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PHIPSON

ON

EVIDENCE

FIRST SUPPLEMENT TO THE THIRTEENTH EDITION

SWEET & MAXWELL

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PHIPSON ON EVIDENCE

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EDITORS' NOTE: As Senior Editor of the last three editions of Phipson on Evidence, Judge John Buzzard took a very active part in the revision of the main work and the preparation of Supplements. His death in January 1984 has deprived us of the benefit of his energy and scholarship, and is a great loss not only to us personally but to all those who use and work with Phipson.

CHAPTER 1.—INTRODUCTORY

PHIPSON PARAGRAPH

1–19 NOTE 88. The scepticism expressed in the footnote to the text as to the correctness of *R.* v. *Reynolds* appears to have received some support from the decision in *R.* v. *Goldstein* [1982] 1 W.L.R. 804 (C.A.), where it was held that the principle that a hearing must take place in open court is not necessarily to be applied where a question of pure law for the judge falls to be decided.

In magistrates' courts, where the tribunal unites the functions of trier of fact and adjudicator on legal questions, it is not appropriate to hold a trial within a trial in order to determine whether or not evidence is admissible. Thus, magistrates who refused to hear further argument about an issue they had decided, purportedly on the *voir dire*, were held to have adopted the correct course, even if only by accident, because the hearing of the issue as to admissibility was not in truth a trial within a trial at all: *F.* (*an infant*) v. *Chief Constable of Kent* [1982] Crim.L.R. 682 (D.C.).

5.—LAW AND FACT

1–24 Add NOTE 17a. See Mureinik, "The Application of Rules: Law or Fact" (1982) 98 L.Q.R. 587.

Fact

1–30 NOTE 69. The question of whether or not the jury are entitled to take into account the accused's own view of whether or not his conduct was honest, has been further considered in two decisions of the Court of Appeal in *R.* v. *McIvor* [1982] 1 W.L.R. 409 (C.A.) and *R.* v. *Ghosh* [1982] 3 W.L.R. 110. The court noted, and perhaps exaggerated, the conflict between such cases as *R.* v. *Boggeln* (see text), *R.* v. *Gilks* [1972] 1 W.L.R. 1341 (C.A.) and *R.* v. *Landy* [1981] 1 W.L.R. 409 (C.A.) (all cases where the subjectivist line was or appeared to be approved) and the more orthodox view expressed in *R.* v. *Feely* and *R.* v. *Greenstein* (see text) that it is the jury's view of what is dishonest and not the accused's which is relevant to the issue of criminal liability. In *R.* v. *McIvor* (above), the Court of Appeal restated the proposition that dishonesty was a question for the jury alone, but they appeared to draw a distinction between offences involving theft and those involving fraud, a distinction inconsistent with *R.* v. *Greenstein* (above). In *R.* v. *Ghosh* (above) the court removed this distinction, and brought back the accused's view of his own acts

as being directly relevant to the question of whether or not he should be convicted of an offence of dishonesty. This does not, as some commentators have suggested, give the accused a double-barrelled attack on the indictment, entitling him to an acquittal if *either* the jury *or* he himself believed that the act with which he was charged was not a dishonest one. For these purposes the Court of Appeal took the question to be not the simple one of whether the accused thought that he was acting honestly, but whether he thought that *others* would think so. This is not dissimilar to the approach proposed in the main work; and while we recognise that it has the disadvantages as well as the advantages of sophistication, we do not think that the question is or could be a simple one, and respectfully suggest that the approach of the Court of Appeal in *R.* v. *Ghosh* is to be welcomed.

CHAPTER 2.—MATTERS OF WHICH EVIDENCE IS UNNECESSARY

2.—Judicial Notice

(g) *Notorious facts*

2–21 Note 98. Judicial notice may be taken of the fact that the standard form of Lloyd's S.G. Policy, with appropriate Institute Warranties attached, is used worldwide: *The Al Wahab* [1982] 1 W.L.R. 961 (H.L.).

Add Note 99a. In the interests of uniformity, judicial notice will be taken of the fact that a flick-knife is an offensive weapon: *Gibson* v. *Wales* [1983] 1 W.L.R. 393 (D.C.); *R.* v. *Simpson* [1983] 1 W.L.R. 1494 (C.A.). The same considerations do not apply to sheath knives, where it is a question of fact in each case whether any particular sheath knife was an offensive weapon: *R.* v. *Williamson* (1977) 67 Cr.App.R. 15 (C.A.).

Note 2. Add: *Waring* v. *Administração Geral* [1983] 1 Lloyd's Rep. 45: arbitrators may use their general knowledge of the relevant trade without putting the matters on which they rely to the parties. If, however, they have particular knowledge of the events which are the subject-matter of the dispute before them, they are bound to tell the parties of that knowledge so as to enable them to call evidence in order to support or contradict the arbitrators' understanding of the facts.

CHAPTER 4.—BURDEN AND STANDARD OF PROOF

1.—Burden of Proof

B. Meaning and Scope of Rule

(2) The evidential burden

(b) *The evidential burden in criminal cases*

4–10 If there is evidence of facts which could give rise to a defence of lawful excuse in a case of threatening to kill (Offences Against the Person Act 1861, s.16, as amended by Sched. 12 to the Criminal Law Act 1977) the onus lies with the prosecution to prove the absence of lawful excuse: *Cousins* [1982] 2 W.L.R. 621 (C.A.).

If in a case of handling stolen goods a defendant says that he believes that the goods are stolen, the prosecution is not relieved of proving that the goods *are* stolen: *R.* v. *De Acetis, The Times*, January 22, 1982.

4–13 The judge should only leave to the jury a defence which has not been put forward by the defendant when there was evidence from which the jury could reasonably infer that the defendant acted in a way which provided a defence at law. There was no duty to leave to the jury fanciful or speculative defences: *Critchley* (1982) Crim.L.R. 524, (C.A.) (A case of murder in which a defence of self-defence was raised for the first time in the defence speech. The Court of Appeal upheld the judge's direction that self-defence was not in issue.) The failure of a judge to leave a defence raised by evidence (no matter from what source) can amount to such a non-direction as to destroy the conviction if the Court of Appeal conclude that he was called upon to leave the defence to the jury: *R.* v. *Bashir* (1982) 77 Cr.App.R. 59, 62 (*per* Watkins L.J.).

NOTE 63. (i) *Non-insane Automatism*: Add *R.* v. *Stripp* (1978) 69 Cr.App.R. 318 (C.A.). (viii)(a) *Road Traffic Act* 1972. The provisions in Sched. 8 to the Transport Act 1981 have been substituted for ss.6–12 of the Road Traffic Act 1972.

Statutory and common law exceptions

(a) *Where a statute expressly casts the burden upon the defendant*

4–14 NOTE 68. (i) *Diminished Responsibility*: Add: While medical evidence is not in terms required by the Homicide Act 1957, s.2(1), in order to establish diminished responsibility, it is a practical necessity if the defence is to be run at all: *R.* v. *Dix* (1982) 74 Cr.App.R. 306, (C.A.), applying *R.* v. *Byrne* [1960] 2 Q.B. 596; 44 Cr.App.R. 246.

(iv) *Prevention of Corruption Act 1916*, s.2. Add *R.* v. *Braithwaite* [1983] 1 W.L.R. 385; [1983] 2 All E.R. 87; 77 Cr.App.R. 34.

2.—STANDARD OF PROOF

(1) Criminal cases

4–31 The failure of the judge to direct the jury was a serious defect in the summing-up which could not be cured by the fact that prosecuting and defence counsel referred to the standard of proof in their speeches and by the fact that the jury was experienced: *R.* v. *Edwards* (1983) 77 Cr.App.R. 5 (C.A.). The judge's duty is "to direct the jury on the standard of proof so as to ensure that the direction was heard by them in each criminal trial with the authority which only the judge could give to such a direction": *Edwards, supra*, p.7.

In *Edwards* the court said that the proviso could be applied in cases where there had been a failure to direct the jury on the burden of proof, as in any other case. The court found that the case against the appellant was overwhelming and applied the proviso, although there had been no direction as to the standard of proof.

NOTE 39. Add: A direction to the jury that they must be satisfied so that they are "reasonably sure" is enough to vitiate a subsequent correct direction as to the standard of proof: *R.* v. *Sweeney, The Times*, October 22, 1983 (C.A.).

(c) *Admissibility of evidence*

4–34 In *R.* v. *Ewing* [1983] Q.B. 1039; [1983] 3 W.L.R. 1, a differently constituted Court of Appeal said that the reasoning in the judgment in *Angeli* was *per incuriam*. The court held that in a criminal trial where handwriting is to be used for the purposes of comparison under section 8 of the Criminal Procedure

Act 1865, it should be proved to the satisfaction of the judge to be genuine and the standard of proof should be the normal criminal standard.
The Court's reasoning was as follows:

(i) Section 8 of the 1865 Act says nothing about the standard of proof to be used.

(ii) The standard of proof is governed by the common law (see *Blyth* v. *Blyth* (No. 2) [1966] A.C. 643 (H.L.), to which the court in *Angeli* had not been referred).

(iii) Therefore in civil cases, the civil standards should be used; and in criminal cases, the criminal standard.

This view is consistent with the view expressed in the main text. It is submitted that *Ewing* should be followed in preference to *Angeli*.

CHAPTER 9.—FACTS RELEVANT TO PROVE THE MAIN FACT

5.—Standards of Comparison

Handwriting

9–42 Note 22. *R.* v. *Angeli* has been overruled by *R.* v. *Ewing* [1983] Q.B. 1039 (C.A.): see below § 27–67.

CHAPTER 12.—SIMILAR FACTS

A.—General Principles

Discretion of court

12–06 In *R.* v. *Rimmer and Beech* [1983] Crim.L.R. 250, the defendants were charged with murder. Each blamed the other. Counsel for one defendant cross-examined the second defendant as to the latter's mental health. The second defendant sought leave to call evidence on this issue. The judge refused leave. The Court of Appeal upheld this decision since to open up such issues would involve an inordinately long examination as to the man's mental health and would have blurred the crucial issues for the jury. The Court apparently considered that, beside the problem of opening up side issues which might confuse the jury, the evidence was insufficiently relevant. This is however not clear from the report.

Need a specific defence be raised before similar fact evidence is admitted?

12–20 In *R.* v. *Lewis* (1982) 76 Cr.App.R. 33 the defendant was indicted for offences of indecency against children. Four incidents were involved. In the case of three of the incidents, the defence was accident or that there was an innocent explanation. In the fourth case, the defendant denied that the incident had occurred at all. Evidence was admitted (a) of documents obtained from the Paedophilic Society and (b) of the defendant's references to himself as a paedophile. The defendant appealed against his conviction on the grounds that:

(i) where there is substantial dispute as to whether the acts complained of took place, the prosecution is not entitled to put forward evidence designed to negative accident or an innocent explanation of the acts;

(ii) the judge should have excluded the evidence as a matter of discretion.

The Court of Appeal held that:

(i) The evidence of paedophilia was admissible as to those incidents where

the defence was accident or innocent explanation and the fact that it was inadmissible on the count when the incident was denied did not render the evidence inadmissible in the context of the other counts.

(ii) The evidence could have an unduly prejudicial effect if its true impact and significance was not carefully explained to the jury. But since the judge had done this the appeal did not succeed on that ground either.

Proving similar facts

12–32 Where the defence involved casting serious imputations on the character of a prosecution witness, the Court of Appeal held that the judge had properly allowed the prosecution to adduce similar fact evidence as additional evidence: *R.* v. *Hill* [1982] Crim.L.R. 518.

CHAPTER 13.—CHARACTER

4.—Evidence of the Character of the Accused

(3) Evidence of the bad character of the accused

13–16 Note 78. Add: *R.* v. *Nye* (1982) 75 Cr.App.R. 247 (C.A.), where the accused in a criminal case has a conviction which is "spent" under the Rehabilitation of Offenders Act 1974, a direction should be sought from the judge at the outset of the trial as to whether or not the accused may be treated as a man of good character. The matter is one for the discretion of the trial judge, and he should take into account how long ago the conviction became spent and how dissimilar to the present charge is the offence of which the accused was formerly convicted.

(d) *Cross-examination of the accused as to character*

13–24 Note 11. Add: *R.* v. *Palmer* [1983] Crim.L.R. 252 (C.A.), (no cross-examination about acquittals—see further below § 13–47).

Exceptions to section 1(f)

13–25 Notes 13–14. In *R.* v. *Weekes* [1983] Crim.L.R. 801 (C.A.), the accused pleaded guilty to certain charges as to which he had made admissions in a statement to the police. He pleaded not guilty to other charges, the subject of a separate indictment, and said that admissions in the statement relating to those offences had been obtained by intimidation. The trial judge permitted the prosecution to cross-examine him about the charges to which he had pleaded guilty, for the purpose of showing consistency. *Held* that, even though the cross-examination might have been permitted under section 1(*f*)(ii), the conviction would be quashed because there was no right to introduce the acquittals under section 1(*f*)(i) for the stated purpose.

13–26 Add at the end: for a discussion of the purposes for which cross-examination under section 1(*f*)(i) is permissible, see Pattenden, "the Purpose of Cross-examination Under Section 1(f) of the Criminal Evidence Act 1898," [1982] Crim.L.R. 707.

General effect of section 1(f)(ii)

13–29 Note 34. Add: *R.* v. *de Vere* [1981] 3 W.L.R. 593 (C.A.), where it was held: (a) that, an unsworn statement attacking the prosecution witnesses does not expose the accused to cross-examination under section 1(*f*)(ii); (b) that,

following *Gadbury* and *Campbell* (see text), an assertion of his good character given by the accused in the course of an unsworn statement may be the subject of evidence in rebuttal, subject to the leave of the court being first obtained. The consistency of the two halves of this decision is less than striking.

Operation of section 1(f)(ii)

13–37 Add at NOTES 70–78: *R.* v. *Britzman* (1982) 76 Cr.App.R. 134 (C.A.) is of general importance in relation to the application of the "imputations" provisions of section 1(*f*)(ii). It was held that merely to deny admissions alleged by the police to have been made to them or in their presence would, on the facts of that case, suffice to deprive the accused of his protection under section 1(*f*), even though his counsel was astute enough to avoid the suggestion that the police were guilty of perjury. The decision in *R.* v. *M'Gee and Cassidy* (see text) was preferred to that in *R.* v. *Nelson* (criticised *ibid.*). The court, in laying down guidelines for the application of section 1(*f*)(ii), reiterated the well-established principle that a mere emphatic denial of a charge would not justify cross-examination on the accused's record, and it was observed in particular that a denial of a particular statement was not the same as the suggestion that the account of the whole of an interview was fabricated. Similarly, the court issued a reminder that it must be recognised that defendants sometimes use wild language in giving evidence, and that that will not necessarily involve the casting of imputations on the character of prosecution witnesses, especially where the form of cross-examination to which the accused has been subjected has in effect trapped him into an intemperate observation. Finally, the court observed that it was unnecessary to rely on the section when the other evidence against the accused is overwhelming, although we have doubts as to the appropriateness of the trial judge being required to make an assessment of the weight of the evidence, especially when it is incomplete, for the purpose of guessing how it will appear to a jury.

Purpose of cross-examination under section 1(f)(ii)

13–41 NOTE 90. Add: Pattenden *op. cit.* § 13–25 above.

Invisibility of character of accused

13–43 NOTE 8. Add: In both *R.* v. *Stubbs* (1981) 79 Cr.App.R. 246 (C.A.) and *R.* v. *Winter* [1980] Crim.L.R. 659 (C.A.), it was held that an accused ought not to be cross-examined as to credit, after he had thrown away his shield, on the basis that the entries in his application for legal aid were false.

13–45 NOTE 20. Add: *R.* v. *Watts* (1983) 77 Cr.App.R. 126 (C.A.). In this case, the Court of Appeal gave effect to some of the criticisms levelled at the decision in *R.* v. *France*, which was said to have been misreported and suspect. In *R.* v. *Watts* the accused, a man of low intelligence, with two previous convictions for indecently assaulting small children, was accused of an indecent assault against a woman which had taken place near his home. He alleged the admissions which he was said to have made to the police were fabricated, and his conviction was quashed on the ground that the trial judge had erred in permitting his previous convictions to be put to him in cross-examination under section 1(*f*)(ii). It must be said that the decision has not rendered the law any clearer or more certain, because the ground on which the Court of Appeal proceeded was that the trial judge had exercised his discretion in the wrong way, and that neither *R.* v. *France* nor *R.* v. *Duncalf* (see text) gave guidance on the exercise of the discretion. Nor is the question of the correct principles

governing the exercise of the discretion in relation to previous similar and previous dissimilar convictions satisfactorily resolved by the latest decision (although we think that it has much to commend it), because there was not a full consideration of the relevant authorities: see further below, § 13–49.

Procedural aspects of section 1(f)(ii)

13–47 NOTE 31. Add: The fact that it is desirable for the judge warns a defendant or his counsel when a line of cross-examination involves a risk of falling foul of s.1(*f*)(ii) involves the need for the judge to know in advance of the defendant's character: *R.* v. *Ewing* [1983] Q.B. 1039 (C.A.). The position is different in the case of magistrates, who also act as triers of fact—see *R.* v. *Liverpool City Justices, ex p. Topping* [1983] 1 W.L.R. 119 (D.C.).

Add NOTE 32a. See *R.* v. *Palmer* [1983] Crim.L.R. 252 (C.A.), where an accused referred to his previous convictions for the purpose of showing that he had always pleaded guilty to offences of which he was guilty. In the course of cross-examination as to whether or not juries had always believed him, the accused said that he had been acquitted by a jury when he had pleaded not guilty. The judge refused an application which was immediately made on behalf of the accused that he discharge the jury, but he warned them to disregard the answer and the acquittal, without recurring to this in his summing-up. It was *held* that the accused had put his bad character in issue, and that in those circumstances counsel had to be particularly careful; but that the trial judge had acted perfectly properly. It was said that it might have been different if the accused had put his *good* character in issue. It is, with respect, hard to see (a) how the accused's bad character was "in issue," since there was no dispute about it, and the accused was himself relying on it; (b) how the acquittal reflected on the accused's character, when all it did in fact was to lend credence to his case that he pleaded guilty when he was guilty; and (c) how proviso (ii) to s.1(*f*) ever came to be relevant at all, because, the accused's bad character having been "revealed," the prohibition never bit in the first place: see *Jones* v. *D.P.P.* (Text § 13–25 to § 13–26). As it is not uncommon for an accused to rely positively on his previous convictions, the implications of the decision in *R.* v. *Palmer* may require that it be reconsidered.

Judicial discretion under section 1(f)(ii)

13–48 NOTE 40. Add: *R.* v. *Nye* (1982) 75 Cr.App.R. 247 (C.A.) shows that when exercising the discretion under s.1(*f*)(ii) the judge should take into account the provisions of the Rehabilitation of Offenders Act 1974.

13–49 Add: *R.* v. *Watts* (*supra* § 13–45 n. 20). The Court of Appeal held that the two convictions for indecently assaulting small children had little, if any, relevance to credibility, not being offences of dishonesty. While, as stated above, there is much to be said for this approach, consistent as it is with the dicta in *Maxwell* v. *D.P.P.* [1935] A.C. 309 (H.L.) (on which the Court of Appeal expressly relied) as to the danger of the jury confusing matters directly relevant to the issue of guilt and those which go merely to credibility, no reference was made to the indivisibility of the accused's character (see text § 13–43) nor to the procedure followed in *Selvey* v. *D.P.P.* (see text § 13–45, n. 15) where convictions for dishonesty were excluded, and convictions for similar sexual offences were permitted to be the subject of cross-examination. We think, with respect, that the approach adopted in *R.* v. *Watts* was the right one; but it would be helpful to have the court's exegesis of the effect of the recent authorities which have moved away from the *Maxwell* principle.

NOTES 46–47. Add: *R.* v. *Varley* [1982] 2 All E.R. 519 (C.A.) lays down guidelines for the court's approach to s.1(*f*)(iii) of the 1898 Act. In that case, one of two defendants jointly charged with robbery alleged that his admitted participation was due to the threats of the other accused. The latter denied that he had taken part in the robbery at all, and alleged that his co-accused was lying. The Court of Appeal held that he had rightly been permitted to be cross-examined on his record under s.1(*f*)(iii), and stated the relevant principles as follows:

(a) The expression "evidence against any other person charged in the same proceedings" in the sub-paragraph means evidence which supports the prosecution case or undermines the defence of the other defendant.
(b) Once the subsection was applicable, there was no discretion to prevent cross-examination on behalf of the co-accused under it, though in appropriate cases there might be justification in allowing separation of trials.
(c) It was immaterial whether the evidence which triggered the operation of the subsection was given in chief or in cross-examination.
(d) A hostile intent was unnecessary to bring the subsection into operation: the test for its applicability was objective.
(e) Where the case fell within the category of undermining a co-defendant, a cautious approach was to be adopted: it is insufficient that the evidence of one accused is inconvenient for a co-accused, nor is mere inconsistency between their respective evidence of itself sufficient to activate the subsection.
(f) A mere denial that one accused took part in an alleged joint venture will not justify a cross-examination under s.1(*f*)(iii): the evidence must also point to the involvement of his co-accused.
(g) However, contradiction of the other defendant's account of the affair might well (as in the instant case) amount to "evidence against" that defendant.

The Court in this case suggested that it would be unnecessary thereafter to refer to any other authority for guidance on the application of s.1(*f*)(iii); and it certainly contains a most helpful summary of the applicable principles. Those who wish to look behind it all the same, will find additional assistance in the cases of *R.* v. *Davis* and *R.* v. *Bruce* (to be found in the main work) and *R.* v. *Hatton* (1977) 64 Cr.App.R. 88 (C.A.) (which ought to be, but appears to have slipped through the net).

13–51 Add: see Pattenden, *op. cit.* § 13–25 (*supra*).

5.—CHARACTER OF THIRD PARTIES

13–53 NOTE 62. Add: *R.* v. *Viola* [1982] 1 W.L.R. 1138 (C.A.). The decision in *R.* v. *Lawrence* and *R* v. *Mills* were followed, save that a dictum in the latter case that it was a matter for a judge's discretion whether or not to allow the complainant in a prosecution for rape to be cross-examined on her sexual conduct on other occasions was disapproved. It was not a matter of "discretion," but of "judgment" (although we do not fully appreciate the distinction). In the instant case, it was held that the trial judge was right to refuse to allow cross-examination of the prosecutrix as to whether or not she had had intercourse with her boy-friend on the afternoon following the evening of the alleged rape, but wrong in refusing to allow cross-examination as to an alleged attempt by