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The Law of Evidence

D. W. Elliott

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by

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PREFACE

IN 1876, Sir James Stephen in the introduction to his *Digest of the Law of Evidence* noted that "all the existing books on the Law of Evidence are written on the usual model of English law books, which, as a general rule, aim at being collections more or less complete of all the authorities upon a given subject to which a judge would listen in an argument in court. Such works often become, in the hands of successive editors, the repositories of an extraordinary amount of research, but they seem to me to have the effect of making the attainment by direct study of a real knowledge of the law, or of every branch of it as a whole, almost impossible."

This complaint, in effect that students are expected to learn from practitioners' tomes, is certainly less justified today, both in law generally and in evidence in particular. Indeed, it can plausibly be claimed that, since the appearance of Cross's *Evidence*, systematic study is better catered for in evidence than in many other subjects. In 1958, it was possible for Sir Rupert Cross to observe that "any advocate can say whether evidence is admissible or inadmissible, but he is frequently at a loss to explain why this is so." If that is no longer true, it is undoubtedly chiefly due to Sir Rupert's own work, which although large, is aimed at elucidating principle rather than at accumulating authorities.

Nevertheless, there appears to be a continuing need for small books, which seems to arise out of the nature of the subject. Evidence today may not any longer deserve the charge that it resembles more a pile of builder's debris than a rational edifice, but it is still true that there is no natural order in which topics may conveniently be studied. Every topic needs cross-referencing with every other topic in a way which makes difficult going of at least the opening chapters. The more an author attempts to be thorough, even at the level of principle and eschewing all attempt to be a complete repository, the more does the beginner feel that he cannot see the wood for the trees.

Phipson's *Manual* has always been a small book. It started as an epitome of Phipson's *Evidence*, being merely a selection of some of the material gathered in that large repository of

learning, and traces of this origin remained through many editions. That the work continued to find favour, in spite of an arrangement not really appropriate to systematic study, seems to demonstrate that for students of evidence "small is beautiful." Nevertheless it is now felt that the work would be improved if it were no longer committed, even distantly, to the idea that a slimmed down version of a practitioners' tome is appropriate fare for students.

Both matter and arrangement are therefore very different from what has gone before. As to matter, moribund topics, of which the law of evidence has more than its fair share, are suppressed or get merely a passing mention. Mere lists of things, *e.g.* of the matters which by statute must be judicially noticed, are omitted, and usually replaced by a reference to some other place where they may be found. Where a point is well settled by one authority, redundant cases are not cited. A more critical tone than formerly is adopted in those places (still too many in spite of the efforts of reformers) where justice and common sense are subordinate to unenlightened technicality. Frequent reference is made to proposals of the 11th Report of the Criminal Law Revision Committee. As to arrangement, as is more fully explained in Chapter I, more prominence is given to criminal evidence, on the view that that is, on the whole, the vital part of the modern law. The overall objective is to teach the beginner to swim without throwing him into the deep end of the pool. Whether that objective is attained, or even possible, will be for others to say.

I am grateful for the fact that I have not been condemned to the solitary labour of a cell-bound monkish glossator. My colleagues at Newcastle-upon-Tyne, particularly Mr. J. N. Wakefield and Professor J. B. Clark, have cheerfully submitted to my importuning, without of course bearing any responsibility for the final result. With singular devotion well beyond the call of duty Miss Lorraine Spence and Miss Lynn Tait have laboured over a manuscript which in places resembled nothing so much as a medieval palimpsest. An attempt has been made to state the law as at July 31, 1979.

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