

Book Review: Evidence, by Rubert Cross

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Book Review

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CROSS, RUPERT, M.A., B.C.L. *Evidence* Butterworth & Co. Ltd., 158.
514 pp.

William Fallon, "The Great Mouthpiece", is said to have explained his success simply—"I learned the rules of evidence." This disclosure may surprise many, but to the more knowledgeable it is a characteristic legal gloss—in this case, of his own dramatic flair, understanding of juries, and unrivalled resourcefulness. But to the apprentice advocate the law of evidence is not a gloss but an essential; he must acquire and disguise a mastery of those rules.

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1 R.S.A. 1955, c. 83.

In practice the law of evidence poses a special problem. In preparing for trial, substantive and procedural questions may be anticipated. But problems in the law of evidence depend on the course of the trial. Admissibility must be ruled on instantly. In adducing or objecting to the admission of evidence, failure to understand the issues involved may result in the loss of advantages which cannot be regained, either in the course of the trial or on appeal.

Familiarity with the rules of evidence is gained by watching and participating in the conduct of trials. This is in itself of course incomplete, and must be supplemented by the obtaining of a knowledge of principles from a text. Of the various texts on the subject, Mr. Cross's work is the most valuable to the student and beginner.

In the preface to his book, Mr. Cross makes the following statement of intention:

"In the preface to the first edition of his *Law of Evidence*, the late G. L. Phipson said that he had endeavoured to supply students and practitioners with a work which would take a middle place between 'the admirable but extremely condensed *Digest of Sir James Stephen*, and that great repository of evidentiary law, *Taylor on Evidence*.' Those words were written as long ago as 1892, and Phipson's book now has claims to be regarded as the great English repository of evidentiary law. I realize therefore that I am flying high when I say that I hope to have supplied students and practitioners with a work which will take a middle place between those of Stephen and Phipson."

Mr. Cross is not "flying high"; His work is concise without being superficial. It is neither too lengthy to discourage the student nor too condensed to perplex him.

Mr. Cross's book should provide an excellent complement to *McRae on Evidence*. That standard Canadian work, though of unquestionable value, suffers from a defect which is perhaps an inevitable result of its method of exposition. I am referring to the author's enunciation of principles by the reproduction of extracts from judicial pronouncements. This method produces a frequent loss of continuity, and the basic principles being discussed often fail to emerge clearly. This defect can be alleviated by a reading of Mr. Cross's book, and the use of both works should enable the student to grasp basic principles and to acquaint himself with their application.

There is little to be gained, in a review of this kind, in summarizing the contents of the book. Brief mention might be made however, of certain portions of it which the student should find of particular value.

The hearsay rule and the question of similar fact evidence are perhaps the most difficult of the major evidentiary problems which the beginner faces. Mr. Cross's exposition of these matters is admirably lucid and thorough, and should remove much of the perplexity which surrounds them. In his treatment for example, of the rules relating to the use of similar fact evidence, he begins by

giving one of the clearest and most satisfactory statements of the principles involved which I have seen:

"It may therefore be assumed that it is settled that evidence of a party's misconduct on other occasions is admissible if it tends to rebut a defence that can fairly be said to be open to him, provided always that it is relevant for some reason other than its tendency to establish wrongdoing by proof of disposition without even referring to method. Due regard must nevertheless be had to what may be described as the state of the pleadings, for an admission may make all the difference. This is a truism so far as civil cases are concerned, but it is also valid with regard to criminal proceedings. As a rough generalization it may be said that there are three typical defences in relation to the latter. First, whether the crime was committed or not, it was not committed by the accused—the defence of mistaken identity; second, though the accused was present on the occasion under investigation, no crime was committed—the defence of innocent presence or association; thirdly, though the external events alleged by the prosecution occurred, the accused was not responsible for them, either because he did not cause them, or else because he lacked *mens rea*—the defences of accident and mistake. These defences are not mutually exclusive, but an indication that one or other of them will, or will not, be raised may affect the admissibility of misconduct on other occasions." Mr. Cross then proceeds to give a very thorough outline of cases in which such evidence has been held to be admissible, grouped under various headings, as, for example, "Incidents in the transaction under investigation", "Conduct of a highly repetitive, unique or continuing nature", and so on. This results in, first, an understanding of the rule itself and its rationale, and secondly, on insight into the application of the rule in decided cases.

In addition to these major topics, Mr. Cross's book contains a good deal of valuable information upon subjects concerning which the beginner may encounter some difficulty finding material elsewhere. In this regard, his chapter entitled "The Course of Evidence", is particularly useful, containing for example, material on the rule against self-serving evidence and the finality of answers to collateral questions.

A valid test of the worth of any text is its usefulness to the practitioner as well as to the student. Mr. Cross's exposition of theory should be of assistance to even the most experienced advocates. As the author states in his preface, "in nine cases out of ten, any advocate can say whether evidence is admissible or inadmissible, but he is frequently at a loss to explain why this should be so." The counsel who has read and digested Mr. Cross's book should have no reason to find discomforting the keenest judicial probings into his offer of, or objection to, evidence.

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