*Cross on Evidence* by David Byrne Q.C. and J. D. Heydon, 3rd Australian edn., Sydney, Butterworths, 1986. cxii + 1088 pp. $79.00 (hard cover), $59.00 (soft cover).

There are intrinsic difficulties in writing about the law of evidence. One of the major reasons for this is the adjectival nature of this branch of law. To derive the principles of evidence from the cases one has to separate observations about the law of evidence from the substantive law. Another reason is that the origins and bases for many of the rules of evidence are obscure, the rules evolving from the *ad hoc* decisions of trial judges which were then followed until the practice became established. Further it should be noted that not all single instance judges have the same understanding of the rules. It is only when the rules are considered by the appellate courts and by academic writers that rationales begin to appear. In fact the appellate judges have sometimes thrown their hands up in despair of finding a rationale, and called for legislative intervention as in *Myers* v. *D.P.P.* [1965] A.C. 1001.

This difficulty in finding rationales is at least partially attributable to the fact that the study of the theory of evidence and the study of the rules of evidence were for too long divorced. The rules of evidence tended to be expounded as rules of technical law that were to be learnt, as from a hornbook, and not understood.

Nevertheless a literature of the subject can be traced back to the seventeenth century. It may be appropriate here, in order to better appreciate the work of Cross, to pick out some of the most significant works in the field published in Britain. The manuscripts of Jeremy Bentham were written between 1802 and 1812 and published under the title *Rationale of Judicial Evidence* by John Stuart Mill in 1827. The work was devoted to a discussion of theory and a criticism of the English law. Bentham and Mill were both nonlawyers. In the introduction to the work in question Bentham claimed to have brought an "uninformed but happily a new and uncorrupted understanding" to bear on "the grand fountain of legal instruction on the subject of evidence, the work of the Lord Chief Baron Gilbert."[1] His editor relied not directly on the cases but rather on the compilations of two reporters. The general comment on the English law of evidence was to the effect that: If the discovery of truth be the end of the rules of evidence, the sages of the law had failed to adapt their means to their ends. In fact he stated that in this respect the sagacity displayed by the judicature was as much below the level of that displayed by an illiterate peasant or mechanic in the bosom of his family, as the sagacity displayed by that peasant in the line of physical science is below that of a Newton.[2]

In 1848 Pitt Taylor, later elevated to the bench, produced a work entitled *A Treatise on the Law of Evidence as administered in England*

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[1] Bentham, Jeremy, *Rationale of Judicial Evidence*, at 6.
[2] *Id.*, 5-6.

*and Ireland, with illustrations from American and other Foreign Laws.* Taylor's work was founded on an American work, but he professed the objects of "affording to the profession really useful and accurate information" while claiming that "in stating what the law is, I have not been unmindful of what, in my humble opinion it ought to be." This book attempted, still perhaps not successfully, the necessary marriage of theory and law.

In 1876 Sir James Stephen published the first edition of his *Digest of the Law of Evidence.* Stephen was responsible for the adoption of the Indian Evidence Act of 1872 and had drafted a similar code for England which although ready to be introduced in the Session of 1873 was never actually made public. His book was founded on that work and was the substance of a course of lectures which he presented as Professor of Common Law at the Inns of Court. His goal was to enable students to obtain a precise and systematic acquaintance with the subject in a moderate space of time. In order to achieve that goal he stated that he had had to separate the subject of evidence from other branches of the law, to reduce it into a compact and systematic form and to compress it into precise definite rules. He stated that the great bulk of the law of evidence consisted of a hopeless mass of confused negative rules, which might be remembered by a great effort, but could not be understood as a whole, or reduced to a system.

In 1892 Phipson published a work on the law of evidence which he saw as filling a middle place between Stephen's digest and Taylor's repository. However, Phipson's work eventually attained the dimensions of an encyclopaedia. This opus is now a fit subject for Stephen's criticism of those books which:

> 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 . . . seem to me to have the effect of making the attainment by direct study of a real knowledge of the law . . . almost impossible. The enormous mass of detail and illustrations which they contain and the habit into which their writers naturally fall, of introducing into them everything which has any sort of connection however remote with the main subject make these books useless for purposes of study, though they may increase their utility as works of reference.[3]

Rupert Cross published the first edition of "Cross on Evidence" in 1958 proclaiming his object of fulfilling a middle place between Phipson and Stephen. It was his intention to meet the need for an "up to date account of the theory of the subject". This need was, he stated, "made plain by the fact that, 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."

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[3] Stephen, *Digest of the Law of Evidence*, 1876, at viii.

Rupert Cross was born in 1912. He was blind from infancy. He took a second in History at Oxford in 1933 and a first in Law in 1935. He was admitted as a solicitor in 1939 and practised until 1945 when he became a full-time lecturer at the Law Society School of Law in London. He became a fellow at Magdalen College, Oxford in 1948. In 1956 he was made university lecturer in evidence. In 1958 he published the first edition of the parent work. In 1964 he became twelfth Vinerian professor of English law. Thereafter honours were heaped upon him in recognition of his services to the law of evidence and criminal law. In 1972 he was made a bencher of Middle Temple and in 1973 he was knighted. He died from cancer in September 1980 having seen his work go into its fifth edition and having formed plans for the sixth edition.

The sixth edition was eventually published in England in 1985. It is stated to be by the late Sir Rupert Cross, and Colin Tapper M.A., B.C.L., of Grays Inn, Barrister, All Souls Reader in Law and Fellow of Magdalen College, Oxford. In the preface Tapper explains that this edition is the first not to have been written in its entirety by Sir Rupert Cross. It appears that the plans for the sixth edition formed before Sir Rupert's sudden death called for it to have been written jointly by Cross and Tapper.

The sixth edition witnesses many changes, not all of them minor. These changes are to be welcomed. They are explained by changes in the underlying law. Tapper states that they are a reflection of the fact that the joint authors perceived the balance of the law of evidence to have shifted since the first edition was published. "In civil proceedings," Tapper asserts, "the law of evidence had taken on a much less technical cast, and exclusionary rules have increasingly given way to the operation of discretions, guidelines and considerations of weight. The mainly matrimonial litigation which sustained much of the technicality is now a thing of the past."

If this is so, and the reviewer would agree that it is, much of the credit for it may in fact belong to this work, *Cross on Evidence*. Tony Honore, Regius Professor of Civil Law at Oxford in his tribute to Cross[4] testified to the effect of the work which was to become authoritative not merely in Britain, but throughout the English speaking Commonwealth.

Evidence in the pre-Cross age was, he asserts, a jumble of rules supplemented by a few interesting articles. "The chaotic arrangement of the subject in the books was incompatible with serious academic study. After 1958 that changed."[5] "Rupert turned a subject which, in the hands of his predecessors, had been a confused jumble of doctrines, statutes, and decisions into an academic discipline . . . it was he who first in this country forced the ragged strands of the law of evidence to speak the language of the scholar and gentleman."[6]

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[4] Honore, "The primacy of oral evidence?" in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, 1981, 172.

[5] *Ibid.*

[6] Honore, Memorial Address in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, 1981, xxi, xxii.

In what has been set out above the reviewer has attempted to explain the importance of the parent work; the focus must now shift to the third Australian edition. The authors of this work, and the term "author" is chosen advisedly, are David Byrne, Q.C. and J. D. Heydon. Both are practising barristers, although in the past Heydon has held distinguished academic positions.

It should first be noted that the third edition has disposed of some of the objections that the reviewer had to the second Australian edition. The first of these objections was to the statement of the rules on refreshing memory. It lay in the fact that the 1972 decision in *Re Van Beelen* (1972) 6 S.A.S.R. 534 was not noted. In that case specific criticisms were made of the relevant passage in Cross. The statement of the rule has now been revised to overcome the criticism, although the decision itself is not noted.

The second objection was to the treatment of similar fact evidence. The treatment of this topic in earlier editions was less than helpful. As the second Australian edition was published in 1979, it could and should have taken the opportunity to revise the treatment of this topic in the light of the decisions in *Boardman* v. *D.P.P.* [1975] A.C. 421, and *Markby* v. *R.* (1978) 140 C.L.R. 108. In the interval between the appearance of the second and third Australian editions two other very significant High Court decisions in this area[7] have been handed down and these have been incorporated into a thorough and very successful reconsideration of the topic.

If there is a complaint to be made against this edition it is that it has still too much of an "English taste." The authors acknowledge drawing extensively from Mr. Tapper's edition and proclaim that "this is essentially an edition of Cross on Evidence. Nevertheless it is an Australian work." Whilst acknowledging the key role Sir Rupert Cross has played in the development of our understanding of the law of evidence and the desirability of drawing on his work, if this book is to fill the position of the leading Australian monograph on evidence, it must take fully into account the growing differences between our Australian law of evidence and the British law. For this reason the decision of the authors to produce a truly Australian work is welcomed, but the question must be asked: Have they achieved this goal? and do they appear to have achieved it? To determine this, it is appropriate to examine first those sections of the book dealing with areas of the law of evidence in which there are relevant differences between the positions taken by the Australian courts and those taken by British courts. The topic of illegally obtained evidence is an outstanding example of such an area.

Although incidental, it should be noted that the Canadian position on illegally obtained evidence is misrepresented.[8] It is true that the Canadian decisions cited denied the existence of any discretion to exclude

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[7] Perry v. *R.* (1982) 15 C.L.R. 580, *Sutton* v. *R.* (1984) 51 A.L.R. 435.
[8] Byrne and Heydon, *Cross on Evidence*, 3rd Australian edition, 693.

illegally obtained evidence, however, even before the Charter the position had been reconsidered.[9] Since the adoption of the Charter of Rights in 1982 the exclusion of evidence on this ground has been put on a constitutional ground.[10]

To return to the main concern, although the Australian decisions in this section of the work are fully and properly set out in the course of the exposition, they are not fully integrated into the introduction and conclusion. It might have been thought, in the light of the fact that Cross avowed an intention echoed by Tapper to deal with relevant Commonwealth authorities, that the Australian cases would have been dealt with in the parent work. However, an examination of the sixth edition of the parent work shows that this assumption is incorrect. The authors did rewrite this section of the book to incorporate the Australian material. Why then did they not incorporate it into the introduction and conclusion to the section? The explanation of this source of dissatisfaction does not lie in the fact that the Australian authors adopted a hands off approach to the theoretical discussion. In fact, in many places through the book, their theoretical discussions are much fuller and more satisfactory than those to be found in the parent work. The Australian edition (1066pp of text including tables) is substantially heftier than the sixth edition of the parent work (641) and the reason for this is not exclusively to be found in the addition of Australian materials. Thus, for example, the discussion in paragraph 1.2 of the "Development of the Law of Evidence" has been expanded by the use of hypothetical material. Also in Chapter I there is a discussion of "The Status of Evidence not Objected to." This would appear to be a topic of general relevance, but it is a topic not included in the parent work. On the other hand the Australian work has excluded any discussion of the question of reform of the common law rules on corroboration. Although this section of the parent work draws heavily on the work of the British Criminal Law Revision Committee, the question is of general interest.

Two conclusions appear from a close comparison of the British with the Australian edition. The first is that the laws of the two jurisdictions are in fact diverging, as in Britain increasing reliance is put on statutory provisions not duplicated in Australia. The Civil Evidence Act 1968 (UK) and the Police and Criminal Evidence Act 1984 are particularly significant. It would appear that further English editions are likely to become less and less relevant in Australia.

The second conclusion is that the decisions of Australian courts, particularly the High Court, have added a wealth of material to the common law of evidence. This is in fact acknowledged by Tapper in his preface to the sixth edition. It is to be regretted that it is not more apparent on reading the Australian edition.

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[9] *Rothman* v. *R.* [1981] 1 S.C.R. 640, 121 D.L.R. (3d.) 578.

[10] Part I of the Constitution Act, 1982, s. 24(2) see Klinck "The Quest for Meaning in Charter Adjudication: Comment on *R.* v. *Therens*" (1985) 31 *McGill Law J.* 104-127.

The reviewer's opinion is that the authors have produced a work that gives a full and proper account of Australian contributions to the common law of evidence, but that they have failed to give that impression. Some flag waving was called for.

In conclusion the reviewer acknowledges the contribution of Sir Rupert Cross to the theory of the law of evidence and welcomes the new Australian edition of this work.

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