E. R. Baker & F. B. Dodge

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Baker & Wilkie's
Police Promotion Handbook

Criminal Evidence and Procedure

Seventh Edition

Butterworths

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Criminal Evidence and Procedure

Seventh edition

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London
Butterworths
1981

England
London
Butterworth & Co (Publishers) Ltd
88 Kingsway, WC2B 6AB

Australia
Sydney
Butterworths Pty Ltd
271-273 Lane Cove Road, North Ryde, NSW 2113
Also at Melbourne, Brisbane, Adelaide and Perth

Canada
Toronto
Butterworth & Co (Canada) Ltd
2265 Midland Avenue, Scarborough M1P 4S1

New Zealand
Wellington
Butterworths of New Zealand Ltd
33-35 Cumberland Place

South Africa
Durban
Butterworth & Co (South Africa) (Pty) Ltd
152-154 Gale Street

USA
Boston
Butterworth (Publishers) Inc
10 Tower Office Park, Woburn, Mass 01801

ISBN 0 406 84131 4

Composition by Harrison Company, Publisher, Norcross, Georgia, U.S.A.
Reproduced from copy supplied, printed and bound in Great Britain
by Billing and Sons Limited, Guildford, London, Oxford, Worcester

Preface

This book, which is No. 2 in the series of Police Promotion Handbooks, is designed to cover the syllabus relating to criminal evidence and procedure. Its preparation has been based on principles designed to achieve the same purposes as the other books in the series, namely to enable a student to acquire both the fundamental knowledge and the technique of answering questions, the latter by the lay-out of the text and the exclusion of unnecessary verbiage and detail.

This new edition (the seventh) incorporates changes in contents and format to meet the requirements of the recently revised syllabuses and introduces a feature which should be of particular assistance to police students, i.e. the marking of text to indicate whether it relates to the examination for promotion to sergeant, or to inspector, or to both. It also takes account of the changes and additions to the law (including the effect of recent cases) since the publication of the sixth edition in 1979, notably the Magistrates' Courts Act 1980, the Forgery and Counterfeiting Act 1981 and the Criminal Justice (Amendment) Act 1981.

E. R. BAKER
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September 1981

Latin legal terms in general use

a fortiori	so much the more so; with greater reason
ab initio	from the beginning
aliunde	from elsewhere; from another person, place or quarter
animus furandi	intent to steal
ante	before
bona fide	in good faith
certiorari	(literally) to be more fully informed of; an order which issues from the High Court of Justice removing causes from inferior courts of record to the High Court for review
contra	against
contra pacem	against the peace
corpus delicti	the body of essential fact constituting a criminal offence
dictum, dicta (pl.)	a saying, sayings
doli incapax	incapable of crime
ejusdem generis	of the same kind or nature
et seq. (et sequentes)	and the following
ex hypothesi	following from this assumption
ex officio	by virtue of office
ex parte	on behalf of
flagrante delicto	in the commission of the offence

habeas corpus	(literally) you must have the body; a prerogative writ to a person detaining another in custody commanding him to produce that person before the court
ibid. (ibidem)	in the same place, in the same book, chapter, passage, etc.
in camera	the public excluded from court or heard in the judge's private room
infra	below
intra vires	(literally) within the powers; valid
inter alia	among other things
ipso facto	by the very fact
mandamus	(literally) we command; an order which issues from the High Court of Justice to compel the performance of a public duty
mens rea	guilty mind
modus operandi	the way in which anything is done; mode or manner of operation
obiter dictum, obiter dicta (pl.)	a mere saying by the way; a chance remark, which is not binding upon future courts, though it may be respected according to the reputation of the judge, the eminence of the court and the circumstances in which made
onus probandi	the onus (or burden) of proof
per	by
per se	by or in itself
post	after
prima facie	at first sight, on the face of it
quaere	query
sic	so, thus
simpliciter	absolutely, without qualification
sine die	without naming a day, indefinitely
sub judice	under judicial consideration

subpoena duces tecum	a writ commanding a person to attend in court under a penalty and to bring with him certain documents in his possession
supra	above
ultra vires	(literally) beyond the powers; an act in excess of the authority conferred by law and therefore invalid
viva voce	orally
viz. (videlicet)	that is to say; in other words; namely

Important

Edge-marking of text

Police students should note that the edge-marking of the text indicates the examination to which it relates, as follows:

examination for promotion to inspector only,

examination for promotion to sergeant only.

Unmarked text relates to both examinations.

Contents

Chapter 1 **Evidence**

Introduction

Criminal law falls into two parts, viz.:

a) SUBSTANTIVE LAW — that part of the criminal law which creates and defines crimes and provides penalties.

b) ADJECTIVE LAW — that which provides and specifies the legal means by which the substantive law may be enforced, i.e. *proof and procedure.*

It is with adjective criminal law that this handbook is concerned.

Proof: In law, the means by which proof can be effected are threefold, viz.:

a) Judicial Notice

b) Presumptions

c) Evidence

Judicial notice

Definition — *certain matters are so universally known or clearly established as matters of common everyday knowledge that their existence can be accepted by the courts without evidence of them.*

The court is said to take 'judicial notice' of these matters. They relate to:

i) *Undoubted facts,* e.g. that the earth moves around the sun, 2 and 2 are 4, there are 366 days in a leap year, etc.

ii) *Law, procedure & custom,* e.g. that statutes are either public or private statutes, and whereas no proof is required of a law regarding offences applicable to everybody (re Public Acts of Parliament), there must be a proof by a printer's copy of any private company's law.

iii) *Constitutional and political matters,* e.g. that A is the Prime Minister, or B the leader of the opposition.

iv) *Official seals & signatures of certain kinds*, e.g. the Fiat of the Attorney General.

v) *Territorial & geographical matters and divisions.*

vi) *The official gazettes.*

R v Luffe (1807)
The court in effect says: 'We know that without being told'. The large variety of facts within this category include: all statute and common law, orders and regulations, court procedure, judicial seals, judges' signatures and titles, the ordinary meaning of words, the ordinary course of nature, ordinary measures of time, weights and measures, etc.

Legal presumptions*

Definition — *are the conclusions which, by law, must or may be drawn by the court upon proof of certain facts.*

A legal presumption may be either:

a) Irrebuttable (or conclusive), i.e. is bound to be accepted, no evidence to the contrary being admissible. It is an inference the court *must draw.*

EXAMPLES:

Upon proof of:	*Presumption*
Age under 10 yrs:	Not capable of committing crime.
Age under 14 yrs:	Incapable of sexual intercourse.

R v Waite (1892)
Held: — that a boy under 14 is incapable of sexual intercourse. No evidence is admissible to show he had in fact arrived at the full state of puberty, and could commit the crime.

b) Rebuttable (or inconclusive) — conclusion to be drawn in the absence of proof to the contrary. Evidence is admissible to rebut the presumption, e.g.:

i) Every person is presumed sane *until the contrary is shown.*

ii) Every accused person is presumed innocent *until proved guilty.*

iii) A child over 10 years and under 14 years cannot commit crime *unless proved to know right from wrong, or of mischievous nature.*

iv) A person not heard of for 7 years by those who would normally be expected to hear of him, is presumed dead, *in absence of evidence to contrary.*

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* Not included in the syllabuses but included because of possible reference to it in the text of the Handbook.

NOTE
Until it was abolished by the CJ Act 1967, s. 8, it was a rebuttable legal presumption that every sane person intended the natural and probable consequences of his actions. Section 8 provides that this presumption is not now legally binding, and the court (or jury) should decide instead whether the consequences were intended or foreseen by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

PRESUMPTIONS OF FACT are merely conclusions which may be logically inferred from given or proved facts. *Always rebuttable* of course. It is the purpose of circumstantial evidence to raise a presumption of fact, i.e. of guilt or innocence of accused.

Summary. Evidence is not required to prove facts which courts must know (by judicial notice) or must take for granted (by presumptions), but otherwise all proof is effected by evidence.

Kinds of evidence

Definition — *evidence includes all the legal means, exclusive of mere argument, which tend to prove or disprove the facts under judicial enquiry (i.e. in issue).*

Evidence is classified according to:

i) the manner of its presentation to the court (oral, documentary and real);

ii) the nature of the evidence (direct and circumstantial);

iii) the application of the 'best evidence' rule (primary and secondary); and

iv) the source from which it is derived (direct and hearsay).

1. According to the manner of its presentation

This may be:

a) ORAL (OR PAROL) EVIDENCE — by word of mouth.

b) DOCUMENTARY EVIDENCE — by the contents of any printed or written document.

c) REAL EVIDENCE — by the production of any article or thing.

Documentary and real evidence can take the form of 'exhibits'.

Oral evidence always accompanies documentary or real evidence to explain them, e.g. — to read contents or explain its connection with the case.

R v Francis (1874)
Witnesses can testify as to the state of material objects without their

production as exhibits, but they should be produced whenever conveniently possible.

R v Nowaz (1976)
Police officer allowed to give oral evidence of a forged document he had seen, where production of that document was not possible because its holder claimed diplomatic immunity.

2. According to its nature, as direct or indirect

a) DIRECT EVIDENCE — evidence of the facts in issue (or, in other words, of the facts which constitute the crime). The evidence of an eye-witness.

b) INDIRECT OR CIRCUMSTANTIAL EVIDENCE — evidence not of the facts in issue, but of other facts from which the existence or otherwise of the facts in issue may be logically inferred.

EXAMPLE:

Evidence: 'A' found in possession of jemmy.
Nature: 'Direct' if charge is 'going equipped'.
'Indirect' (or 'circumstantial') if charge is burglary.

3. Based on the best evidence rule — primary and secondary evidence

DOCUMENTS As to Documentary Evidence (for examination to inspector) see Appendix 5, p. 205.

The best evidence rule, at one time widely applied, but now limited in the main to proving the contents of documents, is that the *best evidence* (or that which affords the least doubt, e.g. the document itself) is required and that evidence inferior to this (e.g. a copy) is inadmissible except in special circumstances. The rule indicates the division of evidence (as to documents) into:

a) PRIMARY EVIDENCE — the best, or affording the greatest certainty, e.g. the original, and

b) SECONDARY EVIDENCE — i.e. inferior, substituted, or such as itself indicates a more original source of information, as a copy would the original.

The present rule is, therefore, that *to prove a document or its contents secondary evidence will not be admitted except on proof of good reason for the absence of primary evidence.*

Secondary evidence (documentary) may be admitted if it is proved that primary evidence cannot be adduced because:

a) it is in the possession of the other party, who has failed to comply with a notice to produce, or

b) it is in possession of a stranger not bound to produce, after notice to produce and failure to comply, or

c) it has been destroyed, or

d) it has been lost and not found after rigorous search, or

e) its production is impracticable, e.g. would disintegrate on careless handling.

R v Morton (1815)
When the original is lost or has been destroyed, and proper search has been made for it, it is necessary to satisfy the court either as to the destruction of the original, or that a sufficiently thorough search has been made and that the paper really is lost.

The Queen's Case (1820)
The law requires that the best evidence must be given of which the nature of the case is capable. The best evidence of the contents of a document is the document itself, and therefore, as a general rule, the contents of a document which is capable of being produced must be proved by the production of the document itself and not by oral evidence.

Doe d Gilbert v Ross (1840)
Whenever a copy of a document may be used, parol evidence of it may be given. Either is called 'secondary evidence'.

Tracy Peerage (1843)
Where the original is a fixed inscription of a tombstone secondary evidence has been held admissible — as it has also been in the case of a placard posted on a wall; *Bruce v Nicolopule* (1855).

Williams v Russell (1933)
A constable may testify to the contents of the defendant's licence and certificate of insurance which he has read (no notice having been given).

See also *R v Nowaz* (1976), p. 4.

TAPE RECORDINGS

R v Ali and Hussain (1966)
With regard to admissibility in evidence there is no difference between a tape recording and a photograph. It is for the judge to consider its accuracy and admissibility, and for the jury, as a matter of fact, whether to treat it as such. The best evidence rule applies provided that (a) the accuracy of the recording can be proved, (b) the voices recorded are properly identified, and (c) the subject matter is relevant and otherwise admissible. If the original is lost, the copy has to be proved to be a true copy.

R v Stevenson, Hulse & Whitney (1970)
Original tapes, like photograph negatives, have to be retained in strict custody. A tape recording is to be treated with care and circumspection by those who obtained it in the first place. If impugned and it appears likely that the evidence offered was not the original, the court has no alternative but to reject.

R v Robson; R v Harris (1972)
The court has to be satisfied that a tape recording is authentic. It was argued that the best evidence rule applied and that tapes should be excluded unless shown to be originals or true copies of the originals in cases where the absence of the original could be satisfactorily explained. A further objection was that transcripts from the tape should not be furnished to the jury because some words on the tape were not identifiable by ear. *Held*: — the judge is required to do no more than to satisfy himself that a prima facie case of originality has been made out for the prosecution by evidence defining and describing the origin and history of the recording up to the moment of production. If this evidence is unshaken by cross examination it is not incumbent to hear and weigh other evidence. The tapes remain subject to the more stringent test that the jury must be satisfied of authenticity before taking account of contents. With regard to the transcripts these should be supplied with a warning as to doubtful passages and that doubtful passages should be resolved in favour of the defence.

NOTE
For *documentary evidence* see also Appendix 5, p. 203.

4. Based on the 'hearsay' rule, as 'direct' and 'hearsay'

To prove the truth of what was said or written:

a) no witness can testify as to what he heard someone else say, and

b) no document can be used in evidence except by the person who made it.

Such is 'hearsay' evidence.

Ratten v The Queen (1971)
The defence to a charge of murder of a woman was that the gun accidentally 'went off' while being cleaned. In rebuttal the prosecution called evidence of a telephone operator that shortly before the time of the shooting she had received a call from the address concerned and a woman had hysterically said 'Call the police, please' and hung up. Objection was made on the ground that this evidence was hearsay. *Held*: — this evidence was not hearsay. Words spoken are just as much facts as any other actions. The question of hearsay arises only when the words are relied on to establish some fact narrated by the words. Even if hearsay, the words in this case could have been admissible as part of the 'res gestae' as there was a close connection between the statement ascribed to the deceased and the shooting which occurred very shortly afterwards.

In contrast to 'hearsay', *direct evidence* is evidence by a witness of what he himself has perceived by his own senses.

NOTE
Evidence of what someone else said is 'direct' and not 'hearsay' when it is tendered to prove not the truth of the statement but that it was in fact made.

Exclusion of hearsay — reasons:

a) Statement not made on oath and no adequate guarantee of truth.

b) Statements tend to lose truth by repetition.

c) Would tend to encourage use of weaker means of proof.

d) Defendant, not present, had no opportunity to deny or to question its truth.

e) Would prolong proceedings and provide scope for fraudulent practice.

Exceptions to rule as to inadmissibility of 'hearsay'. These are many. All of them become admissible as exceptions because the full range of objections (above) do not apply. Try to justify each exception by applying (a) to (e) above to it.

Learn the headings of the exceptions as follows:

i) Statements by the accused.

ii) Statements in presence and hearing of accused.

iii) 'Dying declarations'.

iv) 'Recent (or early) complaints'.

v) Res gestae.

vi) Depositions.

vii) Statements contained in trade or business records.

viii) Statements made by deceased persons in certain cases.

ix) Entries in certain public documents.

x) Evidence by certificate, or statutory declaration.

xi) Written statements admissible in evidence by virtue of CJ Act 1967.

I) STATEMENTS BY ACCUSED

Any relevant statement made by the accused is admissible, subject to the conditions relating to *admissions* and *confessions* (considered later on p. 56).

II) STATEMENTS MADE IN PRESENCE AND HEARING OF ACCUSED

Note — 'presence *and* hearing'. Care must be taken to give evidence not only of the statement but of the reaction to it of the accused whether by words or demeanour.

Important — a statement made in the presence and hearing is evidence against the accused only in so far as he, by words or conduct, appeared to accept it as true. If nothing that he did or said can be construed as his acceptance of it, then the jury will be directed to ignore it.