Missouri Law Review

Volume 1
Issue 4 *November 1936*

Article 6

1936

# Book Reviews

# Book Reviews

THE ART OF CROSS-EXAMINATION. FOURTH EDITION. BY FRANCIS L. WELLMAN. NEW YORK: THE MACMILLAN COMPANY, 1936. pp. xiv, 479.

This is a revised and enlarged edition of an interesting and instructive book dealing with that most important and difficult branch of the trial lawyer's art—cross-examination. For more than thirty years the three earlier editions of the work have been in demand among lawyers. In the present edition the author has revised his material; he has added new chapters on various phases of the subject, and others containing excerpts from skilful cross-examinations in noted cases, some of which are quite recent.

This volume will afford entertainment to lawyer and layman alike. The author presents his material skilfully. He dramatizes the excerpts from noted cross-examinations in entertaining fashion. It is a readable volume upon a fascinating subject; and is the type of work which will bear reading more than once.

What is more important to the lawyer, however, is the instructive character of the book. It has definite educational value to one who specializes or intends to specialize in the trial of cases. It deals in practical fashion with problems which actually confront the cross-examiner in the court-room. The methods recommended are those which years of practical experience in trial work have shown to be sound. The volume reflects a thorough understanding of the psychology of the court-room (court-room sense)—an essential of the art of advocacy which some lawyers never acquire.

The author does not pretend to present dogmatically any rigid code of methods to be employed by the cross-examiner in all cases or under all circumstances. To the contrary, the author recognizes that the shifting circumstances of a particular trial may set at naught the most carefully laid plans, and that "the truly great trial lawyer is he who, while knowing perfectly well the established rules of his art, appreciates when they should be broken." A study of this book will help the cross-examiner to understand the "established rules of his art," and also to "appreciate when they should be broken" (pp. 132-133).

The author says there is no short cut to proficiency in the art of advocacy; that it is actual experience, and experience alone, that brings success; "that the experienced advocate can look back upon those less advanced in years or experience, and rest content in the thought that they are just so many cases behind him; that if he keeps on, with equal opportunities in court, they can never overtake him" (p. 5). Of the weapons of the advocate the author ranks cross-examination ahead of "court-room oratory" in effectiveness (p. 1).

Among the suggestions which the author offers for the guidance of the cross-examiner are the following:

The cross-examiner should know when not to cross-examine at all. If the opposing witness' story on direct examination has not been materially harmful or if the witness has not made much impression, and if there is a likelihood that cross-examination may only serve to emphasize a story which has thus far been weak and unimpressive, or may open up unfavorable facts or lines of inquiry not developed on direct examination, the cross-examiner had better let well enough alone and dismiss the witness forthwith.

With the apparently honest witness a courteous and conciliatory manner is recommended; such an approach frequently has a disarming effect and may lead to favorable admissions from the witness which a brow-beating manner would never elicit. A brow-beating manner is to be avoided under all circumstances; it antagonizes the witness to no purpose; and juries resent it.

The cross-examiner should be a good actor and should school himself never to betray any apparent surprise or concern over an unfavorable answer. A damaging

answer accepted by the skilled cross-examiner as a matter of course and with no apparent concern will frequently fall perfectly flat.

Absolute fairness with the witness is vital. Juries are quick to detect and resent any unfairness or twisting of the witness' answers.

Prolonged and pointless cross-examinations inevitably react unfavorably against the cross-examiner. The cross-examiner should develop his points in as few questions as possible, and so clearly that the jury will not fail to understand them.

It is a fatal mistake to take the witness over the story he has given on direct examination, in the absurd hope that he will change it. This only enables the witness to tell his story again with redoubled effect. The cross-examiner should rather hunt for the weak points in the story, if there are any, and concentrate upon them. If the witness is partisan, or if his means of knowledge is scanty, or if he lacks the intelligence to observe and relate the facts accurately, or if his story is unreasonable or inconsistent, or is in conflict with the known facts in the case, a skilled cross-examiner should concentrate his efforts upon the attempt to expose these infirmities.

It is sometimes wise to break the effect of the witness' story by putting questions so framed as to acquaint the jury at once with the fact that there is a more probable story to be disclosed later on from other evidence.

It is unwise to attempt to make capital of trifling discrepancies. Juries have little sympathy with petty triumphs over the witness.

As far as possible the cross-examiner should avoid asking a really critical question unless he is reasonably sure of the answer the witness will give. This is particularly true where the answer, if it proves unfavorable, cannot be effectively disproved by other evidence.

If the cross-examiner obtains from the witness a really favorable answer, he should pass immediately to some other subject, and not give the witness an opening to retract or modify the favorable answer and so destroy the point.

A skilled cross-examiner will frequently put his questions in a somewhat argumentative form. The value in this method is that jurors seeing the point for themselves, as if it were their own discovery, are likely to cling to it all the more tenaciously.

Where there is no hope of obtaining favorable testimony from the witness himself, and where the witness' character is open to legitimate attack, the force of his testimony may sometimes be weakened or destroyed by cross-examining him on collateral matters having no direct connection with the pending issues. The author gives examples of the effective use of this method, in some cross-examinations by Max D. Steuer, Martin W. Littleton and others.

The story of a perjured witness may sometimes be broken by asking him to repeat the story, whereupon the witness is likely to repeat it in almost the same identical words, which is some indication that he is testifying by rote and not from recollection. Thereupon the cross-examiner will take him to the middle of the story, then jump to the beginning, and then to the end; then will draw his attention to facts disassociated with the main story, whereupon the witness unprepared for the new inquiries will draw on his imagination for answers, and will probably find himself unable to invent answers as fast as the cross-examiner can ask questions, and at the same time remember his previous inventions correctly. If the witness is speaking by rote rather than from recollection, he is likely to succumb.

In cross-examination persistence is a virtue. If the cross-examiner fails in one line of attack, he should abandon it and try something else. If the witness' story is perjured there is a weak spot somewhere, and it is the business of the cross-examiner by persistent probing to expose it.

The cross-examiner should be cautious about giving the witness any opportunity to state his reasons or explanations, because they will usually serve to reinforce the witness' story, not weaken it.

It is generally unwise for a cross-examiner to attempt to cope with a well qualified expert witness in his own field of inquiry. This should only be attempted where counsel by careful study of the subject is prepared, with authorities at hand, to expose the expert's erroneous conclusion. Usually a better approach is to attempt to bring out from the expert independent facts tending to support the cross-examiner's theory of the case; and, where the expert has based his opinion upon a hypothetical question assuming facts which are probably not true, to submit to him the facts as they really exist and draw his opinion based thereon. The jury should be made to see that it is not so much the truth of the expert's answer as the truth of the assumptions in the hypothetical question which should be weighed.

The cross-examiner should be cautious about asking the expert any question which will permit him to expatiate or lecture upon his own views, or give the reasons for his opinion. The reasons will usually sound plausible, and of course will appear to support the opinion.

The expert witness is usually partisan. His partisanship should be exposed if possible, and the amount of his fee for appearing should be ascertained. If he makes a business of testifying in similar cases, or if his fee for appearance is contingent upon the result of the trial, these facts should be disclosed.

Much depends upon the sequence of cross-examination. If possible, the cross-examiner should not put the crucial question until the foundation for it has been laid in such a way that when confronted with the damaging fact the witness cannot plausibly deny it or explalin it away.

The cross-examiner should begin the examination with one of his strongest points. The point is then likely to make a deeper impression than if dragged in later as an apparent afterthought. An effective blow at the opening of the cross-examination may also serve to tame the witness and make him more tractable thereafter. "This taming of a hostile witness is one of the triumphs of the cross-examiner's art" (p. 119).

The cross-examiner should insist upon direct and responsive answers, and not allow the witness to evade them. If the cross-examiner loses control of the witness and allows him to run wild, it is usually the witness who will triumph, at the expense of the cross-examiner.

Above all, the cross-examiner should look for a good place to stop. It is a golden rule in cross-examination to know when to stop, and if possible to finish with a triumph. If the cross-examiner succeeds in scoring a decisive hit, he should if possible end the examination there. "Stop with a victory, is one of the maxims of cross-examination" (p. 131).

The book contains suggestions upon "Cross-Examination as to Probabilities," and "Cross-Examinations as to Credit, and its Abuses." There is also an interesting chapter upon "The Fallacies of Testimony," wherein the author considers the well known fact that perfectly honest witnesses observing the same occurrence will often differ widely in their narration of it. Suggestions are made as to proper methods of exposing fallacies, and these are illustrated by examples of cross-examinations from actual cases.

There is an interesting chapter on "Famous Cross-Examiners and Their Methods." More than half of the volume is composed of examples of cross-examinations in noted cases by skilled cross-examiners at the American and English Bar, including Sir Charles Russell (later Lord Chief Justice of England), Joseph H. Choate, Max D. Steuer, Martin W. Littleton, Henry W. Taft and many others. The author has selected these examples with discrimination, and they add greatly to the volume by illustrating in a concrete way the methods of cross-examination which have been found effective in actual use by masters of the art.

This work is an instructive treatment of a fascinating subject. In an interesting foreword the Hon. John W. Davis discloses that he has been a reader of "Wellman's *Art of Cross-Examination*" in its various editions for thirty years.

 

He says the book is "packed with wisdom and entertainment"—which is not an overstatement. (p. x iii).

Kansas City, Missouri WILLIAM S. HOGSETT

---

ESSENTIALS OF INSURANCE LAW. BY E. W. PATTERSON. NEW YORK: MCGRAW-HILL BOOK COMPANY, INC., 1935. pp. ix, 501.

Incipient experiences of the ex-insurance agent enrolled in a law school course in insurance usually prove discomforting—to the agent. His "know-all" attitude soon gives way to chagrin, upon discovery of his ignorance of even simple aspects of insurance law. Such frequent occurrences illustrate the lack of knowledge on the part of agents of the essential legal factors of the insurance business.

For such ignorance (by no means confined to agents) insurance companies have paid dearly. The tremendous volume of litigation involving waiver and estoppel bears witness to this fact. Professor Patterson prefaces his book in part as follows: "The insurance agent, the broker, the office employee and the executive official, each can have but an incomplete grasp of the insurance business without knowledge of its basic legal relations. . . . There is need for a non-technical summary of legal doctrines coupled with an explanation of their dependence and their influences upon the principles and practices of the insurance business. To supply this need is the aim of the present volume."[1]

The book should be judged most severely by the extent to which the author has achieved this main purpose. To make understandable to lay-readers the complexities of the law of insurance must have been a tantalizing task for a legal expert. Over-simplification, crypticism, creation of a false picture of certainty and predictability—these were red flags, denoting danger. It is no small accomplishment that the author has successfully avoided them. He has skillfully condensed a voluminous subject into 500 pages without resorting to a mere descriptive statement of legal rules. Various devices were effectively employed; a closely knit and highly integrated organization, lucid definitions of concepts, rules of law enlivened by well-selected actual case illustrations, and an easy, almost conversational style. Another reviewer has aptly coined the phrase, "a chatty book."[2] Occasional homely figures of speech relieve the conventional phraseology.[3]

"The present volume was begun as the result of a conviction that those in charge of insurance enterprises could have avoided many disastrous mistakes, all too apparent in litigation or legislation, if they had possessed an understanding of the essentials of insurance law. The insurance company or broker can better serve their customers and their own interests if they are aware of legal pitfalls."[4] In addition to his compendious synthesis of insurance law, Professor Patterson takes frequent occasion to reveal such pitfalls. For example, an agent should be aware of the fact that his company frequently comes to bat in the courtroom with two strikes called. An illustrative case reveals that an agent pasted on a policy, in such position as to interrupt the orderly sequence, an iron-safe clause. In holding for the insured the court declared that the clause was not a part of the policy. Professor Patterson comments, "The moral of this case for the local agent who issues policies is clear. He should attach the rider at an appropriate place on the policy and not slap it in the middle of a sentence."[5]

---

1. Preface, vii.
2. Gardner, Review of PATTERSON, ESSENTIALS OF INSURANCE LAW (1935) 35 COL. L. REV. 475.
3. A legendary anecdote regarding a white man and an Indian sharing the spoils of the chase, illustrates the point that the insurer "can not have one policy for premium catching and another for loss dodging." P. 455. The difficulties of explaining complexities of the law of waiver to laymen is illustrated by the use of a familiar Potash and Perlmutter story. P. 418.
4. Preface, viii.
5. P. 247.

Advice is not confined to agents; policy-determining officials of the companies are not spared. The book, while not designed to take a partisan point of view, does, however, question short-sighted policies of companies, when the opportunity is presented. Commenting upon efforts by companies to have immaterial warranties construed strictly, Professor Patterson tartly advises, "Insurance law would today be much fairer to insurers if they had not insisted on winning Pyrrhic victories."[6]

But the work deserves use by others than insurance company employees. A 500 page book, written primarily for the non-lawyer, is confessedly not a profound analysis of the law of the subject. Yet the thoughtful text and the carefully selected footnote references make it a helpful starting point for the busy practitioner. (Unfortunate, however, is the inconvenient location of the footnotes at the close of each chapter.)

High spots for the lawyer are found in the chapters dealing with warranties, waiver, and estoppel. A critical reviewer admits that, "Professor Patterson's treatment of the law of warranties, representations, concealment, and definition of the risk insured against, from the standpoint of the underwriter who must work out some practical means of measuring the risk he is undertaking, will prove illuminating to any lawyer who is not already a master of insurance law."[7] The subject matter of warranties and representations is organized around their common law and statutory development. Unfortunate early decisions by the otherwise great Mansfield amounted to invitations to insurers to load policies with myriads of immaterial warranties. The book meticulously traces this development down to its present day statutory modification. Advance sheets daily bear witness to the continuing importance of these problems.

A legal analyst of problems of waiver may correctly observe, "Confusion has herein found its masterpiece." Distinguished scholars have attempted clarification.[8] Doctrine and terminology herein remain shrouded in confusion. The concept "waiver" is a chameleon, its definitions multiform and its application varied.[9] The law would be improved by its eradication.[10] Professor Patterson's treatment of the subject is in terms of the fact situations involved, such as "waiver" of breach existing at inception of the contract, "waiver" of breach subsequent to issuance of the policy, and "waiver" of breach occurring after loss. The chapter alone should be a money-saver to companies whose employees read and comprehend it. Informalities in waiver transactions between the local agent and insured breed trouble. Its analysis should be valuable to lawyers as to when and where to sue, for the author reveals that Federal courts are much more reluctant to discover waiver than are state courts.

For students of law the succinct and systematic analysis of fundamentals gives to the book a value comparable to that of the better hornbooks. The organization follows closely that of Professor Patterson's *Casebook on Insurance.* Many of the same cases are discussed.

The work constitutes a worthy addition to the series of insurance books of the publisher. Its quality and the name of the author lend dignity and prestige to that series. And for the author it marks another in the already impressive list of achievements which are products of his pen.

University of North Carolina JOHN E. MULDER

6. P. 243.

7. Gardner, *supra* note 2, at 476.

8. WILLISTON, CONTRACTS (2d ed. 1936) c. XXV; VANCE, INSURANCE (1930) c. 9; EWART, WAIVER DISTRIBUTED (1917).

9. Professor Williston finds nine typical uses of the term. WILLISTON, *loc. cit. supra* note 8, § 679. His estimate is extremely conservative.

10. Ewart has so advocated, with little avail. Ewart, *loc. cit. supra* note 8.

HOW TO FIND THE LAW. SECOND EDITION. BY HENRY J. BRANDT. ST. PAUL: WEST PUBLISHING CO., 1936. pp. xvi, 826.

When one examines this book, he finds some old friends, but new material is also discovered. Here we have, under a new name, a modern, improved edition of Cooley's *Brief Making and the Use of Law Books*, which was first published about the beginning of the present century. It has had an honorable history, and, as a pioneer treatise on the subjects mentioned in its title, did much to stimulate the interest of law schools in the study of legal bibliography and, perhaps, brief making. The writer can well remember when schools devoted but a few hours to the study of the lawyers' tools, when a representative of a publisher would give a series of lectures relating to them. It soon became apparent that that was not enough time to give to such an important study, and gradually law schools have come to give a place in their curricula to legal bibliography. The book being reviewed is thought by the writer to be one of the good texts relating to the study of the books which are essential to a lawyer's business.

The introductory chapter suggests the necessity of a lawyer's having the ability to determine the problem with which he must deal at any particular time, and of his possessing knowledge of how to search for precedents. Then follows a series of chapters on the existence and use of certain types of legal authorities. Next comes material dealing with supplementing and evaluating precedents. This, naturally, leads to a detailed study of certain parts of the American digests and the citators. Thereafter, comes a summary of the contents of several previous chapters relating to the manner of finding an original precedent and supplementing it. The succeeding chapter is unusual. It deals with business data for the lawyer, and is written by Nathan Isaacs and Georges F. Dariot, professors in the Graduate School of Business Administration, Harvard University. This should be valuable, for lawyers are daily confronted with business problems.

Next we find an old and valuable friend. It is a discussion of the use of decisions and statutes by Eugene Wambaugh, Professor of Law, Emeritus, of the Harvard Law School. The writer has read this material many times, and always with profit. Then follow other well-known chapters. One is on the trial brief, written by Professor Edson R. Sunderland and Clifford W. Crandall; another discusses the brief on appeal and is written by Henry S. Redfield, formerly professor of law at Columbia University. These two chapters make valuable reading, not only for students, but for lawyers. Somewhat strangely, the discussion of English legal reference materials follows, rather than precedes, the material on briefs. This completes the first division of our book.

At the end of many chapters, review questions are asked. To the writer this seems an excellent idea, as it focuses attention on the main points of these subdivisions.

The second part of the book under discussion sets forth, for the most part, excerpts from legal sources. In an earlier edition some of these excerpts were in the first part of the book. The editor of the 1936 edition states that most teachers thought "page sequence of text material is more desirable" than sequence of text and illustrations. That is debatable.

A map showing the states covered by the subdivisions of the National Reporter System helps one to visualize their territorial coverage. Another map provides a similar service in relation to the federal judicial circuits. Some of the pictures of books should be helpful at preliminary lectures.

A chart of the main titles used in the *Cyclopedia of Law and Procedure* and in *Corpus Juris*, and the titles of the *American Digest System* classification are inserted between a list of American legal bibliography and a table of abbreviations of American authorities. The writer believes that they could better have been placed with other material dealing with the encyclopedias and digests. Then comes a list of English reports with abbreviations and parallel citations, to the

Full Reprint Edition of such reports. There is an adequate table of contents and at least a fairly good index.

Without making comparisons with other books on the subject covered by this one, it is proper to say that the publishers have provided a meritorious aid to students who must learn how to find their way around in the materials with which lawyers have to deal. It is clearly an improvement in some ways over the book first used years ago by the writer, but it retains old features of value.

St. Louis University Law School CARL C. WHEATON

---

CASES ON CRIMINAL LAW AND PROCEDURE. THIRD EDITION. BY WILLIAM E. MIKELL. ST. PAUL: WEST PUBLISHING CO., 1935. pp. xxiv, 775, x, 303.

In this single volume there are two collections of cases, separately indexed. The first, copyrighted in 1933, deals with the substantive principles of criminal law, while the materials on criminal procedure were published two years later. The former contains 21 chapters, commencing with one on the sources of criminal law, common law and statutory, of the state and federal governments. Then follows a group of cases, chiefly historical, aimed at getting the feel of what acts were deemed criminal at common law. Chapter 3 deals with the elements of crime, the act and the mental state. Then fourteen chapters treat the various specific crimes, in what may be called the heart of the book. The next three chapters are concerned with general principles of criminal law developed from the standpoint of defenses to criminal charges. They include ignorance and mistake of law and fact, insanity, other defenses based also upon absence of *mens rea*, and matters of excuse, justification and privilege. A chapter upon parties and combinations of persons completes this book.

The materials upon criminal procedure are divided into 14 chapters arranged in the chronological order of events from arrest to review. The condensation of many of the topics is made possible by the information conveyed through frequent excerpts from the American Law Institute's *Code of Criminal Procedure*. The cases, about 180 in number, include a much larger percentage of very recent decisions than in the first portion of the volume.

Professor Mikell has not accepted the criminological approach of Waite, and to a lesser degree of Sayre. His treatment is essentially a legalistic one. Having taken this premise, the editor departs from the plan of his second edition and quite properly gets quickly into the specific crimes. General principles of criminal law are handled mainly in connection with defenses. While one may disagree with the editor's approach, his arrangement or other features of the book, no one can deny his unerring skill in the choice of cases. In addition, the opinions are well edited and supplemented—though not profusely—by appropriate citations of cases and periodical literature. The volume contains about the proper amount of materials. Roughly the book could be covered adequately in about 75 class meetings. By some judicious omissions this could be reduced to 60 meetings, or the usual time allotment when both criminal law and procedure are included in a single course.

Although the work is an improvement upon an able second edition, the reviewer does not regard it as a panacea for the teaching of criminal law to first-year students. That the situation has not been a happy one is fairly generally recognized by most law teachers and students. While there are perhaps a dozen "regular" teachers of criminal law, the course is generally assigned to the newcomer to a law school faculty and in turn relinquished by him as soon as an opportunity presents itself. In spite of the human interest offered in some of the cases, most students are not impressed with the subject-matter either as a direct preparation for practice or as assistance in the understanding of other courses. Filled with hazy concepts, conflicts of holding and viewpoint, and inconsistencies of language and approach, criminal law is among the most difficult of legal subjects. Moreover it

stands by itself in the law school curriculum. Nothing follows from it and no later course is builded upon it to any appreciable degree. All this is not for want of ability and perseverance of casebook compilers. Both Beale's and Mikell's works have gone through several editions and Sayre, Waite, and Harno, who have followed, have contributed much. Surely with such an array of talent, we cannot blame the casebooks for the unsatisfactory results of courses in criminal law.

The reviewer is of the opinion that the regrettable situation is due to the practice of placing criminal law in the first year of the law school course. Just why this arrangement was originally made, or why it has been so long continued is somewhat of a mystery. One suspects that is may be in order to fill out the first year course schedule. Certainly there is nothing basic about the principles of criminal law that make it advisable that it be studied before other studies. As already pointed out, there are few if any helpful comparisons to be drawn between the criminal and the civil law.

What, then, is the solution? The reviewer believes that the answer will be found in asking the further question as to what benefit we should expect students to derive from the course in criminal law. A small minority of law school graduates enter almost immediately into the field of practice of the criminal law, either on the side of the prosecution or the defense. These persons require a basic understanding of the entire field, particularly the procedural matters. The great majority of lawyers have little or no direct contact with the criminal law. However they need to obtain in law school a general knowledge of criminal law in order to fit themselves as well-rounded advisers to clients. Equally important they should be equipped to help shoulder the responsibilities for reform of criminal law administration which the profession has shirked until recently. The reviewer believes that these several functions would be best performed if the subejct were offered in the third year of law studies, when the young lawyer is on the threshold of his professional career. At this time the class will have sufficient background to put a proper estimate upon the idiosyncracies and quibbles of the criminal law without neglect of the legal and social problems in connection with modern law enforcement. Probably this plan would lead ultimately to the use of a somewhat different type of materials upon the subject. However until these appear, Professor Mikell's book could serve as a basis for such a course, as well as the one for which it was intended.

University of Missouri Law School THOMAS E. ATKINSON