

***The Conduct of an Action* R. J. Rolls, Q.C. and the late W. B. Williston, Q.C., Toronto: Butterworths, 1982. Pp. xl, 216, \$29.95 (cloth).**

Reading this book will not transform the reader into a *guru nonpareil* of the litigation set but putting into practice these heretofore uncollected precepts of trial lawyers will lift the novice to the level of a semi-professional and convert the semi-professional into a knowledgeable adversary.

The Conduct of An Action is a legal work which transcends time. It is not a book which is simply *circa*. 1980. The writers have collected, extracted and then cogently authored the principles of case law, original reason and common sense from decisions spanning more than two centuries; decisions which made some lawyers, trial lawyers, and some trial lawyers, great lawyers.

Readers may find the book slow-going despite the descriptive word "Action" in the title, the pontificating "Rights and Duties of Judge and Counsel at Trial" or such, *en vogue* and whimsical chapter headings as "The Brief" or the untailed "Nonsuit" (puns intended). It is a book for mental ingestion, for study and not for casual reading. It is the type of work you want to discuss with other lawyers as you proceed through its depths because it stimulates one's thinking.

Highly profiled throughout this legal work is the preeminence of referrals to criminal cases. Not generally appreciated or discerned in our profession is the fact that many elements of preparation and conduct of an action have a kinetic mobility between civil and criminal practice.

Because of the distinguished position of one of the authors, the late, W. B. Williston, Q.C., the book may have a fruitful shade more significance for New Brunswick lawyers than might otherwise be. Mr. Williston was the most prominent innovator of concepts in putting together the new rules of court for Ontario. His untimely death transferred the helm to new captains with a different philosophy. New Brunswick followed the conceptual wake of the Williston course. Thus, various references in the book to new rules will be beneficent to New Brunswick practitioners in areas where there is a subject lacuna in the written lectures by the drafters of the New Brunswick Rules of Court.

This book carries a subliminal theme throughout its pages which gently prods the reader to think and act ethically toward the bench, bar and witnesses as the lawyer shepherds the client's case through the preliminary preparation for trial and the trial itself. This feature alone lifts it high above the mountain of books by U.S. authors who exalt the "smart" tactics which

have made them successful practitioners or former practitioners. It is therefore a treat to read a work which is truly for the benefit of the profession rather than promoting the great "I am".

The reader will perceive a clear distinction between the purpose of this book and the two volume effort by the same scribes in 1970, *The Law of Civil Procedure*¹ which interpreted the Rules of Court through judicial precedent and practice.

Williston and Rolls, these generators of useful legal texts, are cautious in what they say, and ever so precise. They do not venture unsupported opinions for academic stimulation but solidly footnote what they say. The only deviation of note was a challenge to Phipson, 12th edition² with respect to the right of defense counsel to cross examine a co-defendant in all cases. They based their objection to Phipson's conclusion on an 1879 New Brunswick case heard in Saint John, *McMillan v. Walker et al.*,³ which particular point, in refusing defense counsel the right to cross-examine a co-defendant, was sustained on appeal⁴ and approved by the Supreme Court of Canada.⁵ I agree with Williston and Rolls' conclusion.

Several references are made to the draft *Uniform Evidence Act*.⁶ The references may be anticipatory for the benefit of the readers or the authors' subtle approval of the draft Act; it is hard to tell which.

This book is not a collection of recent and startling pronouncements of the highest judicial authorities which by themselves will adapt and equip the reader for the modern practice of law. Far from it, it is a modern collection of thoughtfully reasoned judgements tied together by two experts in the field of legal thinking who are/were (W. B. Williston died prior to publication of the book) adept at reducing the individual high water marks of each case into cohesive themes and the themes into easy to read, although sometimes dry, subjects and chapters.

Fully one-third of the case material forming the nucleus of the book is drawn from nineteenth century cases and more than one-third from the first half of this twentieth century.

¹W. B. Williston and R. J. Rolls, *The Law of Civil Procedure*, (Toronto: Butterworths, 1970).

²*Phipson on Evidence*, 12th ed., (London: Sweet and Maxwell, 1976). Note that the 13th edition has an identical passage.

³Unreported, St. John Circuit, November 1879.

⁴(1881), 21 N.B.R. 31 (N.B.S.C.).

⁵(1882), 6 S.C.R. 241 (S.C.C.).

⁶Bill S-33, First Session, Thirty-Second Parliament, 29-30-31 Elizabeth II 1980-81-82.

Having found that seasoned precedent forms the nucleus of the book, one also discovers that the core of the legal atom is not the Supreme Court of Canada, Privy Council or House of Lords but rather the lower courts. In fact, the courts of first instance and of appeal, contribute ninety percent of the stepping stones used by the authors to escort the reader through the subject matters of their treatise on managing an action. This fact, nor this percentile, should come as surprising axioms, they are merely the frustrating truths which legal probers eventually run to ground in their search for the final authority.

The Conduct of An Action may be described by some as a handbook, but if so, it is an altruistic work which lifts the nascent to the periphery of experience and keeps the experienced, experienced.

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