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BOOK REVIEWS

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A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA— by James F. Dreher (South Carolina Bar Association, 1967. Pp. 97. $5.00, hardcover; $3.75, softcover).

When the Committee on Continuing Legal Education of the South Carolina Bar Association decided to publish a handbook on evidence law in South Carolina, it undertook a project of great potential value to the bench and bar of the state. The Committee also exercised good judgment in the selection of a writer, Professor James F. Dreher, and in agreeing to his suggested approach to this demanding task.[1]

That approach, which greatly enhances the worth of this new book, was to combine a brief and accurate restatement of present evidence law in South Carolina with occasional editorial comment on what evidence law *ought* to be — for the latter, drawing principally upon the two acknowledged giants among evidence commentators, Professors Wigmore and McCormick.

Mr. Dreher's restatement of present law combines adequate coverage with economy and clarity of style. A great deal of information is compressed into these scant 93 pages. True enough, Mr. Dreher develops only the main principles, but he does that accurately, and he provides references to the Wigmore and McCormick treatises for the qualifications and refinements. Thus, the book should in itself answer most of the evidence questions that arise in daily practice and should give judges and practitioners at least a start in researching finer points. Of course, most of the leading cases on evidence decided by the Supreme Court of South Carolina are cited, and many are discussed briefly in the text.

Mr. Dreher has a facility for covering quite well in a surprisingly small number of pages topics that greatly perplex many lawyers and judges. Two instances are sufficiently outstanding to merit special attention. On pages 29-33 the author gives a good summary sketch of the impact of federal constitutional law on the admissibility of evidence in state criminal trials. His exposition of what constitutes hearsay evidence, pages 59-63, is amazingly concise and extremely helpful.

1. *See* J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA iii (1967) (author's foreword).

Obviously in such a short outline of a complex subject any reviewer can spot passages in which he thinks that brevity of expression might render the exposition misleading. In his discussion of impeachment on collateral matters Mr. Dreher states as the standard test of what is collateral, whether the adversary would have the right to prove it in support of his case "independently of the purpose to impeach."[2] That should read, "independently of the purpose to impeach by showing the inconsistency." Some facts are not considered to be collateral even though they can be shown only to impeach. Thus, another witness can be called to contradict a witness, not only on facts relating to the substantive issues of the case, but also on facts relating to "bias, interest, conviction of crime, and want of capacity or opportunity for knowledge."[3]

The only other passage which I feel is sufficiently misleading to require notice deals with presumptions. Mr. Dreher says: "The most valuable attribute of a rebuttable presumption (and the only one we really know it possesses) is that it will take a case to the jury if no evidence is offered against the presumed fact."[4] In the parenthetical clause Mr. Dreher fails, even as Professor McCormick's own treatise fails, to distinguish between permissible inferences (or prima facie evidence) and true presumptions. If the basic facts of a true presumption are shown, and if no evidence is offered against the presumed fact, it is commonly accepted that this does more than get the case to the jury; it gets the case "beyond" the jury and requires a peremptory instruction that the presumed facts must be taken as true.[5]

The second aspect of Mr. Dreher's approach in this book, as indicated above, was to deal with the law of evidence as it *ought* to be. It should be said here that Mr. Dreher found (as does this reviewer) that the South Carolina Court has done a generally good job with the rules of evidence.[6] But in three distinct ways Mr. Dreher has been bold enough to advise the Court on ways and means of making the good better.

First, he discusses several areas where ambiguous or seemingly conflicting holdings give the court flexibility for the future, and in these areas he points the way that has the approval of the

2. *Id.* at 15.
3. C. MCCORMICK, THE LAW OF EVIDENCE 101-02 (1954).
4. J. DREHER, *supra* note 1, at 86.
5. *See* STANSBURY, NORTH CAROLINA EVIDENCE §§ 215 & 218 (2d ed. 1963).
6. J DREHER, *supra* note 1, at v (author's foreword).

major commentators. A good example of this is the discussion of the business records exception to the hearsay rule. Mr. Dreher there commends to the court an early strong case giving a liberal construction to the common law rule and expresses the hope that a later, more restrictive holding will not have further influence.[7] Mr. Dreher also warns the court about potentially troublesome interpretations of certain cases possibly affecting the competency as witnesses of atheists and agnostics[8] and a case dealing with the authenticity of telephone calls purporting to come *from* a business office.[9]

Second, Mr. Dreher traces the very sound gradual evolution of several areas of evidence law in South Carolina and modestly points out the next logical steps. For example, he traces the court's gradually expanding acceptance of the opinions of highway patrolmen on the speed of vehicles, estimated from skid marks and other physical evidence; and he suggests further liberalizations that accord with advancing police science and with the attitudes of courts in other states.[10] The author also gives the same treatment to the exception to the hearsay rule governing testimony given at a former trial.[11]

Third, Mr. Dreher does not shy away from flatly recommending change where South Carolina evidence law seems plainly wrong. A prime example is his suggestion that the rule holding that a litigant waives his objection to testimony by cross-examining on the subject should be changed.[12] It is, indeed, unfair to require a lawyer to forego all chance of carrying a point with the jury in order to preserve the point for appeal. Mr. Dreher also calls for changes in the Dead Man's Statute[13] and in the rules governing the admissibility of a writing as a record of past recollection.[14] All of these suggestions are supportable and seem to have been well considered.

Reviewing this book is my first concentrated introduction to evidence law in South Carolina. With all respect, Mr. Dreher might well have suggested perhaps two further changes. First, the practice in many states of permitting an expert who has

7. *Id.* at 81-82.
8. *Id.* at 25.
9. *Id.* at 48.
10. *Id.* at 11-12.
11. *Id.* at 63-65.
12. *Id.* at 2.
13. *Id.* at 23-24.
14. *Id.* at 80.

been present in the courtroom to state his opinion based upon "the evidence you have heard given" seems a very sound practice, since hypothetical presentation has many problems and the precise basis of the opinion may be explored at length on cross-examination.[15]

Second, South Carolina has not enacted a statute creating a privilege for communications between physician and patient.[16] This is fine, since such statutes serve little or no useful purpose and give plaintiffs in personal injury cases an unfair advantage. On the other hand, it seems that the policy considerations which justify South Carolina's priest-penitent privilege[17] also suggest a need for a privilege for psychiatrist-patient communications. These relationships have efficacy only where communication is as uninhibited as possible.

South Carolina evidence law has far more good and progressive features than noticeably bad ones. For example, Mr. Dreher discusses the statute which admits medical or scientific works into evidence in certain types of cases. Mr. Dreher finds it hard to believe the statute was literally intended and seems to suggest a restrictive interpretation.[18] Respectfully, I take sharp issue here. The statute is a giant stride forward, as a learned treatise exception to the hearsay rule is well justified in theory and practice. The "battle of the books" feature, which the author fears, has not materialized in the one state which has had for many years a common law rule admitting treatises. That state is Alabama, and my favorable attitude undoubtedly stems from my experience with the rule when I practiced there some years ago.[19]

Other features of South Carolina evidence, as reported by Mr. Dreher, which strongly appeal to me are: the commendably discretionary approach to the rule in *Queen Caroline's Case*,[20] governing the "laying of a foundation" to impeach a witness by prior inconsistent statement;[21] the rule whereby the credibility of a witness who is a stranger in the community may be bolstered in advance by character witnesses who know his reputation[22]

15. *See id.* at 10 (author's discussion of restrictive South Carolina practice).
16. *Id.* at 28.
17. *Id.* at 29.
18. *Id.* at 85.
19. *See* Comment, *Learned Treatises as Direct Evidence: The Alabama Experience*, 1967 DUKE L. J. 1169.
20. 129 Eng. Rep. 976 (1820).
21. J. DREHER, *supra* note 1, at 13-14.
22. *Id.* at 22.

(Trial courts might well be given a discretion to permit such advance bolstering of other classes of witnesses which juries sometimes instinctively mistrust, such as Negroes, children, prosecuting witnesses in assault cases, and the like.); and the refusal of the South Carolina Court to adopt at least one of the senseless restrictions on the use in evidence of dying declarations.[23]

Debunking department: Mr. Dreher has performed a splendid service for lawyers and judges by exposing what he calls a "folk-lore rule of evidence," the supposed principle that the hearsay rule never excludes a statement that was made in the presence of the party against whom it is offered. The author is quite right in declaring that this rule "simply cannot be correct;"[24] and, if it causes half as much trouble in the trial courts of South Carolina as it does in those of Alabama and North Carolina, Mr. Dreher's debunking of it is alone worth the price of this little book.

A copy of *A Guide to Evidence Law in South Carolina* will most likely and most deservedly find its way to the desktop of every trial lawyer and every judge in South Carolina.

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23. State v. Terrell, 12 Rich. L. 321 (S.C. 1859); *see* J. DREHER, *supra* note 1, at 75-76.

24. J. DREHER, *supra* note 1, at 71.