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Manual of the Law of Evidence

Geoffrey Bennett

the damage. Pedants might applaud the absence of *Fowler* v *Lanning* and the consequential retention of subtle trespass-case distinctions.

The authors and publishers are to be congratulated on making available to all this first-rate treatise on the Irish law of torts.

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PHIPSON AND ELLIOTT: MANUAL OF THE LAW OF EVIDENCE. Eleventh edition by D. W. Elliott. [London: Sweet & Maxwell. 1980. xxxii and (with index) 376 pp. Hardback £15.65 net. Paperback £12.00 net.]

The eleventh edition of this book is somewhat unusual in that it is not merely an updated version of the text, but is in many ways a substantially new book. This has, no doubt, at least been partly a response to the growing realisation that Evidence is a subject worthy of study quite apart from its value to practitioners. Accordingly, the latest edition of this work admirably reflects the need for a book which, to quote the author, teaches the beginner "to swim without throwing him into the deep end of the pool."

The arrangement of chapters is quite different, and is an obvious and successful attempt to provide a conceptual framework into which the puzzled student can fit the details of the law. For example, Part IV of the book entitled "The Protection of the Accused" brings together chapters on corroboration, the right of silence, confessions, character of the accused and discretion. Whereas the earlier editions betrayed the marks (some might say the sin) of their parentage in a practitioner's manual, this edition clearly breaks away from this approach. The subject is presented in a way calculated to enable a student to learn, rather than as an abridgment of a standard reference work. This re-arrangement and re-selection of subject matter, with the jettisoning of many of the more recondite aspects of an already difficult subject, is combined with an admirable lucidity of style. Where the need for brevity has taken its toll, the footnotes invariably provide a reader with the facility to pursue the point further. Another welcome innovation is the rather more critical note sometimes introduced into the text together with the reform proposals of the Eleventh Report of the Criminal Law Revision Committee.

In a work that provides a summary of a vast and complicated field, it is all too easy for a reviewer to draw attention to some trifling omission or lack of emphasis. It is a reflection of the quality of the book that any such points are likely to be relatively unimportant. Nevertheless, there are some surprising features. Tape recordings are not indexed and receive only a one sentence reference.[1] One would have thought that an area which can only become more important and which also provides considerable scope for legal argument might have benefited from greater coverage. In Part III, "The Trial", it is curious, and perhaps somewhat confusing for a student, that the issue of the competence and compellability of witnesses is considered after the chapter on the course of the trial.

This edition continues the practice of having statutory material in Appendices. Hence the Criminal Evidence Act 1898, the Civil Evidence Act 1968 and the Judges' Rules and Administrative Directions to the Police are all readily available. Given the common reluctance of students to consult what a statute actually says, this is a useful aid to teaching and understanding.

To compare the book with Professor Cross's *magnum opus* is a somewhat fatuous exercise, but irresistible to anyone who has to recommend a student textbook. On balance, there is much to be said for preferring *Phipson's Manual* to its larger rival. Although Professor Cross's work authoritatively reviews all the developments which a student is likely to come across, its bulk and exploration of detail often tend to obscure the central issues from one approaching the subject for the first time. The ideal combination, it might be felt, is the use of *Phipson's Manual* as a main text, with reference to *Cross* on details. It is,

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however, surprising that as between the two very different books, the variation in price is small. It is difficult to resist the feeling that many will still prefer to pay just a little more for a copy of *Cross*.

The book is well written, readable and perhaps the best in the class of introductory books on Evidence. Nevertheless, although it seems primarily to have been regarded as a book for students, there must be few practitioners who would not find this as useful a *vade mecum* as previous editions.

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CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS. Edited by Colin Tapper. [London: Butterworths. 1981. xxvi and (with index) 336 pp. Hardback £15.00 net.]

The essays in this book were originally intended to form a *Festschrift* to mark Rupert Cross's seventieth birthday; his death unfortunately prevented that intention from being realised, and they are now offered as a tribute to his memory. In a most happy and fitting gesture the publishers have devoted the proceeds of the book to the founding of a prize for the best paper in Evidence in the BCL examinations. The memorial nature of the book is further enhanced by the inclusion of the memorial address given by Professor Honoré in All Souls College chapel.

The essays in the book are contributed by a distinguished band of scholars, all of them close colleagues of Rupert Cross. The essays fall into three classes: there are five papers on criminal law, three on what may conveniently be called penology and five on evidence.

The first group of five consists of papers by Professor Hart on *Haughton* v *Smith*, by Professor J. C. Smith on "Secondary Participation and Inchoate Offences", by Dr Ashworth entitled "The Elasticity of *Mens Rea*", by Glanville Williams on *Smith* v *Hughes* as an example of extensive statutory interpretation and by Professor Treitel on some situations where the law of crime and the law of contract come into contact with each other. The first three papers in this set almost form a sub-group on their own. They all deal with inchoate and accessory offences, although these are not Dr Ashworth's main interest, but this is not what most strikes one who, like myself, has been trained in a system which is still basically common law, whose outstanding feature in modern times is its pragmatism, and in which appellate judgments are almost uniformly brief. What I find most remarkable about these papers is that they reveal a system which, at least in comparison with Scots law, is almost scholastic in its intricacy. One is reminded of the story of the conversation on theft between an English and a Scottish judge: the English judge expressed astonishment that any civilised legal system could survive without some form of Theft Act, and the Scottish judge replied that the Scots did not need an Act of Parliament to tell them what stealing was. English law clearly has a greater intellectual content, and has been highly developed as a result of greater and more concentrated thinking, than has Scots law, but one wonders, all the same, whether this type of thinking has much to do with the simple moral problems with which the criminal law deals, and also whether the resultant solutions are really workable.

Dr Ashworth's paper addresses itself to one aspect of this problem. I was at first disappointed by it, because I had expected from its title a discussion of the concept of *mens rea* itself – after all, Rupert Cross was one of the first to suggest that the received academic wisdom on recklessness was a little unreal. But Dr Ashworth does show that an intellectually pure approach to subjective *mens rea* can be (and, I would suggest, inevitably will be) circumvented by statutory means, such as defining offences broadly, as has been done in the Criminal Damage Act 1971, so that an intention to do what actually was done is no longer required. I am not sure that Dr Ashworth thinks that this is a good thing, but there is a lot to be said for avoiding the need to prove the occurrence of mental events in the accused's mind. The sort of assessment necessary to reach a suitable sentence is much easier

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