features which are foreign to any presumption of innocence. Physically, any such presumption is somewhat tenuous when the defendant is placed in a box and guarded by Sheriff's deputies and, in the event the defendant is in custody, he is escorted in and out of the Court room by these officials. By way of parenthesis, if the defendant is free on recognizance, clearly bail is not granted as a result of a presumption of innocence, but is a device to secure the attendance of the defendant at trial. Conceptually, and this observation is applicable both before and at trial, any privilege against self-incrimination, or expressly recognized in s.2(d) of the Canadian Bill of Rights, is incompatible with a presumption of innocence.

In view of all that has just been said, Mr. Justice Hartt's observations in his essay on character evidence take on added significance, to assure a fair trial, as we shall soon see.

Besides discussing the import of Criminal Code changes made in 1969 affecting the "presumption" sections, the "Burdens of Proof" article deals with the meaning of the words "beyond a reasonable doubt". Perhaps the most favored definition is the one given by Lord Denning in *Miller* v. *Minister of Pensions* (1947) 2 All E.R. 372:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice.

But the author demonstrates that most attempts to improve on the definition of the words "beyond a reasonable doubt" have proved to be futile exercises and most judges who have tried to improve and explain its meaning to juries have met with disastrous results causing misdirections and consequent new trials being granted. The word "satisfaction" may well suggest, for instance, a standard lower than traditionally required before a man is branded as a criminal. "Feeling sure" savours of certainty. "Are you Shaw?" said the passerby to George Bernard Shaw. "Yes, certain" was the reply.

Judge Graburn also discusses the general subject of Standards of Proof, including the theories held on the subject by Professor Fridman (now Dean, Faculty of Law, The University of Alberta).

One other most important question dealt with in Studies in Canadian Criminal Evidence has been raised by Mr. Justice Hartt, now Chairman of the Law Reform Commission of Canada. His essay on Character Evidence raises a disturbing issue with consequent second thoughts in an important area of our Canadian Criminal Justice System, namely, the fairness of some of our criminal trials. Can the accused be said to have had a fair trial when he can be compelled to disclose at his trial his previous convictions when he decides or is compelled by circumstances to give evidence on his own behalf? Is it fair to compel him to do this on the sole grounds of testing his credibility? Admittedly there are circumstances where he should be compelled to disclose his previous convictions, as when he puts his character in issue. Certainly, as the noted jurist points out, the character of an accused is very relevant, but the law is very careful not to permit evidence of character being introduced in evidence, because it is simply inadmissible evidence, unless the accused himself takes the stand as a witness on his own behalf. But the moment he decides to give evidence, is he not placed at a great disadvantage? Is the accused in the same position as any other witness? Is there not great danger that the jury will confuse the issues and leave doubt as to whether the act or the actor is being condemned?

In this well-reasoned approach to all these questions, Mr. Justice Hartt demonstrates convincingly that the present practice and state of the law in this regard is most questionable. He argues that it is unnecessary and results often in hardship and a denial of a fair trial for an accused. He touches upon the history of section 12 of the Canada Evidence Act. It may well be that Parliament should consider favorably in the future what is recommended in the staff paper prepared for the Law Reform Commission, when it states that "the existing inquiry into

past convictions, under the guise of determining credibility must be forbidden. The presumption of innocence demands no less".

But the book should be considered essential reading for all lawyers and students if for no other reason than Mr. Justice Freedman's comments on the law of admissions and confessions. The learned jurist also touches on the question of the compellability of spouses to give evidence against each other and what he has to say on this subject is most timely in the light of the proposals by a committee of the Law Reform Commission to make husbands and wives compellable witnesses against each other. To quote him:

> The objective of a criminal trial is justice. Is the quest of justice synonymous with the search of truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. Such a result may follow from the law's deliberate policy. The law says, for example, that a wife's evidence shall not be used against her husband. If truth and nothing more were the goal, there would be no place for such a rule. For in many cases the wife's testimony would add to the quota of truth. But the law has regard to other values also. The sanctity of the marriage relationship counts for something. It is shocking to our moral sense that a wife be required to testify against her husband. So, rather than that this should happen, the law makes its choice between competing values and declares that it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at an unlimited cost. 'Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.'

Mr. Justice Branca, a practicing criminal lawyer for many years, will provide the reader with much enlightenment on a branch of the law that has always been a problem area, namely, what constitutes corroboration in law. This subject is explored thoroughly.

All in all, the editors of Studies in Canadian Criminal Evidence have succeeded marvelously in their stated objective to provide answers in these and in other problem areas in a criminal trial.

—GUY BEAUDRY*

*Alberta Provincial Judge, Donner Fellow 1972-73.

HUMAN RIGHTS CASEFINDER:
1953-1969: THE WARREN COURT ERA: Edited by A. F. Ginger Meiklejohn, Civil Liberties Library, California. Pp. XV and 281. $25.00.

The United States produces annually a huge volume of reported cases. To aid in finding them publishers have developed elaborate tools such as West's Key Number Digests and Sheppard's Citations.

The Casefinder is another of these tools, designed to direct one to the cases on Human Rights decided during the "Warren era". This refers to the sixteen year period when the Honourable Earl Warren was Chief Justice of the Supreme Court of the United States. While the Court has nine members, a total of sixteen justices sat with Chief Justice Warren. At any given time, a majority were among those classed as "activist". The Court acquired this label because it expanded the scope of protection of the individual on many fronts and in the name of one or another of the constitutional safeguards. In other words it struck down legislation and practices that previously had either been free from attack or been