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MURPHY ON
EVIDENCE

Peter Murphy



NINTH EDITION

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PREFACE TO THE NINTH EDITION

This ninth edition is published on the 25th anniversary of this book. I wrote the first edition during the period 1979/1980 as a teaching vehicle for the use of students and teachers working together on an introductory course in the law of evidence. The choice of texts at the time lay between Cross, a rich, complex academic work, but one which students with no previous background in the subject found difficult; and one or two short books which provided merely an outline of the law without going into enough detail to be useful, certainly for a degree-level course. It seemed to me that a text which fell somewhere between these two extremes, providing adequate academic coverage while at the same time dealing to some extent with the realities which face judges and practitioners in this eminently practical subject, would prove to be useful. During the process of writing the book I experienced many doubts. The kindness and encouragement of Professor Sir Rupert Cross, conveyed in a number of warm personal conversations, was a source of great comfort during those times. I took a partly completed manuscript to a major publishing house, which rejected it on the ground that the fictitious case of *Coke and Littleton* I had devised for teaching purposes was too salacious. A chance introduction led me to John Gibbs of Financial Training Publications, who agreed to publish the book without hesitation after a single pleasant lunch. He did so in 1980 under the FTP hallmark title, *A Practical Approach to Evidence*, and the salacious tale of *Coke and Littleton* remained as written. The formation of Blackstone Press by John's colleagues, Alistair MacQueen, Heather Saward, and Jonathan Harris, provided an amicable transition to a specialist legal publishing house, where every edition up to and including the seventh, was prepared with meticulous care under the eagle eye of my editors, Derek French and Pat Brown. Along the way, Blackstone changed the book's name to *Murphy on Evidence*. The eighth edition was the first to be published by Oxford University Press, following OUP's acquisition of Blackstone. Over twenty-five years and eight editions, I have tried to be faithful to the mission of the book to provide an up-to-date and readable introduction to the law of evidence, and I am truly grateful to those teachers and students who have used and recommended it throughout that long period.

It hardly needs to be said that, during that period of twenty-five years, the law of evidence has undergone profound changes, and these changes have been reflected in successive editions. Never has this been more apparent than in relation to this ninth edition. I am glad that my publishers and I took the difficult decision to publish the eighth edition in 2003, with massive changes looming on the horizon, but not yet upon us. The eighth edition proved to be a record of the final developed state of the English law of evidence, as it was known to generations of judges, practitioners, and students. The Criminal Justice Act 2003 took only a few words to sweep away a legacy of jurisprudence which, in some cases, hearkened back two centuries and more to the formative period of the common law rules of evidence. Those of us who have grown to love the subject have lost some old friends in the flood. The rules governing the admission of evidence of bad character and hearsay in criminal cases, two of the pillars of evidence law, have been reformed in a very radical way. The wisdom of these momentous changes, and of the haste with which they have been introduced, will be for later commentators to judge. The Act's provisions dealing with evidence of bad character came into force on 15 December 2004, and those dealing with hearsay on 4 April 2005.

This ninth edition has, of course, been substantially revised to take full account of the Criminal Justice Act 2003. The chapters dealing with character evidence and hearsay evidence in criminal cases have been completely re-written. The Act's long tentacles reach even beyond these areas into previous consistent and inconsistent statements, evidence of reputation, expert evidence, and confessions. The rules dealing with character evidence have implications, which may not yet have been fully realized, for other subjects, such as the rule of finality of collateral issues and evidence of the sexual behaviour of complainants. The result is that this ninth edition is the product of the most comprehensive revision in the book's history. In addition, other legislation and the usual torrent of case law, have demanded attention to all parts of the text. Important developments have occurred, for example, in the areas of confessions, the accused's silence, public interest immunity, and reverse burdens of proof (this last subject producing a fascinating mutiny by the Court of Appeal, which the House of Lords promptly quelled by pulling rank in no uncertain terms). These changes have been fully noted throughout. The new Criminal Procedure Rules 2005 came into effect on 4 April 2005, and references to rules applicable to criminal cases have been updated as appropriate.

I have made one structural change. The chapter (now chapter 8) dealing with the statutory exceptions to the hearsay rule, including the preserved common law exceptions, now follows immediately upon the chapter which describes the rule itself and its operation. Admissions and confessions, and the accused's denials and silence, now become chapters 9 and 10 respectively.

My thanks to all those who have worked so hard at OUP to produce this edition, especially Wendy Lynch, Natalie Williams, and Nicola Bateman, and my editor, Kate Whetter. My thanks also on this anniversary to John, Alistair, Heather, and all my collaborators from the Blackstone days. I am glad to acknowledge, for the first time in this book, my oldest debts of gratitude to my mentors in the law; my tutor, John Hopkins M.A., LL.B., Fellow of Downing College, Cambridge, an honorary Bencher of the Middle Temple, and formerly Senior Tutor of Downing and University Lecturer in Law; my Middle Temple sponsor and peerless purveyor of war stories from the Bar, Sven Olsen, barrister, and later a distinguished Circuit Judge; and my pupil master, Gilbert Rodway, an accomplished advocate at the Bars of England and Hong Kong, the latter as Queen's Counsel. Their wisdom and guidance have been my foundation as a lawyer. Last, but not least, my thanks to my wife, Chris, for her love and support, which makes my work possible.

I have tried to state the law as at 8 April 2005.

Peter Murphy
Houston

EXTRACT FROM PREFACE TO THE FIRST EDITION

The law of evidence underlies the whole practice of law in every field capable of leading to litigation. Not only a thorough understanding of the rules of admissibility, but also a mature feel for the weight and tactical significance of evidence should be a part of the foundation of every practice. Cases are probably won and lost more often for reasons of evidential acumen, or the lack of it, than for reasons of any other sort. At the same time, evidential problems have a habit of arising, to quote a celebrated rule to be found in chapter 14 of this book, '*ex improviso*, which no human ingenuity could foresee'. Law and practice can almost always be made the subject of prior research; as often as not, evidence presents problems without warning calling for immediate reaction. Failure to object at the right time, or the making of an unfounded objection may in some cases have serious consequences for the fate of the piece of evidence concerned, or the case as a whole. One's opponent's objections, whether well or ill founded must be dealt with. A colleague at the Bar once said to the author that there was, in his opinion, only one rule of evidence, namely a reaction of instinct on hearing any words spoken in court, which said either, 'Yes, that's all right', or 'No, we can't have that'. That sort of instinct exists and very often works even before the witness speaks at all; it takes time to develop; time, and a thorough knowledge of the rules; but it is of incalculable importance.

Given all this, it is somewhat surprising to survey the textbooks on the subject and to find that they are prone to two distinct tendencies. There are those which treat the subject in a highly academic way, divorced from the realities of practice. There are those which treat the subject as a mass of apparently unrelated minutiae, divorced from any discernible theme. There is also, happily, the matchless but demanding work of Professor Cross, comparisons of which are vain. The present work is intended simply to meet the long-felt need of students for the Bar examinations, now joined by students for the Law Society's examinations, and those on degree courses, for a book soundly based around the considerations of practice in the courts. It is hoped that those concerned professionally with the law of evidence may also find it useful. There are, no doubt, many matters of great interest in academic terms which will not be found here; but equally, the important, recurring issues are dealt with in the context of their practical operation, and of the rules of practice which apply to them.

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