REPORT
ON
THE LAW OF EVIDENCE

ONTARIO LAW REFORM COMMISSION

Ministry of the
Attorney
General

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The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964*, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. Allan Leal, Q.C., LL.M., LL.D., *Chairman*
Honourable James C. McRuer, O.C., LL.D., D.C.L.
Honourable Richard A. Bell, P.C., Q.C.
W. Gibson Gray, Q.C.
William R. Poole, Q.C.

Lyle S. Fairbairn, LL.B., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada.

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ONTARIO LAW REFORM COMMISSION

Sixteenth Floor,
18 King Street East,
Toronto, Ontario,
M5C 1C5

To The Honourable R. Roy McMurtry, Q.C.,
Attorney General for Ontario.

Dear Mr. Attorney:

Pursuant to the provisions of section 2(1)(a) of *The Ontario Law Reform Commission Act, 1964*, the Commission authorized a research project on the law of evidence concerning those matters over which the Legislature has jurisdiction. The function of the project was to examine the present law of evidence within the province and to suggest reforms which would preserve the sound and established principles of the law of evidence, yet adapt that law where necessary to cope with the changing conditions of modern society. The project required a critical examination of the rules of evidence in civil proceedings, in prosecutions for provincial offences, and, to the extent that such proceedings are not governed by the provisions of other Acts, of the rules of evidence in proceedings before tribunals or investigatory bodies acting under statutory authority.

Professor Alan W. Mewett of the Faculty of Law of the University of Toronto was engaged to direct and supervise a research team on the law of evidence. In the early stages of the project, we received assistance from a Consultative Committee, composed of members of the Bench and Bar, who gave us their comments on suggestions made to us concerning areas of the law of evidence in need of reform.

The major portion of our recommendations are contained in a new Draft *Evidence Act*, attached as an Appendix to this Report. This Draft Act contains many new provisions, which seem to us desirable, as well as much that is taken, sometimes in a redrafted form, from the existing provincial statute *The Evidence Act*. Our Report can be seen as an analysis and commentary on this Draft Act.

After giving careful consideration to the research papers prepared by the Research Team, to the helpful comments of the Consultative Committee and after much additional research, the Commission now submits its Report on the *Law of Evidence*.

In the day to day business of the law, few things are more important yet as little understood, as the laws of evidence. Since they control the facts that may be used in judicial investigations the laws of evidence form a vitally important part of the judicial process in the search for truth. The rules of evidence have been built up over the centuries, originally within the common law as principles of law built up from case to case, increasingly supplemented by statutory provisions reforming or consolidating the common law. In most areas, the basic principles underlying the present law are sound, but some of the rules of evidence, especially the common law rules, are obscure; others have been rendered obsolete by the increasing complexity of modern life, and in particular by modern methods of communication and recording events.

We remain convinced that the common law approach to evidence is basically sound, and that it would be unwise to reform the law in radically new directions, alien to the tradition of the common law, for example by leaving the admissibility of evidence solely to the judgment of individuals presiding in particular cases. There must be guidelines which control the admissibility of evidence, but the guidelines must be such that they will not defeat the tribunal in its search for truth.

Often the law has shown itself out of touch with modern life, indeed at times out of touch with common sense. For example, in *Myers* v. *D.P.R.*[1] records of automobile engine numbers systematically recorded on the assembly line were held to be inadmissible in evidence at common law. It was held that such a record was hearsay evidence. In *Goody* v. *Odhams Press Ltd.*,[2] an action for defamation based on a newspaper article in which a convicted person was referred to as a robber, it was held that proof of the robbery conviction was no evidence that he was a robber. Such examples show that some of the rules of evidence do not commend themselves to the wisdom of the layman.

In this report we recommend a number of specific amendments, both to the common law and to statute law. We have prepared a new Draft *Evidence Act*, patterned upon *The Evidence Act* currently in force; our Draft Act contains the major portion of our recommendations together with many sound provisions from the present Act. We have thought it desirable to codify some of the common law, but we do not think it would be wise to attempt to prepare an exhaustive and comprehensive code of evidence. In our view, this would give rise to a whole new course of judicial interpretation creating much uncertainty about the precise meaning of words and phrases used in such a code, a development which could seriously disrupt the administration of justice. The better course, as we see it, is to codify and consolidate where necessary and desirable, but to leave ample room for the organic growth of the common law to

[1][1965] A.C. 1001.
[2][1967] 1 Q.B. 333.

meet future conditions which cannot be foreseen. We support the view that good rules of evidence are essential to the conduct of a fair hearing.

We have endeavoured to prepare a concise statute that is sufficiently comprehensive to meet most daily requirements in the administration of justice and to rationalize the rules of evidence with modern concepts of proof. We seek to reduce as far as possible forensic debate on what is, or is not, admissible in the average cases over which the Legislature has constitutional jurisdiction. There will be some unusual cases that will arise from time to time that will require extensive research and debate, but we trust that these will be unusual indeed.

CHAPTER 1

HEARSAY EVIDENCE

1. The Rule

In general, the law seeks to admit evidence that is relevant to the matters in issue in a proceeding. However certain types of evidence have been regarded as so inherently untrustworthy as to merit exclusion. One major example of potentially valuable evidence which is excluded because it may be inaccurate is hearsay evidence. An exact formulation of the rule has never been achieved by the courts, and there is no agreement among writers on the subject. Speaking broadly it may be said that a statement[1] is hearsay when it is made by a person who is not testifying and is introduced as truth of the matters stated.

The following statement by the Judicial Committee of the Privy Council is generally accepted as reflecting the law in Ontario:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[2]

There are many exceptions to the rule against the admission of hearsay evidence, both under the common law and by statute. Most authors set out 31 or 32 specific exceptions, but there is no general consensus among them as to what are exceptions. The leading American writer on evidence, Wigmore, lists only 14 and devotes over 800 pages to discussing them.[3] Statements contained in public documents and made by public officers in the discharge of their duties are but one example of evidence which may be admissible as an exception to the hearsay rule.

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[1]The rule against hearsay applies to oral and written statements as well as to gestures: Cross, *Evidence* (4th Ed. 1974), at p. 401.

[2]*Subramaniam* v. *Public Prosecutor*, [1956] 1 W.L.R. 965, 970, quoted with approval by Schroeder, J.A. in *R.* v. *Rosik*, [1971] 2 O.R. 47, 70.

[3]The 14 exceptions are:

1. dying declarations,
2. statements of fact against interest,
3. declarations about family history,
4. attestation of a subscribing witness,
5. regular entries in the course of business,
6. sundry statements of deceased persons,
7. reputation,
8. official statements and public documents,
9. learned treatises,
10. sundry commercial documents,
11. affidavits,
12. voter's declarations as to qualifications, domicile, or bribery,
13. declarations of a mental or physical condition,
14. spontaneous exclamations.

The Evidence Act (Ontario),[4] and the Canada *Evidence Act*,[5] also provide for some statutory exceptions to the hearsay rule as in the case, for example, of certain business records.

In practice, the hearsay rule has been applied as a general exclusionary rule unless the evidence tendered comes within, or is forced into, one of the exceptions. Various reasons have been advanced for excluding hearsay evidence. Many of these reasons advanced to justify the rule tend to go to the weight to be given to the evidence rather than to a rationale for its exclusion. It is sometimes contended that the absence of the oath and the lack of an opportunity to verify the statement by cross-examining the declarant impairs its reliability. There is, in addition, the risk of incorrect transmission, though if the statement is contained in a written document the last objection loses much of its force.

The rule is sometimes justified on the ground that the courts should receive only the best evidence that is available; if this is so, however, hearsay evidence would not be received where direct testimony is available and would be admitted in cases where no other evidence is available. However, the exceptions to the rule indicate that the courts are prepared to accept hearsay evidence in certain clearly defined areas even where the "best evidence" is available. In some cases hearsay may be admitted on the ground that it is the only method of proving certain issues, such as bodily or mental feelings; the cause of those feelings is a different matter and must be established without resort to hearsay evidence.[6]

As the common law developed, the courts appear to have isolated certain arbitrary areas where hearsay evidence will be admitted, while denying it in certain other areas; a development based more on convenience than on principle. Sometimes the admission appears to depend not only on the circumstances of the making of the statement but also on the relief claimed at the trial. For example, in a trial for murder or manslaughter a dying declaration, made by the person whose death is the subject of the charge, which satisfies certain tests, will be admitted, but such a declaration is not admissible in any other type of proceedings.[7]

The approach taken by the courts to exclude generally all hearsay evidence with defined exceptions, has tended to obscure the fact that it is not possible to treat all hearsay in the same manner. The rules concerning some types of hearsay may not be appropriately applied to other types. Hearsay may take many forms. For example, the statement may be an informal oral one not meant to be overheard, a formal oral statement, an informal written statement, a statement written in pursuance of some duty, a sworn statement, a statement in a previous judicial proceeding, conduct intended as an assertion, a drawing, chart, or photograph.

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[4]R.S.O. 1970, c. 151, s. 36.
[5]R.S.C. 1970, c. E-10, s. 30.
[6]*Youlden* v. *London Guarantee & Accident Co.* (1912), 26 O.L.R. 75, 4 D.L.R. 721, affirmed (1913), 28 O.L.R. 161, 12 D.L.R. 433; *Home* v. *Corbeil*, [1955] O.W.N. 842, [1955] 4 D.L.R. 750, affirmed [1956] O.W.N. 391, 2 D.L.R. (2d) 543.
[7]*R.* v. *Jurtyn*, [1958] O.W.N. 355; *R.* v. *Buck*, [1940] O.R. 444.

Considerable dissatisfaction with the hearsay rule has been expressed over the last hundred years. In 1876, for example, Mellish, L.J., stated:

> If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made ante litem motam, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence.[8]

It is quite apparent that by the application of the hearsay rule evidence essential to the proper determination of an issue may be excluded. The essential question is whether the rationale for the rule justifies the consequences. To answer this question it is useful to consider first how the laws of evidence in other jurisdictions deal with the problem.

2. Continental Jurisdictions

Since the introduction of the continental codes following the French Code Civil of 1804, the old system of conclusive and binding rules governing the weight and value of proof has been superseded by a system which permits the tribunal to receive any offer of direct or indirect proof and to weigh the evidence submitted in its sole discretion.[9] The fundamental principle applied is that, subject to certain exceptions, the civil codes will not determine, restrict or interfere with the assessment of the persuasive value of any evidence.[10] The court is not fettered by any formal rules of evidence, as would be a court within the common law tradition, but can evaluate the evidence produced by the parties in its own free and reasonable discretion.[11] In French criminal procedure, for example, the judge can admit all evidence which is reasonably probative, so that hearsay statements may be given as much weight as they merit;[12] in general, however the inferiority of derivative evidence is well recognized.[13]

The admissibility and value of hearsay evidence is thus not explicitly dealt with in the civil law jurisdictions; rather it is determined by the relevance of the particular evidence in question in any particular case. Hammelmann, in considering this point, divides verbal hearsay evidence into two groups: first, common rumours of indeterminate origin whose evidentiary value is so slight that they are usually considered irrelevant; secondly, what is referred to as testimonial hearsay evidence of the second degree, where the witness affirms a fact of his personal perception. For example if a witness heard a certain person make a statement, the judge may refuse to admit that witness' statement as evidence if the statement is considered logically irrelevant to the issue. Should the statement have some bearing on the issue, the court may accept the witness as one who is

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[8]*Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154, 250.

[9]David and de Vries, *The French Legal System* (1958), at p. 76.

[10]Hammelmann, "Hearsay Evidence, a Comparison" (1951), 67 L.Q.R. 67, 71.

[11]Cohn, *Manual of German Law* (1971), vol. 2, at p. 179.

[12]Vouin, "The Protection of the Accused in French Criminal Procedure" (1956), 5 I.C.L.Q. 1, at p. 15.

[13]Hammelmann, footnote 10 *supra*, at p. 71.

reporting, not hearsay, but circumstantial evidence from his own perception.[14]

The pattern of civil proceedings in civil law countries also involves extensive interlocutory procedures which provide additional opportunities for rejecting irrelevant testimony. Before the French preliminary inquiry, the *enquête*, the parties must state in writing the facts they wish to establish through witnesses' testimony; the tribunal will not issue the interlocutory order leading to an *enquête* until it has considered both the relevance of the proposed facts, and the admissibility of the instruments of proof relied upon by the parties.[15]

In the *enquête* itself, the judge conducts the interrogation on the basis of questions prepared by the parties. As a result of this process, evidence may be admitted which would, under our common law rules of evidence, be viewed as hearsay. Dalloz summarizes the matter:

> The tribunal assesses freely the weight of the testimony. . . . Obviously more importance must be attached to the testimony of a witness who has personally seen or heard the fact which he describes than to the testimony of witnesses who have gained their knowledge from another person. Nevertheless, depositions in the *enquête* are not without value merely because the witness had only indirect knowledge of the facts to which he testified, gained from hearsay; in this respect the law relies on the intelligence and prudence of the judges.[16]

In French criminal proceedings, the presiding judge conducts the examination of witnesses at the final hearing. Although documents or written declarations which have come from persons who have died or who are unable to appear, may be admitted at the discretion of the judge, written evidence will be excluded if the witness is in court or could have been called. Such evidence is, however, received only "*en titre de renseignement*", or, to paraphrase, only for information. If a witness refers to vague rumours or hearsay and cannot be more specific, the judge must, under article 270 of the *Code d'instruction criminelle*, interrupt and reject all evidence that tends to prolong the hearing without assisting in the search for truth. On the other hand, however, if some relevance can be shown, hearsay may be admitted in situations where it would clearly be excluded in Ontario. The discretionary powers of the trial judge, rather than any complex formulation of exclusionary rules, are what control hearsay in French courts.

In Italian law, testimony is limited to statements of third persons made in court;[17] testimony is not subject to any formal exclusionary rules,

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[14]*Ibid.*, at pp. 72-73.

[15]*Ibid.*, at p. 73; Wright, "French and English Civil Procedure: A Parallel" (1926), 42 L.Q.R. 327, 342; Freed, "Comparative Study of Hearsay Evidence Abroad: France" (1969), 4 International Lawyer 159.

[16]*Dalloz, Repertoire Pratique*, vol. IX, at p. 389 as quoted in Hammelmann at p. 73.

[17]Written or oral statements made out of court are admissible, but not as testimony.

such as the hearsay rule.[18] However certain rules[19] do seem to have emerged from a body of decisions in the *Corte di Cassazione*: first, that hearsay testimony which amounts to a self-serving statement of a party is not normally entitled to any probative weight.[20] Secondly, that hearsay testimony standing alone and uncorroborated has no probative value whatsoever.[21] Lastly, that hearsay testimony may only acquire probative value and be used to support a judicial finding of fact when there is some corroborative evidence from another source.[22]

Hence, although the Italian judge has, like his French and German counterparts, a discretion to evaluate and admit all evidence,[23] this discretion is subject to these well-defined rules. Hearsay testimony is admissible to provide additional evidence to assist the court, but its role is purely supplementary and it is not accorded probative value equal to that of direct testimony based on first-hand knowledge. Italian civil procedure, in addition, restricts the inquisitorial role of the judge. Ordinarily the examining judge may neither call a witness on his own motion, nor extend his questioning of a witness beyond the matters specified in the written lists of questions submitted by the parties. The parties in the dispute are specifically forbidden from examining or cross-examining witnesses.[24]

For all these reasons, the potential role of hearsay evidence in Italian civil proceedings is very different from its role in other civil law systems; it would be inaccurate to characterize the Italian system as one which freely allows hearsay testimony. The absence of the comprehensive exclusionary rule which we know in the common law is mitigated and balanced by definite judicial limitations.

In Switzerland, civil procedure is governed, not by federal law,[25] but by the twenty-five different laws of the individual cantons, which often have very different fundamental principles underlying their procedure.[26] Some cantons regularly admit hearsay evidence in legal proceedings where it forms relevant circumstantial evidence.[27] For instance, the Code of Civil Procedure of the Canton of St. Gall provides that "hearsay testimony can, according to the trustworthiness of its source, be accepted in certain circumstances as circumstantial evidence".[28]

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[18]Cappelletti and Perillo, *Civil Procedure in Italy* (1965), at p. 216.

[19]Rules taken from Rava, "Comparative Study of Hearsay Evidence Abroad: Italy" (1969), 4 International Lawyer 156, 158.

[20]Cass. 8/10/1966 N. 2171, *Torsiello* v. *Fallimento Malanga* (from Rava, *supra*).

[21]Cass. 7/6/1966 N. 1770, *Esposito* v. *Esposito* (from Rava, footnote 19 *supra*).

[22]Cass. 1/24/1962 N. 121, *Beruini* v. *Gasperoni*. Cass 3/9/1966 N. 662, *Fei* v. *Della Casa* (from Rava, footnote 19 *supra*).

[23]*Codice di Procedura Civile* art. 116, para. 1: "The court must evaluate the evidence in accordance with its prudent judgment, except as otherwise provided by law."

[24]Cappelletti and Perillo, *Civil Procedure in Italy* (1965), at p. 224.

[25]Article 64 of the Federal Constitution of the Swiss Confederation 1874 provides: "the organization and procedure of the courts and the administration of justice remain with the Cantons as in the past".

[26]Arminjon, Nolde & Wolff, *Traite de Droit Comparé* (1950), Tome II, p. 394.

[27]Hammelmann, footnote 10 *supra*, at p. 76.

[28]In article 158, as quoted in Hammelmann, footnote 10 *supra*, at p. 76.

Within the German legal system the principle of free appreciation of evidence (*Prinzip der freien Beweiswurdigung*) governs the court in considering the facts before it.[29] It means that the court is not fettered by any formal exclusionary rules of evidence, but can evaluate the evidence produced in its own free and reasonable discretion.[30] For this reason, German law is much less rigorous with regard to controlling the admissibility of evidence than is the common law; in principle any evidence, even hearsay, is admissible, and it is the court's task to decide what value to attach to it. Although the dangers of relying on hearsay evidence do seem to be recognized, there have been some notable miscarriages of justice resulting from its inclusion.[31] Cohn agrees that there can be no doubt that much of the dissatisfaction, expressed by common law lawyers observing German procedure in action, is fully justified.[32]

As can be seen, it is difficult to draw any general conclusions concerning evidence and procedure from the civil law systems. The conduct of trial and proof in all these countries do tend to be more dominated by the judge than procedures in common law countries, and this has led to civil law trials being designated, erroneously, as inquisitorial in nature.[33] Although questioning by counsel is sometimes permitted,[34] in general the judicial interrogation of witnesses reduces the need for extensive cross-examination. Similarly the jury plays a much less important part in civil law proceedings than in the common law systems, and thus there is less need for elaborate rules of evidence to control the admissibility of testimony in court.[35] The legal systems themselves, although in principle admitting virtually all evidence, do contain safeguards to minimize the harm that may be caused by unreliable testimony in general, and hearsay in particular. Arguments, based on continental experience, for the total abolition of the hearsay rule, or for a system of free weighing of evidence, are unconvincing if they fail to recognize the significant differences between civil and common law systems. Although most civil law jurisdictions do not exclude hearsay as such, they do possess compensating features which remove some of the basis of concern about the trustworthiness of hearsay. In recommending any reform of the law of hearsay in Ontario, therefore, the recent experience of civil law jurisdictions is only marginally relevant.

3. Some Approaches to Reform

(a) *England*

In England there has been considerable legislative reform of the law concerning hearsay. The first major reform took place in 1938.

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[29]Kunert, "Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Civil Procedure" (1966), 16 Buff. L.R. 122, 142.

[30]Cohn, *Manual of German Law* (1971), vol. 2, p. 179.

[31]Cohn, *supra*, at p. 224 refers to the "Bullerjahn case", during the Nazi era.

[32]*Ibid.*, at p. 225.

[33]Weber, *On Law in Economy and Society* (1954), at pp. 46-47; Hamson, "The Protection of the Accused — English and French Legal Methods", [1955] Crim. L.R. 272, 276.

[34]In Germany the judge must, under section 397 of the *Zivilprozessordnung*, permit counsel to ask questions themselves.

[35]Merryman, *The Civil Law Tradition* (1969), at p. 125.

Sections 1 and 2 of the *Evidence Act*, 1938,[36] provided, in substance, that documentary evidence was admissible in civil proceedings as evidence of the facts stated therein on the following conditions:

(i) subject to certain exceptions, that the maker of the statement had personal knowledge of the facts stated;

(ii) that if the maker of the statement was alive and could be called as a witness he must be called except in exceptional circumstances;

(iii) that the statement was made *ante litem motam*;[37] and

(iv) that the statement was written and signed by the maker of the document, or at least otherwise recognized by him.

The *Civil Evidence Act 1968*,[38] extended the provisions of the *Evidence Act*, 1938. The effect of the later Act[39] is to make virtually all "first-hand" hearsay, oral as well as documentary, admissible, provided that certain conditions and procedural requirements set out in the Rules of Court made pursuant to section 8 of the Act are satisfied.[40] Under the Rules, a party who wishes to introduce a hearsay statement into evidence must give notice of his intention to do so to every party to the proceedings. The notice must contain particulars of the time, place and circumstances

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[36]1938, 1 & 2 Geo. VI, c. 28. The English legislation of 1938 has been followed in both Australia and New Zealand: Evidence Act 1898-1973 (N.S.W.) ss. 14A-14C (added 1954); Evidence and Discovery Acts, 1867-1973 (Qld.) ss. 42A-42C (added 1962); Evidence Act 1929-1972 (S.A.) ss. 34C-34D (added 1949); Evidence Act 1906-1971 (W.A.) ss. 79B-79D (added 1967); Evidence Act 1910-1970 (Tas.) ss. 78-79 (added 1943); but see Evidence Act 1958-1973 (Vic.) s. 55 (added 1971) and Evidence Ordinance 1971 (A.C.T.), No. 4, part VI. For New Zealand see *Evidence Amendment Act 1945*. In New Zealand the Torts and General Law Reform Committee reported on the subject of *Hearsay Evidence* in July 1967. They recommended against the admission in evidence of oral hearsay generally. The case for reform in both Australia and New Zealand has, however, continued to be strenuously argued: see Campbell, "Recent and Suggested Reforms in the Law of Evidence" (1967), 8 U. of W. Aust. L. Rev. 61; Harding, "Modification of the Hearsay Rule" (1971), 45 A.L.J. 531; Rt. Hon. Sir A. Turner, "Reforms in the Law of Evidence", [1969] N.Z.L.J. 211.

[37]That is, at a time when the declarant had no motive to distort the truth, as in the case of a statement made before the controversy arose.

[38]1968, c. 64. The Act was based on the Thirteenth Report of the Law Reform Committee, *Hearsay Evidence in Civil Proceedings*, Cmnd. 2964, (1966).

[39]Cross has summarized the effect of the English Act as follows:

> Subject to possible problems relating to implied assertions and negative hearsay, the effect of s. 2 of the Civil Evidence Act 1968, read together with the rules of court made under s. 8, is to abolish altogether the rule against hearsay in civil proceedings so far as 'first-hand' hearsay is concerned, provided one of the reasons mentioned in s. 8 for not calling the maker of the narrated statements exists, and provided the prescribed procedure for establishing this fact has been followed; in civil cases to which these provisos do not apply, the court has a discretion to admit first-hand hearsay as evidence of the facts stated. By 'first-hand' hearsay is meant a statement proved by the production of a document or else by the evidence of a witness who heard or otherwise perceived it being made: Cross, *Evidence* (Supp. to 3rd. Ed. 1969), at p. 18.

[40]*Civil Evidence Act 1968*, c. 64, ss. 2, 8.

[28]In article 158, as quoted in Hammelmann, footnote 10 *supra*, at p. 76.

in which the statement was made, the substance of the statement, and the persons by and to whom the statement was made. If the person wishes to allege that the declarant cannot or should not be produced, the notice must also specify this fact, and the reason relied on.[41] The opposite party may, by filing a counter notice, require any person of whom particulars were given with the notice to be called as a witness in the proceeding, unless one of the reasons for not calling the declarant set out in section 8(2)(b) of the Act exist.[42] If, however, the notice has stated that the person sought to be called as a witness cannot or should not be called, the counter notice must contain a statement that the person can or should be called.[43] The question whether the person sought to be called should be called as a witness may then be resolved by the court on an interlocutory application.[44]

It is possible, therefore, under the English legislation, to introduce hearsay evidence where one of the reasons for not calling the declarant set out in the Act exists, and, also, where a party has served the appropriate notice and has not been served with a counter notice requiring him to call the declarant.

Assuming that the requisite conditions and procedure have been complied with, there is no discretion in the court to refuse to admit first-hand hearsay unless the statement was made in earlier legal proceedings.[45] There is, however, power in the trial judge to admit hearsay evidence notwithstanding that the procedural requirements have not been met.[46] This Rule is based upon the principle that non-compliance with the procedural requirements should not, by itself, result in the exclusion of material hearsay evidence otherwise admissible, but that the court should be able to do what is just in the circumstances.

Second-hand hearsay is generally inadmissible,[47] except insofar as it may be admitted under the several common law exceptions to the hearsay rule retained by virtue of section 9 of the *Civil Evidence Act 1968*.[48]

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[41]The Supreme Court Practice 1973, O. 38, R. 22(3).

[42]These reasons are that the declarant is "dead or beyond the seas or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he was connected or concerned as aforesaid and to all the circumstances) to have any recollection of matters relevant to the accuracy or otherwise of the statement": *Civil Evidence Act 1968*, s. 8(2)(b).

[43]The Supreme Court Practice 1973, O. 38, R. 26.

[44]*Ibid.*, R. 27.

[45]Section 8(3)(b) of the *Civil Evidence Act 1968*, and the Supreme Court Practice 1973, O. 38, R. 28.

[46]The Supreme Court Practice 1973, O. 38, R. 29.

[47]*Civil Evidence Act 1968*, s. 2(3).

[48]The Act deals with other matters of concern to this Commission and discussed later in this Report: See *infra*, Chapters 3 and 6. For example, a witness' previous statement, whether consistent or inconsistent, is, subject to certain conditions, admisssible in evidence not only as proof of the fact that the statement was made, but also of the truth of the statement: ss. 2 and 3. Also the rule in *Hollington* v. *Hewthorn* ([1943] K.B. 587) is reversed so as to make a conviction admissible in evidence in subsequent civil proceedings for the purpose of proving that the person so convicted committed the offence in question: section 11.

(b) *United States*

Because the changes made were probably the earliest and broadest it is convenient to mention first those made in Massachusetts in 1898[49] (subsequently followed by Rhode Island[50]). The rule was:

> A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.[51]

By a subsequent amendment to the legislation this rule has been extended to encompass "any action or other civil proceeding", and extended by rendering admissible private conversations between husband and wife and removing the requirement that the statement be made *ante litem motam*.[52]

A *voir dire*[53] is required to ascertain whether the prerequisites have been met before the evidence is admitted. It is to be observed that such evidence is not limited to written statements, but is confined to statements where the declarant is dead.

Under the Model Code of Evidence proposed by the American Law Institute, hearsay evidence would be generally inadmissible, except in certain elaborately codified circumstances.[54] We draw attention in particular to the following exception:

> Evidence of a hearsay declaration is admissible if the judge finds that the declarant
>
> (a) is unavailable as a witness, or
>
> (b) is present and subject to cross-examination.[55]

Under the Code, hearsay upon hearsay, that is, second-hand hearsay is generally excluded.[56] In addition, the court would have a discretion to exclude evidence, hearsay or otherwise, whenever its value is outweighed by the likelihood of waste of time, prejudice, confusion or unfair surprise.[57]

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[49]Mass. Acts, 1898, c. 535, enacted at the instance of Professor James Bradley Thayer.

[50]R.I. Gen. Laws §9-19-11 (1970), as cited in 5 Wigmore, *Evidence*, §1576 (Chadbourn Rev. 1974).

[51]As set out in Mass. Gen. Laws (Ter. Ed) c. 233, s. 65.

[52]Now Mass. G.L.A., c. 233, §65; an additional subsection (65(a)) was added in 1973:

> If a party to an action or suit who has filed answers to interrogatories under any applicable statute or any rule of the Massachusetts Rules of Civil Procedure dies, so much of such answers as the court finds have been made upon the personal knowledge of the deceased shall not be inadmissible as hearsay or self-serving if offered in evidence in said action or suit by a representative of the deceased party; (added by Mass. Act 1973, c. 1114, s. 215).

[53]A procedure for ascertaining whether the testimony of a particular witness would be admissible in evidence.

[54]American Law Institute, Model Code of Evidence (1942), Rule 502.

[55]*Ibid.*, Rule 503.

[56]*Ibid.*, Rule 530.

[57]*Ibid.*, Rule 303.

It does not appear that the proposals of the American Law Institute have met with favour. They were considered at the time to be too sweeping in nature, because the effect of the wide range of exceptions would be to make hearsay generally admissible.[58] Subsequent proposals and legislation have retrenched from this first, extreme, position.

The California Evidence Code[59] provides "except as provided by law, hearsay evidence is inadmissible". The exceptions listed[60] proceed along traditional common law lines, but extend their scope.

The Commissioners on Uniform State Laws considered these matters in their Uniform Rules of Evidence in 1953,[61] rejected the extreme position taken by the American Law Institute, but proposed changes that are wider than those adopted in some jurisdictions. Hearsay would be generally inadmissible, with thirty codified exceptions, some more widely phrased than the common law rules. A further exception not based upon the common law was proposed:

> (i) A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness.[62]

In their comments, the Commissioners point out that none of the exceptions to the rule are based solely on necessity, that is, the unavailability of a witness. The Model Code theory that any relevant hearsay has probative value, is rejected in favour of the traditional policy that the value of hearsay depends primarily upon the circumstances in which the statement was made.

The United States Federal Rules of Evidence[63] retain the exclusionary principle,[64] but list 24 exceptions to the hearsay rule which operate in circumstances in which the declarant is not required to be a witness, even though he is available, and which synthesize common law exceptions to the hearsay rule.[65] The Rules also provide for a further five exceptions to the exclusionary principle, which operate when the declarant is unavailable as a witness,[66] and which reflect common law exceptions based on unavailability. In addition, some admissions offered against a party are stated to be "not hearsay", as are certain prior statements of a witness

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[58]See Maguire, *Evidence—Common Sense and Common Law*, at p. 153 as cited in Murray, "The Hearsay Maze: A Glimpse at Some Possible Exits" (1972), 50 Can. Bar Rev. 1, at p. 4.

[59]Cal. Evidence Code, §1200 (West, 1968).

[60]*Ibid.*, §§1220-1341.

[61]Now superseded by the Uniform Rules of Evidence, 1974. The new Uniform Rules of Evidence are almost identical to the Federal Rules of Evidence, 28 U.S.C.A., enacted by Pub. Law 93-595, effective July 1, 1975.

[62]National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953), Rule 63.

[63]Federal Rules of Evidence, 28 U.S.C.A., enacted by Pub. Law 93-595, effective July 1, 1975.

[64]*Ibid.*, Rule 802.

[65]*Ibid.*, Rule 803.

[66]*Ibid.*, Rule 804.

when the declarant testifies at the trial or hearing and is subject to cross-examination on the statement.[67]

The Federal Rules provide for a residual flexibility and offer an opportunity for development in the law by permitting the court to admit into evidence hearsay statements not specifically covered by the listed exceptions, but having equivalent circumstantial guarantees of trustworthiness "if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant".[68]

Proposals for reform in the law concerning hearsay evidence appear to have followed generally along three alternative lines:

(1) the preservation of a general exclusionary hearsay rule and the codification of existing common law exceptions either modified or enlarged, subject to a discretion to refuse such evidence where prolix, unnecessary or unfair;

(2) the abolition of the general exclusionary hearsay rule and the making of first-hand hearsay admissible with certain exceptions;

(3) the preservation of the general exclusionary hearsay rule with specified exceptions in addition to those provided at common law.

4. Proposals for Reform

In considering possible reforms for the law of evidence in Ontario, we can usefully start with the broad principles set out in the Thirteenth Report of the English Law Reform Committee:

> The purpose of 'evidence' is to enable the court at the trial to ascertain what in fact happened in the past and sometimes what are likely to be its consequences in the future, so that the court may determine whether what did happen entitles the plaintiff to any, and, if so, what, legal reparation from the defendant. *Prima facie* any material which is logically probative of a fact in issue, i.e., which tends to show that a particular thing relevant to the cause of action or to the defence happened or did not happen or is likely or unlikely to happen, is capable of assisting the court in its task and should be capable of being tendered in evidence, unless there are other reasons for refusing to admit it. We are not concerned here with

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[67] *Ibid.*, Rule 801(d)(1) and (2).
[68] *Ibid.*, Rules 803(24) and 804(5).

> rules which prohibit a party from proving a particular fact at all, but only with rules which exclude the use of a particular kind of material to prove a fact which a party is permitted to prove in some other way. Such rules should have a rational basis. It should be possible to point to some disadvantage flowing from the admission of the particular kind of material as evidence of a fact which would outweigh the value of any assistance which the court would derive from the material in ascertaining what in fact happened.[69]

In applying these principles, it is important to remember that their relevance depends on the type of tribunal by which the facts are to be determined and the nature of the issue with which the tribunal is concerned. In Ontario, the tribunal may be a judge of the High Court sitting with or without a jury, a judge of a County or District Court sitting with or without a jury, a Small Claims Court judge or a provincial judge sitting either in the Criminal Division or the Family Division of the Provincial Courts. In addition, it may be an investigatory body such as a Royal Commission or one of a great number of tribunals acting under statutory authority and deciding grave issues or very simple matters in the regulation of community living, many of which could not be decided either in practice or in justice without the admission of hearsay evidence.

The most commonly advanced arguments against admitting hearsay statements in evidence are that they are unreliable because:

(1) they are not made under oath;

(2) they are not subject to testing by cross-examination;

(3) they may not be the "best" evidence;

(4) they may lead to unnecessary proliferation of evidence;

(5) as statements are repeated, their accuracy tends to deteriorate.

There is some foundation for each of these objections when they are applied generally, but the objections are not all valid for all types of hearsay evidence. We have come to the conclusion that some changes are necessary.

The present exceptions to the exclusionary rule have been built up in a piece-meal fashion and, although in Canada[70] the categories do not appear to be closed, the process of judicial reform of the hearsay rule and the creation of further exceptions to the rule is, at best, slow and uncertain. Unquestionably, relevant and useful evidence is excluded in many cases because of the rule, where no harm would be done by admitting it. A real issue is whether the objections to hearsay evidence go to its admissibility or to the weight that a trier of fact should give to it. If the dangers inherent in admitting hearsay are such that a trier of fact is likely to give such improper weight to the evidence as to lead to a wrong conclusion, the rule should be an exclusionary one with the exceptions confined within narrow definable limits. If, on the other hand, the trier of fact is likely to weigh hearsay statements in the light of all the

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[69] *Supra* footnote 38, at p. 4.

[70] *Ares* v. *Venner*, [1970] S.C.R. 608; however in England the opposite conclusion was reached in *Myers* v. *D.P.P.*, [1965] A.C. 1001.

circumstances and give them the weight that those circumstances warrant, there should not be a general exclusionary rule.

Unfortunately, little is known about the psychological processes by which weight is given to evidence, or how inferences are drawn. No scientific studies are available to assist us in determining whether the ordinary juryman would or would not attach the same importance to direct testimony as he would to hearsay evidence, or whether he is capable of distinguishing between the two and attaching the appropriate weight to hearsay evidence. We have grave doubts whether this can be determined by scientific research.

The value of a hearsay statement depends upon the circumstances in which it was made, recorded or overheard, and subsequently narrated. Hearsay evidence may consist, as it did in *Myers* v. *D.P.P.*,[71] of indisputable and reliable contemporaneous records, or a vague rumour repeated second or third hand. The former may have greater value in the decision-making process than evidence given under oath, while the latter has little value whatever. If evidence is of little or no value, the inherent dangers of its admission outweigh whatever value it might have, but if hearsay evidence has great value means must be found for its admission.

We have come to the conclusion that further limited provision should be made for the admission of hearsay evidence in civil cases. However, we think that the following proposals should not apply to criminal or provincial offences. As to tribunals, the law is satisfactorily dealt with in section 15 of *The Statutory Powers Procedure Act*.[72] The provisions of the statute

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[71]*Supra*, footnote 70. In that case the records consisted of serial numbers impressed on engines of motor vehicles during their manufacture.

[72]S.O. 1971, vol. 2, c. 47, s. 15:

15.—(1) Subject to subsections 2 and 3, a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(*a*) any oral testimony; and

(*b*) any document or other thing,

relevant to the subject matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing,

(*a*) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(*b*) that is inadmissible by the statute under which the proceedings arise or any other statute

(3) Nothing in subsection 1 overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, document or other thing may be admitted as evidence at a hearing.

(4) Where a tribunal is satisfied as to their authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

(5) Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a true copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document.

do not apply to investigatory bodies where the parties affected are not entitled to a hearing; but it is, nevertheless, a safe guide to be followed. A somewhat similar provision, differently worded, was included in *The Coroners Act, 1972*.[73] Accordingly, our recommendations in this chapter apply only to civil proceedings.

In devising a formula to guide the courts as to the admissibility of hearsay evidence, one must first determine whether the rule should be exclusionary or inclusionary. It is hard to contend that all hearsay evidence can be questioned on the ground of its weight. As indicated, certain hearsay evidence such as the record of a serial number impressed on an automobile engine during manufacture should be deserving of great weight. The reliability of certain hearsay evidence has been acknowledged by the statutory exceptions that have already been made, for example, copies of entries in a book or record kept by a bank.[74]

The object of reform should be to devise a rule that will provide for the admissibility of hearsay in proper cases while at the same time providing proper safeguards against the dangers inherent in its use. The effect of the American Model Code of Evidence with its broad exceptions would be to make hearsay generally admissible. We do not believe that adequate legal safeguards have been there provided. In our opinion, too much discretion has been left to the judge, and there is a serious danger of confusion and disparity in its application.

The American codes, and in particular the Federal Rules of Evidence, represent an attempt to rationalize, codify and liberalize the traditional exceptions to the hearsay rule. Generally speaking, however, codification tends to inhibit the growth and development of the common law, a defect which the Federal Rules sought to cure by the inclusion of a residual exception providing for the admissibility, in certain circumstances, of hearsay statements not specifically covered by the codified exceptions, but having "equivalent circumstantial guarantees of trustworthiness". In our view such a residual exception would introduce too much uncertainty into the law of evidence.[75] For these reasons we reject the approach of codifying the exceptions to the hearsay rule.

Nor do we think that the English approach should be adopted. In England, where the hearsay rule was effectively reversed by statute, notices and counter-notices by the parties are required whenever it is proposed to use hearsay evidence. This would, under our practice, tend to confuse and would certainly delay trials. It may be satisfactory in England where litigation is carried on by a highly specialized bar, but we do not think it would be satisfactory in Ontario. Under the *Civil Evidence Act 1968,*

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[73]S.O. 1972, c. 98, s. 36.

[74]R.S.O. 1970, c. 151, s. 34.

[75]The House Committee on the Judiciary would have deleted the residual exceptions contained in Rules 803(24) and 804(b)(5) as injecting too much uncertainty into the law and impairing the ability of practitioners to prepare for trial: see Hearings on Proposed Rules of Evidence Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93rd Congress, 1st. Sess., series 2 (1973) cited in Tribe, "Triangulating Hearsay" (1974), 87 Harv. L.R. 957, 973.

it is possible to introduce first-hand hearsay of any kind where a party is not required by counter-notice to call the declarant. In this case the judge does not appear to have sufficient authority to exclude hearsay evidence where in his opinion the probative value would be outweighed by the prejudice and confusion it would create. In addition, we consider that the judge has too broad a discretion to admit evidence when the procedural safeguards have not been met.

In our view, the general exclusionary rule now in effect should be retained, together with the existing common law exceptions. The hearsay rule should, however, be relaxed by way of further, codified, exceptions.[76]

If a hearsay statement is to be admitted, the first requirement is that the facts contained in the statement should be within the personal knowledge of the declarant. Hearsay upon hearsay, that is, second-hand hearsay, should certainly be excluded except in those cases where it is now admissible at common law, for the obvious reason that efforts to test its reliability would not only confuse trials but also distort issues.

Subject to this we think a good case is made out for the admission of hearsay evidence based on necessity. If the declarant is available to give evidence there is no reason why hearsay evidence should be admitted except where specific statutory provision is made. On the other hand, if the declarant is dead or for some reason is unable to attend to give evidence, a real need arises which we think outweighs the frailties of hearsay evidence in the search for truth.

A further question arises. Should the rules for admission be broader than this? Should the court have power to admit hearsay evidence in other circumstances which, in the opinion of the court, would justify its admission? Under the Federal Rules certain hearsay statements are admissible, after assurances of their accuracy, even though the declarant is available. As we have noted, this is a wider departure from common law principles than we think should be made.

We recommend that a first-hand hearsay statement should be admissible in evidence, (a) where all parties agree to its admission with or without the admission of the truth of the facts stated therein, or (b) if the maker of the statement has died or is too ill to testify or cannot with reasonable diligence be identified, or found, and direct oral evidence of the maker of the statement would be admissible.

We must also consider what inquiry should be made into the circumstances under which the hearsay statement was made, the opportunities the declarant had for observing the facts that he purported to state and the credibility of the declarant. The English *Civil Evidence Act 1968*[77] has dealt with these matters in this way:

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[76]In Chapter 11, in order to adapt the law to current technological developments, we recommend a further specific exception to the hearsay rule relating to the admission of computer records.

[77]1968, c. 64, s. 7. See also the safeguards contained in section 6 of the Act.

7. (1) Subject to rules of court, where in any civil proceedings a statement made by a person who is not called as a witness in those proceedings is given in evidence by virtue of section 2 of this Act—

(a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as witness shall be admissible for that purpose in those proceedings; and

(b) evidence tending to prove that, whether before or after he made that statement, that person made (whether orally or in a document or otherwise) another statement inconsistent therewith shall be admissible for the purpose of showing that that person had contradicted himself:

Provided that nothing in this subsection shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(2) Subsection (1) above shall apply in relation to a statement given in evidence by virtue of section 4 of this Act [records compiled] as it applies in relation to a statement given in evidence by virtue of section 2 of this Act [hearsay statements], except that references to the person who made the statement and to his making the statement shall be construed respectively as references to the person who originally supplied the information from which the record containing the statement was compiled and to his supplying that information.

(3) Section 3(1) [concerning previous statements] of this Act shall apply to any statement proved by virtue of subsection (1)(b) above as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in paragraph (a) of the said section 3(1).

A provision of this sort may tend to give rise to a proliferation of issues; we must consider what limitations there should be in Ontario. The matter is further complicated by the mode of trial as distinct from the issues to be tried. Some civil actions are tried by a jury and others by a judge alone.

Whatever method is employed to relax the hearsay rule, some opportunity for an inquiry is necessary to determine the credibility of the declarant whose statement is admitted, his opportunity to know the facts related and the circumstances under which they were related. Provisions, similar to those contained in the English *Civil Evidence Act 1968*, are essential, with adequate safeguards against a proliferation of issues and confusion at trial. We think that the law should be concise, and should give the court scope for a wise and fair application.

5. Recommendation

We recommend that *The Evidence Act* be amended to include the following provision:

(1) In this section "statement" means any representation of fact, whether in words or otherwise, made to a witness called to give evidence.

(2) In a civil proceeding a statement that would otherwise be inadmissible as hearsay is nevertheless admissible as evidence of any fact stated therein of which direct evidence would be admissible,

(a) if the parties to the proceeding agree to its admission with or without admission of the truth of facts; or

(b) if the maker of the statement could have testified from personal knowledge and

(i) he has died, or
(ii) he is too ill to testify, or
(iii) he cannot with reasonable diligence be identified or found.

(3) Notice of intention to introduce evidence under clause *b* of subsection 2 shall be given by the party intending to do so to other parties to the proceeding in accordance with such rules as the Rules Committee may make.

(4) Where corroboration is required by law, a statement admitted under this section shall not be taken to be corroborative of the evidence of a witness called to prove the statement.

(5) Where a statement is tendered in evidence under this section, the circumstances under which it was made may be investigated by the court, and, where it is admitted, the credibility of the maker of the statement may be impeached to the same extent and in the same manner as if he had been a witness in the proceeding except as to the right to cross-examine him.

(6) Nothing in this section is to be taken to affect the admission of evidence that would otherwise be admissible under this Act or any other Act or at common law or to make admissible any evidence that would be inadmissible on any ground of privilege under this Act or any other Act or at common law. [Draft Act, Section 22].

CHAPTER 2

RES GESTAE

It has been generally acknowledged that the phrase *res gestae* is a vague, all-embracing description for several types of reported statements, some of which are received as original evidence, others by way of exception to the hearsay rule. The phrase itself means simply "the facts", or "the transaction"; a statement is said to be part of the *res gestae* when it forms "a part of the story". Central to the doctrine is the notion that a statement may be admissible, either because it is a fact in issue, or a fact relevant to the issue, or because it is so closely associated in time and circumstance with the event in question that, whether technically hearsay or not, it has a high degree of relevance.[1]

It has been said:

> The marvellous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as *"res gestae"*.[2]

The term *"res gestae"* is often referred to as an exception to the hearsay rule, though in fact it applies to evidence that is not really hearsay at all. The phrase "*res gestae*" appeared as early as the year 1794 during the trial of Horne Tooke for high treason.[3] Garrow, who appeared for the government, wished to have a certain letter admitted as evidence and claimed that it should be admitted as part of the *"res gestae"*. It has been said, "from such a humble beginning the rule flourished throughout the course of the nineteenth century, used by judges and lawyers and text-writers to fit every conceivable legal situation".[4]

Today, if a transaction is in issue, "all facts, whether they be acts or omissions or declarations, which either are part of the transaction or accompany and explain it, are admissible and are usually called the *res gestae*. Sometimes, . . . it is the central transaction itself which is called the *res gestae*, when the constituent or accompanying facts are described as parts of the *res gesta*".[5]

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[1]See Hoffmann, *South African Law of Evidence* (1963), at p. 283.

[2]Morgan, "A Suggested Classification of Utterances Admissible as *Res Gestae*" (1922), 31 Yale L.J. 229.

[3]*R.* v. *Tooke* (1794), 25 State Tr. 1, 440. Wigmore traces it to the Ship Money Case, *R.* v. *Hampden* (1637), 3 State Tr. 826, 988: 6 Wigmore, *Evidence*, §1767 (3rd Ed. 1940).

[4]Slough, "Res Gestae" (1953), 2 U. of Kan. L. Rev. 41.

[5]Elliott, *Phipson's Manual of the Law of Evidence* (10th Ed. 1972), at p. 28.

1. Categories of Res Gestae

Because the problems connected with the use of the term are "so shrouded in doubt and confusion"[6] it has been considered necessary to classify *res gestae* into categories; but classification is not without its difficulties. Authors do not agree on the number of categories, and different classifications frequently overlap. However, it is useful to attempt some summary of the classifications that have been made although this will involve some repetition.

(a) *Words Creating a Right or Liability*

Words creating a right or a liability[7] form the first classification. They are the facts in issue: for example, an oral offer or acceptance, or words alleged to be slanderous. The fact in issue may be complex as to time, as it may involve inquiry not merely into one event which occurred at one instant but a number of events that occurred over a period of time. The fact in issue may be complex as to persons and it may involve the conduct of third parties.[8]

The term as used in this context does not describe an exception to the hearsay rule. These statements are not admitted as proof of the truth of the facts asserted in them, but are admitted as proof that the statements were made. Their evidentiary value lies in the inferences to be drawn from the fact that they were made.

(b) *Statements Relevant to Facts in Issue*

The second category of cases to which the *res gestae* doctrine has been applied, consists of facts or statements which are relevant to the facts in issue. For example, if the question is whether an assault by B upon A was provoked, the fact that, prior to the assault, B had made an insulting gesture or had called A a liar, would be admissible in evidence as relevant to the issue of provocation.[9]

Stone contends that the use of the term *res gestae* here adds nothing to the simple question of relevance, as he feels that the statement is admitted because it is relevant, not because it is part of the *res gestae*.[10] Thus any inquiry as to contemporaneity or who was the actor or the utterer is not only unnecessary but entirely misleading.[11] Relying on the cases of *Rouch* v. *G. W. Ry*[12] and *Rawson* v. *Haigh*,[13] Stone argues that where the statement made has independent relevance, the requirement of contemporaneity has no application. Declarations may be admissible whether they are prior or subsequent to the act to which they are relevant.[14]

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[6]Stone, "*Res Gestae Reagitata*" (1939), 55 L.Q.R. 66.
[7]Nokes, "Res Gestae as Hearsay" (1954), 70 L.Q.R. 370, 371.
[8]Stone, footnote 6 *supra*, at p. 70.
[9]*Ibid.*, at p. 71.
[10]*Ibid.*
[11]*Ibid.*, at p. 72.
[12](1841) 1 Q.B. 51, 113 E.R. 1049.
[13](1825), 2 Bing. 99, 130 E.R. 242.
[14]Stone, footnote 6 *supra*, at pp. 72-73.

It may well be doubted that this type of statement is, in most cases, hearsay evidence at all. It is unnecessary to categorize it as *res gestae* unless what is sought to be proved is the truth of any facts contained in the statement as opposed to the mere fact that the statement was made. In most cases where it is sought to admit evidence under this category, it is merely the latter that is relevant.

(c) *Verbal Parts of Facts in Issue or of Relevant Facts*

The third general category, and one difficult to distinguish from the first two, may be described as verbal parts of facts in issue or of relevant facts.[15] Such words, though not in themselves facts in issue or relevant facts, constitute a verbal part of facts in issue or of relevant facts.

Cross categorizes such words as "Statements Accompanying and Explaining Relevant Acts,"[16] and says, "[T]he *raison d'etre* of this exception . . . is that the statement throws light on the nature of a relevant act because of its proximity to it, and, in the absence of such proximity, the statement would lack connection with the act and become a mere hearsay assertion about it."[17]

Nokes classifies these statements as words relevant to the legal nature of a transaction, and says,

> These explain an action or omission which is in issue, though the words do not constitute a part of the issue; as when repayment of a loan is disputed, and proof is given of the payment and of the borrower's statement appropriating the money to the loan. This type of statement is sometimes called a verbal part of a fact or a verbal act.[18]

Certain requirements must be met before statements may be properly included within this category.[19]

(a) The conduct of which the utterance forms a part must in itself be a fact in issue or a relevant fact.

(b) The conduct of which the utterance forms part must in itself be incomplete as a legal act. The act taken alone must leave it in doubt whether it operates in one way or another, as, for example, whether money is handed over as a gift or a loan.

(c) The utterance must render definite what is otherwise ambiguous. It must complete the act, but must still be only part of the fact to be proved.

(d) The utterance must be contemporaneous with the act of which it forms a part, because words cannot be part of the act unless

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[15]*Ibid.*, at p. 74.
[16]Cross, *Evidence* (4th Ed. 1974), at pp. 503-505.
[17]*Ibid.*, at p. 504. See also *Hyde* v. *Palmer* (1863), 3 B. & S. 657, 122 E.R. 246; and *Wright v. Doe dem Sandford Tatham* (1837), Ad. & El. 313, 112 E.R. 488.
[18]Nokes, footnote 7 *supra*, at p. 371.
[19]Stone, footnote 6 *supra*, at pp. 74-80; see also Cross, *Evidence* (4th Ed. 1974), at pp. 503-505.

they accompany it. Unless they are a part of it they are not admissible, since their relevance would then depend on the truth of what is asserted, and they would be hearsay. However, if the ambiguous conduct in issue is continuous, explanatory words during the entire continuance are contemporaneous.

(e) The utterance must be by some person whose conduct constitutes the legal act involved.

Again, this category cannot be properly termed hearsay.[20] The statement is admitted as evidence of the act, not as evidence of the truth of what is contained in the statement. The statement is part of the event that took place and so evidence of the statement is evidence of the event. We agree with Professor Stone that it is inappropriate to apply the term *'res gestae'* to this class of statements.

(d) *Statements Linked by Time, Place or Circumstance with a Fact in Issue or Relevant Fact*

A fourth and important category of *"res gestae"* is one in which statements are admitted because they are closely linked by time, place and circumstance with some fact in issue or relevant fact. The problem here is that "It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction, and have a very different tendency to what would be produced if the whole were heard".[21] Thus, "intimate proximity, in time, place or circumstance, of fact A to fact B, fact B being in issue or relevant, makes fact A admissible as part of the *res gestae (stricto sensu)* of fact B, without any affirmative showing of the independent relevance of fact A".[22]

(e) *Spontaneous Statements relating to an Event in Issue made by Participants and Observers*

A fifth category of *res gestae* is that of spontaneous statements relating to an event in issue made by participants or observers, or as Nokes put it "words relevant to a state of fact".[23] This category is a topic of great debate; some writers refuse to accept it as an exception to the hearsay rule.[24] Lord Atkinson, for example, stated that it is to be remembered that statements admissible under this head "are not, as against the accused, affirmative evidence of the facts stated, but only of the knowledge of, or the belief in, those facts by the person who makes the statements, or of his intention in respect of them."[25]

However, others have treated this category of *res gestae* as an exception to the hearsay rule. Cross has demonstrated that the majority of the

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[20]For a contrary view, see Sopinka and Lederman, *Evidence in Civil Cases* (1974), at pp. 123-124.

[21]*Thomson* v. *Austen* (1823), 2 R. & R. 26 as quoted in Stone, footnote 6 *supra*, at p. 81.

[22]Stone, footnote 6 *supra*, at pp. 81-82.

[23]Nokes, footnote 7 *supra*, at pp. 371-372.

[24]See Phipson, *Evidence* (11th Ed. 1970), paras. 193 and 645.

[25]*R.* v. *Christie*, [1914] A.C. 545, 553.

dicta and decisions of the courts justify the view that statements described as part of the *res gestae* are treated sometimes as hearsay and sometimes as original evidence.[26] The *res gestae* doctrine appears to rest ultimately on two propositions: "that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words, and the dissociation of the words from the action would impede the discovery of truth".[27]

The justification for this exception to the hearsay rule, if indeed it is an exception, is the probability that the statement is true because it was made before the declarant had time to think of his self-interest and make up a story which would be to his own advantage. Thus the statements must be made contemporaneously with the event in issue and they must directly concern it, with contemporaneity being a matter of degree.

(f) *Words Relating to the Declarant's Physical or Mental State*

Words relating to the speaker's physical sensation, such as pain or illness, and words relating to a speaker's mental state have also been categorized as admissible in evidence as part of the *res gestae*,[28] although it is suggested that these categories are exceptions to the hearsay rule in their own right and need no help from the *"res gestae"* doctrine.

2. Application of The Doctrine

In application, the doctrine has had the effect of rendering admissible statements that would otherwise be excluded. For example, not only might they be caught by the hearsay rule, but they might also otherwise be caught by the rule against self-serving statements,[29] opinion evidence[30] or previous inconsistent statements.[31]

For the purposes of this Report, it is useful to consider in particular the fifth classification of statements to which the doctrine of *res gestae* has been applied, that is, spontaneous statements made by participants or observers in relation to an event in issue.

Prior to the decision of the Judicial Committee of the Privy Council in *Ratten v. The Queen*,[32] the courts, in considering whether such statements were admissible in evidence, were concerned primarily with whether the statement was strictly contemporaneous with the event in issue. Emphasis was placed on the questions whether a statement could be said to be part of a transaction or event, and when a particular transaction began and ended.

The detection of a sufficient association in time, place, or circumstance between words and accompanying actions or events raises questions

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[26]Cross, *Evidence* (3rd Ed. 1967), at pp. 465, 467.
[27]Lord Normand in *Teper* v. *R.*, [1952] A.C. 480, 486.
[28]Nokes, footnote 7 *supra*, at p. 372; *Stone*, footnote 6 *supra*, at p. 84.
[29]Gooderson, "*Res Gesta* in Criminal Cases", [1957] Camb. L.J. 55, 67-68.
[30]*Ibid.*, at pp. 55-56.
[31]*Ibid.*, at pp. 69-70.
[32][1972] A.C. 378.

of degree, and there is great debate and much disagreement as to the degree of contemporaneity that is required. In both *R.* v. *Foster*[33] and *R.* v. *Lunny*[34] statements made after the event were admitted, in the former case on the basis that it was the best possible testimony. However, in *R.* v. *Bedingfield*,[35] Cockburn, C.J. came to a different conclusion. In that case, the accused was charged with murder by cutting a women's throat and his defence was that she committed suicide. The deceased emerged from the room in which the prisoner was subsequently found with her throat cut, and immediately cried, "Oh dear, Aunt, see what Bedingfield has done to me". She was evidently seeking assistance, but died before it could be given. Cockburn, C.J., would not admit her statement in evidence because "It was something stated by her after it was all over, whatever it was, and after the act had been completed".[36] He stated further:

> . . . statements made by the complaining party, after all action on the part of the wrongdoer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrongdoer . . . do not form part of the *res gestae*, and should be excluded.[37]

This view has been supported by other cases. In *R.* v. *Goddard*[38] Hawkins, J., rejected a complaint made ten minutes after a mortal injury. In *R. v. Christie*[39] a statement made after an alleged assault was rejected. In *Teper* v. *R.*[40] Lord Normand followed the *Bedingfield* case, and stated "[I]t is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement."[41]

The decision in the *Bedingfield* case has, however, been the subject of criticism. Thayer was of the opinion that the statement in *Bedingfield* should have been admissible as it was "enough that the declaration be substantially contemporaneous; it need not be literally so".[42] Professor Gooderson concurred with Thayer's view that there should be a little more elasticity in the admission of evidence, and suggested reliance could be placed on the discretion of the court to exclude evidence which, though admissible, has a far greater prejudicial than evidentiary effect. He considered Chief Justice Cockburn's position too strict, especially where death has been caused by an indirect means such as poisoning.[43]

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[33](1834), 6 Car. & P. 325, 172 E.R. 1261.
[34](1854), 6 Cox C.C. 477.
[35](1879) 14 Cox C.C. 341.
[36]Cross, *Evidence* (4th Ed. 1974), at p. 506.
[37]As cited by Armour, C.J., in *R.* v. *McMahon et al.* (1889), 18 O.R. 502, 517.
[38](1882), 15 Cox C.C. 7.
[39][1914] A.C. 545, 556.
[40][1952] A.C. 480.
[41]*Ibid.*, at p. 487.
[42]Thayer, "Bedingfield's Case" (1881), 15 Am. L. Rev. 71, 107.
[43]Gooderson, "*Res Gesta* in Criminal Cases", [1956] Camb. L.J., 199, at pp. 208, 211.

As a result of the criticism of John Pitt Taylor,[44] Chief Justice Cockburn wrote an extensive letter to the Law Journal[45] defending his decision. He said in part:

> Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment, —whether on the part of the agent or wrong-doer in order to its performance, or on that of the patient or party wronged, in order to its prevention,—and whatever may be said by either of the parties, during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive,—as e.g., in the case of flight or applications for assistance,—form part of the principal transaction, and may be given in evidence as part of the res gestae, or particulars of it.

This correspondence was relied on in argument and quoted by the Supreme Court of Canada.[46]

The reason for the rule requiring contemporaneity is that spontaneous declarations are more likely to be true because they are made before there is time to devise or contrive anything for one's own advantage. "Insistence that the statement should be nearly contemporaneous with the act is some compensation for the absence of the safeguards against false testimony in court—for the lack of cross-examination of the originator of the statement, of an oath, of publicity, and of opportunity to judge the speaker's demeanour".[47]

In *Ratten* v. *The Queen*,[48] a decision of the Privy Council, Lord Wilberforce considered the *Bedingfield* case, and stated that the relevant test to be applied in determining the admissibility of evidence under this category of *res gestae* is not whether the making of the statement was part of the transaction or event, but, rather, the risk of concoction or fabrication of evidence by the declarant. Nowhere have we found the subject we are here concerned with discussed with more clarity and precision than in the following extract from the judgment:

> The expression "res gestae", like many Latin phrases, is often used to cover situations insufficiently analyzed in clear English terms. In the context of the law of evidence it may be used in at least three different ways:
>
> 1. When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing

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[44]In *The Times*, November 17, 1879.
[45]Law Journal, January 3, 1880, at pp. 16-17.
[46]Quoted in *Gilbert* v. *The King* (1907), 38 S.C.R. 284, 298.
[47]Nokes, footnote 7 *supra*, at p. 379.
[48][1972] A.C. 378.

in a broader sense, what was happening. Thus in *O'Leary* v. *The King* (1946), 73 C.L.R. 566 evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon, J. said at p. 577:

> Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event.

2. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, i.e., are the relevant facts or part of them.

3. A hearsay statement is made either by the victim of an attack or by a bystander—indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae. A classical instance of this is the much debated case of *Reg.* v. *Bedingfield* (1879) 14 Cox C.C. 341, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason, why this is so, is that concentration tends to be focused upon the opaque or at least imprecise Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is two-fold. The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been victims of assault or accident. The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person (as he could not at the time when earlier reported cases were decided) can give his own account if different. There is no such difference in kind or substance between evidence of what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognized and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors

> but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it.

After reviewing the authorities Lord Wilberforce concluded:

> These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.[49]

In Canada the *res gestae* rule has received a narrower interpretation than in England, as may be seen in the following case comments.

In *R.* v. *Cohen*,[50] the accused was charged with assault. A disturbance occurred in a hotel room, and statements were made by the victim of the assault in the presence of the accused to people who came to the door of the room. These statements were held admissible as part of the *res gestae* because "The dispute, the fight, the disturbance, whatever one may call it, which was the cause of this charge, was still in progress when these things were said. The girl was seeking refuge from attacks which obviously had been made upon her and the appellant was still pursuing her and continued to do so for some little time".[51]

In *R.* v. *McMahon*[52] statements made by the deceased were held not admissible as part of the *res gestae* as "they were made after all action on the part of the wrongdoer had ceased", as the principal act had been completed and all pursuit or danger had ended. Armour, C.J., held that the *Goddard* and *Bedingfield* cases should be followed.[53]

In *Gilbert* v. *The King*,[54] evidence of statements made by the deceased immediately after a shooting but while still in fear of further attacks from the accused and requesting assistance and protection were held admissible as part of the *res gestae*, even though the accused was absent at the time the statements were made.

In *R.* v. *Wilkinson*,[55] the deceased fled to a neighbour's house after an argument with the accused, and was there killed by a shot that came through the window. However, before she was shot, she had told the neighbour that the accused had tried to kill her and was likely to shoot

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[49] *Ibid.*, at pp. 388-389, 391.
[50] [1947] O.W.N. 336 (Ont. C.A.).
[51] *Ibid.*, at pp. 339-340.
[52] (1889), 18 O.R. 502 (Q.B.D.).
[53] *Ibid.*, at p. 517.
[54] *Gilbert* v. *The King (No. 2)* (1907), 38 S.C.R. 284.
[55] [1934] 3 D.L.R. 50, 62 C.C.C. 63 (N.S.C.A.).

through the window. This statement was held admissible. Hall, J., stated ". . . the effort to murder was a continuous transaction from the attack in the bedroom till consummated by the fatal shot. During the entire period [the deceased] was actuated by most intense fear. . . .She had no opportunity for fabrication and her statements were not mere narration of events but were part of the transaction itself and [were] admissible on this ground."[56] The deceased made her statements during the continuation of the murderous assault.

In *R.* v. *Leland*[57] the Court of Appeal discussed the subject of *res gestae* at length. The deceased and the husband of the accused were engaged in a fight in the bathroom of the house occupied by the deceased, his wife, the accused and her husband. The accused was seen moving along the hall. The lights went out. Shortly after they came on again, the deceased was heard to call from the head of the stairs "Rose, she stabbed me!" Rose was the name of the wife of the deceased. Evidence was given by a witness that she saw blood in front of the bathroom door and heard the deceased fall down stairs. The accused was heard to say "What will I do now?" The Crown sought to introduce the deceased's statement as proof of the truth of the assertion. While the rationale of the decision is confusing, the Court appears to have been of the view that the statement of the deceased did not form part of the *res gestae*, stating, ". . . the fighting had ceased. No one was pursuing the deceased or seeking to continue the struggle. . . . Our rules of evidence do not seem to extend to cover a case of spontaneous exclamations, in the broad terms stated by Wigmore."[58]

In civil cases, the courts have tended not to require the same degree of strict contemporaneity between the statement and the event in issue as is required in criminal cases.[59]

The law on this subject in Ontario is, at best, unclear, and should be clarified by legislation. It is not realistic to require trial judges to explore scholarly discussions of law to determine the admissibility of and the evidentiary value to be given to statements made under the circumstances we have been discussing.

3. Developments in the United States

In considering what changes should be made in our law, it is useful to consider developments in the United States, although this may require some repetition of matters we have discussed concerning the classification of categories of *res gestae*. In the United States the law governing *res gestae* has been greatly influenced by the work of Professor J. H. Wig-

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[56]*Ibid.*, at p. 70.

[57][1951] O.R. 12 (C.A.).

[58]*Ibid.*, at p. 30. The decision of the Supreme Court of Canada in the *Gilbert* case is referred to but not discussed. Nor is the *Bedingfield* case considered, or the criticism of the judgment of Cockburn, C.J.

[59]See, for example, *Sitkoff* v. *Toronto Railway Co.* (1916), 36 O.L.R. 97; *Cassels* v. *T.T.C.*, [1938] O.R. 155, [1938] 1 D.L.R. 746; and *Rodych et al.* v. *Krasey et al.*, [1971] 4 W.W.R. 358 (Man. Q.B.).

more.[60] As far back as 1898, Wigmore "enunciated as a new and additional exception to the hearsay rule, having no connection with the 'res gestae' doctrine, the theory of 'Spontaneous Exclamations' ".[61]

In Wigmore's view "the phrase '*res gestae*' has long been not only entirely useless but even positively harmful". He contended that "it is useless, because every rule of Evidence to which it has ever been applied exists as part of some other well-established principle and can be explained in terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology".[62]

It is useful to set out how some of the major American writers on evidence, have classified the categories of cases to which the doctrine of *res gestae* has been applied.[63]

(a) *Verbal Acts*

Under the 'Verbal Act' doctrine, an utterance is admitted as a verbal part of an act. Wigmore points out that, although the phrase *res gestae* has been constantly used in admitting verbal acts in evidence, such utterances are admissible independently of the *res gestae* doctrine:

> It follows from the very nature of the Hearsay rule that utterances used not assertively but as a part of some otherwise relevant act are receivable as not obnoxious to the rule; this is inevitably true on principles otherwise fixed, and would have been equally true had no mention of the Latin words ever been made in our courts or our books.[64]

Wigmore classifies 'Verbal Acts' into three main categories: utterances forming a part of the issue, utterances forming a verbal part of an act, and utterances used as circumstantial evidence.

(i) *Utterances forming a part of the issue*

Wigmore points out, as have many other authors, that "[w]here the utterance of specific words is itself a part of the details of the issue under the substantive law and the pleadings, their utterance may be proved without violation of the Hearsay rule, because they are not offered to

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[60]Slough, "Res Gestae" (1953), 2 U. of Kan L.R. 41, 43 states, "much of the obscurity surrounding our latin phrase [*res gestae*] has been dispelled, thanks to the productive scholarship of legal giants such as John Henry Wigmore and Edmund Morgan".

[61]McWilliams, "Admissibility of Spontaneous Declarations" (1933), 21 Cal. L. Rev. 460, 463.

[62]6 Wigmore, *Evidence*, §1767 (3rd Ed. 1940).

[63]It is not intended to deal exhaustively with the categories of *res gestae*; for example, no reference is made to Wigmore's "Statements admissible as part of the issue under the pleadings" or "Statements of a Mental Condition": Wigmore, *supra*, §§1770 and 1714 (3rd Ed. 1940).

[64]*Ibid.*, §1768.

evidence the truth of the matter that may be asserted therein".[65] Examples of this are seen in utterances involved in making a contract, consent for a marriage contract, and in cases of defamation.

(ii) *Utterances forming a verbal part of an act*

In many cases "without the words, the act as a whole may be incomplete; and, until the words are taken into consideration, the desired significance cannot be attributed to the wordless conduct."[66] The words enter as evidence irrespective of the truth of the statement, if certain conditions are satisfied. First, the conduct that is to be made definite must be independently material and provable under the issues, either as a fact directly in issue or as incidentally or evidentially relevant to the issue. Second, since the utterance serves merely to assist in completing and giving legal significance to the conduct, it is not needed when the conduct is already complete in itself. The conduct must be equivocal or incomplete as a legal act before the utterances can be admissible. Third, the words must aid in completing the indefinite conduct, and no more. And fourth, the words must be exactly contemporaneous with the act, for here the words are used only as a verbal part of an entire act.

Wigmore lists some instances where this doctrine can be applied: declarations accompanying a delivery of money to determine whether a loan or a payment was made or whether it was a gift; all declarations by an occupant of land, asserting a claim of title, are verbal parts of his act of occupation, serving to give it an adverse colour; declarations made by an accused found with stolen goods, since "recent possession of stolen goods raises a presumption that the possessor is the thief or robber or knowing receiver. . . . Thus, the total significance of the act of possession becomes material, and upon the principle of Verbal Acts, the utterances of the person while in possession may be received as verbal acts";[67] the revocation of a will, since the intent of this act can only be ascertained by considering the words accompanying it; and declarations accompanying an act of bankruptcy.[68]

(iii) *Utterances used as circumstantial evidence*

Under this category an utterance may be admitted as indirect or circumstantial evidence. For example, when it is sought to establish a certain state of mind of an individual, statements made by him may be admitted as circumstantial evidence of that state of mind, or of the knowledge, belief or sanity, of that individual. These statements, not being admitted to prove the truth of the matter contained, are not inadmissible because of the hearsay rule, and Wigmore includes them under the 'Verbal Acts' doctrine.

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[65] *Ibid.*, §1770.
[66] *Ibid.*, §1772.
[67] *Ibid.*, §1781.
[68] *Ibid.*, §§1778-1786.

(b) *Spontaneous Exclamations*

Wigmore defined a 'spontaneous exclamation' as "a statement or exclamation, by a participant, immediately after an injury, declaring the circumstances of the injury or by a person present at an affray, a railway collision or other exciting occasion asserting the circumstances of it as observed by him."[69] He justified the admissibility of such exclamations on the theory that "under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy . . . and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him, and may therefore be received as testimony to those facts."[70] This would make the statement evidence of the facts contained therein.

According to Wigmore, certain conditions must be satisfied before a statement may be admitted in evidence as a spontaneous exclamation. First, there must be some occurrence that is startling enough to produce the required nervous excitement and render the utterance spontaneous and unreflecting. Second, the utterance must be made before there is time to contrive a story. The statements do not have to be strictly contemporaneous with the exciting event, but "may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated".[71] Third, the utterance must relate to the circumstances of the occurrence preceding it. And fourth, the declarant must appear to have had an opportunity to observe personally the matter of which he speaks. Other disqualifications which concern the declarant, such as infancy or marital relationship, should not bar the testimony. The spontaneous exclamation doctrine overrides these considerations.

The principles regarding the 'Verbal Act' doctrine are often confused with those relevant to the 'Spontaneous Exclamation' doctrine. There is no place in the latter for the requirement that there be a main or principal act. All that is required is a startling event producing nervous excitement; such event need not in itself be relevant to the issue.[72] The 'Spontaneous Exclamation' doctrine applies to bystanders as well as to participants.[73] The rule of contemporaneity is not the same for both; nervous excitement may continue for some time.

Wigmore emphasized that spontaneous exclamations, although traditionally admitted in evidence under the *res gestae* doctrine, are in fact

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[69]*Ibid.*, §1746.
[70]*Ibid.*, §1747.
[71]*Ibid.*, §1750.
[72]*Ibid.*, §1753.
[73]*Ibid.*, §1751.

admissible independently of that doctrine and as a separate exception to the hearsay rule. Speaking of the spontaneous exclamations exception, he said:

> Its application has almost invariably been made in terms of 'res gestae'. But this does not mean that there is any anomalous doctrine which must be recognized by that name. What is actually done by the Courts, and not what name they use, is always the important consideration in dealing with a rule of Evidence; and since what they do in this instance is to admit extrajudicial assertions as testimony to the fact asserted, the plain truth is that they have recognized a separate Exception to the Hearsay rule.[74]

(c) *Contemporaneous Statements*

Like Wigmore, Professor Edmund M. Morgan has had a great effect on the development of the principle of *res gestae* in the United States. Although he agreed in general with Wigmore's views on *res gestae*, he argued that another class of statements is admissible as part of the *res gestae* exception: that of the contemporaneous statement.

Morgan identified "seven classes of cases in which the phrase [*res gestae*] is often used as a device for admitting or excluding evidence, some of them having no element of hearsay involved in them".[75] Six of these classes are similar to those of Wigmore.[76] The class not included in Wigmore's classification consists of "cases in which the utterance is contemporaneous with a non-verbal act, independently admissible, relating to that act and throwing some light upon it".[77] For Wigmore contemporaneity is important only as evidence of spontaneity.[78] Wigmore believed that an exciting event was necessary in order to insure the veracity of the statement. Morgan insisted that the contemporaneous statement exception was proper, first because such statements *are* unpre-

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[74]*Ibid.*, §1768.

[75]*Morgan*, "Res Gestae" (1937), 12 Wash. L. Rev. 91, 92.

[76]The first class consists of cases in which the utterance is an operative fact: "a fact which, of itself or in combination with others, creates a legal relation and without which that legal relation would not arise". The second class consists of cases in which the utterance, regardless of its truth, has probative value upon the question of the existence or non-existence of a material fact; the utterance is used only to show a certain statement or claim was made. The third class consists of cases where "non-verbal conduct is accompanied by verbal conduct . . . and the operative effect or the legal significance of the non-verbal conduct depends upon the words"; here, the non-verbal conduct is ambiguous, and the words accompanying it clarify the action. The fourth class consists of cases in which the operative effect of non-verbal conduct depends upon the intent which accompanies it, and of the state of mind. The fifth class consists of "cases in which the utterance is a direct declaration of a presently existing mental condition made naturally and without circumstances of suspicion". In all of these situations, it is not the truth of the statement that is asserted and therefore the rule against hearsay is not violated. See generally Morgan, "A Suggested Classification of Utterances Admissible as *Res Gestae*" (1922), 31 Yale, L.J. 229, and Morgan, "Res Gestae" (1937), 12 Wash. L.R. 91.

[77]Morgan, "A Suggested Classification of Utterances Admissible as *Res Gestae*" (1922), 31 Yale L.J. 229, 236.

[78]Morgan, "Res Gestae" (1937), 12 Wash L.R. 91, 98.

meditated, and, second, because of the guarantee of trustworthiness of the witness who can corroborate the occurrence of the event as well as the fact and content of the utterance. The statement must be contemporaneous with the event, but the event need not be startling.

Morgan's final class consists of "cases in which the utterance is made concerning a startling event, by a declarant labouring under such stress of nervous excitement caused by the event, as to make such utterance spontaneous and unreflective".[79] The utterance is offered for its truth and is hearsay, and its sole guarantee of trustworthiness lies in its spontaneity. This class is the same as Wigmore's spontaneous exclamations exception, for Morgan points out that "it is only since the publication of Dean Wigmore's work that this exception to the hearsay rule has gained wide recognition".[80] Morgan also states that "it is, however, by no means universally accepted, and nowhere is the theory of the exception applied with logical completeness [because], if spontaneity of itself is to be accepted as a guaranty of trustworthiness, then the subject matter of the declaration should not be limited to the startling event which operated to still the reflective faculties".[81] And yet many courts so limit it, and insist on strict contemporaneity of time and place.[82]

Today in the United States, 'spontaneous exclamations' (excited utterances) are generally recognized as an exception to the hearsay rule. There is, however, much disagreement as to whether Morgan's contemporaneous declaration exception is a valid one. Where this exception for spontaneous exclamations in the absence of a startling event has been recognized, the courts have held that to qualify under the exception the utterance must satisfy six conditions of admissibility designed to insure its trustworthiness.[83]

First, the statement must be occasioned by the occurrence of an event or the existence of a condition that is independently relevant. Second, the statement must prove, fill out, explain or illustrate the event or condition. Third, the statement must be substantially contemporaneous with the event or condition.[84] This requirement is the primary guarantee of trustworthiness as it normally assures spontaneity and corroboration by the witness.[85] Fourth, the statement must be spontaneous, although "all the requirement need mean is that there be no apparent motive to lie".[86] Fifth, the witness who reports the statement must have witnessed what the statement reports. However, this requirement is occasionally disregarded, for the statement, despite the absence of this requirement

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[79]Morgan, footnote 77 *supra*, at p. 238.
[80]*Ibid.*
[81]*Ibid.*, at pp. 238-239.
[82]*Ibid.*, at p. 239.
[83]Note, "Spontaneous Exclamations in the Absence of a Startling Event" (1946), 46 Colum. L. Rev. 430, 435-441.
[84]However, according to the preceding article, this requirement probably means no more than what the declarant reports must be relevant.
[85]Morgan, "Res Gestae" (1937), 12 Wash. L.R.. 91, 95-97; Hutchins & Slesinger, "Some Observations on the Law of Evidence: Spontaneous Exclamations" (1928), 28 Colum. L. Rev. 432, 436-440.
[86]Note, footnote 83 *supra*, at p. 438.

"has considerable value, both as corroboration of the witness and possibly, being more reliable than his testimony, as the best way of proving the issue".[87] And sixth, the declarant must have witnessed what the statement reports.

Although there has been debate concerning the validity of these two hearsay exceptions, the majority of American writers do accept their validity. In a pioneering article in 1928, Professors Hutchins and Slesinger point out that in '*res gestae*' cases the law relies in part on immediacy: "the desire to lie requires some time and reflection to develop."[88] "It seems then that the courts are on the right track in demanding speed as a guarantee of truth or at least of the absence of attempted falsehood."[89] However, there is a problem in knowing how long it takes for one to be able to fabricate a story, as it is believed to vary from person to person, and so "the sound discretion of the trial judge . . . is likely to be fallible".[90]

Shock is also seen as rendering difficult a consciously planned lie. Hutchins and Slesinger suggest that psychologists would probably concede that excitement stills the voice of reflective self-interest, but they might question whether this factor of reliability is not over-borne by the distorting effect which shock produces;[91] for stress distorts the capacity to perceive.[92] It could be argued that in light of possible distortion because of shock, and, because some persons are more self reliant than others, the rule should read: "Hearsay is inadmissible, especially (not except) if it be a spontaneous exclamation."[93]

However, Hutchins and Slesinger conclude that such a result would be preposterous.[94] "If relevant [the statements] should go to a jury",[95] as they are better than no evidence at all. Contemporaneous statements, both excited and unexcited, are so valuable for the accurate reconstruction of the facts that the need is not to narrow the use of such statements, but to widen the exception to embrace as well, unexcited declarations of observers near the time of happening.[96]

Professor McCormick, in his treatise on Evidence, supports the idea that statements accompanying non-startling events or relating to a condition which the declarant is observing, though unexcited, usually possess a high degree of trustworthiness. He states that even where an observer witnesses an event which does not produce shock or excitement,

> . . . The observer may yet have occasion to comment on what he sees (or learns from other senses) at the very time that he is

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[87]*Ibid.*, at p. 440.
[88]Hutchins & Slesinger, footnote 85 *supra*, at p. 436.
[89]*Ibid.*
[90]*Ibid.*, at p. 437.
[91]*Ibid.*
[92]Marshall, *Law and Psychology in Conflict* (1969), at pp. 19-20.
[93]Hutchins & Slesinger, footnote 85 *supra*, at p. 439.
[94]*Ibid.*
[95]*Ibid.*, at p. 440.
[96]*Ibid.*

receiving the impression. Such a comment, as to a situation then before the declarant, does not have the safeguard of impulse, emotion, or excitement, but as Morgan points out there are other safeguards. In the first place, the report at the moment of the thing then seen, heard, *etc.*, is safe from any error from defect of memory of the declarant. Second, there is little or no time for calculated misstatement, and third, the statement will usually be made to another (the witness who reports it) who would have equal opportunities to observe and hence to check a misstatement. Consequently, it is believed that such comments, limited to reports of present sense-impressions, have such unusual reliability as to warrant their admission under a special exception to the hearsay rule for declarations of present sense-impressions.[97]

4. Alternative Approaches to Reform

The Scottish Law Commission recommended that hearsay evidence should be admissible if the reported statement was made by a person as a natural, spontaneous and immediate reaction to an event which took place in his presence, sight or hearing, so as to form part of that event and be explicatory of it.[98] This would make the statement not only evidence that it was made and allow the inferences to be drawn from the fact that it was made, but evidence of the facts stated.

The American Law Institute in its Model Code of Evidence in 1942 proposed the following rule:

> Rule 512. Contemporaneous or Spontaneous Statements
>
> Evidence of a hearsay statement is admissible if the judge finds that the hearsay statement was made
>
> (a) while the declarant was perceiving the event or condition which the statement narrates or describes or explains, or immediately thereafter; or
>
> (b) while the declarant was under the stress of a nervous excitement caused by his perception of the event or condition which the statement narrates or describes or explains.[99]

The provisions of the Federal Rules of Evidence[100] dealing with excited utterances and contemporaneous statements not made under the

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[97]McCormick, *Evidence* (1st Ed. 1954), at p. 710.

[98]Scottish Law Commission, Memorandum No. 8, *Draft Evidence Code (First Part)*, Article 1.6, at p. 16. The Commission commented that, "There has been a good deal of confusion on this topic, mainly arising from a failure to distinguish between a statement which is part of the *res gestae* and a *de recenti* statement. . . . A statement forming part of the *res gestae* . . . may have been made by some unknown person; it must be part of the event; and it is independent, and possibly corroborative, evidence . . . . If a *de recenti* statement is one made shortly after the occurrence it cannot by definition be part of the occurrence".

[99]American Law Institute, Model Code of Evidence (1942), Rule 512, at p. 262.

[100]28 U.S.C.A., Rule 803, enacted by Pub. Law 93-595, effective July 1, 1975.

stress of nervous excitement, are similar to the provisions of Rule 512 of the Model Code. Subsections (1) and (2) of Rule 803 provide that such statements shall be admitted as exceptions to the rule against hearsay:

Rule 803.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The Uniform Rules of Evidence[101] on *res gestae* also conform substantially to Rule 512 of the Model Code. The relevant rules provide for the admission of both excited utterances, and contemporaneous statements not made under the stress of nervous excitement.

Rule 63. Hearsay Evidence Excluded—Exceptions

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

(4) *Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally.* A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception.

There is some doubt whether or not the statement might have to relate to the circumstances of the exciting occurrence.[102]

The new Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform State Laws in 1974, contain provisions dealing with excited utterances and contemporaneous statements which are identical to the provisions of subsections (1) and (2) of Rules 803 of the Federal Rules of Evidence.[103]

The New Jersey Committee Report[104] recommended the adoption of rules 63(4)(a) and (b) of the Uniform Rules, 1953. The Committee

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[101]National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953).

[102]Quick, "Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)" (1960), 6 Wayne L. Rev. 204, 207.

[103]National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1974), Rules 803(1) and 803(2).

[104]*Report of the Committee on the Revision of the Law of Evidence to the Supreme Court of New Jersey* (May 25, 1955).

also suggested for consideration: (1) a preliminary specific finding by the trial judge of intrinsic trustworthiness; and/or (2) verification by the auditor if established by the declarant himself; and/or (3) exclusion if self-serving; and/or (4) admission only when the declarant is not available for cross-examination.[105]

The California Law Revision Commission stated that 63(4)(b) of the Uniform Rules of Evidence was merely a statement of the existing California law, and recommended its adoption.[106] In the 1965 draft Code, section 1240 read:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

The rationale for this rule was said to be that the "spontaneity of such statements and the consequent lack of opportunity for reflection and deliberate fabrication provide an adequate guarantee of their trustworthiness".[107]

The same Commission, pointing out that rule 63(4)(a) of the Uniform Rules had been advocated by Morgan and McCormick, recommended its adoption.[108] Thus in the 1965 draft Code, section 1241 read:

> Evidence of a statement is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made while the declarant was perceiving the act, condition, or event.

The comment on the Code was that such statements would be sufficiently trustworthy to be considered by the trier of fact for the three reasons discussed by McCormick which were set out earlier.[109]

This section varies greatly from 63(4)(a) of the Uniform Rules of Evidence, 1953. The whole basis of the section is the unavailability of the witness, and thus a contemporaneous statement may not be introduced as a self-serving statement, or as a previous inconsistent statement, unless it is made admissible by some other section.

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[105]*Ibid.*, at p. 120.

[106]California Law Revision Commission, *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence, Article VIII, Hearsay Evidence* (August 1962), at p. 466.

[107]California Law Revision Commission, *Recommendation proposing an Evidence Code* (Jan. 1965), at p. 237.

[108]California Law Revision Commission, footnote 106 *supra*, at pp. 467-468.

[109]California Revision Commission, footnote 107 *supra*, at p. 238.

5. Conclusions

The recommendations we make under this heading are influenced by the recommendations we have made concerning changes in the general law relating to hearsay evidence. Although, as we have pointed out, many *res gestae* problems are not exceptions to the hearsay rule, there is an area in which *res gestae* statements do operate as exceptions to the hearsay rule. If the rule against hearsay were to be entirely abolished, the admissibility of the *res gestae* statements that are now exceptions to the hearsay rule would be dependent upon their relevance, their weight, the opportunities the declarant had for observation, and the likelihood of any factual statement being accurate. There would be no need for any separate rules regarding the admissibility of *res gestae* statements, since they would either be admissible, if not hearsay, under other principles or, if hearsay, under a provision abolishing the rule against hearsay.

However, we have decided that hearsay should not be admissible generally, but only under limited circumstances. If the law is amended as we recommended in Chapter 1, many statements of the sort discussed in the cases, for example, *R.* v. *Leland* and *Gilbert* v. *The King*, will be admissible on the ground that the maker of the statement has died before the trial, or is otherwise unavailable to give evidence.

There remain to be considered statements made as a spontaneous reaction to an exciting or shocking event taking place in the presence of the declarant. In such a case, the fact that the statement is made while the declarant is under the stress of nervous excitement minimizes the risk of fabrication or concoction. In our view, such statements should be admitted in evidence, without proof of that element of strict contemporaneity which appears to be necessary for admission in evidence under the *res gestae* doctrine.

Similarly, we are of the view that contemporaneous statements, that is, statements made while the declarant is perceiving an event or immediately thereafter, should also be admitted in evidence. If the making of the statement is substantially contemporaneous with the event, the statement is likely to be reliable, as there is no time for reflection or fabrication. Moreover, the value of the statement is likely to be superior to any later recollection which may be given in testimony by the declarant. We think such statements should be admissible regardless of whether the person making the statement is dead, or cannot be found, or is too ill to testify. We recommend that *The Evidence Act* be amended to include a provision concerning spontaneous and contemporaneous statements under defined circumstances.

6. Recommendation

We recommend that the amendment should be in the following form:

> Whether or not a person is called as a witness in a proceeding, a statement made by him is admissible in evidence if it was made in such conditions of spontaneity or contemporaneity in relation to an event perceived by the witness as to exclude the probability of concoction or distortion. [Draft Act, Section 23.]

CHAPTER 3

PREVIOUS STATEMENTS

1. Previous Inconsistent Statements

At common law, the prior inconsistent statement of a witness under cross-examination could be introduced in evidence and considered only for the purpose of impeaching the witness' credibility, and not as substantive evidence of the facts contained in the prior statement. It is not clear, however, whether at common law a party could impeach his own witness by proof of a prior inconsistent statement.[1]

Today, in Ontario, as in most common law jurisdictions, the common law rule governing the use of prior inconsistent statements still prevails, and it is the duty of the court to instruct a jury that they may consider the prior statement only as affecting a witness' credibility, if so requested by a party who fears that the statement may be treated by the jury as substantive evidence against him.

The method of proving prior inconsistent statements under the provincial law of Ontario is prescribed by statute. Section 21 of *The Evidence Act* (Ontario),[2] dealing with cross-examination of a witness concerning prior written statements, provides:

> 21. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the matter in question, without the writing being shown to him, but, if it is intended to contradict him by the writing, his attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting him, and the judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he thinks fit.

This section is procedural, and does not extend the common law limitations on the use of the statement as substantive evidence. It may only be used to discredit the witness.[3]

Likewise, a witness may be cross-examined concerning prior oral statements inconsistent with his present testimony. Section 22 of *The Evidence Act* (Ontario) provides:

> 22. If a witness upon cross-examination as to a former statement made by him relative to the matter in question and inconsistent

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[1]Cross, *Evidence* (4th Ed. 1974), at p. 222; see also *Greenough* v. *Eccles* (1859), 5 C.B.N.S. 786, 802, 141 E.R. 315, 322; and *Melhuish v. Collier* (1850), 15 Q.B. 878, 890, 117 E.R. 690, 695.

[2]R.S.O. 1970, c. 151.

[3]*R.* v. *Birch* (1924), 18 Cr. App. Rep. 26.

> with his present testimony does not distinctly admit that he did make such a statement, proof may be given that he did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

This provision is also procedural and does not affect the common law concerning the evidentiary value of the statement.

A party may discredit his own witness, under section 24 of the Act, by proving that he made a prior inconsistent statement only if, in the opinion of the judge, the witness has proved to be adverse.[4] Like the other sections of the Act dealing with proof of prior inconsistent statements, this section gives no evidentiary value to the statement, and the common law rule that the prior statement may be used only to discredit the witness applies.

A statement made on examination for discovery by a party, or an officer or servant of a party, to an action is admissible as evidence of the facts stated at the instance of the opposite party, notwithstanding that the person making the statement is not called as a witness.[5]

Other provisions in the Act concerning statements made out-of-court are not germane to the subjects discussed in this chapter.[6]

The common law rule that a previous inconsistent statement is not received as proof of the facts stated, has been generally accepted for 5 major reasons:

(1) When the statement was made, the witness was not under the sanction of an oath and was not speaking for the record in the solemnity of a judicial proceeding.

(2) There is doubt whether cross-examination of the declarant at the trial will prove adequate as a test of the dependability of an alleged prior out-of-court statement, as there may not be complete and adequate opportunity for cross-examination relevant to the time and circumstances under which the statement was made.

(3) The admission of prior inconsistent statements as substantive evidence might encourage the fabrication of evidence. It is said "their unrestricted use as evidence would increase both temptation and opportunity for the manufacture of evidence. [Thus]

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[4]For a discussion and recommendations concerning impeachment of one's own witness, see Chapter 12, Section 4, *infra*.

[5]R.S.O. 1970, c. 151, s. 16; R.R.O. 1970, R. 545, rr. 326, 328.

[6]Several of these we discuss elsewhere in this Report. They relate to entries in books of account kept by a department of government (section 32), bank records as *prima facie* evidence of all entries therein and of matters, transactions and accounts therein recorded (section 34), business records made in the usual and ordinary course of business, etc. (section 36), and medical reports obtained for a party to an action and signed by a legally qualified medical practitioner licensed to practice in any part of Canada (section 52).

declarations extracted by the most extreme '3rd degree' methods could readily be made into affirmative evidence."[7]

(4) It is feared that the admission of previous inconsistent statements would lead to the admissibility of previous consistent statements.

(5) It is contended that the jury would attach unwarranted weight to the prior statement, as juries are not experienced in the process of giving greater weight to certain testimony. The task of instructing a jury on the relative weight to be given to this type of hearsay evidence would be great.

Despite these objections, others have argued forcefully that such statements should be received as substantive evidence. The two safeguards of the truth of testimony given in court are the oath with its accompanying liability for punishment for perjury, and the probe of cross-examination. Many authors contend that the major safeguard against unreliable evidence is the test of cross-examination. The oath and consequent sanctions, though of substantial value, are not as effective a guarantee of truth as effective cross-examination.[8]

In the case of a previous inconsistent statement made by a witness who is giving evidence or is available in court, only the oath is lacking, for the previous statement may be tested in cross-examination and re-examination: "the two questioners will lay bare the sources of the change of face"[9] and reveal which story is worthy of belief.

Evidence of a previous inconsistent statement where the declarant is on the witness stand has, therefore, some of the safeguards of examined testimony. "If we look to the procedural guarantees of truth of the prior statement and of the present testimony of the same witness, we can only conclude that they stand approximately equal, since they both are subject to the same test of cross-examination."[10] The proponents of this argument do not accept the proposition that, if cross-examination is to be effective, it must be conducted when the questioned statement is made and under the circumstances in which it was made.

Another argument presented in favour of giving substantive value to prior inconsistent statements is that they are nearer to the event than is the testimony in court, and recollection is likely to be better than when later statements are made. For "other things being equal, a memory is most accurate when recall is made immediately following the observation . . . [and so] the time-element . . . always favour[s] the earlier statement . . . [A]s a class, prior inconsistent statements, when they are so verified

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[7]*State* v. *Saporen* (1939), 205 Minn. 358, 361-363, 285 N.W. 898, 901.

[8]McCormick, *Evidence* (2nd Ed. 1972), at p. 601. See also 6 Wigmore, *Evidence*, §1827 (3rd Ed. 1940); and Henry, "Uniform Rules of Evidence—Should they be Adopted? Their Effect on Local Practice" (1964), 39 Wash. L.R. 380, 388.

[9]McCormick, footnote 8 *supra*, at p. 603.

[10]McCormick, *Evidence* (1st Ed. 1954), at p. 75.

that their actual making is not in doubt, are more reliable as evidence of the facts than later testimony of the same witnesses".[11]

The practice of cautioning a jury that it must consider the prior statements of the witness not as substantive evidence on the main issue, but solely as bearing on the credibility of the witness has been ruthlessly criticized by eminent scholars and judges as "pious fraud", "artificial", basically "misguided", "mere verbal ritual" and an "anachronism that still impede(s) our pursuit of truth".[12] The soundness of this practice has been challenged as being a rule juries would not understand, since "the distinction between the two is not easily appreciated by a jury":[13]

> If a jury is not to be trusted to evaluate hearsay evidence properly, it may be doubted that it could consider it for one purpose but avoid being influenced by it for another purpose. Jurors normally reach a decision as a spontaneous reaction to the incidents of the trial as a whole, the conduct of the witnesses, the parties, the court, and counsel. They do not, and ordinarily could not, add to the scales of their deliberation each item of evidence, assigning to each fragment its due legal value, and then reach a decision by merely ascertaining which side preponderates. Opinions are not formed in any such manner; belief or disbelief is not a voluntary process, controllable with the precision of a scientific instrument. The impression that testimony makes upon the minds of the jury can never be entirely removed or controlled by instructions from the court, no matter how conscientiously the jury may try to follow the instructions. It is a very difficult matter to control our own psychological reactions.[14]

McCormick's approach would be not merely to weigh the credibility of the testimony given in court but to decide which of the two stories is true: "Men will often believe that if a witness has earlier sworn to the opposite of what he now swears to, he was speaking the truth when he first testified".[15] Unless the statement may be true, it does not have the effect of shaking the credibility of the testimony, and that it *may* be true is what is meant by accepting a statement as evidence of the truth. "The notion that the judge and jury may only say 'we know not which story is true; we only say that the witness blows hot and cold, and hence is

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[11] *Ibid.*, at pp. 75-76. See also Marshall, "Evidence, Psychology and the Trial" (1963), 63 Col. L.R. 196; in general, the fresher the memory, the fuller and more accurate it is: see Trankell, *Reliability of Evidence* (1972); Marshall, *Law and Psychology in Conflict* (1969), at p. 54; Stewart, "Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence", [1970] Utah L. R. 1; Redmount, "The Psychological Basis of Evidence Practices: Memory" (1959), 50 J. Crim. L.C. & P.S. 249.

[12] *United States* v. *De Sisto* (1964), 329 F. 2d 929 (U.S.C.A. 2nd Circ.).

[13] Clark, C.J., in *Mediin* v. *County Board of Education et al.* (1914), 167 N.C. 239, 241, 83 S.E. 483, 484.

[14] R.T.K., comment in 133 A.L.R., 1444 at p. 1466 considering *Chicago, St. Paul, Minnesota and Oregon Railway Company* v. *Kulp* (1941), 102 F. 2d 352.

[15] *United States ex rel NG. Kee Wong* v. *Corsi* (1933), 65 F. 2d 564, 565 (C.C.A. 2nd).

not to be believed in either' demands a finical neutrality alien to the atmosphere of a jury trial."[16]

Some consider that the refusal to accept previous statements as substantive evidence, is arbitrary and without practical effect where the impeaching party does not have the burden of producing evidence on the issue to which the statement relates. Where the party bearing the burden of proof produces only one witness to a material fact, and his evidence is attacked by demonstrating that he made a previous inconsistent statement, it is immaterial to the party that does not have the burden of proof whether the prior statement is accepted as substantive evidence, or merely used to impeach. In either event the jury can use it to cancel the effect of the witness' testimony. The impeaching statement, though not substantive evidence, may be a sufficient basis for a decision in favour of the defendant. It is argued that if the previous statement and the circumstances surrounding its making are sufficiently probative to lead the jury to disbelieve the story of the witness on the stand, they should be sufficient to justify the jury's believing the statement itself.[17]

Where the party who has the burden of proof seeks to use a prior inconsistent statement to impeach the evidence of his own witness, the situation is quite different. If a previous inconsistent statement were to be admitted as proof of the facts stated therein, and the evidence of the sole witness called has not discharged the onus but he has admitted making a previous inconsistent statement which *would* discharge the onus, the case could well be decided on evidence not given under the sanction of an oath, except where the witness testifies as to the truth of the previous inconsistent statement.

2. Previous Consistent Statements

The most widely accepted rule in the common law world on this subject can be stated as follows: "any declaration made by the accused, before or after the commission of the offence, that may be in his favour, is deemed self-serving and as such is not admissible in evidence".[18] At one time it was thought in England that the evidence of a witness could be corroborated by proof of his own former statements.[19] However, it is now settled law that a witness' own previous statements cannot be used, either in criminal[20] or civil[21] cases, to corroborate his testimony.

Three exceptions to this rule are commonly accepted. First, self-serving evidence is generally admitted in evidence if the declaration is admissible as part of the *res gestae*; but "this is not to say that in all instances a court will disregard a statement's tendency to enhance a

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McCormick, footnote 10 *supra*, at p. 78.

[17]*Di Carlo* v. *U.S.* (1925), 6 F. 2d 364, 369 (C.C.A. 2nd), cert. den. (1924), 268 U.S. 706.

[18]Grosman, "An Important Exception to the Rule Against Admission of Self-Serving Evidence" (1963-64), 6 Crim. L.Q. 27.

[19]This was held to be so in *Lutteral v. Reynell et al.* (1677), 1 Mod. 283, 86 E.R. 887.

[20]*R.* v. *Parker*, [1783] 3 Dougl. 242, 99 E.R. 634.

[21]*Gillie* v. *Posho*, [1939] 2 All E.R. 196.

litigant's position".[22] McCormick finds that under the prevailing view the self-serving nature of a statement, while not a conclusive reason for exclusion, is an indication that the statement was the result of reflective thought and, thus, is a factor to be considered in deciding whether the statement was appropriately spontaneous so as to be part of the *res gestae*.[23] Second, complaints by victims of sexual offences are admitted for a limited purpose. In the Middle Ages it was essential that the victim raise a hue and cry in cases of rape because it was thought that this type of evidence greatly increased the likelihood that the complainant was being truthful. By the beginning of the eighteenth century a strong presumption existed against a complainant in a rape case if she did not complain within a reasonable time of the alleged offence. Third, previous consistent statements may be admitted in evidence to rebut a charge of recent fabrication; however, they must have been made prior to the time of the alleged fabrication.

Some suggest that there are further exceptions to the rule against admitting self-serving statements in evidence. For example, in a few United States jurisdictions, prior consistent statements are admitted whenever the witness has been impeached by evidence of prior statements, inconsistent with his testimony.[24]

One English author suggests that there is in England implicit authority for the practice of admitting statements of the accused when arrested even if they are entirely self-serving,[25] and he cites the case of *R.* v. *Wallwork*[26] in support of this view. In that case, Wallwork appealed against his conviction partly on the ground that the judge in summing up for the jury had not mentioned that Wallwork had always strenuously denied the offence. Lord Goddard found, however, that this was undoubtedly clear to the jury, as the trial judge read passages to them from the evidence of the police inspector, in which Wallwork emphatically denied to the police inspector that he had anything to do with the offence.[27] Gooderson argued that, "The Court of Criminal Appeal would not have investigated the ground of appeal with such care had it occurred to them that Wallwork's statement to the police was inadmissible because of the rule against narrative".[28] In a New Zealand case[29] there is a dictum that a similar rule applies there. In that case Ostler, J., said: "Exculpatory statements made to the police when making enquiries about a crime . . . if properly obtained, are always admissible both for and against the person who made them if he is subsequently charged. . . ."[30] Although Wigmore argues that it is highly desirable that any statement protesting

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[22]Price, "Exclusion of Self-Serving Declarations" (1963), 61 Mich. L. Rev. 1306, 1314.

[23]McCormick, footnote 10 *supra*, at p. 582.

[24]Cowan, "Prior Consistent Statements Admissible for Rehabilitation when Witness' Testimony Assailed as Recent Fabrication" (1957), 45 Calif. L. Rev. 202, 203-204.

[25]Gooderson, "Previous Consistent Statements", [1968] Camb. L.J. 64, 66-68.

[26]*R.* v. *Wallwork* (1958), 42 Cr. App. R. 153 (Eng. C.A.).

[27]*Ibid.*, at p. 160.

[28]Gooderson, footnote 25 *supra*, at p. 68.

[29]*R.* v. *Coats*, [1932] N.Z.L.R. 401.

[30]*Ibid.*, at p. 407

innocence made upon arrest, should be receivable,[31] the bulk of United States case law is against this view.

Statements by the accused when incriminating articles are recovered from his possession have sometimes been admitted in evidence. "The clearest case [for this] is where the accused is found in posssession of recently stolen goods, for this raises against him a presumption of fact that he is either the thief or the receiver. It is clear that any explanation he gives is admissible in evidence."[32] Both the Supreme Court of Canada[33] and Wigmore consider that such statements are admissible in evidence as part of the *res gestae*. However, it is not as clear why this is so if the statement is self-serving.

For years, testimony concerning previous identification of an accused has been received in evidence in Canada.[34] The courts here and in England assume, without discussion, that evidence of previous identification either in a parade or by photograph is admissible unless there was something unfair in the methods used.

There are three principal arguments supporting the rule against allowing previous consistent statements to be received in evidence: first, it may be dangerous to leave probative value and weight of certain types of evidence to the jury, since jurors are not experienced in the process of determining the weight to be given to different classes of testimony and may give undue weight to the previous statement. Secondly, evidence of a previous consistent statement would be superfluous since a witness' testimony is generally regarded as true, unless there is a particular reason for rejecting it as false. This rule reduces collateral issues and saves time. Thirdly, the risk of fabrication is thought to be so great that self-serving statements must in general be excluded. This fear is widespread, and is the basic reason why so few courts allow self-serving statements to be introduced in evidence.[35]

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[31]Wigmore, footnote 8 *supra*, §1732, at p. 106.

[32]Gooderson, footnote 25 *supra*, at pp. 70-71.

[33]*R.* v. *Graham* (1972), 26 D.L.R. (3d) 579.

[34]In its Report, the Royal Commission on Police Powers and Procedure assumes that police witnesses can testify to previous identification in parades and by photograph: *Report of the Royal Commission on Police Powers and Procedure*, Cmnd. 3297, (1929), para. 128. The position in New South Wales was stated by Ferguson, J., when he said ". . . evidence has been admitted in criminal trials from time immemorial of the identification of the accused by witnesses out of Court", (*R.* v. *Fannon & Walsh* (1922), 22 S.R. (N.S.W.) 427, 430). The learned judge justified the rule on the ground that an identification soon after the commission of the offence strengthens the value of identification in the witness box, though he regarded the latter as the most trustworthy evidence of identification. In the United States, there is a division of authority on the question, but the trend is in favour of admissibility of evidence of extra-judicial identification: see 4 Wigmore, *Evidence*, §1130, (3rd Ed., 1940); and Note by C. R. McCorkle in 71 A.L.R. (2d) 449; see also, Gooderson, footnote 25 *supra*, at pp. 78, 80.

[35]For example, the court held in *State* v. *Burgess* (1914), 259 Mo. 383, 168 S.W. 740 (Missouri S. Ct.), that "to permit a party to corroborate a witness by proof that on some other occasion the witness made the same statements to another party which he or she has testified to upon the trial would set up a new and dangerous method of corroboration. . . . If such a practice . . .

On the other hand it has been said that "there is much to be said for a broad formulation of the rule under which proof of prior consistent statements would be permissible whenever the fact that the statement was made is substantially relevant for some reason other than its tendency to confirm the consistency of the witness".[36]

Several reasons may be advanced in support of this statement. The rule arose as a corollary to the rule that prevailed in England until 1851 rendering parties incompetent as witnesses. Until that time "it was felt that parties to a suit were so naturally and consistently biased in their own favour that any testimony which they might give, even when under oath and subject to stringent cross-examination, was of such doubtful value as evidence that it should not go before the jury in any circumstances".[37] Since this doctrine of interest has long been abandoned, it is said that the rule against self-serving statements should be reformed, as both rules are built on the same logical foundation. The abandonment of the doctrine of interest is "based on the theory that jurors being reasonable men realize the tendency of humans to advance their own welfare, and will take this factor into consideration in judging the credibility of witnesses. If the jury weigh the testimony given in court they should be able to weigh the value of a statement given before trial. It is a matter of degree, with one being perhaps slightly less reliable than the other".[38]

Another argument is that the rejection of self-serving statements is unfair, for "statements made by a party before the trial may be proved if they tend to discredit that party's own evidence, but statements made by him which are consistent with his evidence are inadmissible".[39] The rationale of the rule would seem to be that the "accused will manufacture evidence for himself" and that this manufactured evidence should not be considered by a jury or a judge; admissions against the accused's interest on the other hand are more likely to be true.[40] A double standard is set up which many regard as unjustified because the previous consistent statements are often made under the same circumstances as previous inconsistent statements.[41]

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were permitted, an untruthful witness could then corroborate himself as to a falsehood by first relating the falsehood, to other parties, and then, after he has sworn to the falsehood introduce such other parties to show that he has theretofore made the same statements to them". This argument was also advanced by Eyre, C.J., in *R.* v. *Hardy* (1794), 24 State Tr. 199, 1093, and by the majority in *Corke* v. *Corke and Cooke*, [1958] P. 93.

[36]Cross, *Evidence* (3rd Ed. 1967), at pp. 194-95.

[37]Middleton, "Admissibility of Self-Serving Declarations" (1959-60), 14 Ark. L. Rev. 105, 110.

[38]*Ibid.*, at pp. 110-111.

[39]Jolowicz, "Self-Serving Statements or Conduct", [1958] Camb. L.J. 145.

[40]Grosman, footnote 18 *supra*, at p. 27.

[41]As an example of the injustice of this double standard, the case of *Jones* v. *S. E. and Chatham Ry. Co.* (1918), 87 L.J.K.B. 775 is cited. In this case a woman injured her hand, and the issue was whether she had been injured at work or at home. She could receive compensation only if the injury occurred at work. Evidence of certain persons who said that she had said to them that the injury had been inflicted at home was admitted, but evidence of persons who were prepared to say that the woman had told them shortly after the accident that the injury had been received at the place of her employment was excluded.

A third argument proceeds that it is unconvincing to maintain that permitting the introduction of self-serving declarations would allow a party to make evidence on his own behalf because to do so would be to assume that the statements are false. "The court is assuming that the accused's only purpose would be to deceive the court, and, in fact, [by assuming this] the court is abdicating its usual function of presuming a man innocent until proven guilty . . . [This is] repugnant to the fundamentals of British justice".[42] Wigmore agrees with this objection because he believes the rule is premised on the assumption that "this accused person might be guilty and therefore might have contrived these false utterances. . . . But it was not to have been anticipated in a legal system which makes so showy a parade of the presumption of innocence".[43]

The fourth argument is one suggested by Morris, L.J., in a dissenting judgment in *Corke* v. *Corke and Cooke*.[44] In that case he was in favour of admitting a previous consistent statement or act. He stated that the essential test as to admissibility of evidence is the test of relevance, and relevance is to be judged by applying a fair-minded common sense approach. The learned Lord Justice considered that the relevant statement was to be regarded as conduct and that since conduct which suggests guilt may be proved, so may conduct which suggests innocence. Even though there is a danger of fabrication, this should go to the weight of the evidence, rather than to its admissibility.

Finally it is argued that the opportunity for cross-examination provides a sufficient test of the truth of the previous consistent statement: "reliability is initially established by the fact that the witness appears personally before the court and is under oath to tell the truth [and] the testimony given is subject to cross-examination by the opposing party. This gives an opportunity to challenge any testimony offered, to probe for inconsistencies, and generally discredit any untruthful testimony".[45] But this is not entirely true where a previous consistent statement is proved by a witness other than the witness who made the statement.

3. Reforms Proposed in Other Jurisdictions

The extent of the law reform activity in this area of the law in other jurisdictions indicates that there is much dissatisfaction with the present rules concerning prior statements. In the United States changes have been proposed by many reform bodies, and have been adopted in some states; in England legislation has been enacted.

(a) *United States*

In the United States, one of the first major proposals for reform of the law concerning prior statements was contained in the hearsay provisions of the Model Code of Evidence,[46] approved by the American Law

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[42]Grosman, footnote 18 *supra*, at pp. 28-29.
[43]Wigmore, footnote 8 *supra*, §1732, at p. 102.
[44][1958] P. 93, 106.
[45]Note (1968), 54 Iowa L. Rev. 360, 361-362.
[46]American Law Institute, Model Code of Evidence (1942).

Institute in 1942. Under Rules 303 and 503 of the Code, which deal broadly with hearsay evidence, previous statements, both consistent and inconsistent, would be admitted, unless excluded on some other ground. The relevant Rules provide:

> Rule 503
>
> Evidence of a hearsay declaration is admissible if the judge finds that the declarant
>
> (a) is unavailable as a witness, or
>
> (b) is present and subject to cross-examination.
>
> Rule 303
>
> (1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will
>
> (a) necessitate undue consumption of time, or
>
> (b) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or
>
> (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.

These provisions are based on the view that if the declarant is in court and subject to cross-examination, there is no real foundation for a hearsay objection. However, there is no requirement in the Model Code that such hearsay statements, to be admissible, should exhibit circumstantial guarantees of trustworthiness.

In 1953, the Commissioners for Uniform State Laws approved the Uniform Rules of Evidence.[47] Although these Rules have been superseded by the Uniform Rules of Evidence, 1974,[48] the earlier rules do provide a useful model for discussion. Rules 63(1) and 45 provide:

> Rule 63. Hearsay Evidence Excluded—Exceptions
>
> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> (1) A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness.
>
> Rule 45. Discretion of Judge to Exclude Admissible Evidence
>
> Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will

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[47]National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953).

[48]Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform State Laws (1974).

(a) necessitate undue consumption of time, or

(b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or

(c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

Under Rule 63 prior inconsistent statements would be admissible as substantive evidence if the declarant is present and available for cross-examination. Nor are prior consistent statements rendered inadmissible by reason of the hearsay rule. The rationale for this is that cross-examination at the trial is as adequate as it would have been at the time the statement was made, and also that Rule 45 gives protection from possible abuse of this Rule. For example, "unless there has been substantial impeachment of the witness his prior consistent statements would add very little to his trial testimony and it is likely that they would be excluded by the trial judge".[49] Under this proposal the out-of-court statement could be excluded under Rule 45, on the ground that it was not worth the time or that its effect was merely cumulative. The merits of this proposal were stated by the California Law Revision Commission to be as follows:

> . . . in lieu of regulating the admissibility of prior consistent statements by the perplexing 'recent contrivance' doctrine (under which the evidence is inadmissible in all cases as substantive evidence but admissible in some as nonsubstantive), we would have a simple rule of admissibility of such statements as substantive evidence on the merits in all cases, subject only to the judge's discretion to reject them as merely cumulative. The new rule would be simpler for both judge and jury to understand and apply.[50]

The California Law Revision Commission, however, recommended against the adoption of Rule 63(1) of the Uniform Rules of Evidence, 1953,[51] and contended that the Rule,

> . . . would permit a party to put in his case through written statements carefully prepared in his attorney's office, thus enabling him to present a smoothly coherent story which could often not be duplicated on direct examination of the declarant. The prohibition against leading questions on direct examination would be avoided and much of the protection against perjury provided by the requirement that in most instances testimony be given under oath in court would be lost. Inasmuch as the declarant is, by definition, available to testify in open court, the Commission does not believe that so broad an exception to the hearsay rule is warranted.[52]

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[49]Donnelly, "The Hearsay Rule and Its Exceptions" (1955-56), 40 Minn. L. Rev. 455, 460.

[50]California Law Revision Commission, *Tentative Recommendation and a Study Relating to The Uniform Rules of Evidence, Article VIII, Hearsay Evidence* (August 1962), at p. 427.

[51]*Ibid.*, at p. 313 *et seq.*

[52]*Ibid.*, at p. 313.

The California Commission proposed instead, that the present law respecting the admissibility of out-of-court declarations of trial witnesses be codified with some revisions. The Commission recommended that the law respecting the admissibility of prior inconsistent statements be codified and the law regarding the admissibility of prior consistent statements substantially restated;[53] it was proposed that in both instances the extra-judicial declarations should be admitted as "substantive evidence in the cause rather than, as at the present, solely to impeach the witness in the case of prior inconsistent statements and, in the case of prior consistent statements, to rebut a charge of recent fabrication".[54] The California Commission contended that it was not realistic to expect a jury to understand and apply the subtle distinctions taken in the present law as to the purposes for which the extrajudicial statements of a trial witness may or may not be used. It also took the view that a party should be able to use a prior inconsistent statement of a trial witness in order to make out a *prima facie* case or defence, and stated that "in many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy which gave rise to the litigation".[55]

McCormick does not entirely subscribe to the philosophy of the former Uniform Rules of Evidence because of the hazard in falsely reporting oral statements. "We may well be justified, [he says], in placing a special safeguard upon the use of such supplemental evidence if we believe that the risk of mistransmission outweighs the probable value of the evidence." McCormick proposed the following alternative rule: "that a statement made on a former occasion by a declarant having an opportunity to observe the facts stated, will be received as evidence of such facts, notwithstanding the Hearsay Rule if:

(1) the statement is proved to have been written or signed by the declarant or to have been given by him as testimony in a judicial or official hearing, or the making of the statement is acknowledged by the declarant in his testimony in the present proceeding, and

(2) the party against whom the statement is offered is afforded an opportunity to cross-examine the declarant".[56]

Professor Judson F. Falknor has proposed a rule which is substantially similar to that advocated by McCormick.[57] However, this general approach has been rejected by those who contend that it is the function of the jury to decide whom and what to believe.[58]

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[53]*Ibid.*, at pp. 312-313.
[54]*Ibid.*, at p. 313.
[55]*Ibid.*
[56]McCormick, "The Turncoat Witness: Previous Statements as Substantive Evidence" (1947), 25 Tex. L. Rev. 573, 588.
[57]Falknor, "The Hearsay Rule and Its Exceptions" (1954-55), 2 U.C.L.A. L. Rev. 43, 53-54.
[58]See Donnelly, footnote 49 *supra*, at p. 461.

(b) *England*

The common law rule against the use of prior statements as proof of the facts contained was altered by the changes to the hearsay rule made by the English *Evidence Act*, 1938. As we stated in chapter 1 the provisions of this Act made admissible as substantive evidence in civil proceedings, a relevant statement contained in an original document on the following conditions:

(1) subject to certain exceptions, that the maker of the statement had personal knowledge of the facts stated;

(2) that if the maker of the statement was alive and could be called as a witness he must be called except in exceptional circumstances;

(3) that the statement was made *ante litem motam*, and

(4) that the statement was written and signed by the maker of the document, or at least otherwise recognized by him.

The circumstances in which the maker of the statement was not required to be called as a witness, were where he was dead or unfit to attend as a witness or was beyond the seas and it was not reasonably practical to secure his attendance, or if all reasonable efforts to find him were without success.[59] Fear that the prior statement might be misreported appears to have led to the requirement that the maker of the statement be called as a witness.

The English Law Reform Committee considered the problem of distortion in its Report on Hearsay.[60] It observed that the 1938 legislation proceeded from a distinction between written and oral hearsay and extended only to written statements. It examined the rationale for the distinction as follows:

> [A] written statement speaks for itself. There can be no dispute as to whether what it says is accurate; there can be no dispute, save as a matter of semantics, as to what it says. It is otherwise with an oral statement the maker of which is not called as a witness. The court's knowledge of what was said by the alleged maker of the statement depends upon the honesty and accuracy of recollection of the witness who gives evidence of it. There is a double source of error; the statement may not only be inaccurate, it may also be misreported. But this criticism goes to probative value: it is equally valid of oral statements at present admissible at common law—for instance, under the *res gestae* rule.[61]

The Law Reform Committee was divided as to whether a prior statement should be admitted as evidence of the facts contained in the

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[59]*Evidence Act*, 1938, 1 & 2 Geo. VI, c. 28, ss. 1, 2.

[60]Law Reform Committee, Thirteenth Report, *Hearsay Evidence in Civil Proceedings*, Cmnd. 2964, (1966).

[61]*Ibid.*, para. 14, at p. 7.

statement.[62] A substantial minority recommended that it should not, except in exceptional circumstances:

> Those who take this view attach importance to the principle that, where it is available, the 'best evidence' should normally be given and, while in favour of admitting hearsay evidence where it is necessary (because direct evidence is not available) or convenient and innocuous (because no adverse party wishes seriously to dispute it), they regard as particularly valuable oral evidence given in answer to questions *which are not leading questions*. To admit a statement made outside court when the maker is not only available but is actually called as a witness is, in their opinion, a departure from the 'best evidence' principle for which there is no sufficient justification. If the previous statement is consistent with what the witness says in court, it is of little value; if inconsistent, it should not be used by the party calling the witness to contradict or qualify his oral testimony. The minority sees no reason why a party should be permitted, where his witness fails to 'come up to proof', to remedy the defect in his evidence by showing that on another occasion the witness made a different statement. They are, therefore, opposed to the admission of previous *inconsistent* statements in any circumstances. They recognize, however, that there are exceptional cases where a previous *consistent* statement could properly be admitted at the judge's discretion: for instance, a contemporaneous statement made by an eye-witness to an event who has subsequently lost nearly all recollection of what happened.[63]

A narrow majority, however, took a different view. They considered that:

> whether consistent or inconsistent with the witness' oral testimony, a previous statement made by him should be admissible at the judge's discretion, which could be exercised where circumstances justified his taking this course. They attach considerable importance to conferring on the judge a residual discretion to admit statements, as evidence of the facts which they tend to establish, where those statements appear to him to be likely to assist in ascertaining the truth. A proof of a statement taken from a witness for the purposes of the trial is of small probative value and they would not normally expect a judge to admit it, except in rebuttal of suggestions made in cross-examination; but a statement made by an eye-witness shortly after the event that he has witnessed is sometimes more likely to be accurate than his recollection of the event extracted from him in the witness box years later. Whether consistent or inconsistent with his oral evidence, the majority think not only that it may sometimes be a useful aid in assessing the probative value of the latter, but also that it may occasionally possess in its own right a higher probative value than the so-called 'best evidence' with which it is inconsistent. They would expect statements made while the witness' recollection

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[62] *Ibid.*, para 35, at p. 16.
[63] *Ibid.*, para. 36, at p. 17.

was still fresh to be freely admitted by the judge as evidence of the facts which they tended to establish.[64]

The members of the Committee were all agreed, however, that if a prior statement is to be admitted as substantive evidence, it should be so admitted only at the discretion of the trial judge. They were "accordingly unanimously of the opinion that the . . . automatic admissibility of statements of the kind to which the Evidence Act, 1938 applies, where the maker of the statement is called, should, to his extent, be limited."[65]

Section 2(1) of the *Civil Evidence Act 1968*[66] provides that a statement made by any person, whether called as a witness or not, is admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible. This would apply to previous statements, both consistent and inconsistent, of a witness called at the trial. However, this is subject to the limitations set out in subsection 2.[67]

Section 3 provides that where a previous inconsistent statement made by a witness is proved, either after he has been declared hostile or in cross-examination, or where a previous consistent statement made by a witness is admitted to rebut a suggestion that his evidence has been fabricated, the statement is admissible not only to attack his credibility or to support his credibility, as the case may be, but also as evidence of the facts stated therein.

4. Recommendations

We have concluded that it would not be wise to permit counsel calling a witness to adduce evidence of a prior statement inconsistent with the evidence given by the witness at the trial, as proof of the facts contained in the statement. In our view, proof of such a statement should be permitted only for the purpose of discrediting a witness who has disappointed an examiner. To admit a prior statement as evidence of the facts contained therein, would permit a statement not given under oath to contradict the evidence of the maker of the statement which has been given under oath.

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[64] *Ibid.*, para 37, at pp. 17-18.

[65] *Ibid.*, para. 35, at p. 17.

[66] *Civil Evidence Act 1968*, c. 64.

[67] (2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person by whom the statement was made, the statement—

(a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and

(b) without prejudice to paragraph (a) above, shall not be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person by whom it was made, except—

(i) where before that person is called the court allows evidence of the making of the statement to be given on behalf of that party by some other person; or

(ii) in so far as the court allows the person by whom the statement was made to narrate it in the course of his examination-in-chief on the ground that to prevent him from doing so would adversely affect the intelligibility of his evidence.

On the other hand, where the evidence of a witness is challenged by the opposing party as a fabrication for the purpose of the trial, the fact that he made a prior consistent statement may well support the credibility of the witness. In addition, the witness is on the witness stand and available to testify to the facts contained in the statement.

We make the following recommendations:

1. A party producing a witness should be permitted to prove a previous consistent statement to rebut a suggestion that his evidence as given at the trial has been fabricated. In such a case, the statement should be admitted not only to support the credibility of the witness, but as substantive evidence of the facts stated therein. But where corroboration is required, no such statement should be used to corroborate the witness' evidence. *The Evidence Act* should be amended to include the following provision:

> (1) A previous consistent statement made by a witness in a proceeding is admissible in evidence to rebut an allegation that his evidence has been fabricated, and such a statement shall be admitted not only to support the credibility of that witness, but also as evidence of any fact contained therein of which direct oral evidence by him would be admissible.
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> (2) Where corroboration is required by law, a statement admitted under this section shall not be taken as corroborative of the evidence of the witness who made the statement. [Draft Act, Section 28.]

2. If, in the opinion of the court, a witness has made an inconsistent statement at some other time, the party producing the witness should be permitted to prove that the witness made the prior inconsistent statement; but before proof is given, the circumstances under which the statement was made should be drawn to the attention of the witness and he should be asked whether or not he made the statement. If it is proved that the witness made a prior inconsistent statement, the only evidentiary value it should have should be to discredit the evidence of the witness given at the trial. *The Evidence Act* should be amended by substituting for section 24, the following provision:

> (1) A party producing a witness in a proceeding shall not impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or proof that the witness at some other time made a statement inconsistent with his present evidence.
>
> (2) Before proof of a prior inconsistent statement is given in a proceeding, the circumstances of it sufficient to designate the particular occasion on which it was made shall be drawn to the attention of the witness and he shall be asked whether or not he made the statement.

(3) No such prior statement is admissible in evidence in proceeding to prove any fact contained in it. [Draft Act, Section 24.]

3. Where on cross-examination a witness admits making a statement inconsistent with his present testimony, or where he does not admit making a statement inconsistent with his present testimony and proof is given that he did in fact make such a statement, the statement should be received as evidence of the facts stated therein. Section 22 of *The Evidence Act* should be amended to read as follows:

(1) If in a proceeding a witness upon cross-examination as to a former statement made by him relative to the matter in question and inconsistent with his present testimony does not distinctly admit that he did make such statement, proof may be given that he did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

(2) Where under this section it is proved that a witness made a statement inconsistent with his present testimony, the statement shall be admitted as evidence of the facts stated therein but only if the witness could have testified as to such facts. [Draft Act, Section 34.]

CHAPTER 4

ILLEGALLY OBTAINED EVIDENCE

1. Introduction

The admissibility of illegally obtained evidence in criminal trials has long been the subject of controversy; little, however, has been said about its admission in civil trials. The chief reason for this is that evidence when obtained illegally in the criminal process usually attracts greater notoriety, as it involves improper acts on the part of the State and its agencies. We shall examine the rule governing the admissibility of illegally obtained evidence in both civil and criminal proceedings in Canada and make some comparison with the approach taken in other jurisdictions.

Those who would not admit illegally obtained evidence, even where it is relevant to the facts in issue, contend that it should be excluded on the following grounds:

(1) as a deterrent to illegal behaviour;

(2) the law breaker should not be allowed to benefit from his illegal activity;

(3) the admission of such evidence involves the courts in recognition of wilful disobedience of the law tending to bring the administration of justice into disrepute; and

(4) its admission would be unjust or unfair to the accused.

On the other hand, it is argued that where evidence is logically relevant to the facts in issue, it should be admitted despite the fact that it was illegally obtained because:

(1) the predominant concern of the tribunal of fact is the search for truth, and the fact of the illegal acquisition of evidence does not affect the logical relevance of that evidence;

(2) other sanctions and remedies exist against the perpetrator of illegal acts that are better suited to deter wrongdoers than an evidentiary rule of exclusion; and

(3) it would be a grave injustice to a party to be denied the use of illegally obtained evidence where he was not involved in the illegality.

Lord Cooper (Lord Justice-General) in *Lawrie* v. *Muir*[1] summed up the basic conflict of principle in this area of the law:

> From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are

[1][1950] S.C.(J.) 19.

> liable to come into conflict — (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.

2. Theoretical Basis For Exclusion

Wigmore[2] has divided the rules governing the admissibility of evidence into two groups: those which may be said to be designed to improve the quality of proof, and those which are not concerned with an inquiry into truth but are based on extrinsic policy. In the latter group, evidence may be disallowed where certain values are considered to predominate over the truth inquiry. Marital communications, confidential communications between a solicitor and his client, and secrets of State, illustrate rules coming within this category.

In the United States, in order to deter illegal activity in the securing of evidence in criminal proceedings, evidence is inadmissible if law officers have acquired it illegally or illegal acts have led to its discovery. In Canada, on the other hand, the courts have been more reluctant to subordinate the truth inquiry to extrinsic policy considerations. Generally speaking, the English and Canadian criterion for the admission of illegally obtained evidence is the logical relevance of the evidence to the facts in issue. The way in which it was obtained is treated as a collateral issue having no bearing on the trustworthiness of the evidence, although in practice the court may consider the matter as having some effect on the credibility of the party who produces it.

Where improperly or illegally obtained evidence has been excluded in Canada, it has generally been on the basis, not of extrinsic policy considerations, but rather because of the danger that such evidence might be untrue. In *Regina* v. *Wray*,[3] Cartwright, C.J., said:

> The great weight of authority indicates that the underlying reason for the rule that an involuntary confession shall not be admitted is the supposed danger that it may be untrue.[4]

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[2] 8 Wigmore, *Evidence*, §2175 (McNaughten Rev. 1961). Wigmore also discusses a third group of rules: those which determine the relevance of circumstantial and testimonial evidence.

[3] [1971] S.C.R. 272. This case is discussed in greater detail in Chapter 5, *infra*.

[4] *Ibid.*, at p. 279.

This appears to be the basis of the rule in *R.* v. *St. Lawrence*,[5] in which it was held that those parts of a confession which are subsequently confirmed by fact are admissible, even though the confession is not proved to be voluntary and is otherwise inadmissible.

In a dissenting judgment in the *Wray* case, the Chief Justice discussed the rationale of probative worth behind the *St. Lawrence* rule, and pointed out that if the only reason for the rule excluding an involuntary confession was the danger that it might be untrue, then there was a lack of logic in the exclusion of an involuntary statement which the accused subsequently admits on his oath to be true. The Chief Justice put forward as an additional rationale for the exclusion of involuntary confessions, the privilege against self-incrimination. However, he went on to accept the *St. Lawrence* rule, which seems to contradict his former argument and places him with the other Justices of the Court who considered the probative worth as the sole criterion of admissibility. Only Mr. Justice Hall felt that the Court ought to reconsider the *St. Lawrence* rule.

Martland, J., said in the majority decision ". . . in my opinion, under our law, the function of the court is to determine the issue before it, on the evidence admissible in law, and it does not extend to the exclusion of admissible evidence for any other reason".[6]

Because the law governing the admissibility of illegally obtained evidence in criminal proceedings applies equally to civil cases, a discussion of the present law must involve a consideration of the major criminal cases.

3. The Exclusionary Rule In Criminal Trials And Its Effect On The Civil Law

(a) *The Law in Canada*

The principle governing the admissibility of illegally obtained evidence in criminal cases is stated by Lord Goddard in a decision of the Judicial Committee of the Privy Council, *Kuruma* v. *The Queen*.[7] He said:

> In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.[8]

This principle was referred to with approval by the Supreme Court of Canada in *A.G. for Quebec* v. *Bégin*.[9]

Although *Kuruma* v. *The Queen* was a criminal appeal, Lord Goddard saw "no difference in principle for this purpose between a civil and

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[5][1949] O.R. 215 (H.C.J.).
[6][1971] S.C.R. 272, 288.
[7][1955] A.C. 197 (P.C.).
[8]*Ibid.*, at p. 203.
[9][1955] S.C.R. 593, 597.

criminal case".[10] Many of the authorities reviewed in making this statement of the law were civil cases.[11]

There are few reported cases in Canadian jurisdictions where the admissibility of illegally obtained evidence in civil trials has been considered. Although, as we have seen, it is settled for criminal cases that evidence otherwise admissible is not rendered inadmissible by the fact that it was illegally obtained,[12] the law on this point in civil cases is not so clear. The few precedents and *obiter dicta* that do exist, however, seem to indicate that the rule is the same in both civil and criminal cases. Legal commentators have taken this view.[13]

In *Cuthbertson* v. *Cuthbertson*,[14] one of the questions in an action for alimony concerned documents which the defendant alleged were stolen by the plaintiff. The court said that the admissibility of evidence is not affected by the fact that the evidence was obtained by illegal means.[15] As authority for this proposition, reference was made to *Wigmore on Evidence*.[16] The decision rested on the authority of *Lightheart* v. *Lightheart*[17] which was an action brought in Saskatchewan for judicial separation. In that case the wife offered in evidence incriminating letters showing her husband's adultery. She had obtained these letters from a locked drawer in her husband's desk, the key of which she had taken from his pocket while he slept. It was argued that the wife should not be permitted to gain an advantage from her wrongful conduct, characterized by counsel as theft. The court allowed the letters to be admitted, basing its decision on a finding that the wife was not guilty of theft. The reasons for judgment contain the following *obiter* statement, "It seems clearly settled that . . . howsoever the documents were obtained they could be put in evidence".[18] In support of this proposition the learned judge quoted from *Rex* v. *Honan*[19] where Meredith, J.A., as he was then, giving the judgment of the Ontario Court of Appeal said: "the question is not, by what means was the evidence procured; but is, whether the things proved were evidence; . . . it is still quite permissible to 'set a thief to catch a thief' ".[20]

Prior to the decision of the Supreme Court of Canada in *Regina* v. *Wray*,[21] it was thought that a trial judge had a discretion to exclude relevant evidence which had been illegally or improperly obtained. In *Kuruma* v. *The Queen*, Lord Goddard was careful to qualify the breadth

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[10][1955] A.C. 197, 204.
[11]*Lloyd* v. *Mostyn* (1842), 10 M. & W. 478; *Calcraft* v. *Guest*, [1898] 1 Q.B. 759 (C.A.); *Lawrie* v. *Muir*, [1950] S.C. (J.) 19; *Rattray* v. *Rattray* (1897), 25 Rettie 315.
[12]*Kuruma* v. *The Queen*, footnote 7 *supra*.
[13]Cross, *Evidence* (4th Ed. 1974), at p. 282.
[14][1951] O.W.N. 845 (H.C.J.).
[15]*Ibid.*, at p. 848.
[16]8 Wigmore, *Evidence*, §2183 (3rd Ed. 1940).
[17][1927] 1 W.W.R. 393 (Sask. K.B.).
[18]*Ibid.*, at p. 397.
[19](1912), 26 O.L.R. 484 (C.A.).
[20]*Ibid.*, at p. 489.
[21][1971] S.C.R. 272.

of the statement we have quoted by saying that there remained in the court:

> a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. . . . If for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.[22]

Lord Parker, C.J., in a later case, *Callis* v. *Gunn*, stated that a judge has a discretion to exclude evidence, even if relevant, that would operate unfairly against an accused, or that has been obtained in an oppressive manner by force or against the wishes of the accused.[23]

In *Regina* v. *Wray*, however, in which the Supreme Court of Canada considered the admissibility of evidence discovered as a result of an involuntary confession, it was decided that a judge has no residual discretionary power to exclude relevant evidence except where its evidentiary value is slight and its prejudicial character far outweighs the evidentiary value. Martland, J., referring to the statement of Lord Goddard in the *Kuruma* case, said:

> It recognized a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. Even if this statement be accepted, in the way in which it is phrased, the exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.[24]

Therefore, in Canada at common law a judge would appear to have no discretion in a criminal case to exclude relevant and substantial evidence on the basis that it has been obtained illegally. We have been unable to find any authority that the law is different in civil cases.

Nor is evidence rendered inadmissible by reason of the fact that it has been secured in contravention of the provisions of the Canadian Bill of Rights. In *R.* v. *Hogan*[25] the Supreme Court of Canada considered the admissibility of a certificate concerning a breathalizer test where the test was administered by officers who had refused the accused's prior request to consult counsel. It was argued that the refusal of an opportunity to consult counsel was a violation of the Canadian Bill of Rights, that the breathalizer sample was illegally obtained, and that, therefore, the certificate concerning it ought not to have been admitted in evidence. The majority of the court held that even if the evidence had been improperly

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[22]*Kuruma* v. *The Queen*, [1955] A.C. 197, 204 (P.C.).
[23][1964] 1 Q.B. 495, 501.
[24][1971] S.C.R. 272, 293.
[25]*Hogan* v. *The Queen*, [1975] 2 S.C.R. 574.

or illegally obtained there were no grounds for excluding it at common law, and that, in view of other evidence of intoxication, it could not be characterized as unfair to accept the evidence as proof of the exact quantity of alcohol absorbed into the blood stream. Ritchie, J., in writing the majority judgment said, "I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, [the Bill of Rights] it justifies the adoption of the rule of 'absolute exclusion' on the American model which is in derogation of the common law rule long accepted in this country".[26]

The learned judge followed the reasoning in *King* v. *The Queen*,[27] a case from Jamaica where the Privy Council considered the subject of illegally obtained evidence generally and the effect of the search and seizure provision in the Jamaican Constitution. Many of the relevant cases in Scotland and England were discussed. The evidence in question was obtained by an illegal search of the accused. The Committee discussed the following statement of Lord Parker in *Callis* v. *Gunn*,[28] concerning the court's discretion to exclude illegally or improperly obtained evidence: "[It] would certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort". The Committee qualified this statement by concluding that unfairness to the accused in this context is not susceptible of close definition and must be judged in the light of all the material facts and findings and of the surrounding circumstances.[29]

The particular relevance of the *King* case to the *Hogan* case is the disposition of the argument that, where the illegally obtained evidence was obtained in violation of the accused's constitutional rights, it ought to have been excluded under the Jamaican Constitution. Lord Hodson disposed of this argument concisely:

> This constitutional right may or may not be enshrined in a written constitution, but it seems to the Lordships that it matters not whether it depends on such enshrinement or simply upon the common law as it would do in this country. In either event the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form.[30]

With this the majority of the Supreme Court in *R.* v. *Hogan* agreed.

Laskin, C.J., dissenting, with whom Spence, J., agreed, held that the results of the breathalizer test should have been excluded. He termed the Canadian Bill of Rights "a quasi-constitutional instrument". To the subject of evidence obtained in breach of the provisions of the Bill of Rights, he would apply the philosophy of the American exclusionary rules developed in the interpretation of constitutional guarantees in the United States of America to which we refer briefly later in this chapter. It would

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[26]*Ibid.*, at p. 584.
[27][1969] 1 A.C. 304 (P.C.).
[28][1964] 1 Q.B. 495, 502.
[29]*King* v. *The Queen,* footnote 27 *supra,* at p. 319.
[30]*Ibid.*

appear from the decision in the *Hogan* case that the provisions of the Canadian Bill of Rights do not affect the admissibility of evidence that may have been obtained in violation thereof.

In Canada, therefore, the courts regard illegally obtained evidence as admissible, on the view that determining the truth of a matter is something which prevails over other policy considerations which might be set up as a basis for excluding such evidence. If illegally obtained evidence is to be excluded more readily, legislation will be necessary to ensure such a result.

One example of legislative modification of the common law rule at the federal level is seen in the recent amendments to the *Criminal Code* dealing with the protection of privacy. In 1974, the *Criminal Code* was amended by adding Part IV.1 dealing with the invasion of privacy. Under this Part, it is an offence[31] to intercept a private communication "by means of an electromagnetic, acoustic, mechanical or other device" without authorization.[32] Provision is made for the exclusion of evidence obtained in contravention of Part IV.1 in the following terms:

> A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.[33]

The section goes on to empower the judge to admit the evidence if it is relevant, notwithstanding that there is a defect in form or procedure which is not substantive or, in the case of relevant evidence obtained through the interception of a private communication, if the court finds that its exclusion "may result in justice not being done".[34]

(b) *The Law in England*

In England, as we have seen[35], there is no exclusionary rule for illegally obtained evidence in civil and criminal trials, although some degree of discretion is reserved to the trial judge in criminal cases.

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[31]Every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for five years [*Criminal Code*, s. 178.11(1)].

[32]For provisions concerning authorization, see *Criminal Code*, s. 178.11(2)(b) and s. 178.12 *et seq*. The power to grant authorization for the interception of private communications is limited to cases of investigations concerning designated offences, all of which are offences against federal law (see s. 178.1).

[33]*Criminal Code*, s. 178.16(1).

[34]*Ibid.*, s. 178.16(2); the evidentiary rights of privilege are also preserved (s. 178.16(5)).

[35]*Kuruma* v. *The Queen*, [1955] A.C. 197 (P.C.); *Callis* v. *Gunn*, [1964] 1 Q.B. 495.

The courts, in adhering closely to the principle that illegally obtained evidence, if relevant, is admissible, have undermined the law respecting privileged communications in some cases.

Lloyd v. *Mostyn*[36] was an action on a bond that was said to be privileged from production on the ground that it came into the lawyer's hands in confidence. The plaintiff tendered a copy of the bond. Its admission was opposed by the defendant on the ground that the privilege attaching to the original document applies equally to a copy. This argument was rejected by the court, which stated that, "where an attorney entrusted confidentially with a document communicates the contents of it, or suffers another to take a copy surely the secondary evidence so obtained may be produced".[37] On the issue of illegally obtained evidence, Parke, B., was of the opinion that the manner of acquiring the document was irrelevant. The sole consideration was the logical relevance of the evidence to the matter in issue.

That decision was approved in *Calcraft* v. *Guest*,[38] in which the admissibility of documents prepared for an earlier lawsuit was in issue in subsequent litigation. It was uncertain on the facts whether the documents came into the hands of the appellant "accidentally", as he contended, or "wrongfully", as the respondent argued. The court appeared to be of the opinion that the way in which evidence was obtained was of no consequence.

The rule in *Lloyd* v. *Mostyn* and *Calcraft* v. *Guest*, however, is quite distinct from equitable relief that may be granted to restrain the use of information wrongfully obtained. In *Lord Ashburton* v. *Pape*,[39] the defendant in bankruptcy proceedings hoped to introduce copies of correspondence from the plaintiff to his solicitor, which he had obtained by improper means. The plaintiff sought an injunction restraining the defendant from disclosing the privileged documents or copies of them in the bankruptcy proceedings. Cozens-Hardy, M.R., reaffirmed the principle in *Calcraft* v. *Guest* in the following words:

> The rule of evidence as explained in *Calcraft* v. *Guest* merely amounts to this, that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may produce a copy as secondary evidence although that copy has been obtained by improper means, and even, it may be, by criminal means. The Court in such an action is not really trying the circumstances under which the document was produced. That is not an issue in the case and the Court simply says 'Here is a copy of a document which cannot be produced; it may have been stolen, it may have been picked up in the street, it may have improperly got into the possession of the

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[36](1842), 10 M. & W. 478.
[37]*Ibid.*, at pp. 481-482, *per* Parke, B.
[38][1898] 1 Q.B. 759 (C.A.).
[39][1913] 2 Ch. 469 (C.A.).

> person who proposes to produce it, but that is not a matter which the Court in the trial of the action can go into'.[40]

This passage demonstrates the courts' failure to distinguish between the issues of privilege and illegally obtained evidence; as a result, the rule that illegally obtained evidence is admissible, where relevant, is used as an argument in favour of admitting illegally obtained secondary evidence of privileged communications.

Notwithstanding the affirmation of the rule that illegally obtained evidence is admissible in civil proceedings, the court granted an injunction restraining the defendant from introducing the copies of the privileged evidence in the bankruptcy proceedings for the following reasons stated by Swinfen Eady, L.J.:

> There is here a confusion between the right to restrain a person from divulging confidential information and the right to give secondary evidence of documents where the originals are privileged from production, if the party has such secondary evidence in his possession. The cases are entirely separate and distinct. If a person were to steal a deed, nevertheless in any dispute to which it was relevant the original deed might be given in evidence by him at the trial. It would be no objection to the admissibility of the deed in evidence to say you ought not to have possession of it. His unlawful possession would not affect the admissibility of the deed in evidence if otherwise admissible. So again with regard to any copy he had. If he was unable to obtain or compel production of the original because it was privileged, if he had a copy in his possession it would be admissible as secondary evidence. The fact, however, that a document, whether original or copy, is admissible in evidence is no answer to the demand of the lawful owner for the delivery up of the document, and no answer to an application by the lawful owner of confidential information to restrain it from being published or copied.[41]

The equitable principle recognized in *Lord Ashburton* v. *Pape* provides a partial solution to the problem posed by the general rule governing the admissibility of secondary evidence of privileged communications, which has been illegally obtained; however, a litigant may find it both inconvenient and expensive to commence separate proceedings for an injunction to protect privileged evidence. We shall make recommendations concerning the admissibility of secondary evidence of privileged communications in chapter 9.

(c) *The Law in Scotland*

The law of Scotland on the admissibility of illegally obtained evidence differs from the law of England and Canada in that the trial judge is granted a discretionary power to exclude such evidence; this

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[40] *Ibid.*, at p. 473.
[41] *Ibid.*, at pp. 476-77.

discretion exists in England in criminal trials only,[42] and in Canada, if it exists, it is very limited.[43]

The derivation of the discretionary rule is to be found in Lord Aitchison's statement in *H.M. Advocate* v. *McGuigan*: "an irregularity in the obtaining of evidence does not *necessarily* make the evidence inadmissible."[44] This statement has been interpreted to mean that there is no absolute rule rendering evidence inadmissible because of the illegal way in which it was acquired, and neither is there an absolute rule requiring its admission if relevant without regard to its illegal acquisition. The trial judge has the discretion to admit or exclude such evidence in light of the circumstances of the particular case.

In *Rattray* v. *Rattray*,[45] a divorce case, it was held, Lord Young dissenting, that a letter from the wife to her lover must be received although it had been stolen from the post office by the husband and notwithstanding that he had been convicted for the offence. This may appear to be an acceptance of the rule operative in England and Canada, but an inference may be drawn that Lord Trayner, in the majority decision, would have been prepared to exclude evidence as inadmissible in some cases.

In *Maccoll* v. *Maccoll*,[46] an action for divorce, counsel for the defender objected to the admissibility of a letter that the pursuer had criminally intercepted in transit to the defender's lover. The issue was whether in these circumstances the document could be admitted in evidence at the instance of one who obtained it illegally. The letter was admitted on the authority of *Rattray*.

Lawrie v. *Muir*[47] is the leading case concerning the discretion vested in the trial judge to admit or exclude otherwise admissible evidence which has been obtained illegally. A shopkeeper was convicted of using milk bottles which did not belong to her, contrary to the Milk Order. The crucial evidence was given by inspectors of a milk bottle collecting organization who found the bottles on an unauthorized search of her premises. She appealed the conviction on the ground, among others, that the evidence was inadmissible as having been obtained by an illegal search. The Court held that an irregularity in the obtaining of evidence does not necessarily render it inadmissible, but the conviction was quashed because the inspectors ought to have known they were exceeding the limits of their authority.

The law of Scotland appears to have adopted a middle road between an exclusionary and non-exclusionary policy, through the discretion given to the trier of fact as set out in the judgments in *Lawrie* v. *Muir*. In Scotland, it is accepted that there is no absolute rule, and that the

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[42]*Kuruma* v. *The Queen*, [1955] A.C. 197 (P.C.); *Callis* v. *Gunn*, [1964] 1 Q.B. 495.
[43]*Regina* v. *Wray*, [1971] S.C.R. 272.
[44][1936] S.C.(J.) 16, 18 (emphasis added).
[45](1897), 25 Rettie 315.
[46][1946] S.L.T. 312 (Outer House).
[47][1950] S.C.(J.) 19.

principle should not be strictly applied, but rather varied with the circumstances.

(d) *The Law in the United States*

In American jurisdictions, constitutional considerations have played an important part in shaping the rule excluding illegally obtained evidence. The Fourth Amendment of the American Constitution, protecting the citizen against unreasonable search and seizures, has been invoked as the foundation for the rule excluding evidence acquired as a consequence of an illegal search or seizure. In the leading case of *Mapp* v. *Ohio*,[48] it was held that the States are required to exclude from State criminal trials evidence illegally seized by State officers. It appears that the Fourth Amendment precludes only official actions. It was stated in *Burdeau* v. *McDowell* that:

> The papers having come into the possession of the Government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.[49]

In civil cases, however, there is no general exclusionary rule although the courts have excluded evidence in cases analogous to criminal cases or where the nature of the illegality merited exclusion.[50]

3. Policy Considerations

The major policy arguments advanced in support of and against the adoption of an exclusionary rule governing the admissibility of illegally obtained evidence may be summarized as follows:

(a) *Deterrence*

Deterrence of illegal activity is a principal reason put forward by those who advocate an exclusionary rule. This has been the basis of the application of the exclusionary rule in the United States in criminal proceedings. It may be argued that the fruits of an illegality by a private citizen should be on no higher basis than the fruits of an illegality by a

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[48]*Mapp* v. *Ohio* (1961), 367 U.S. 643. This matter was recently considered by the United States Supreme Court in *U.S.* v. *Calandra* (1974), 414 U.S. 338, in which Mr. Justice Powell in delivering the judgment of the Court said at p. 347 that the primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures."

[49](1921), 256 U.S. 465, 476. It has been argued that this case was effectively overruled by *Elkins* v. *U.S.* (1960), 364 U.S. 206.

[50]See *Sackler* v. *Sackler* (1964), 255 N.Y.S. (2d) 83; *contra, Williams* v. *Williams* (1966), 8 Ohio Misc. 156, 221 N.E. (2d) 622; *Kassner* v. *Fremont* (1973), 47 Mich. App. 264, 209 N.W. (2d) 490; *Del Presto* v. *Del Presto* (1966), 92 N.J. Sup. 305, 223 A (2d) 217; *Cataphote Corp.* v. *Hudson* (C.A. Miss.) (1970), 422 F. 2d 1290, on remand D.C. (1970), 316 F. Supp. 1122, aff'd (1971), 444 F. 2d 1313.

public authority. This argument assumes that the adoption of the exclusionary rule will remove the incentive to break the law to obtain evidence, and that there is no other effective way to enforce the law.

The argument that an exclusionary rule is necessary to deter illegal acts in the gathering of evidence for civil proceedings seems to us to be weak. There are criminal sanctions and tort remedies available in place of a rule of exclusion which will deter private individuals from obtaining evidence illegally, punish those who do, and give civil redress to the person against whom the illegal conduct was directed.[51] The argument is particularly weak when applied to those civil cases in which it is sought to introduce evidence obtained illegally by the police. The police are servants of the State. The civil litigant ought not to be limited in his search for truth because a servant of the State has acted illegally.

We have found little evidence that the present state of the law is inadequate to deter illegal conduct in the collection of evidence in this country. Seldom has the issue of illegally obtained evidence arisen in civil cases in Canada. We do not think it would be wise to adopt an evidentiary rule of absolute exclusion based on deterrence without the evidence to support its necessity, and at the expense of not having all relevant evidence at the disposal of the court deciding an issue.

However, the law relating to invasion of privacy is not wholly satisfactory.[52] Sophisticated technology has made possible the violation of spheres of private communication and action that have been traditionally protected by physical barriers and common law tort categories of trespass or nuisance. Electronic devices exist that enable one party to shadow another, overhear and record his confidential conversations, and photograph him. These technological innovations can be used in the collection of evidence for private lawsuits. Unregulated, they may be misused by private investigators and evidence collection organizations. Privacy legislation could be enacted which might contain a provision concerning the exclusion of evidence obtained through an invasion of privacy. As we saw earlier, this is the approach taken in the *Criminal Code*, in Manitoba,[53] and in several American jurisdictions. It expresses a strong policy position of the legislature against evidence secured by such means. Privacy legislation, in which 'privacy' is broadly defined, can operate, effectively, to exclude much illegally obtained evidence. In practice, a provision of this sort may be a wider rule of exclusion than a rule barring the admission of illegally obtained evidence. There is a definite overlap; many of the cases we have discussed in which illegally obtained evidence was in issue, involved an invasion of privacy.

However, we have concluded that, if there is to be legislation in Ontario concerning the exclusion of evidence obtained through invasion of privacy, it should be enacted as part of comprehensive privacy legislation, and not by amendment to *The Evidence Act*.

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[51]See Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer", in Linden (ed.), *Studies in Canadian Tort Law*.

[52]See Ontario Law Reform Commission, *Report on Protection of Privacy in Ontario* (1968); Joint Task Force of Department of Communications and Department of Justice, *Privacy and Computers* (1972).

[53]*Privacy Act*, S.M. 1970, c. 74.

(b) *The "Clean Hands" Argument*

In support of an exclusionary rule, it is argued that exclusion denies to the wrongdoer any benefit of his wrongful act. Exclusion of evidence favourable to his case is said to be a sanction against the person who obtains evidence illegally; the court will exclude such evidence on a "clean hands principle". However, this argument has no application where the person who submits the evidence is not a party to the illegal act.

(c) *Integrity of the Judicial Process*

Another ground of public policy put forward is not concerned with the relationship between the litigants, but involves the integrity of the judicial process. It is argued that exclusion protects the integrity of the courts by refusing to countenance unlawful actions. Where a court admits evidence that has been obtained illegally without any regard for that fact, the contention is that this implicates the courts in the illegality. This is said to breed disrespect for the law and for the judicial process. The response by Wigmore that the illegality is by no means condoned, but is merely ignored,[54] is an unsatisfactory legal nicety. Illegality that is ignored by the institution whose very existence is premised on obedience to the law, amounts to illegality condoned in the mind of the public the institution serves. This is a strong argument for the adoption of some evidentiary rule of exclusion. In the narrow context the test of relevance of evidence produced is all that concerns the court; in its larger role, the court must ensure that the judicial process is not abused. However, in this area there are no absolutes. In some cases grave injustice would be done if evidence illegally obtained were not admitted, and the respect for the courts as courts of justice would be lowered much more than if the evidence were rejected. There are many degrees of illegality, and there may be cases of illegality for which no party to the action is responsible.

(d) *Procedural Arguments*

One of the traditional arguments favouring the reception of illegally obtained evidence is that the method by which the evidence was obtained is a collateral issue, and not the central issue of the inquiry. Consequently, the court assumes the policy position of refusing to hear argument that would distract it from a resolution of the facts in issue. "We think such testimony (illegally obtained) is admissible. It is not the policy of the courts, nor is it practicable, to pause in the trial of a cause, and open up a collateral inquiry upon the question of whether a wrong has been committed in obtaining the information which a witness possesses."[55]

4. Conclusion

We now consider whether an exclusionary rule ought to be adopted in Ontario to replace the existing rule in civil cases, that the court will admit all relevant evidence without considering the manner in which it was obtained.

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[54]Wigmore, footnote 2 *supra*, §2183.

[55]*Cluett* v. *Rosenthal* (1894), 100 Mich. 193, 58 N.W. 1009, 1010.

There may be times when the court should have the power to exclude evidence because the manner of its acquisition was contrary to the policy of the State as expressed in enacted legislation. However, there are occasions where the public interest requires that evidence be admitted in a civil proceeding despite the illegal manner in which the evidence was obtained. The illegality may be trivial or technical, or one for which the party submitting the evidence may be in no way responsible. The courts should not be required in all cases to exclude illegally obtained evidence with the result that its exclusion would defeat the civil rights of the litigants. The adoption of a rigid rule of exclusion would be no improvement on the existing rule of "admissible-when-relevant" despite the illegality in the acquisition. For the same reason, any provision in privacy legislation should not adopt a rule excluding all evidence obtained by an invasion of privacy.

Although it was speaking in the context of a criminal case, the High Court of Justiciary of Scotland discussed the merits of the discretionary element. The views expressed are equally applicable to civil trials:

> It would greatly facilitate the task of Judges were it possible to imprison the principle within the framework of a simple and unqualified maxim, but I do not think it is feasible to do so. I attach weight to the fact that the word used by Lord Chancellor Chelmsford and by Horridge J., when referring to the disregarding of an irregularity in the obtaining of evidence, was 'excuse'. Irregularities require to be excused, and infringement of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed.[56]

Mr. Justice Haim Cohn of the Supreme Court of Israel drew an analogy between the exclusion of illegally obtained evidence and the privilege attaching to state secrets.[57]

> The Supreme Court of Israel, following Scots, Canadian and the 'better' American precedents, has recently laid down that there is no absolute privilege from the disclosure of state secrets in Israel, but that the trial judge has to satisfy himself, each time such privilege is claimed, that the harm which is likely to be caused to the state by the production of the evidence outweighs the public interest in a full disclosure to the court of all evidentiary material relevant to the issue.
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> It thus appears that where the common law has provided an exclusionary rule of evidence in the public interest and for reasons of public policy, the modern tendency is to divest that rule of general and unrestricted application, and to vest in the trial judge a discretion as to whether or not, and to what extent, to apply the rule in the particular case before him. And there seems to be no valid

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[56]*Lawrie* v. *Muir*, [1950] S.C.(J.) 19, 27.

[57]Cohn, "The Exclusionary Rule Under Foreign Law: Israel" (1961), 52 J. Crim. L.C. & P.S. 282.

> reason why the development which has marked the exclusionary rule in respect of state secrets should not be brought to bear, mutatis mutandis, on an exclusionary rule in respect of illegally seized evidence. In both cases, there is a conflict of public interests and that conflict cannot justly and equitably be solved by an inflexible rule of general application, but rather should be solved in each individual case according to the best judgment of the trial judge.[58]

A Draft Code of Evidence prepared in Israel in 1952 contains the following provision:

> 75. A court may refuse to admit in evidence any document (including any form of record of anything said, written, printed or photographed) which the party producing it has stolen or obtained by any other illegal means, or in making or circulating which the party producing it committed a criminal offense.

Specific guidelines may be laid down to aid the judge in the exercise of his discretion. The Ouimet Committee suggested guidelines applicable in the context of the criminal law:

> (1) The Court may in its discretion reject evidence which has been illegally obtained.
>
> (2) The Court in exercising its discretion to either reject or admit evidence which had been illegally obtained shall take into consideration the following factors:
>
> (i) Whether the violation of rights was wilful, or whether it occurred as a result of inadvertence, mistake, ignorance, or error in judgment.
>
> (ii) Whether there existed a situation of urgency in order to prevent the destruction or loss of evidence, or other circumstances which in the particular case justified the action taken.
>
> (iii) Whether the admission of the evidence in question would be unfair to the accused.[59]

We think the Israeli Draft Code of Evidence forms a basis for consideration, but we thing it does not go far enough. The Israeli proposal is restricted to documentary material which is obtained by the illegal conduct of the party producing it, and no guidelines are laid down for the exercise of the discretion conferred on the judge. Our conclusion is that the court should have power in proper cases to reject any evidence, documentary or otherwise, on the ground that it was illegally obtained, whether through the illegal acts of the party producing it or of a third person, and that there should be guidelines for the exercise of the judicial discretion.

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[58] *Ibid.*, at p. 282-83.

[59] *Report of the Canadian Committee on Corrections* (Ouimet Committee Report) (1969), at p. 74.

5. Recommendations

1. A rule should be adopted with respect to illegally obtained evidence which would give power to the court to refuse to admit in evidence anything which has been obtained by illegal means. This power should be a controlled power, to be exercised after considering all of the material facts, the nature of the illegality and the concept of fairness to the parties involved.

2. Further legislation concerning the question of the exclusion of evidence obtained as a consequence of an invasion of privacy should be dealt with, if necessary, in the context of comprehensive privacy legislation, and not by way of amendment to *The Evidence Act.*

We recommend the enactment in *The Evidence Act* of the following section:

> In a proceeding where it is shown that anything tendered in evidence was obtained by illegal means, the court, after considering the nature of the illegality and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence if the court is of the opinion that because of the nature of the illegal means by which it was obtained its admission would be unfair to the party against whom it is tendered. [Draft Act, Section 27.]

CHAPTER 5

EVIDENCE PROCURED BY METHODS REPUGNANT TO THE FAIR ADMINISTRATION OF JUSTICE

1. Introduction

Evidence may be obtained by methods which, although not strictly illegal, are nonetheless repugnant to the fair administration of justice. A discussion of evidence obtained by such methods involves some consideration of the subject of confessions, although evidence may be obtained by reprehensible conduct that does not necessarily involve a confession.

A confession as the term is used in this chapter may be briefly defined as a statement made by an accused to a person in authority which may tend to prove his guilt.[1] Such a statement is inadmissible in evidence on the trial of an indictable offence unless it has been proved to have been made voluntarily. A voluntary statement in this context is one that has not been obtained by threats, or fear of prejudice, or hope of advantage, exercised or held out by a person in authority.[2] Although this definition has been framed differently on occasion by different courts, in substance the test is the same.

In civil cases the opposition has a right to compel production and discovery, and statements made to a police officer, or any other person in authority, may be admitted in evidence in a civil trial, even if they arise out of a matter that involves criminal responsibility. The circumstances under which the statement is made will affect the weight to be given to the statement but not its admissibility.

2. Evidence Procured Through an Involuntary Confession: The Wray Case

The case of *Regina* v. *Wray*[3] illustrates dramatically the difficulties in the present law concerning the admission of improperly obtained evidence. The trial judge, five judges of the Court of Appeal for Ontario and three judges of the Supreme Court of Canada expressly found that the facts of the case were such as to tend to bring the administration of justice into disrepute. The majority of the Supreme Court of Canada did not expressly disagree with this finding, but on a pure question of law reversed the judgment of the Court of Appeal and directed a new trial.

John Wray made a statement to police officers under circumstances that rendered it inadmissible as a voluntary statement. The majority of the Supreme Court held that evidence of the facts discovered as a result of the inadmissible confession was admissible, together with statements made by the accused which the discovery of the facts confirmed. In order to

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[1] *R.* v. *Bird*, [1967] 1 C.C.C. 33, 43.
[2] *Ibrahim* v. *The King*, [1914] A.C. 599.
[3] [1971] S.C.R. 272.

discuss the difficulties arising out of this decision and to consider possible reforms, it is necessary to set out the facts of this case at length.

(a) *The Facts*

An attendant at a gasoline station in the City of Peterborough was fatally wounded by a shot from a Winchester 1892-44-40 rifle on the 23rd of March, 1968. The record does not disclose what investigations took place between March 23 and June 2.

On June 2 Inspector Lidstone of the Ontario Provincial Police went to Wray's home, where he lived with his father and mother. The Inspector said he was looking for a Winchester 44-40 1892 model rifle. He searched the home but did not find one. The Inspector then interviewed Wray and told him he was looking for a missing rifle and asked him if he might search his car. This was done with Wray's permission. On June 4 the Inspector together with another police officer interviewed Wray in Peterborough. He was asked if he knew what a polygraph was. The officers explained that the machine was a lie detector and told Wray how it worked. Wray was then asked if he would take a lie detector test and to this he assented. Thereupon the Inspector arranged for him to be given a test by John Jurems, who operated an establishment in Toronto equipped for that purpose. The interrogation took place in Toronto and lasted from 2.35 p.m. until 7.10 p.m.

Wray was taken into an inner room equipped with devices used in the test. The police officers arranged to sit in an adjacent room with a tape-recorder connected to the inner room so that all conversation between Jurems and Wray would be recorded. The record of the proceedings covered 60 pages. The full effect of what took place in this case can best be understood and appreciated by considerable recourse to the transcript. Before the proceedings commenced Wray was asked by Jurems to sign certain release forms.

(b) *The Interrogation of Wray*

JUREMS Well this is a release form, John, that you have to sign to give me permission to examine you, see, because to put some attachments on you I have to have your permission. Right.

WRAY Yes. If the test is negative or positive it wouldn't be used in evidence against me?

JUREMS No, not necessarily, used as evidence against you.

WRAY Or as evidence for them?

JUREMS No, it's just to see John, we want to know. Let us assume that you're telling the truth?

WRAY Yes.

JUREMS The machine will show that you're telling the truth and that will be the end of that. That will take the policemen off your back. Is that what you want?

WRAY Yes.

JUREMS So, if you would print your name on top there and sign it here. Now before I — before you do that, here's — I'll explain the machine to you. This is a tube that goes on your chest, right across here, all it does is register your breathing. Yeah. Now have you been to a doctor where he's taken your blood pressure.

WRAY Uh, yes.

JUREMS You know where he's put a cloth around your arm and he's pumped it up and he's taken your blood pressure. Now the other portion goes in the palm of your hand and all it does is register skin sensitivity.

WRAY Yes.

JUREMS And that's it. So if you'll sign this release form for me John, then we can — you read it. If there's anything there that you don't understand let me know. Now you print your name on top.

WRAY On here.

JUREMS Then sign it there. You say when you had your blood pressure taken were you at a doctor's when that was done?

WRAY Yes.

JUREMS What was he taking your blood pressure about?

WRAY For a medical.

JUREMS Oh, for a medical. What was that for?

WRAY When I went for British American Oil last spring.

JUREMS Oh, when you went with the British American Oil.

WRAY Yes. . . .

JUREMS Okay John, you come along over here. Well this is the numagraph [*sic*] tube I was telling you about. All it does is register your breathing. Now this is the cardiocuff and all we're going to do with that is take your blood pressure. Now give me your arm. No, no straighten it right out, that's it. Have you ever had a test like this before?

WRAY No.

The release was signed and Wray was questioned concerning the 44-40 rifle and a direct question was put, "Did you shoot a man at the Shell Station on March 23?" The answer was "No." In order to obtain a mechanical reaction to his responses, Wray was told by Jurems he should answer yes to a series of questions that were to be put to him, and then, to another series of questions, that he should answer no. In the first series he was asked, "Did you shoot a man at the Shell Service Station on

March 23?" According to instruction, he answered yes. In the second series he was asked, "Do you know where the 44-40 rifle is?" The answer was "No." "Did you throw it in the swamp?" Answer: "No."

Referring to events at the service station, Jurems told Wray: "You must have got out of the car because your footprints are around there, John." He replied, "No, I didn't get out of the car. I drove out to Lansdowne Street and No. 7 Highway." Jurems admitted in cross-examination at the trial that this was a lie and that Wray's footprints had not been identified.

Inspector Lidstone intervened in the questioning and a long discussion between the Inspector and Wray followed.

Jurems resumed the questioning. He asked Wray if he was thirsty and produced a glass of ginger ale. Jurems said: "A long shot straight, eh, say when. There you are. Now you know John that the machine is pretty accurate. I'll be able to tell you what card you've chosen. Right — it was the eight." Wray answered "Yes."

During this questioning Jurems said: "Eleven-thirty, now why did vou get out of the car, John?" Wray: "I didn't get out." Jurems: "Well because . . . you must have got out of the car because they got your footprints. Did you get out for a leak?" Wray did not reply. The questioning continued as follows:

JUREMS Well, see, let's put it this way. I'm going to give you powers of suggestion, see.

WRAY I know you suggest that I may have gone to the bathroom.

JUREMS Now here, on a thing like this, see, it only happens once in a lifetime, see. So if you were in that vicinity the first thing that's going to strike you is that they may think that you had committed it, right?

WRAY Right.

JUREMS All right. Now why did you get out of the car? Did your car stall?

WRAY No, it didn't stall.

JUREMS Eh?

WRAY No, it didn't stall. It was running well.

JUREMS Well, what did you stop for, a leak?

WRAY I may have stopped for a leak, but . . .

JUREMS But you got out of the car, did you?

WRAY I can't remember. I don't have total recall.

JUREMS Well, total recall is not difficult because, see, John now here now in my position I've been at this a long time now. I know when you are hesitant telling. When you're

not sure. This is by the way you are when I ask you a question. Now certain questions you can come up with a quick answer. Certain questions you are hesitant, but you are hesitant on particular questions. You recall when your parents were there. When they seen you. You recall what time you went home. You recall going past the station. Now when you go past the station and you read about this in the newspapers, eh, first thing a person thinks, well, boy, oh boy, they may think that I'm the Joe that did it. What the hell did I do. So you have a recall. Now you did that, didn't you.

WRAY Yes.

JUREMS Now you got to be truthful. Sure you did that. Fine. Now, why did you get out of the car, John? Now there's nothing . . .

WRAY Yeah, I know.

JUREMS Talk a little louder, John.

WRAY I might have got out to check a tire, I can't — I can't remember exactly.

JUREMS But you got out of the car. Is that why your footprints are around there?

WRAY I may have got out of the car. I may have got out of the car at Cooper's when I turned around there. I was there for about five minutes.

JUREMS Cooper's.

WRAY Maybe, even less.

JUREMS What's Cooper's?

WRAY It's a trailer camp. I have a friend there.

JUREMS Oh, oh yeah. But your footprints are in the vicinity of the filling station.

WRAY I can't understand it because I . . .

JUREMS Pardon.

WRAY I don't understand that. Why did it. How do they know they are my footprints. I know they are not stupid but, well.

During this questioning Jurems brought up the name of Ralph Ball, indicating that Ball had seen Wray at the service station. He asked Wray "Do you know a Ralph Ball?" Ralph Ball was a totally fictitious character invented by Jurems. "Did you arrive in Toronto on March 23rd with only $12.00?" Answer: "Yes." "Are you trying to shield your mother?" Answer: "No." "Did you ever shoot anyone in all your life?" Answer: "No." "Did you leave Peterborough because a storm was brewing?" Answer: "Yes."

After a long interrogation, Lidstone and the other police officer Woodbeck resumed their questioning:

LIDSTONE John, in trying to get all this thing straightened out we keep coming up with these little things which don't make sense. Now I know you've been more than co-operative with us, see, and we sure appreciate your co-operation. Are you sure of the time that you left Peterborough? Now looking back on it I have to, I think it's only right, I should point these out to you. That you said, if I remember correctly, you correct me if I'm wrong and I have it recorded. It's written down of you. You said that you left Peterborough about twelve-thirty or a quarter to one, and went to Toronto. Is that right — have I got it right?

WRAY Yes, that's right about the time I believe I left.

LIDSTONE And you said that your mother when you asked, when you were leaving Peterborough at that time, your mother was saying something about the murder and was concerned about the gun. Is that right?

WRAY Yes, sir.

LIDSTONE Now the problem we have is this, John, that we've previously checked this, we've known this for some time that there was nothing on the radio stations till ten after one, that there had been a murder out there and there is no way she could have known that anybody had been murdered, or that there had been somebody shot at twelve-thirty or a quarter to one. Now, how do you . . .

WRAY Yes, well perhaps I'm using the word murder instead of shot.

LIDSTONE Nobody knew there was anything going on out there until a quarter, until ten after one, when, when both the radio stations CHEX carried the first, the first news flash at ten after one, nine minutes after one was the first thing that anybody knew about it, and yet you say your mother asked you at a quarter to one about the gun missing and was most concerned about this thing. Now I'm not saying that your mother's lying.

WRAY No.

LIDSTONE Or that you're lying. I'm wondering what is the explanation.

WRAY Well, the explanation is this, times — times.

LIDSTONE No.

WRAY And the explanation is that I'm not too sure about the times. I know that I got in about noon hour. You know

that noon hour is one hour long and perhaps it might stretch a little longer.

LIDSTONE Well, well could I, could I put it to you this way?

WRAY Yeah.

LIDSTONE Could I put it to you this way. That you went out. When you went out the highway and you drove down past Knoll's you told us that you went back to the garage. Could it be that you got back to the garage at twelve-thirty and you were in fact there at — after twelve-thirty when your uncle came back from lunch, and you were still there after twelve-thirty when he came back from lunch and then after that you went home and so in fact instead of being twelve-thirty when you got to the house it was one-thirty when you got to the house and by this time your mother knew. Could this be it?

WRAY That may be closer.

LIDSTONE Now what do you think? I don't want to lead you, I mean.

WRAY No. I don't know anything about my uncle's movements.

LIDSTONE You were there when he came back from lunch that day weren't you? You weren't there when he left for lunch. You had been there and you left. Is that right? Well that's what you told me earlier. You said that you had been there but you drove away in the car. You had been there and you'd left, when he left for lunch, you weren't there. Now when he came back after lunch you were there. So this would put it in the neighbourhood of twelve-thirty — a quarter to one, when he got back from lunch, to the house to beat a hasty retreat. If it was starting to snow this might well be the situation.

WRAY That's probably right, sir.

LIDSTONE Well I don't want to be putting words in your mouth.

WRAY I know you don't. I'm, uh, no — but . . .

LIDSTONE Yeah, I know, but it made a good alibi too, didn't it? I mean let's be — you know rather practical about this thing. Getting back to the garage as quickly as possible and fooling around with the car a bit longer made an ideal alibi as well after what happened at Knoll's, didn't it, eh?

WRAY . . .

LIDSTONE Yes.

WRAY . . . I could remember.

LIDSTONE Shouldn't we look at it objectively.

WRAY . . . All through my tests that's what I've said. I haven't on purpose given you times because I just couldn't remember . . . and I probably learned one thing . . .

LIDSTONE If you hadn't been washing the car when we came along and asked you to talk to us for a few minutes you might have had your watch on.

WRAY Yeah, I can't remember where I left it now. But,

LIDSTONE Did you go from the garage. Now let me ask you this truthfully did you go from the garage, your uncle's garage to the house?

WRAY Yeah.

LIDSTONE Well, where did you go then?

WRAY Will you clarify that?

LIDSTONE When you left the garage for the last time after being out on the road and back again, did you go from the garage directly to your house or did you stop somewhere?

WRAY I went directly to my house.

LIDSTONE You said you were packing up to go home?

WRAY Right.

LIDSTONE It was just starting to snow.

WRAY Yes, just starting.

LIDSTONE When you fixed the tail pipe. And you fixed the tail pipe when you came back?

WRAY Yes.

LIDSTONE After you'd been out on that road around the country?

WRAY That's right, sir.

LIDSTONE You fixed the brakes before?

WRAY Yes.

LIDSTONE Did a piece break off the tail pipe?

WRAY No.

LIDSTONE What was wrong with the tail pipe?

WRAY The hanger was broken, the rubber of the hanger was broken.

LIDSTONE You fixed that after you went back to, back to the garage, after you had this trip down to Knoll's? . . .

WRAY . . .

LIDSTONE And then, and then you went home after you'd spent that extra little time. When did you decide you were going to put that hanger on?

WRAY After I came back.

LIDSTONE After you came back you decided it was — that's where you spend a little more time, at that hanger, after twelve-thirty, eh?

WRAY . . .

LIDSTONE Now are we getting any closer to the facts in this thing. Is this why you didn't want to mention this before, because once again it looks as though you were building an alibi. Now look, I don't want to put words in your mouth. Is this the reason, we reason things out. We sit here, we sit here and we ponder and we say why was, why is he leaving this out. What else is it leading to. And you've done this so many times today that I don't know what to think and I'm sure that at times you must be wondering yourself what you're thinking. You've done this time and again. You leave these little gems out and when we finally drop them in to you, you say, oh well, yes, my goodness. John, you've done this time and time again. It's like catching a little kid lying. Every time you catch them lying they say they do, well, this is what you're doing with us.

WRAY Yeah, well.

LIDSTONE Well, why are you doing this all the time. You are leaving us in the most peculiar position.

WRAY I'm hurting myself.

LIDSTONE Yeah, but you're putting us in the most peculiar position because then I have to turn around and say did you do this and you say, well, yes, I do. I mean I'm not promising you. I'm not threatening you. All I wanted you to do was tell me the truth, and as we keep going over it, and after you say, well, this is the truth. Then when we get to the end of it and you listen to the truth then I come along and say, well, gee, what about this and you say, Oh well, yes, I forgot about this. Well, it isn't important that I . . .

WRAY I forgot about these things.

LIDSTONE . . . I think it is.

WOODBECK Did you not strike your tail pipe that day, the roads weren't the best then?

WRAY No, I don't think so.

WOODBECK Well why did you fix it up then?

WRAY Yes.

LIDSTONE Just one thing after another. Every time you turn around there's another one to put you down there.

WRAY That's right.

LIDSTONE Now here's a scientific medical term to a person when they cry in their sleep about the whole thing. They have completely blotted out. They've no guilt feeling at all. Just like you have no guilt feeling when you touch somebody for some money, you say in your mind if he lends me the money I'll pay him back. I mean you've done this with Ben Mix. Ben has no reason to lay out $154 bucks for you. You feel everybody owes you something now. John this is right; your mother does, your dad does. Jim. Jimmy works, he knows where every cent goes, pays for things, he's got things getting married. You could no more support a wife or hope to support a wife, could you. You'll have to get a wealthy one who can afford you. Now you've got yourself in this one this certainly has to be the climax of your career to date, hasn't it?

WRAY . . .

LIDSTONE I wouldn't doubt it. But if you feel bad imagine how Comrie's, [the victim] how Don's father and sister feel. And his friends. What did he do to deserve that?

WRAY . . .

LIDSTONE He just happened to be there. He just happened to be there, didn't he? He was shot just when you happened to be down there with your car, the car that was seen leaving. The loaded gun, the shells missing from the house. The gun, the case, of course the case was necessary. You had to pass some of the neighbours. In case any of the neighbours looked out and saw you with a rifle get in the car that morning. They would say, oh, ho, there's something wrong here. But you walk out with a case and nobody pays any attention, so then the case. It just happens that you're down there, down in that same area at the same time then back to the garage. You would have an alibi . . . You're sitting there sweating . . . chills . . . I recognize the signs of stress and you're under stress.

JUREMS Could I talk to John for a few minutes here. There's something I thought of . . .

JUREMS John, now listen to me good. Now I was through the war, see, and I've been around. Now remember this and remember it good. Have you ever seen rubby dubbies, winos?

WRAY Yes.

JUREMS Have you ever seen the alcoholics?

WRAY Yes.

JUREMS Do you know why they go that way. Have you got a clue?

WRAY No. I have an idea.

JUREMS I'll explain you something. You have the cerebreal [*sic*], cerebreal [*sic*] and then you have the the tholmus [*sic*] and the hipatholmus [*sic*]. Now, a person is going to blot out something he doesn't like, see, but you just can't do it, John. You just no can do, because the subconscious mind takes over and you never live it down. Every time you want to do something you think of it. Now here's this poor joker, he's in the grave, oh, yes, now you can never go to him and explain to him, say I'm sorry I did it. He won't understand you. Do you believe in E.S.P., Extra Sensory Perception?

WRAY I don't understand it too much, but I know it exists.

JUREMS All right. All right, do you know what happens when they're dead. The spirit takes off.

WRAY Yes.

JUREMS The body's spirit takes off. Now his body's lying there in the grave. Now for Christ sake, John, if you did it, see, if you did it and if you think for one goddamn minute you can live with this all your life without telling you'll never make it. You'll never ever make it. It will haunt you and in about five years time you will be in the goddamn with the rubby dubs trying to hide it, you'll be trying to get in behind some curtains, you'll be trying to pull a shroud around you but you'll never make it, see. You get half a dozen of those rubby dubs and you bring them in here and I'll put them on the machine and they tell me why they're like that. You know why? They're trying to forget something. They're trying to forget something they did that was very goddamn serious, very bad, see, but they never make it. They go rubby dub, they go here, they steal here, they do every goddamn thing wrong, all their life, eh. Now, if you committed this goddamn thing, see, tell them, tell the cops. What the hell can you get? They're not going to hang you. That's out. There is no capital murder. They're not going to hang you. What do you do. You get in there for seven or eight years and you're out. But at least you've got it and after that you can live with your conscience. But how the hell are you going to go to the grave and explain? You can't, and if you think for one minute, John, remember this that that

boy has relatives, that boy has mother and brothers and sisters and do you know what a vindictive person is? Eh? They'll go for you and maybe a year, maybe five years from now you'll be going down the road and some son of a bitch will run you off the road. You'll never know why, but you'll guess why. See. Now, you were there, see. You were in the goddamn service station. Now when I asked you whether it was an accident you said, yes, and it was an accident, see. There's extenuating circumstances because a person goes in there you didn't go in — you don't go in the — there to shoot the fellow. When a fellow goes in there, sure, what happened to this — look at that goofy one that came here from Montreal, he shot three people in a bank robbery, what did he get, he's out now. He didn't even serve ten years. Three people in a bank robbery. See. So you went in there. You didn't go in there to shoot the guy, but the gun went off. It was at close range. What did he do, grab the gun from you. Did he grab the rifle from you? Eh?

WRAY No.

JUREMS What happened? Well, get it off your chest man, you're young, but in a few years you'll be out. But if you think that you're going to live with this, laddie, you'll never ever never make it. It's going to bug you for the rest of your goddamn life. And you try and sleep, that the sticker, you try and lay down and go to sleep. Now what the hell happened there. Did you get in a tussle with him — what happened. Well, spit it out. Your mother knows, your brother knows, your sisters know, your uncle knows. Do you think you can kid your mother for one minute — never! Your mother knows. That's why she tried to protect you. You know. Now what the hell happened, eh? Will you tell us what happened?

WRAY Yes.

JUREMS Okay, tell us what happened.

WRAY I went in . . .

JUREMS You went in, talk a little louder, John.

WRAY I went in there.

JUREMS Yeah.

WRAY To Knoll's.

JUREMS Yeah, you went in to Knoll's, yeah.

WRAY And the boy —

JUREMS Which boy?

WRAY There's only one boy.

JUREMS Just the boy that was shot. Yeah, what happened?

WRAY He came out.

JUREMS Talk a little louder, John.

WRAY He came out.

JUREMS Yeah.

WRAY And asked me what I wanted.

JUREMS He asked you what you wanted.

WRAY And I told him to open the till.

JUREMS And told him to open the till. Was it closed?

WRAY Yes.

JUREMS And what did he say?

WRAY He said, all right.

JUREMS He opened the till, yeah.

WRAY And then he — he gave me the money.

JUREMS He gave you the money. Well, what the hell did you shoot him for?

WRAY It was an accident.

JUREMS What?

WRAY It was an accident.

JUREMS It was an accident. Sure, you showed it on your check it was an accident. All the reactions you gave me when I asked you was the shooting an accident, you said, yes, and it's an accident. Well, what the hell is wrong with that. All they are going to charge you with. You went in there, your intentions weren't to do any harm to the man. Where is the gun now?

WRAY I don't know exactly.

JUREMS Well, where did you drop it, on the way home?

WRAY No, eh?

JUREMS On the way to Toronto?

WRAY Yes.

JUREMS Around Oshawa?

WRAY No.

JUREMS Where?

WRAY Near Omemee someplace.

JUREMS Where?

WRAY Omemee.

JUREMS Omemee, in the ditch?

WRAY No.

JUREMS Where?

WRAY In the swamp.

JUREMS In the swamp. Could you, could you show the police where it is?

WRAY Yes.

JUREMS Now you're talking like a man. Jesus Christ, John, because you got to live with it all your life, man, oh, man, you'll never make it if you a person sleeps, hasn't it been bothering you?

WRAY Yes.

JUREMS Have you been sleeping well?

WRAY Yes, fairly well.

JUREMS But it bothers you. A person never lives it down. Now when, now I'll call in the — the Inspector there and you tell him what happened, okay. Will you tell him?

WRAY Yes.

LIDSTONE Now, John, you will be charged with the non-capital murder of Donald Comrie on the 23rd day of March, 1968, at Otonabee Township. You are not required to say anything in answer to the charge, but what you do say will be given in evidence. Do you understand that?

WRAY Yes.

LIDSTONE Did you say, yes?

WRAY Yes.

LIDSTONE Will you try and show us the spot?

WRAY . . .

LIDSTONE Is there anything else you want to add?

WRAY No.

LIDSTONE Do you want to read this over, John? Anything you want to change?

WRAY . . .

(c) *The Statement*

Following the interrogation by Jurems and the Inspector a statement was prepared by the officers and signed by Wray. It read:

John Wray

You are charged with the non-capital murder of Donald Comrie on the 23rd of March, 1968 at Otonabee Twp. You are not required to say anything or answer to the charge but what you do say will be given in evidence.

Q. Do you understand that?

A. Yes.

Well I went into the station and asked him for the money and he gave it to me. I told him to back away and he did and I backed away and the gun went off. It was an accident. I didn't mean to shoot him . . . I didn't even know I had the gun pointed in his direction.

Then I went out and ran back to my car and went to the garage. That was it. I didn't mean to hurt him.

Q. What happened to the gun?

A. I threw it in the swamp.

Q. Where?

A. Near Omemee.

Q. Will you try and show us the spot?

A. Yes.

Q. Is there anything else you want to add to this John?

A. Not now, thank you.

"John Wray"

"J.W. Lidstone"
"D.O. Woodbeck"

7:18 p.m.

After this statement was signed the officers drove with the accused to the swamp to search for the rifle. They did not find it the first night. The next day they found it a short distance from where the accused said he had thrown it.

(d) *Excerpts from the Trial Record*

The following are some passages from the record of the evidence given by Jurems at the trial:

HIS LORDSHIP: Now when you said this fellow Ralph Ball saw you there, you were lying?

A. Yes.

Q. Throughout the hearing, in many places you were lying in questions you put to the subject?

A. This Ralph Ball question is an interrogation question.

Q. Did Ralph Ball ever tell you he had seen the subject there?

A. No.

Q. It was lying by you?

A. In a sense.

Q. You are either lying or telling the truth.

A. There is no Ralph Ball.

Q. When you put that question to the subject, were you lying or telling the truth?

A. I was lying.

Q. When you go on and say, "He lives in Lindsay", were you lying or telling the truth?

A. I was lying.

Q. Were you told that Ralph Ball had identified the accused as being near the service station?

A. No.

Q. When you told John Wray that he had been seen in the vicinity of the gas station, you lied to him.

A. Yes.

Q. Answer me this, do you use tricks?

A. Sure you use tricks.

Q. Is that your philosophy?

A. In private investigations you do.

Q. So I am clear about this, you were retained and paid by the Ontario Provincial Police to conduct this examination?

A. Yes.

Q. And you found it necessary, after you got a reaction, to ask questions which would condition the accused to admit his guilt?

A. If he was guilty.

Q. I just want to ask you, at one stage Mr. Wray said to you, "If the test is negative or positive, it will not be used against me". This is page 6 of the first section?

A. Not necessarily.

Q. Is that what you want to say?

A. Yes.

Q. Did Mr. Wray ask you this question and did you give him this answer?

A. If they are in the transcript.

Q. I am telling you it is in the transcript.

A. All right, yes.

Q. He was clearly asking you if this was going to be used as evidence for the police and your answer was "No"; is this correct?

A. Yes.

Q. Also at the top of page 17, on the first tape, did you tell him you could find out where the rifle was?

A. Yes.

Q. Throughout the test, one of the objects you had in mind was to find out where that rifle was?

A. Yes.

. . . .

MR. CARTER: When you were talking about footprints and Ralph Ball, they were not true?

A. They were control questions.

Q. Then you went on to deal with Ralph Ball and that episode, which you say were "control questions". At page one of the second tape you say this fellow Ball — Ralph Ball, had seen you there. Is that a control question?

A. No.

Q. It is not even a question?

A. No.

Q. After that, you questioned him about if he was from Peterborough. Is that a control question?

A. No.

Q. It is an out-and-out lie?

A. Yes.

Q. You were lying to support another lie?

A. Yes.

Q. That is the third lie to support the first lie; is that correct? You were just weaving a story of lies

around a person which would condition him to answer in the affirmative?

A. Yes.

Q. Just to tie this up, again at page three you say, "He seen you right in the vicinity of the filling station". That wasn't a control question, that was a lie?

A. Yes.

Q. That is the fourth lie?

A. Yes.

Q. Then you said, "He seen you get out of the car". Is that a control question?

A. No.

Q. But it is a lie to support the first lie?

A. Yes.

Q. That again isn't a control question, but a lie in support of the first lie?

A. Yes.

HIS LORDSHIP: In support of the first five lies.

MR. CARTER: Finally you got around to asking him "Why would Ralph Ball say you had got out of the car?"

A. Yes.

Q. How in the world would you expect an answer to that question when the whole thing was a lie? You were asking John Wray to speculate as to why a fictionary character, who didn't exist, said something that wasn't true. Isn't that what you were doing?

A. Yes.

Q. Isn't that the result of all your questions, you put him in that position where there could be no other answer?

A. Yes.

(e) *The Result*

The trial judge rejected the confession and refused to admit the evidence of the officers that they found the rifle in the general locality where Wray said he had thrown it. On appeal taken by the Crown to the Court of Appeal, no submission was made that the several statements made by Wray were admissible, except with respect to those that pertained to the finding of the rifle. It was argued that since the statements concerning the finding of the rifle were confirmed by the fact that the rifle was in fact found where Wray indicated, this evidence was admissible.

This argument was based on the decision in *R.* v. *St. Lawrence*,[4] which held that those parts of an involuntary confession which are subsequently confirmed by fact are admissible in evidence. The Court of Appeal dismissed the appeal relying on the following passage in *Kuruma* v. *The Queen*:[5]

> . . . No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasized in the case before this Board of *Noor Mohamed* v. *The King*, and in the recent case in the House of Lords, *Harris* v. *Director of Public Prosecutions*. If for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out. It was this discretion that lay at the root of the ruling of Lord Guthrie in *H.M. Advocate* v. *Turnbull*.

Aylesworth, J.A., in giving the judgment of the Court of Appeal in *R.* v. *Wray* said:

> In our view, a trial Judge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute, the exercise of such discretion, of course, to depend upon the particular facts before him. Cases where to admit certain evidence would be calculated to bring the administration of justice into disrepute will be rare, but we think the discretion of a trial Judge extends to such cases.
>
> Too much need not be said about the facts in this case. Admittedly, the confession or statement by the accused was procured by trickery, duress and improper inducements and it was clearly inadmissible. Moreover, the whole of the circumstances present in the case and before the learned trial Judge were such, in our opinion, as to have warranted the learned trial Judge's rejection of the proffered evidence respecting the accused's involvement in the discovery of the murder weapon upon both the grounds which have been stated. Strictly as a matter of law the rule as to admissibility of evidence illegally obtained may be expressed as put by McRuer, C.J.H.C., in *Rex* v. *St. Lawrence*, [1949] O.R. 215 where at p. 228 he said:
>
> > Where the discovery of the fact confirms the confession — that is, where the confession must be taken to be true by reason of the discovery of the fact — then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible.
>
> It is plain from what already has been said that the application of that rule in a particular case will depend upon the particular circumstances and special facts of the case before the tribunal. Those particular facts and circumstances in the case at bar are such as to lead to the conclusion by this Court that the strict legal rule should

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[4][1949] O.R. 215 (H.C.J.).
[5][1955] A.C. 197, 204 (P.C.).

> not be applied and that the discretion of the learned trial Judge in rejecting the evidence, although such evidence was, strictly speaking, admissible evidence, ought not to be disturbed.[6]

The Attorney General applied for leave to appeal to the Supreme Court of Canada. Leave was granted on the following specific point of law:

> Did the Court of Appeal for Ontario err in law in holding that the learned trial Judge had a discretion to reject the evidence relating to the involvement of the accused in the locating of the murder weapon?

The appeal was heard by the full Court of nine judges. Three judges dissented; the appeal was allowed and a new trial directed. Cartwright, C.J., in his dissenting judgment, identified the crucial issue:

> . . . I will endeavour to state in summary form my grounds for thinking that the judgment of the Court of Appeal should be upheld. The confession of the accused was improperly obtained and was rightly excluded as being involuntary. In spite of this, evidence of the fact that the accused told the police where the murder weapon could be found was legally admissible under the rule in *Rex* v. *St. Lawrence*; but, because the manner in which he was induced to indicate the location of the weapon was as objectionable as that in which he was induced to make the confession, it was open to the learned trial judge to hold that the admission of evidence of that fact would be so unjust and unfair to the accused and so calculated to bring the administration of justice into disrepute as to warrant his rejecting the evidence in the exercise of his discretion; and, finally, there being evidence on which it was open to the learned trial judge to exercise his discretion in the way he did, the propriety of that exercise is not open to review on an appeal by the Crown.[7]

Hall, J., agreed with the Chief Justice that the appeal should be dismissed. He held that the trial judge had a discretion to reject admissible evidence if its admission would operate unfairly against the accused. The learned judge held that it would operate unfairly if it was obtained in an oppressive manner by force or against the wishes of the accused. He held that in this case there was a discretion in the trial judge to be judicially exercised and that if it was judicially exercised it was not subject to appeal.

In addition to the reasons advanced by the other dissenting judges for disallowing the appeal, Spence, J., emphasizing that he agreed with the reasons given in the Court of Appeal, quoted the judgment of Aylesworth, J.A., and said:

> I am most strongly of the opinion that it is the duty of every judge to guard against bringing the administration of justice into disrepute. That is a duty which lies upon him constantly and that is a duty which he must always keep firmly in mind.[8]

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[6][1970] 2 O.R. 3, 4-5.
[7][1971] S.C.R. 272, 286-287.
[8]*Ibid.*, at p. 304.

Martland, J., giving the leading judgment for the majority of the Court[9] quoted from Lord Goddard in the *Kuruma* case as follows:

> In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

The relevant authorities were reviewed and it was concluded that any discretion a trial judge may have to exclude admissible evidence, is confined to cases where the evidence is of trifling weight, or has little probative value, and its admission would have a great prejudicial effect on the jury. A distinction was drawn between "unfairness" in the method of obtaining evidence and "unfairness" in the actual trial of the accused by reason of the effect on the jury of evidence of little probative value but great prejudicial effect. The test for the existence of the discretion was based on:

> . . . the duty of a trial judge to ensure that the minds of the jury be not prejudiced by evidence of little probative value, but of great prejudicial effect, by the test as to whether evidence, the probative value of which is unimpeachable, was obtained by methods which the trial judge, in his own discretion, considers to be unfair. Exclusion of evidence on this ground has nothing whatever to do with the duty of a trial judge to secure a fair trial for the accused.[10]

The learned judge held that the evidence concerning the rifle was admissible on the basis of the law as stated in the *St. Lawrence* case.

Judson, J., concluded that there was no judicial discretion to exclude relevant evidence on the ground of unfairness to the accused. He said:

> If this law is to be changed, a simple amendment to the *Canada Evidence Act* would be sufficient — an amendment to the effect that no fact discovered as a result of an inadmissible confession shall be provable in evidence against an accused person. Such a change should not be effected by turning to a theory of judicial discretion to admit or reject relevant evidence based upon the unsubstantial dicta to which I have referred in these reasons. Judicial discretion in this field is a concept which involves great uncertainty of application. The task of a judge in the conduct of a trial is to apply the law and to admit all evidence that is logically probative unless it is ruled out by some exclusionary rule. If this course is followed, an accused person has had a fair trial. The exclusionary rule applied in this case is one that should not be accepted.[11]

The Court directed a new trial, confining the evidence in question to the circumstances of the finding of the rifle under the direction of the accused.

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[9] *Ibid.*, at p. 287.
[10] *Ibid.*, at p. 295.
[11] *Ibid.*, at pp. 299-30.

3. Conclusion

The record in this case discloses a method of obtaining evidence in the law enforcement process, that not only calls for the severest condemnation but also immediate legislative action. In view of the reprehensible conduct of the police officers and Jurems, we do not think that the court should have been without power to refuse to admit the evidence concerning the finding of the rifle and the statements made by the accused, which were confirmed by the fact that the rifle was found.

We have come to the conclusion that neither the *Canada Evidence Act* nor *The Evidence Act* ought to be amended in the manner suggested by Judson, J. The mere fact that a statement has been made to a person in authority in circumstances in which it could not be proved to be voluntary, should not be the criterion for the exclusion of relevant evidence concerning facts ascertained as a result of such a statement. The approach suggested by Judson, J., would render many investigations of crime an exercise in futility and exclude cogent evidence simply because a police officer or some person in authority had not taken appropriate precautions in questioning an accused person.

In our view, the principles relied on in the dissenting judgments of the Supreme Court of Canada and in the judgment of the Court of Appeal should be used as a guide for remedial legislation. However, such legislation should not be restricted to evidence obtained through involuntary confessions. We think trial judges should have control over the admission of evidence so as to preserve the integrity of the judicial process and protect the administration of justice from practices likely to bring it into disrepute. The judicial process is not confined to the courts; it also encompasses officers of the law and others whose duties are necessary to ensure that the courts function effectively.

4. Recommendations

To safeguard against practices similar to those disclosed in the *Wray* case we recommend that:

1. *The Evidence Act* (Ontario) be amended to include the following provision:

   > In a proceeding the court may refuse to admit evidence that otherwise would be admissible if the court finds that it was obtained by methods that are repugnant to the fair administration of justice and likely to bring the administration of justice into disrepute. [Draft Act, Section 26.]

2. The Attorney General of Ontario should make representations to the Government of Canada requesting that a similar amendment be made to the *Canada Evidence Act.*

3. Where a police officer in conducting an investigation is guilty of conduct likely to bring the administration of justice into disrepute, his conduct should be made a disciplinary offence under the regulations passed under *The Police Act.*[12]

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[12]See R.R.O. 1970, R. 680 (as amended).

CHAPTER 6

THE RULE IN HOLLINGTON v. HEWTHORN

1. The Rule

In Ontario, it is now generally accepted law that evidence of a criminal conviction is inadmissible in subsequent civil proceedings to prove the facts upon which the conviction was based. This rule of evidence was propounded in 1943 in an English case, *Hollington* v. *F. Hewthorn & Co. Ltd.*,[1] which was approved in principle by the Supreme Court of Canada in *English* v. *Richmond*[2] in 1956. Although the rule survives in Ontario, it was reversed by legislation in England in 1968 upon the recommendation of the Lord Chancellor's Law Reform Committee.[3] The reforms in England and similar reforms proposed or enacted elsewhere[4] make it necessary for us to consider whether in Ontario the rule ought to be reversed, amended or left unchanged.

In *Hollington* v. *F. Hewthorn & Co. Ltd.*, the plaintiff claimed damages in respect of a collision between his car, which was driven by his son who subsequently died, and a car owned by the defendant company and driven by one of its employees, who thereafter had been convicted of careless driving. The plaintiff, who had no other evidence available due to the death of his son, sought to introduce this conviction as *prima facie* evidence of the other driver's negligence. The Court of Appeal held, both on principle and on authority, that evidence of the conviction was inadmissible.

It is now generally accepted in Ontario that neither a prior criminal conviction nor a prior finding of culpability in civil proceedings is admissible in evidence in civil proceedings not brought between the same parties.[5] The principle of law involved in *Hollington* v. *Hewthorn* concerning the admission in evidence of a previous conviction or other determination of judicial proceedings is particularly important in six different types of cases:

(1) In a civil action based on negligence where the defendant has been found guilty of negligent conduct arising out of the same facts; *Hollington* v. *Hewthorn* was such a case.

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[1][1943] K.B. 587.

[2][1956] S.C.R. 383, 386, *per* Kerwin, C.J.C.

[3]The *Civil Evidence Act 1968*, ss. 11, 12 and 13, implements the Fifteenth Report of the Law Reform Committee on *The Rule in Hollington v. Hewthorn*, Cmnd. 3391, (1967), to make a criminal conviction admissible in subsequent civil proceedings and likewise to make previous findings of adultery and paternity admissible in subsequent civil proceedings.

[4]See Alberta Institute of Law Research and Reform, Report No. 16, *The Rule in Hollington* v. *Hewthorn* (February, 1975); Report of the Torts and General Law Reform Committee of New Zealand, *The Rule in Hollington v. Hewthorn* (July, 1972).

[5]See *English* v. *Richmond*, [1956] S.C.R. 383; *Re Charlton*, [1969] 1 O.R. 706 (C.A.); but see *contra, Love* v. *Love*, [1969] 1 O.R. 291, discussed in this chapter at page 99.

(2) In an action for defamation based on a statement in which or from which it might be inferred that the defendant has alleged that the plaintiff was guilty of an offence, and where it is sought to justify the statement by proof of the conviction for the alleged offence.[6]

(3) In an action for malicious prosecution, where it is sought to prove that the proceedings involved did not terminate in favour of the plaintiff.

(4) In a proceeding based on the adultery of the respondent or defendant who, as a co-respondent in a previous divorce proceeding, has been found guilty of adultery.

(5) In a divorce proceeding based on the grounds set out in section 3(b) of the *Divorce Act*: that is, that since the celebration of the marriage the respondent "has been guilty of sodomy, bestiality or rape or has engaged in a homosexual act".

(6) In a divorce proceeding based on grounds set out in section 3(b) of the *Divorce Act*: that is, that since the celebration of the marriage the respondent "has gone through a form of marriage with another person".

We shall deal with each of these problems in the order in which we have set them out.

Although evidence of a conviction is not admissible in a subsequent negligence action to prove the facts upon which the conviction was based, a plea of guilty to a charge may be received in evidence in proper circumstances in subsequent civil proceedings as an admission or confession. This was the view of the majority in the *English* v. *Richmond* case. However, in the dissenting judgments of Cartwright, J., and Abbott, J., views were expressed that a plea of guilty to an offence under *The Highway Traffic Act* was not to be taken as an admission of negligence for the purpose of a subsequent civil action. Abbott, J., relied on *Potter* v. *Swain and Swain*,[7] an earlier decision of the Ontario Court of Appeal which held that an admission made by counsel for the purpose of proceedings under *The Summary Convictions Act* was not admissible in evidence in a subsequent civil case.

No question arises concerning proof of an acquittal as evidence that the accused did not commit the act giving rise to the charge. Since the standard of proof in a criminal case is proof beyond a reasonable doubt, it cannot be argued that the failure to meet this standard should be any basis for a conclusion based on the balance of probabilities.

As indicated, in England the *Civil Evidence Act 1968* provides that proof of a subsisting conviction of an offence by any court in the United Kingdom is admissible in civil proceedings, where relevant, for the purpose of proving that the person convicted is guilty of the conduct upon which

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[6]*Goody* v. *Odhams Press Limited*, [1967] 1 Q.B. 333.
[7][1945] O.W.N. 514.

the conviction was based.[8] Similarly, a Report prepared by the Alberta Institute of Law Research and Reform recommends that evidence of the conviction of any person in a Canadian court for an offence, whether federal or provincial, should be admissible in civil proceedings to prove that he committed the offence, whether he was convicted on a plea of guilty or otherwise, and whether or not he is a party to the civil proceedings.[9]

However, it would not be wise, in our view, to amend the law to permit a court to receive in evidence, in civil proceedings, proof of a prior conviction for an offence arising out of the same facts. This issue is particularly significant in negligence actions. The result of a conviction for a breach of a provincial statute or a municipal by-law may be very minor, while the consequences of a judgment in a civil action may be great. In our view the results of the proceedings in the criminal court are quite irrelevant to the issues between the parties in the civil suit. In most negligence cases the real defendant in the civil suit is the insurer. Since the insurer is not before the court in the criminal proceedings, it would be unjust if it were to be prejudiced by the result of those proceedings. If such an amendment were made, it would tend to encourage the use of the criminal courts to promote civil interests.

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[8]Section 11 provides:

> 11. *Convictions as evidence in civil proceedings*
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> (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.
>
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere—
>
> (a) he shall be taken to have committed that offence unless the contrary is proved; and
>
> (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.
>
> (3) Nothing in this section shall prejudice the operation of section 13 [dealing with defamation actions] of this Act or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.
>
> (4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (2) above, a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown. . . .

[9]Alberta Institute of Law Research and Reform, Report No. 16, *The Rule in Hollington v. Hewthorn* (February 1975), at p. 20. The Uniform Law Conference of Canada is considering a similar recommendation.

We do not think that a plea of guilty to an offence should be admissible in evidence in subsequent civil proceedings. We agree with the dissenting views expressed by Abbott, J., in *English* v. *Richmond*[10] and with the judgment of the Ontario Court of Appeal in *Potter* v. *Swain and Swain*.[11] Very frequently where an accused person is charged with a minor offence under a provincial statute such as *The Highway Traffic Act* or a municipal by-law, he will plead guilty and suffer a small fine rather than pay counsel to present a defence and lose time from his employment. In so doing he may not realize that the plea of guilty is not warranted and that the result may be to burden him or his insurer with an evidentiary handicap in subsequent civil proceedings.

Our second category of case is concerned with actions for defamation where the libel in question is that the plaintiff is guilty of a particular crime, and the defendant seeks to justify the statement by proof of a conviction for the alleged offence. Following the rule in *Hollington* v. *F. Hewthorn & Co. Ltd.*, it has been held that convictions for particular crimes cannot be used to prove a plea of justification.[12] In *Goody* v. *Odhams Press Limited*,[13] the plaintiff sought damages for libel following an article describing his participation in the "Great Train Robbery". The plaintiff had been convicted of the train robbery; the defendant wished to introduce this conviction as evidence of his guilt, and in partial justification of the supposedly libellous words. The court held that *Hollington* v. *F. Hewthorn & Co. Ltd.* had decided that a conviction is no evidence of guilt, not even *prima facie* evidence. The Court of Appeal in *Goody* v. *Odhams Press Limited* did, however, consider that the conviction might be proved in mitigation of damges. We think that this distinction borders on sophistry. Where a person has been convicted of robbery, that fact should surely be admissible in evidence in a subsequent civil action to establish that he was a robber.

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[10]*Supra*, footnote 5.

[11]*Supra*, footnote 7.

[12]In England this has been reversed by s. 13 of the *Civil Evidence Act 1968*:

> 13. *Conclusiveness of convictions for purposes of defamation actions*
>
> (1) In an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that at the time when that issue falls to be determined, that person stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly.
>
> (2) In any such action as aforesaid in which by virtue of this section a person is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which that person was convicted, shall, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, be admissible in evidence for the purpose of identifying those facts.
>
> (3) For the purposes of this section a person shall be taken to stand convicted of an offence if but only if there subsists against him a conviction of that offence by or before a court in the United Kingdom or by a court-martial there or elsewhere. . . .

[13]*Supra*, footnote 6.

We recommend that in an action for libel or slander in which the question whether a person did or did not commit a criminal or provincial offence is relevant, proof that the person has been convicted in a court of competent jurisdiction in Canada of the offence alleged should be conclusive evidence that he committed the offence.

Thirdly, in an action for malicious prosecution, the onus is on the plaintiff to show that the proceedings giving rise to the action terminated in his favour. A conviction of the plaintiff for the offence in question is, therefore, conclusive evidence that the proceedings did not terminate in his favour. This is well-established law,[14] and we think no amendment to *The Evidence Act* is necessary.

Love v. *Love*,[15] is an example of our fourth type of case in which a prior judicial determination may be relevant in a subsequent proceeding. In that case, Ferguson, J., held that the petitioner could rely on a finding of adultery in a previous action in which the respondent was a co-respondent, and permitted proof of the previous judgment as evidence of the adultery. The learned judge said:

> A judgment for divorce on the grounds of adultery between A and B makes the issue of adultery *res judicata*. It is a judgment *in rem;* that is to say one that is good not only between the parties and their privies, but good as against the world and that is so because it is a judgment affecting status.
>
> Therefore, in this action now before the Court the adultery alleged in this action between the defendants may be proved by filing the judgment *nisi* in the previous trial, together with proof that the defendants named in that judgment are the same as in the case at bar.[16]

This is a decision of a single judge in an uncontested action. It is quite true that, insofar as the status of husband A and wife B is concerned, the judgment is conclusive as against all the world. But it does not necessarily follow that the issue of the adultery of the co-respondent has been conclusively decided for the purposes of an action brought by his or her spouse, whose status is not affected by the judgment in the action brought by A against B. The learned judge dismissed the principle involved in *Hollington* v. *Hewthorn* as irrelevant, and quoted certain early English cases. The authors of *Rayden on Divorce*[17] after dealing with findings of adultery in prior proceedings between the same parties, state:

> But the case is different where the previous proceedings were not between the same parties: thus if a co-respondent has been found guilty of adultery in a suit instituted against him by a husband, he is not estopped in subsequent proceedings between him and his wife from denying his adultery. A decree containing a finding of adultery in a suit between other parties was not admissible as evidence of

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[14]*Romegialli* v. *Marceau*, [1964] 1 O.R. 407, 42 D.L.R. (2d) 481.
[15][1969] 1 O.R. 291.
[16]*Ibid.*, at p. 292.
[17](12th Ed. 1974) 211.

adultery in a subsequent suit by or against the person so found guilty.

The authors note that the law has been changed by the *Civil Evidence Act 1968*.[18]

It is not satisfactory to leave this important aspect of the law of evidence in such an uncertain condition. It was considered necessary to resolve the problem by statute in England, and we think it should be so resolved here. We do not think any amendment should relate merely to evidence of adultery in divorce matters. If it did, constitutional questions would arise. Any amendment should have general application, and should include actions for alimony, proceedings under *The Deserted Wives' and*

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[18]*Civil Evidence Act 1968*, section 12:

12. *Findings of adultery and paternity as evidence in civil proceedings*

(1) In any civil proceedings—

(a) the fact that a person has been found guilty of adultery in any matrimonial proceedings; and

(b) the fact that a person has been adjudged to be the father of a child in affiliation proceedings before any court in the United Kingdom,

shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those civil proceedings, that he committed the adultery to which the finding relates or, as the case may be, is (or was) the father of that child, whether or not he offered any defence to the allegation of adultery or paternity and whether or not he is a party to the civil proceedings; but no finding or adjudication other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been found guilty of adultery as mentioned in subsection (1)(a) above or to have been adjudged to be the father of a child as mentioned in subsection (1)(b) above—

(a) he shall be taken to have committed the adultery to which the finding relates or, as the case may be, to be (or have been) the father of that child unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court, in the matrimonial or affiliation proceedings in question shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of any enactment whereby a finding of fact in any matrimonial or affiliation proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Subsection (4) of section 11 of this Act shall apply for the purposes of this section as if the reference to subsection (2) were a reference to subsection (2) of this section.

(5) In this section—

"matrimonial proceedings" means any matrimonial cause in the High Court or a county court in England and Wales or in the High Court in Northern Ireland, any consistorial action in Scotland, or any appeal arising out of any such cause or action;

"affiliation proceedings" means, in relation to Scotland, any action of affiliation and aliment;

and in this subsection "consistorial action" does not include an action of aliment only between husband and wife raised in the Court of Session or an action of interim aliment raised in the sheriff court.

Children's Maintenance Act[19] and, where relevant, any other proceedings. Our conclusion is that, where in a proceeding under the *Divorce Act* of Canada, a co-respondent has been adjudged guilty of adultery, the judgment should, in the absence of evidence to the contrary, be proof of the co-respondent's adultery in any subsequent proceeding.

With respect to our fifth and sixth categories of cases, we think that in a proceeding for divorce under the *Divorce Act*[20] of Canada, based on grounds that the respondent has been guilty of the offences set out in section 3(b) or 3(c) of the Act, proof that the respondent has been convicted of any of the alleged offences should be admissible in evidence for the purpose of proving that the respondent was guilty of the named offence.

Section 20 of the *Divorce Act* provides:

> 20. (1) Subject to this or any other Act of the Parliament of Canada, the laws of evidence of the province in which any proceedings under this Act are taken, including the laws of proof of service of any petition or other document, apply to such proceedings.

This provision appears to be intended to enable the Legislature to facilitate proof of the guilt of a party in any proceeding based on section 3(b) or 3(c) of the *Divorce Act*. We think that an amendment to *The Evidence Act* is desirable.

It remains to be considered whether a judgment of a court in an affiliation proceeding should be admissible in subsequent civil proceedings involving the paternity of a child born out of wedlock.

In England, the *Civil Evidence Act 1968* provides that, where a person has been found to be the father of a child in an affiliation proceeding before a court in the United Kingdom, the finding is admissible in evidence in civil proceedings for the purpose of proving that he is the father of the child.[21] The Alberta Institute of Law Research and Reform considered this provision in their Report on *The Rule in Hollington v. Hewthorn*[22] but reserved a recommendation pending consideration of the problem of proof of paternity in a further report.

The Commission does not consider that an order made in affiliation proceedings, as they exist at present, should be regarded as a declaration of paternity for the purpose of all other subsequent proceedings. An affiliation order is obtained by a summary procedure, and for the limited purpose of holding the father responsible for the payment of maintenance to the child under *The Child Welfare Act*.[23] In our *Report on Children*[24] we made the following recommendation:

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[19]R.S.O. 1970, c. 128.

[20]R.S.C. 1970, c. D-8.

[21]Section 12(1), set out in footnote 18, *supra*. A similar provision is being considered by the Uniform Law Conference of Canada.

[22]Alberta Institute of Law Research and Reform, Report No. 16, *The Rule in Hollington v. Hewthorn* (February, 1975), at p. 20.

[23]R.S.O. 1970, c. 64, s. 59, as am. by S.O. 1972, c. 109, s. 6.

[24]Ontario Law Reform Commission, *Report on Family Law, Part III, Children* (1973).

It should be possible for any interested person to obtain a judicial decree of a declaratory nature that a given man is the father of a given child. Such a decree should operate as a presumption that the man is the father of the child for all purposes unless and until the decree is vacated by the making of another decree.[25]

If the issue of paternity were determined by means of a procedure such as that envisaged by the Commission, our view as to the evidentiary effect of the resulting order might be different. In the meantime, however, we make no recommendation concerning this matter.

2. Recommendations

1. No amendment to *The Evidence Act* should be made to make previous convictions for criminal or provincial offences generally admissible in subsequent civil proceedings as proof of the facts giving rise to the conviction.

2. *The Evidence Act* should be amended to provide that a plea of guilty to an offence under the laws of Canada or the laws of a province of Canada or a municipal by-law, should be inadmissible in any civil proceeding to prove the facts constituting the offence to which the plea of guilty was entered.

3. In an action for libel or slander in which the question whether a person did or did not commit a criminal or provincial offence is relevant to an issue arising in the action, proof that the person has been convicted of the offence alleged in a court of competent jurisdiction in Canada should be made conclusive proof that he committed the offence.

4. Where in a proceeding under the *Divorce Act* of Canada a co-respondent has been found to have committed adultery, the judgment of the court should be proof, in the absence of evidence to the contrary, of the co-respondent's adultery in any subsequent proceeding.

5. Legislation should be enacted to provide that conviction for any of the offences named as grounds for divorce in sections 3(b) and 3(c) of the *Divorce Act* should be evidence that the convicted person is guilty of the named offence.

6. A conviction for bigamy should be evidence that the convicted person committed adultery, where proof of adultery is relevant in any proceeding under *The Deserted Wives' and Children's Maintenance Act* or for alimony.

The Evidence Act should be amended to include the following sections:

> Except as provided in this or any other Act, no plea of guilty to or conviction of an offence under the laws of Canada or any province or territory of Canada or a municipal by-law is admissible in evidence in any civil proceeding

[25] *Ibid.*, at pp. 31-32.

as proof of the facts constituting the offence to which the plea of guilty was entered or upon which the conviction was based. [Draft Act, Section 29.]

In an action for libel or slander in which the question whether a person has or has not committed an offence under the laws of Canada or any province or territory of Canada is relevant to an issue in the action, proof that that person was convicted of that offence is conclusive evidence that he committed that offence. [Draft Act, Section 30.]

(1) Where in a proceeding for divorce before a court having jurisdiction in Canada a co-respondent has been found to have committed adultery with a party to the proceeding, proof of the judgment of such court is, in the absence of evidence to the contrary, proof of the adultery of the co-respondent in a subsequent proceeding.

(2) Where in a proceeding for divorce it is alleged that the respondent went through a form of marriage with another person after the marriage in issue was entered into, proof that the respondent was convicted of bigamy in Canada is evidence that he was guilty of the offence.

(3) Where in a proceeding for divorce it is alleged that the respondent has been guilty of sodomy, bestiality or rape after the marriage in issue was entered into, proof that the respondent was convicted of the alleged offence in a court having jurisdiction in Canada is evidence that he was guilty of the offence.

(4) Where in a proceeding under *The Deserted Wives' and Children's Maintenance Act* or for alimony it is relevant to prove adultery, proof of a conviction for bigamy during the marriage of the spouses is evidence of adultery. [Draft Act, Section 31.]

CHAPTER 7

COMPETENCE AND COMPELLABILITY

1. Competence

Witnesses and deponents are required to meet certain minimum standards of reliability; otherwise, they are not permitted to testify. The trier of law determines whether the witness meets these standards. If so, he is competent and his evidence is received. It is for the trier of fact to determine a witness' credibility and the weight to be given to his evidence. There is an area where competence and weight tend to merge: although a witness may be legally competent to testify, in some cases a requirement is imposed that the evidence given by him be corroborated as, for example, in the case of the evidence of young children and of complainants in certain sexual offences.

Historically, the law relating to competence comprised a very significant portion of the law of evidence; however, gradually the concept of competence has given way to a concept of credibility, and the law of competence has thus been reduced to relatively simple proportions.

Traditionally, rules relating to competence have been concerned with three general matters: status, mental capacity and legally recognized undertakings to tell the truth. We shall deal with the first two in this chapter; in the next chapter we shall discuss the last under the heading of "the oath".

(a) *Status*

Under the early common law even an adult who was mentally sound, and who could take the required oath, was nevertheless barred from testifying if he had an interest in the outcome of the litigation, or if he had been convicted of an infamous crime. It was assumed that such persons could not be relied on to speak the truth, and hence they were not permitted to testify in the relevant proceedings. In other words, they were denied status to testify.

In England, until 1828, no person convicted and sentenced for an infamous crime was permitted to testify in court unless he had been pardoned. This situation was ameliorated by the *Civil Rights of Convicts Act*[1] which permitted any person convicted of an offence other than perjury or subornation of perjury to testify after he had served his sentence. By the *Evidence Act,* 1843[2] the remaining disabilities arising from convictions for crime or while serving sentence were removed. In 1854, it was provided by statute that, although a convicted person was a competent witness, the matter of a previous conviction could be raised on the

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[1] 9 Geo. 4, c. 32.

[2] 6 & 7 Vict., c. 85 (Lord Denman's Act).

issue of his credibility.[3] However, an accused person or his spouse was not competent to give evidence at his own trial until 1898.[4]

The disability arising from pecuniary or proprietary interest in the litigation was removed, except for parties and their spouses, by the *Evidence Act*, 1843, and interest in the litigation was made a matter of credibility rather than competence. Parties did not become competent witnesses until 1851;[5] their spouses until 1853.[6]

In Ontario the disqualification of persons accused of criminal offences was removed in 1893,[7] five years earlier than in England. Incapacity for crime or interest in civil cases was abolished in 1849, when the provisions of the English *Evidence Act*, 1843 were introduced into Upper Canada.[8] The relevant provisions of this legislation as they appear in the Consolidated Statutes of 1859 provide:

> 3. No person offered as a witness shall, by reason of incapacity from crime or interest, be excluded from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or on any Inquiry arising in any Suit, Action or Proceeding, Civil or Criminal, in any Court, or before any Judge, Jury, Sheriff, Coroner, Magistrate, Officer or Person having by Law, or consent of parties, authority to hear, receive and examine evidence.
>
> 4. Every person so offered shall be admitted and be compellable to give Evidence on Oath, or solemn affirmation where an affirmation is receivable, notwithstanding that such a person has or may have an interest in the matter in question or in the event of the trial of some Issue, Matter, Question or Inquiry, or of the Suit, Action or Proceeding in which he is offered as a witness, and notwithstanding that such person so offered as a witness, had been previously convicted of a crime or offence.[9]

Because these sections were adapted from the English legislation of 1843 as introduced into Canada in 1849, they appear, when read together, to be redundant, and there is some overlapping.

These provisions, with some revision, appear as sections 6 and 7 of *The Evidence Act*, which read:

> 6. No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest.
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> 7. Every person offered as a witness shall be admitted to give evidence notwithstanding that he has an interest in the matter in

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[3]*Common Law Procedure Act*, 1854, 17 & 18 Vict., c. 125; later adopted into the *Criminal Procedure Act*, 1865, 28 & 29 Vict., c. 18, s. 6, for both civil and criminal cases.
[4]*Criminal Evidence Act*, 1898, 61 & 62 Vict., c. 36, s. 1.
[5]*Evidence Act*, 1851, 14 & 15 Vict., c. 99, s. 2.
[6]*Evidence Amendment Act*, 1853, 16 & 17 Vict., c. 83.
[7]*Canada Evidence Act*, 1893, 56 Vict., c. 31, s. 4.
[8]*An Act to improve the Law of Evidence in Upper Canada*, 12 Vict., c. 70, s. 1.
[9]*An Act respecting Witnesses & Evidence*, C.S.U.C. 1859, c. 32, ss. 3, 4.

> question or in the event of the action and notwithstanding that he has been previously convicted of a crime or offence.[10]

The differences between the two sections are probably unintentional. There would seem to be no significance in the fact that section 6 is framed in exclusionary terms and section 7 in inclusionary terms. Section 6 refers to "*alleged* incapacity", whereas section 7 proceeds from definite facts; section 6 refers to "crime" and section 7 to "crime or offence". Conceivably the latter language covers provincial offences as well as federal crimes,[11] though it is doubtful that most provincial offences would have been considered "infamous crimes" under the common law rule.

Although the sections may overlap, they have been part of our law for a long time and we are not convinced that any change of consequence should be made in them.

As we have indicated, in England parties and their spouses remained incompetent in civil cases on the ground of interest even after the *Evidence Act*, 1843. However, by the *Evidence Act,* 1851 parties were made both competent and compellable in all civil proceedings except proceedings instituted in consequence of adultery and actions for breach of promise to marry.[12] In 1853, spouses of parties to actions were made competent and compellable subject to the exception for proceedings instituted in consequence of adultery.[13] These statutory provisions as to parties and their spouses, which have had separate histories, have been combined and adopted in Ontario as section 8 of *The Evidence Act*:

> 8(1) The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties, and the husbands and wives of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties.[14]

Section 8(1) appears in substance to be satisfactory. We deal with marital privilege in chapter 9 and there make recommendations for amendment to section 8(2), dealing with the competence of spouses to answer questions concerning marital intercourse.

(b) *Mental Capacity*

A minimum level of mental capacity in witnesses has also been considered essential for a rational and expeditious trial process. Medical and legal tests for mental competency are not identical, and it has been held that a patient in a mental institution, who suffers from delusional insanity, may be a competent witness in some cases.[15] In Ontario, the

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[10]R.S.O. 1970, c. 151, ss. 6, 7.

[11]*Street* v. *City of Guelph et al.*, [1964] 2 O.R. 421.

[12]*Evidence Act*, 1851, 14 & 15 Vict., c. 99, ss. 2, 4.

[13]*Evidence Amendment Act*, 1853, 16 & 17 Vict., c. 83, ss. 1, 2.

[14]The first part, dealing with parties, was adopted in 1869: 33 Vict., c. 13, s. 4. The part relating to spouses was added in 1873: 36 Vict., c. 10, s. 1.

[15]*R.* v. *Hill* (1851), 5 Cox C.C. 259.

trier of law determines whether a proposed witness has the mental capacity to testify and must satisfy himself that the witness (1) possesses sufficient powers of perception and recollection, (2) is able to understand reasonable questions asked on cross-examination, (3) has a rational narrative ability, and (4) understands the obligation to speak the truth.[16] Incapacity may be temporary, as in the case of someone intoxicated by drink or drugs, or a child who matures prior to trial.[17]

Few witnesses have been disqualified on grounds of mental capacity, probably because very few who would not qualify have been called by the parties to testify. Determination of mental capacity may raise difficult questions for trial judges. The tendency has been to permit any witness who is brought forward to testify, and to take any extenuating circumstances into consideration in assessing the weight to be attached to his testimony.

Some jurisdictions have enacted legislation defining competence. The California Evidence Code, adopting Rule 17 of the former Uniform Rules of Evidence[18], provides as follows:

> 701. A person is disqualified to be a witness if he is:
>
> (a) Incapable of expressing himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or
>
> (b) Incapable of understanding the duty of a witness to tell the truth.[19]

The Draft Scottish Evidence Code provides:

> 6.2 A person is incompetent as a witness if from nonage or from any physical or mental incapacity he is incapable of either (a) understanding the obligation to tell the truth, or (b) giving evidence in a manner in which the same is or can be rendered intelligible to the Court. The competence of a witness under this Article is to be decided by the presiding judge, who may make such investigation, including the calling of witnesses, as he may think fit, and whose decision in the matter is not subject to review.[20]

We have come to the conclusion that the practice in Ontario with respect to the determination of the mental capacity of a witness is satisfactory, and that no statutory provisions are required.

(c) *Statutory Exceptions*

Some Ontario statutes render certain classes of persons not only non-compellable as witnesses, but also incompetent to give evidence concerning specific areas of information. For example, *The Labour Relations*

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[16]*Udy* v. *Stewart* (1885), 10 O.R. 591.
[17]*Kendall* v. *The Queen*, [1962] S.C.R. 469.
[18]National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953), Rule 17.
[19]Cal. Evidence Code, §701 (West, 1968).
[20]Scottish Law Commission, Memorandum No. 8, *Draft Evidence Code* (*First Part*), Article 6.2 at p. 44.

Act[21] provides that the Minister, Deputy Minister of Labour and other persons named in the statute are not competent or compellable as witnesses in proceedings before the court or other tribunal respecting certain information specified in the statute. Under *The Liquor Licence Act*[22] "no person to whom subsection 1 applies [persons employed in the administration of the Act] shall be required to give testimony in any civil suit or proceeding with regard to information obtained by him in the course of his duties . . .". Such provisions are phrased differently in different statutes, but the object is to protect from disclosure information obtained for certain official purposes.

2. COMPELLABILITY

(a) *Discussion*

A person is "compellable" as a witness if he can be legally obliged to give evidence. Compellability assumes competence, and implies that the witness when sworn must, as a general rule, answer all relevant questions. The sanction for refusal is to be held in contempt of court.

Private privilege may affect a witness' compellability by permitting him to refuse to answer or by preventing him from answering certain specific relevant questions at his or another person's option.

We have sketched the historical background of section 8 of *The Evidence Act*. All parties to an action, and their spouses, are made compellable as well as competent to give evidence on behalf of themselves or of any of the parties. Accordingly, a party may be called to give evidence on behalf of the opposite party, and the prosecutor for a provincial offence may call the accused[23] to give evidence against himself.

Under the provisions of section 9 of *The Evidence Act* and section 5 of the *Canada Evidence Act*, where a witness objects to answer questions on the ground that the answers may tend to criminate him or tend to establish liability in civil proceedings, the answer shall not be used against him in any subsequent civil or criminal proceedings.[24]

Section 10 of *The Evidence Act* provides:

> 10. The parties to a proceeding instituted in consequence of adultery and the husbands and wives of such parties are competent to give evidence in such proceedings, but no witness in any such proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery.

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[21]R.S.O. 1970, c. 232, s. 100(4), (5).

[22]*The Liquor Licence Act, 1975*, S.O. 1975, c. 40, s. 25(2).

[23]Section 1(a) defines "action" to include prosecutions for provincial offences. See also *R.* v. *Greenspoon Bros. Ltd.*, [1967] 2 O.R. 119.

[24]In the recommended Draft Act, it is proposed to remove the necessity for a witness to object to answer in order to obtain the protection of the section: See subsection (3) of section 10.

Apart from the common law privilege against self-incrimination as to adultery, expressly preserved in this section, section 10 poses some difficulty in determining whether parties or their spouses are compellable generally to give evidence in proceedings instituted in consequence of adultery. Historically, they were not compellable to give evidence in such proceedings and, at one time, here as in England, they were not even competent to do so. If section 8 of *The Evidence Act*, providing that parties and their spouses are competent and compellable in actions generally, is to be read subject to section 10, it might be argued that silence as to their compellability in the latter section should be construed on historical grounds to mean that they are not compellable in actions instituted in consequence of adultery.

From the words of section 10 alone it would appear that parties to proceedings instituted in consequence of adultery, and their spouses, are competent but not compellable as witnesses. But if they are called as witnesses, like all other witnesses in such proceedings they are not liable to be asked any question tending to show that they have committed adultery unless they have already given evidence in the same proceeding in disproof of the alleged adultery. Even though rules of compellability assume the competence of the witness, it does not follow that competence implies compellability.

The statutory background in Ontario seems to lend support to the view that the parties and their spouses are compellable. In 1882 the precursor of section 10 was enacted.[25] Its first clause was virtually identical with section 10 and provided that parties and spouses "shall be competent". When the Province's evidence legislation was consolidated in 1909 the new statute read "shall be competent but not compellable",[26] but in 1932 it was restored again to the "shall be competent" form.[27] The intentions of the legislators in making these changes are not known, but it is not unreasonable to hold that the purpose of the 1932 change was to make the parties compellable.

Authority exists for the view that in the absence of other indication, competence implies compellability:

> . . . at the Common Law the right and duty to give evidence are correlative. If one who had the right to give evidence should for any reason refuse, he could be compelled.[28]

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[25]*The Evidence Amendment Act, 1882*, 45 Vict., c. 10, s. 4. Prior to the 1882 enactment proceedings instituted in consequence of adultery were excepted from the statutory provisions rendering parties competent and compellable: *The Evidence Act, 1869*, 33 Vict., c. 13, s. 5(b) and *The Evidence Act, 1873*, 36 Vict., c. 10, s. 3.

[26]*The Evidence Act*, 1909, 9 Edw. 7, c. 43, s. 8.

[27]*The Statute Law Amendment Act*, S.O. 1932, c. 53, s. 11.

[28]*R.* v. *Barnes* (1921), 49 O.L.R. 374, 390 (App. Div.), *per* Riddell, J.

Authorities point both ways as to whether this common law rule applies in a statutory context. The House of Lords has held that it does not,[29] but an early Supreme Court of Canada decision indicates that it does.[30] We think this matter should be resolved by clear statutory provisions.

The exception contained in section 10, relieving parties and witnesses in any proceeding instituted in consequence of adultery from liability to be asked, or obligation to answer, any question tending to show that he or she has been guilty of adultery, preserves the original common law privilege against self-incrimination as to adultery, an ecclesiastical offence for which punishment might be imposed.[31] We do not think this archaic concept is justified in the last quarter of the Twentieth Century. Moreover, there does not seem to be any good reason why a witness in a proceeding instituted in consequence of adultery should be exempt from answering questions tending to show that he or she is guilty of adultery, while the same witness in another proceeding may be compelled to answer such questions.

The privilege has been subjected to much criticism, by Royal Commissions[32] in England, and by scholars[33] in both England and Canada. It was abolished in England in 1968.[34] It should be abolished in Ontario as well, and we so recommend.

(b) *Recommendation*

We recommend that sections 8(1) and 10 of *The Evidence Act* be repealed and the following substituted therefor:

> (1) The parties to a proceeding and the persons on whose behalf it is brought, instituted, opposed or defended are competent and compellable to give evidence on behalf of themselves or of any

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[29]See *Leach v. R.*, [1912] A.C. 305 (H.L.), and the basis on which it was distinguished by Avory, J., in *R.* v. *Lapworth*, [1931] 1 K.B. 117, (C.C.A.). But see also *Tilley* v. *Tilley*, [1949] P. 240 (C.A.), specifically construing the English counterpart to Ontario's section 10; and Cowen and Carter, *Essays on the Law of Evidence* (1956), at pp. 220-30.

[30]*Gosselin* v. *R.* (1903), 33 S.C.R. 255: On a charge of murder the Crown sought to call the wife of the accused as a witness. She was "competent" by the *Canada Evidence Act*, 1893. The majority in the Supreme Court of Canada held that not only could she testify without the consent of the accused, but that competence normally implied compellability and accordingly she could be compelled to testify by the Crown. The Court suggested that had Parliament intended otherwise it would have provided that spouses were only competent "for the defence". This suggestion was enacted in 1906 (S.C. 1906, c. 145, s. 4), and remains in section 4(1) of the *Canada Evidence Act*.

[31]*Redfern* v. *Redfern*, [1891] P. 139; and *Gentle* v. *Gentle et al.* (1974), 3 O.R. (2d) 544.

[32]Royal Commission on Divorce and Matrimonial Causes, Cd. 6478 (1972); Committee on Procedure in Matrimonial Causes, Final Report, Cmd. 7024 (1947); Royal Commission on Marriage and Divorce, CMD 9678 (1956).

[33]Z. Cowen, "Adultery and the Privilege Against Self-Crimination" (1949), 65 Law Q. Rev. 373; Rosen, "The Privilege Against Self-Incrimination as to Adultery: Should it be Abolished?" (1960), 23 Mod. L. Rev. 275; Cross, *Evidence* (3rd Ed. 1967), at p. 238; Morden, Note (1949), 27 Can. Bar Rev. 468; Ryan, Note (1949), 27 Can. Bar Rev. 851.

[34]*Civil Evidence Act 1968*, c. 64, s. 16(5).

of the parties, and the spouses of such parties and persons are competent and compellable to give evidence on behalf of any of the parties.

(2) The parties to and witnesses in a proceeding instituted in consequence of adultery and the spouses of such parties may be asked and shall not be excused from answering any question, including any question tending to show that he or she has committed adultery. [Draft Act, Section 9(1), (2).]

CHAPTER 8

THE OATH

1. Introduction

The concept of the oath as a form of declaration involving a higher authority far antedates the common law. The earliest Biblical reference to a sworn obligation appears in Genesis (22:16) where Jehovah's covenant with Abraham at the burning bush is recorded: "By myself have I sworn, saith the Lord, for because thou hast done this thing, and hast not withheld thy son, thine only *son*;" (22:17) "That in blessing I will bless thee, and in multiplying I will multiply thy seed as the stars of the heaven, and as the sand which *is* upon the sea shore. . . ." This passage was interpreted by the writer of the Epistle to the Hebrews (6:13) in this way: "For when God made promise to Abraham, because he could swear by no greater, he sware by himself," (6:16) "For men verily swear by the greater: and an oath for confirmation *is* to them an end of all strife."

In the earliest Hebraic laws there was a concept of "an oath of the Lord" in judicial proceedings concerning disputes between individuals. "*Then* shall an oath of the Lord be between them . . ." (Exodus 22:11). In certain passages in the New Testament the former concept of the oath is repudiated. Dissenters relied on these passages to justify their refusal to take oaths; subsequently Parliament enacted statutory provisions giving to a witness a right to affirm when he objects to being sworn on the ground of his religious belief. The dissenters relied in particular upon the following passages in the Gospel according to St. Matthew: "Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths; (5.33) But I say unto you, swear not at all; neither by heaven; for it is God's throne: (5:34) Nor by the earth: for it is his footstool; . . ." (5:35). In the General Epistle of James (5:12) is found the following exhortation: "But above all things, my brethren, swear not, neither by heaven, neither by the earth, neither by any other oath . . . ."

The oath as it is now administered in Canadian courts is not, in fact, of religious origin, although it has assumed religious connotations. The oath in earlier English law antedates the principles of proof by rational inference to be drawn from proven facts, and proof by the relevancy of the testimony of witnesses. These methods of proof were developed in English law comparatively recently, although they were part of Roman law. Before the concept of proof by witnesses was developed, the oath was a part of trial by compurgation, or law wager. The defendant under oath denied the charge against him, and if he had the required number of witnesses to support his denial on their oaths he would win his case.[1] Although oaths were used in Roman procedure, trial by compurgation was unknown. However, it was common in the laws of the

[1]Holdsworth, *A History of English Law*, Vol. 1, at p. 305.

barbarians. Holdsworth says that because trial by compurgation was so common and widespread, the Church adopted it.[2]

The compurgators swore to the same oath as their principal; for example, that he did not owe the debt or that he was innocent. This method of settling disputes eventually became corrupt. A profession of oath helpers developed who were available at a price. They made their profession known by a straw they wore in their hats; it has been suggested that this is the origin of the expression "man of straw".

Compurgation became extinct as the jury evolved from an investigatory body finding the facts for itself to a body whose decisions were based on testimonial proof.[3] Proof by the testimony of witnesses became the practice. With proof by the testimony of witnesses, has developed proof under oath.

The concept of the oath has undergone a process of development from superstitution, through religious conviction based on divine sanctions, to the present situation which appears to many people to be a mere formal requirement to which temporal sanctions only are attached.

There can be no doubt that in the English common law as it has been adopted in Canada, the oath as a safeguard for ascertaining the truth in the trial of cases is founded on a belief in divine retribution. One of the leading nineteenth century authorities, Starkie, put it this way: "this imposes the strongest obligation upon the conscience of the witness to declare the whole truth that human wisdom can devise; a wilful violation of the truth exposes him at once to temporal and to eternal punishment". He went on to say: "A judicial oath may be defined to be a solemn invocation of the vengeance of the Diety upon the witness, if he do not declare the whole truth, as far as he knows it".[4]

On this thesis the qualification required of a witness to be sworn was a belief in the existence of God and in a future state of rewards and punishments, as well as a belief that divine punishment would be the consequence of perjury. As a result, certain religious denominations or sects who adhered strictly to the teachings in the New Testament, earlier alluded to, and those who did not understand the nature of an oath, were excluded as witnesses. An atheist was not a competent witness.[5] In *R.* v. *Taylor*[6] Buller, J., held that the proper question to be asked a witness was whether he believed in God, the obligation of the oath and a future state of rewards and punishments. Since the object of the oath was to bind the conscience, a form had to be developed to bind the witness according to what would be most solemn and sanctified by the usage of

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[2]*Ibid.*

[3]The last case in which compurgation was used, was *King* v. *Williams* 2 B. & C. 538 in 1824. It was finally abolished in 1833 (3 & 4 Will. 4, c. 42, s. 13): Holdsworth, *A History of English Law*, Vol. 1, at p. 308.

[4]Starkie, *A Practical Treatise of the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings* (7th Ed. 1842), at p. 21.

[5]*Omychund* v. *Barker* (1745), 1 Atk. 21, 26 E.R. 15; see also *R.* v. *White* (1786), 1 Leach C.C.L. 430, 168 E.R. 317.

[6](1790), 1 Peake Cases N.P. 14, 170 E.R. 62.

the country or of the sect to which he belonged.[7] No precise form of oath has been prescribed by the common law; and no statutory form of words is prescribed as an oath for witnesses in judicial proceedings in Canada.

2. English Legislation

Throughout the eighteenth century, concessions were made to those who objected to taking an oath on the ground of religious scruples.[8] The *Quakers and Moravians Act*, 1833,[9] consolidated much of the previous century's statutory development in this area. It provided: "Every person of the persuasion of the people called Quakers, and every Moravian, be permitted to make his or her solemn affirmation or declaration, instead of taking an oath . . . ." The form of the declaration was: "I A.B. being one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be,) do solemnly, sincerely, and truly declare and affirm". An affirmation or declaration in the proper form was given the same force and effect as if made under oath; that is, it would incur the sanctions of perjury.

In 1838,[10] this privilege was extended to persons who had been Quakers or Moravians and had ceased to be, but retained conscientious scruples about taking an oath.

In 1854, the *Common Law Procedure Act*[11] was enacted; by section 20 of this Act, anyone who could declare that the taking of any oath was contrary to his religious belief was permitted to affirm to written or printed evidence in lieu of swearing. By *The Evidence Further Amendment Act*, 1869[12] it was provided that, where in any civil or criminal proceeding a person objected to taking the oath, or was objected to as incompetent, such person should, if the presiding judge was satisfied that the taking of the oath would have no binding effect on his conscience, make the following promise and declaration: "I solemnly promise and declare that the evidence given by me to the Court shall be the truth the whole truth and nothing but the truth". A party who, having made such a declaration, corruptly gave false evidence was liable to conviction for perjury as if he had taken the oath.

In 1888, these provisions of the Act of 1869 were repealed and the following provision substituted:

> Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or

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[7]Starkie, footnote 4 *supra*, at p. 22.

[8]See 7 & 8 Will. 3, c. 34 (1696); 13 & 14 Will. 3, c. 4 (1701); 8 Geo. 1 ,c. 6 (1721); 22 Geo. 2, c. 30 (1749); 22 Geo. 2, c. 46, s. 36 (1749). See also 9 Geo. 4, c. 74, s. 36 (1828); and generally Tyler, *Oaths, their Origin, Nature, and History* (1834).

[9]3 & 4 Will. 4, c. 49 (1833). See also the *Separatists' Affirmations Act*, 3 & 4 Will. 4, c. 82 (1833).

[10]*Quakers and Moravians Act*, 1838, 1 & 2 Vict., c. 77, s. 1.

[11]17 & 18 Vict., c. 125 (1854).

[12]32 & 33 Vict., c. 68, s. 4; subsequently amended by the *Evidence Amendment Act*, 1870, 33 & 34 Vict., c. 49.

> that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath.[13]

A form of affirmation was provided as follows: " 'I, A.B. do solemnly, sincerely, and truly declare and affirm', and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness."[14] The right to affirm under the *Quakers and Moravians Acts* of 1833 and 1838 was still preserved. It was also provided that, where an oath had been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, should not for any purpose affect the validity of such oath.[15] A witness was permitted, if he wished to do so, to swear with uplifted hand "in the form and manner in which an oath is usually administered in Scotland . . . ."[16] In 1909, provision was made for the manner and form of the oath. "Any oath may be administered and taken in the form and manner following: The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words 'I swear by Almighty God that . . .' followed by the words of the oath prescribed by law."[17] It was also specified that "in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful".[18]

In 1961 the provisions of the *Oaths Act,* 1888, permitting persons who objected to being sworn to make a solemn affirmation instead, were extended to apply ". . . in relation to a person to whom it is not reasonably practicable to administer an oath in the manner appropriate to his religious belief . . .".[19]

3. The Canada Evidence Act

The earliest federal legislation in Canada concerning the oath to be administered to witnesses in criminal cases and in civil proceedings respecting which the Parliament of Canada has jurisdiction, was enacted in 1893 together with the introduction of the *Criminal Code.*[20] The relevant provisions are:

> 22. Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, shall have power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

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[13]*Oaths Act*, 1888, 51 & 52 Vict., c. 46, s. 1.
[14]*Ibid.*, s. 2.
[15]*Ibid.*, s. 3.
[16]*Ibid.*, s. 5.
[17]*Oaths Act*, 1909, 9 Edw. 7, c. 39, s. 2.
[18]*Ibid.*
[19]*Oaths Act*, 1961, 9 & 10 Eliz. 2, c. 21, s. 1; this statute was passed to deal with the difficult situation posed in *R.* v. *Pritam Singh*, [1958] 1 All E.R. 199.
[20]*Canada Evidence Act*, 1893, S.C. 1893, 56 Vict., c. 31.

> 23. If a person called or desiring to give evidence, objects on grounds of conscientious scruples, to take an oath or is objected to as incompetent to take an oath, such person may make the following affirmation: — 'I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.' And upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.[21]

These sections are repeated with minor changes in the *Canada Evidence Act*.[22] As a result, under federal law, a witness must object to taking an oath "on the grounds of conscientious scruples", or an objection must be made that the witness is incompetent to take the oath, before the statutory right to affirm arises. It is clear that the *Canada Evidence Act* recognizes only "conscientious scruples" (the meaning of which is unclear) and incompetence to take the oath as grounds permitting a witness to give evidence by affirmation. This would appear to retain in the federal law of evidence a large body of the common law of England concerning the theological concept of the oath, the divine sanctions attached to it, and a belief in punishment after death.

4. The Ontario Evidence Act

Some of the provisions of *The Evidence Act* (Ontario) concerning the oath differ in substance from the *Canada Evidence Act*. They read:

> 17. Where an oath may be lawfully taken, it may be administered to a person while such person holds in his hand a copy of the Old or New Testament without requiring him to kiss the same, or, when he objects to being sworn in this manner or declares that the oath so administered is not binding upon his conscience, then in such manner and form and with such ceremonies as he declares to be binding.
>
> 18.(1) Where a person objects to being sworn from conscientious scruples, *or on the ground of his religious belief, or on the ground that the taking of an oath would have no binding effect on his conscience*, he may in lieu of taking an oath, make an affirmation or declaration that is of the same force and effect as if he had taken an oath in the usual form. [Emphasis added]
>
> (2) Where the evidence is in the form of an affidavit or written deposition, the person before whom it is taken shall certify that the deponent satisfied him that he was a person entitled to affirm.[23]

The italicized words do not appear in the *Canada Evidence Act*. In addition, there is no provision in the Ontario Act permitting a witness to affirm where he is objected to as incompetent to take an oath. Nor is there a provision in the *Canada Evidence Act* similar to section 17, dealing with the manner and form of administering the oath.

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[21] *Ibid.*
[22] R.S.C. 1970, c. E-10, ss. 13, 14.
[23] *The Evidence Act*, R.S.O. 1970, c. 151, ss. 17, 18.

The first Ontario legislation concerning oaths was passed in 1809: *An Act for the Relief of Menonists and Tunkers in certain Cases*,[24] provided as follows:

> WHEREAS the Religious Societies of the Menonists and Tunkers from scruples of Conscience against taking an oath, are subjected to many inconveniences to themselves and families as well as to others who may require their evidence; for remedy whereof, Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of, and under the authority of an Act passed in the Parliament of Great Britain, intituled, "an Act to repeal certain parts of an Act passed in the fourteenth year of his Majesty's reign, intituled, 'an Act for making more effectual provision for the government of the Province of Quebec, in North America,' and to make further provision for the government of the said Province," and by the authority of the same, That from and after the passing of this Act, every Menonist or Tunker in any case in which an oath is required by law, or upon any lawful occasion wherein the affirmation or declaration of a Quaker will by law be admitted, shall be, and is hereby permitted to make his or her affirmation or declaration in the same manner and form as a Quaker by the laws now in force is required to do, having first made the following affirmation or declaration, that is to say:—
>
> 'I A.B. do solemnly, sincerely and truly affirm and declare, that I am one of the Society of Tunkers or Menonists,' (as the case may be)
>
> which affirmation or declaration as aforesaid of any Menonist or Tunker, except as hereinafter excepted, is hereby declared to be of the same force and effect to all intents and purposes in all Courts of Justice and other places where by law an oath is or shall be allowed, authorized, directed or required, as if such Menonist or Tunker had taken an oath in the usual form, and all and every person or persons who is or are or shall be authorized or required to administer any oath required by any law now in force or hereafter to be made, although no express provision is made for the purpose in any such law, shall be, and is or are hereby required to administer such affirmation or declaration.
>
> II. *And be it further enacted by the authority aforesaid,* That if any person making such affirmation or declaration shall be lawfully convicted of having wilfully, falsely and corruptly affirmed and declared any matter or thing which if the same had been deposed in the usual form upon oath, would have amounted to wilful and corrupt perjury, every such person so offending shall incur and suffer all the pains, penalties, forfeitures and disabilities as by the laws now in force are to be inflicted on persons convicted of wilful and corrupt perjury.

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[24] 49 Geo. 3, c. 6.

> III. *And be it further enacted by the authority aforesaid*, That no Menonist or Tunker shall by virtue of this Act be qualified or permitted to give evidence in any criminal cases, or to serve on juries in criminal cases, or to hold or enjoy any office or place in the government in this Province, any thing herein contained to the contrary notwithstanding.

In 1829 the right to affirm was extended to evidence to be given in criminal cases.[25]

The next legislation in Ontario concerning oaths was enacted in 1869.[26] The preamble to the Act reads in parts as follows:

> Whereas it is expedient to permit any person who declares that the taking of any oath is contrary to his religious belief to make instead of such oath a solemn affirmation or declaration in all cases wherein an oath may be lawfully administered.

The Act goes on to provide:

> 1. If any person called as a witness, or required or desiring to make an affidavit or deposition in any civil proceeding, or on any occasion other than in a criminal proceeding whereon or touching any matter respecting which an oath is now, or hereafter may be requisite by law, whether on taking office or otherwise, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the Court, or Judge, or other presiding officer, or person qualified to take affidavits or depositions, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, viz.:—
>
> 'I, (A.B.) do solemnly, sincerely and truly affirm and declare that the taking of an oath is, *according to my religious belief, unlawful*; and I do also solemnly, sincerely and truly affirm and declare, &c.;' which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. [Emphasis added]

This Act extends the right to affirm to all occasions where an oath is required, and is not confined to cases in which witnesses are giving evidence or making depositions. Under this statute, the condition precedent to permitting the evidence of a witness to be taken under affirmation is that the witness "shall refuse or be unwilling from *alleged conscientious motives to be sworn*". In the form prescribed for the affirmation, the witness was required to declare "that the taking of an oath is, *according to my religious belief, unlawful*".

The law remained in this form until 1909,[27] when provisions similar to the English Act of 1888 were introduced. The Ontario statute was amended to read:

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[25]*An Act to provide for the Admission of the Evidence of Quakers, Menonists, Tunkers and Moravians, in Criminal Cases*, 10 Geo. 4, c. 1 (1829).

[26]*An Act to allow certain persons to make a Solemn Affirmation and Declaration instead of an Oath*, 1869, 33 Vict., c. 14.

[27]*The Evidence Act*, 9 Edw. 7, c. 43, ss. 14, 15.

14. Where an oath may lawfully be administered to any person as a witness or as a deponent in an action or on appointment to any office or employment or on any occasion whatever, such person shall be bound by the oath administered, if the same shall have been administered in such form and with such ceremonies as such person may declare to be binding.

15—(1) If a person called as a witness or required or desiring to give evidence or to make an affidavit or deposition in an action or on an occasion whereon or touching a matter respecting which an oath is required or permitted, objects to take an oath or is objected to as incompetent to take an oath and if the presiding Judge or the person qualified to take affidavits or depositions is satisfied that such person objects to be sworn from conscientious scruples or on the ground of his religious belief or on the ground that the taking of an oath would have no binding effect on his conscience, such person may make an affirmation and declaration in lieu of taking an oath and such affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

(2) Where the evidence is in the form of an affidavit or written deposition the person before whom the same is taken shall certify that the deponent satisfied him that he was a person entitled to affirm.

This amendment made a fundamental change in the law. Previously the person required to take an oath was only permitted to affirm "instead of being sworn" and he was required to declare that "the taking of an oath is, according to my religious belief, unlawful". Under the later statute, although no particular form of oath is prescribed, the person is bound by the oath "if the same shall have been administered in such form and with such ceremonies as such person may declare to be binding". This permitted the person taking the oath to declare the form and the ceremonies which he considered to be binding.

In addition, the permission to affirm was extended to cases where the party objected to taking an oath, or was objected to as incompetent to take an oath, and the officer administering the oath found that the person objected to being sworn from conscientious scruples, or on the ground of his religious belief, or on the ground that the taking of the oath would have no binding effect on his conscience. This was a considerable expansion of the law concerning the right to affirm. But the law, by the use of the words in section 14, "in such form and with such ceremonies as such person may declare to be binding", still recognized various forms of oaths which, according to the common law, were accepted, such as breaking a saucer, cutting off a chicken's head, *etc.*[28]

The relevant sections of the 1909 Act were substantially changed in 1926[29] and, with a few inconsequential changes in terminology, the law has remained the same since that time. The essential changes in the

[28]*R.* v. *Ah Wooey* (1902), 8 C.C.C. 25.

[29]*The Statute Revision Amendment Act, 1926,* S.O. 1926, c. 21, s. 18.

1926 Act were: firstly, a form for taking the oath was prescribed for the first time; that is, holding the Old or the New Testament in the hand. However, if the person objected to being sworn, he was permitted, in accordance with the former law, to declare the manner and form of the ceremonies which would be binding on him. Secondly, the provision for affirmation omitted the specific words "or on an occasion whereon or touching a matter respecting which an oath is required or permitted". These words made it clear that the right of affirmation extended to all cases where an oath was required. However, the opening words of what is now section 18(1), "Where a person objects to being sworn" are, no doubt, intended to comprehend all those cases coming within previous section 14, which contemplated the application of the Act to all cases in which an oath is required to be administered. Lastly, the words "or is objected to as incompetent to take an oath", which continue to appear in section 14(1) of the *Canada Evidence Act*, were deleted.

The result is that in an area in which the law should be particularly clear and precise, there is much confusion. The Ontario Act provides for a manner of taking the oath, suited only to Jews and Christians: the person to whom the oath is administered "holds in his hand a copy of the Old or New Testament", but no form of oath is provided. If a person objects to being sworn in this manner or declares that the oath so administered is not binding upon his conscience, the oath may be administered "in such manner and form and with such ceremonies as he declares to be binding". But where a person objects to being sworn from conscientious scruples, or on the ground of religious belief, or on the ground that the taking of an oath would have no binding effect on his conscience, he may make an affirmation or declaration instead of taking an oath. No form of affirmation is prescribed by law. If a person objects to taking an oath or to the form of oath, these provisions may require a considerable and difficult inquiry by the person administering the oath in order to determine in what form and in what manner the oath should be administered, if one is to be administered, or, on the other hand, whether the witness should make an affirmation or declaration. In practice, the statutory provisions too often receive little or no attention.

We think that this condition in the law cannot be permitted to continue. The concept of "being sworn" and of an "oath" has had, as we have seen, a confused historical origin. It has been supported on religious grounds to sanctify the evidentiary process, and it has been rejected on religious grounds. In deference to religious beliefs, a witness may be permitted either to affirm or, if he declares that an oath is not binding on his conscience, to take an oath in a manner different from that prescribed generally for use in the courts, and with such ceremonies as he declares to be binding. To determine the proper ceremonies is often a difficult matter, and the whole process is impractical in the daily administration of justice.

We have come to the conclusion that a form of affirmation should be adopted that can be subscribed to and respected by those of all faiths, and by agnostics or atheists. We recommend that the form should be simple and reflect the solemnity of the occasion. It should apply to any

occasion when an oath is or may be required to be taken by an adult witness in any proceeding. The sanctions of perjury would attach to false affirmations. In addition, a form of affirmation should be substituted for the oath, wherever an oath may be lawfully taken under provincial legislation. We set out our specific recommendations later.

5. Evidence of Children of Tender Years

At common law, no evidence could be received unless given under oath. A person fourteen years of age or over was presumed to be qualified to take an oath. A child under fourteen years of age, however, was not presumed to have the capacity to take an oath, and could not give evidence, except in certain special cases such as rape, unless it was determined, upon inquiry, that he met the proper qualifications to be sworn.

Omychund v. *Barker*[30] is the classic common law case. The qualification for a witness to give evidence under oath was held to be a belief in a God who both rewards and punishes. In *R.* v. *Brasier*,[31] twelve judges were unanimous in the opinion that no testimony could be legally received except under oath. They were of the opinion that a child under seven would be competent to give evidence if she appeared on strict examination to possess a sufficient knowledge of the nature and consequences of an oath, but that admissibility depends upon the sense and reason the child entertains of the danger and impiety of falsehood. In *R.* v. *Braddon and Speke*,[32] the questioning to determine the qualification of the child went as follows:

A.G.: What age are you of?

Witness: I am thirteen, my lord.

A.G.: Do you know what an oath is?

Witness: No.

L.C.J.: Suppose you should tell a lie, do you know who is the father of liars?

Witness: Yes.

L.C.J.: Who is it?

Witness: The devil.

L.C.J.: And if you should tell a lie, do you know what would become of you?

Witness: Yes.

. . .

L.C.J.: What if you should swear to a lie? If you should call God to witness to a lie, what would become of you then?

Witness: I should go to hell-fire.

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[30](1745), 1 Atk. 21, 26 E.R. 15.
[31](1779), 1 Leach C.C.L. 199, 168 E.R. 202.
[32](1684), 9 State Trials 1127, at pp. 1148-49.

It would appear that the emphasis was on the consequence of swearing falsely, and that the nature of an oath was assumed by the courts to involve submission to divine judgment.

Since 1893, provision has been made in Canada to receive the evidence of a child of tender years (that is, a child under 14 years of age) not under oath in defined circumstances:

> (1) In any legal proceeding where a child of tender years is tendered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.
>
> (2) But no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.[33]

The provision has remained in the *Canada Evidence Act*,[34] and identical legislation applicable to proceedings over which the Legislature has jurisdiction was adopted in Ontario in 1959.[35]

This legislation requires the presiding officer to make three inquiries. First, does the child understand "the nature of an oath"? If he does, he may give evidence under oath and no further inquiry is required. If he does not, two further matters must be determined before his evidence may be received not under oath:

> (1) Is the child possessed of sufficient intelligence to justify the reception of the evidence; and
>
> (2) Does he understand the duty of speaking the truth?

These inquiries are quite different. The first concerns the intelligence of the child, and the second concerns his appreciation of his "duty of speaking the truth". The earlier Canadian cases, which relied on English cases interpreting the common law test as to whether a child should be permitted to give evidence under oath, drew a clear distinction between understanding "the nature of an oath" and understanding "the duty of speaking the truth". As we shall see, this distinction has been judicially narrowed.

In *Sankey* v. *The King*[36] the Supreme Court of Canada considered the extent of the inquiry that must be made to determine that a child of

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[33]S.C. 1893, 56 Vict., c. 31, s. 25.

[34]R.S.C. 1970, c. E-10, s. 16.

[35]S.O. 1959, c. 31; see now R.S.O. 1970, c. 151, s. 19. As a result of a Report of the Council of Judges, *The Evidence Act* (Ontario) was amended to adopt the relevant language of the *Canada Evidence Act*. Prior to the amendment, the common law prevailed in the province and there was no provision for a child under 14 years of age to give evidence not under oath in civil cases.

[36][1927] S.C.R. 436.

tender years "does not understand the nature of an oath" before he may be permitted to give evidence not under oath. The following is the record of the examination of the child in question, Haldis Sandahl.

MR. JOHNSON: I think that if you put her in a chair in the box; we haven't a high chair. This child, my lord, is of tender years, nine years old and I tender her evidence under the provisions of section 16 of the Canada Evidence Act.

MR. PATMORE: I understand that this is because this child does not understand the nature of an oath.

MR. JOHNSON: That is for the judge to satisfy himself.

THE COURT:

Q. Where do you live, Haldis?—

A. Port Essington.

Q. See how loudly you can speak. How old are you?

A. Eight — ten.

Q. And what is your daddy's name?

A. Mr. Sandahl.

Q. What does he do, does he live up there?

A. Yes.

Q. And your mother, does she live with you too?

A. Yes.

Q. You go to school?

A. Yes.

Q. Can you read a little bit?

A. Yes.

Q. And write your own name?

A. Yes.

Q. Do you know that it is very bad for little girls to tell lies?

A. Yes.

Q. Did they tell you that little girls must never tell stories? Do you understand that?

A. Yes.

Q. You must always tell the truth?

A. Yes.

Q. We want you to answer the questions these men ask you and be sure to tell the truth.[37]

Following this interrogation the child had been permitted to give evidence at trial not under oath.

Anglin, C.J.C., made it very clear that the duty of the presiding judge to satisfy himself that the child did not understand the "nature of the oath" was quite distinct from his duty to satisfy himself that "she was possessed of sufficient intelligence to justify the reception of her evidence", and that she understood "the duty of speaking the truth". He said:

> Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself of the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. The term 'child of tender years' is not defined. Of no ordinary child over seven years of age can it be safely predicated, from his mere appearance, that *he does not understand the nature of an oath*. Such a child may be convicted of crime. *Criminal Code,* sections 17-18. A very brief inquiry may suffice to satisfy the judge on this point. But some inquiry would seem to be indispensable. The opinion of the judge, so formed, that the child does not understand the nature of an oath is made by the statute a pre-requisite to the reception in evidence of his unsworn testimony. With the utmost respect, in our opinion there was, in this instance, no material before the judge on which he could properly base such an opinion. He apparently misconceived the duty in this regard imposed upon him by the statute.[38] [Emphasis added]

The conviction was quashed on the ground that the unsworn evidence of the child was admitted.

In *Rex v. Antrobus*[39] the British Columbia Court of Appeal dealt with a case in which a child of nine was permitted to give sworn evidence. The court made a comprehensive review of the requirements necessary to establish the capacity of a child to take an oath, and concluded that, before a child of tender years may be sworn, the test in the *Brasier* case must be met; that is, that the child must appear to possess, on strict examination by the court, "sufficient knowledge of the nature and consequences of an oath", and that the admissibility of children to give evidence under oath depended upon "the sense and reason they entertained of the danger and impiety of falsehood which was to be collected from their answers to questions propounded to them by the Court".[40] In

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[37]*Ibid.*, at pp. 438-39.
[38]*Ibid.*, at pp. 439-40.
[39][1947] 2 D.L.R. 55, [1947] 1 W.W.R. 157.
[40]*Ibid.*, at p. 57, quoting *R.* v. *Brasier*, footnote 31 *supra*, at pp. 199 and 201.

R. v. *Lebrun*[41] the Ontario Court of Appeal followed the judgment of the British Columbia Court of Appeal in the *Antrobus* case.

A different line of reasoning was developed in *R.* v. *Bannerman*[42] by the Manitoba Court of Appeal. The *Antrobus* and *Lebrun* cases were not followed. Dickson, J.A., after reviewing these cases, held that, in considering whether a child understood the nature of the oath, the court was not called upon to consider whether the child understood the "consequences of the oath". He pointed out that these words are not contained in the *Canada Evidence Act*. However, when one examines the history of the oath, the consequences were traditionally an important part of its nature. To be competent to take an oath involved an acknowledgment of a Supreme Being that punished. The court arrived at this conclusion:

> With the greatest respect, it appears to me that the Canadian Courts, in *Rex* v. *Antrobus*, . . . and in cases following that decision, have fallen into error, firstly in adopting the word 'consequences' from *Rex* v. *Brasier*, . . . and giving insufficient recognition to the absence of that word in s. 16 of the Canada Evidence Act, and, secondly, having adopted the word, interpreting it to mean 'the spiritual retribution which follows the telling of a lie' rather than '*the solemn assumption before God of a moral obligation to speak the truth*'. In my view neither case law nor statute requires inquiry as to the child's capacity to know what befalls him if he tells a lie under oath.[43] [Emphasis added]

If this interpretation is to be adopted, "the solemn assumption before God" surely contemplates a belief in God on the part of the child. This would often involve a complex theological discussion, inappropriate for the courtroom, and one in which most judges and lawyers are incompetent to participate. It is not clear what the learned judge meant by the last sentence quoted. In its context it would appear to refer to divine sanctions. However, it is open to the interpretation that the court is not concerned with an inquiry into "the child's capacity to know" the legal consequences of giving false evidence.

In *R.* v. *Taylor*[44] Dickson, J.A., in giving the judgment of the Manitoba Court of Appeal moved farther away from the inquiry involving religious belief. In that case the inquiries that took place made some reference to attending Church, but dealt mainly with the obligation to tell the truth. The learned judge concluded:

> After careful consideration of the evidence I am not prepared to say that the Judge erred in permitting these witnesses to be sworn. It cannot be denied that the child witnesses were not examined on their respective religious beliefs or knowledge but it would seem to me there was evidence upon which the Judge could properly conclude

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[41][1951] O.R. 387.

[42](1966), 48 C.R. 110, 55 W.W.R. 257; aff'd by the Supreme Court of Canada without reasons (1967), 50 C.R. 76, 57 W.W.R. 736.

[43](1966), 48 C.R. at p. 138, 55 W.W.R. at p. 285.

[44](1970), 75 W.W.R. 45, 1 C.C.C. (2d) 321 (Man. C.A.).

> that each of the child witnesses understood the *moral obligation of speaking the truth.*[45] [Emphasis added]

It appears that, in the opinion of the court, the words "understand the nature of an oath", as used in the *Canada Evidence Act*, are synonymous with the words "understand a moral obligation to tell the truth".

The law concerning the admissibility of evidence of children of tender years was again considered by the Supreme Court of Canada in *R.* v. *Truscott.*[46] Eight judges concurred in the majority opinion; Hall, J. dissented. After referring to the passage we have quoted from the *Sankey* case, the majority of the Court went on to deal with the evidence of two children who were permitted to give evidence under oath, in this way: "We are of the opinion that the learned trial judge properly exercised the discretion entrusted to him and that there were reasonable grounds for his concluding that both [children] understood the moral obligation of telling the truth".[47] In a later case, *Horsburgh* v. *The Queen*,[48] this passage was adopted by Spence, J., as the correct interpretation of the law. It follows, therefore, that, at least with respect to the evidence of children, through a process of judicial interpretation, the oath, as it is administered in Canadian courts, has lost much, if not all, of the historic religious attributes attached to it at common law. If the oath is acknowledged as "a moral obligation of telling the truth", with liability for penal sanctions for an intentional failure to do so, then any inherent distinction between an oath and an affirmation ceases to exist.

The interpretation which the courts have placed on the words "understand the nature of an oath" appears to produce a perplexing result. Where a child under 14 is called as a witness, three inquiries by the presiding officer may be necessary: (1) Does the child "understand the moral obligation of telling the truth"? If he does, no further inquiry is necessary, and he may give evidence under oath. If he does not, two further inquiries are required under the statute to determine if he may give evidence not under oath: (2) Is the child possessed of sufficient intelligence to justify the reception of his evidence, and (3) Does he understand the duty of speaking the truth?

Rarely would a child who does not qualify under (2) qualify under (1). If the child does qualify under (2), the court must go on to determine if he "understands the duty to speak the truth". But it would appear from the interpretation placed by the courts on the words "understand the nature of an oath", that is, "the moral obligation of telling the truth", that the matter has already been decided. One of the accepted meanings of "duty", as set out in the Oxford English Dictionary, is "moral obligation". Understanding the moral obligation to tell the truth is the test required under (1). If this interpretation is correct, it follows that a child tendered as a witness who is "possessed of sufficient intelligence to justify the reception of his evidence" and who "understands the duty of speaking

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[45](1970), 75 W.W.R. at pp. 50-51, 1 C.C.C. (2d) at pp. 327-328.
[46][1967] S.C.R. 309.
[47]*Ibid.*, at p. 368.
[48][1967] S.C.R. 746, 777.

the truth" must qualify as a witness who may give evidence under oath. On this reasoning, there is now no authority for receiving the unsworn evidence of a child. No doubt the courts did not intend to produce this result when, by interpretation, the meaning of the words "the nature of an oath" as used in the statute was changed from the traditional meaning involving religious beliefs. This, however, appears to be the result. We think legislative action is imperative.

The form of affirmation that we recommend, if adopted, would resolve many of the difficulties and anomalies that now exist, but not all. For adults it would be rational and adequate. However, for children, more is required. The scheme of the statute now recognizes that there must be corroboration of the evidence of children under fourteen years of age who cannot meet the test required to qualify them to take an oath, but who can meet the test required to qualify them to give unsworn evidence. We agree that this should be the case. We do not think that it can be assumed that all children under fourteen years of age are capable of making the proposed affirmation. Some provision must be made for an inquiry by the court, before a child under fourteen is qualified to give evidence as an adult.

A child under seven years of age may not be convicted of any offence.[49] Nevertheless, the law recognizes that a child under seven may give evidence under oath in certain circumstances.[50] We think it is irrational to permit a child under seven, against whom sanctions of perjury cannot be invoked, to give evidence under oath. In such case the oath has no real significance. On the other hand, the statute recognizes that a child under seven may give evidence not under oath if, in the opinion of the presiding officer, the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth".

We think provision should be made that, wherever a child under seven is presented as a witness, the court should conduct an inquiry to determine if the child is possessed of sufficient intelligence to justify the reception of his evidence and to ascertain if, in the opinion of the court, the child understands that he should tell the truth. In such cases he should be asked to identify himself and to state, "I promise to tell the truth".

The determination of the competence of a child seven years of age and over but under fourteen, to take the affirmation prescribed for adults should be made on a similar basis to that laid down in the *Criminal Code* for the determination of whether a child seven years of age or more but under the age of fourteen years is competent to commit a criminal offence. If a child of the prescribed age is not competent to commit the offence of perjury, it must necessarily follow that his evidence should not be received under the affirmation prescribed for adults which carries with it the sanctions of perjury. On the other hand, if such a child is competent to commit perjury it follows that he should qualify as an adult witness. The relevant section of the *Criminal Code* reads as follows:

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[49]*Criminal Code*, R.S.C. 1970, c. C-34, s. 12.

[50]*R.* v. *Brasier* (1779), 1 Leach C.C.L. 199, 168 E.R. 202; *Strachan* v. *McGinn*, [1936] 1 W.W.R. 412.

> No person shall be convicted of an offence in respect of an act or omission on his part while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.[51]

We have come to the conclusion that where a child who is seven years of age or more and under the age of fourteen is tendered as a witness, the presiding officer should be required to conduct an inquiry to determine whether, in his opinion, the child is competent to know the nature and consequences of his conduct and to appreciate that it is wrong to give false evidence. If the presiding officer so finds, the evidence of the child should be received after he has made the affirmation in the form we recommend for adults. If the presiding officer does not so find, the evidence of the child may be received under the declaration recommended for a child under the age of seven if the presiding officer finds that he meets the test we have set out for children under seven. There should be a provision that no case should be decided on the uncorroborated evidence of a witness who has not made the affirmation prescribed for an adult.

6. Conclusion

1. The historical common law conception of the oath is not now appropriate for use in the courts or on other occasions where an oath is now required.
2. The oath as it is administered has discriminatory aspects rooted in religious beliefs that are unacceptable to many people.
3. Authoritative decisions of the courts have declared the "nature of an oath" in Canadian law to be a "moral obligation to speak the truth" attended with sanctions. If this is generally true for an oath taken by a witness, it must be equally true that the nature of an oath taken on other occasions is a moral obligation to abide by the terms of the oath. This, in fact, is the express obligation imposed today on those who are permitted to affirm.
4. A form of affirmation should be substituted for the oath, wherever an oath may be lawfully taken in Ontario.
5. An affirmation may be administered by requiring a person to repeat "I, A.B., solemnly affirm (followed by the substance of the affirmation)". In the case of a witness, the substance of the affirmation should be: "I will tell the truth, the whole truth and nothing but the truth well knowing that it is a serious offence to give false evidence with intent to mislead the court".
6. The sanctions of perjury should attach to a false affirmation.
7. Before the recommendations made in this chapter are implemented an effort should be made to provide a form of affirmation that would be the same in substance in both civil and criminal cases. This is highly desirable but not essential. It is not the

[51] *Criminal Code*, R.S.C. 1970, c. C-34, s. 13.

case now. No form of affirmation is provided for a witness under *The Evidence Act* (Ontario), while one is provided in the *Canada Evidence Act.*

8. Pending the revision of the statutes, the provisions of *The Interpretation Act* (Ontario)[52] should be reviewed and any necessary amendments made as a transitional means to reconcile the terms "oath" and "swear" or "sworn" as used in different statutes with the term "affirm" or "affirmation" used in the amendment we recommend to *The Evidence Act.*

Section 30 of *The Interpretation Act* provides:

In every Act, unless the context otherwise requires,

26. 'oath', in the case of persons allowed by law to affirm or declare instead of swearing, includes affirmation and declaration;

36. 'swear', in the case of persons for the time being allowed by law to affirm or declare instead of swearing, includes affirm and declare, and 'sworn' has a corresponding meaning.

7. Recommendation

We recommend that sections 17, 18 and 19 of *The Evidence Act* be repealed and replaced with the following section:

(1) Except as provided in subsections 2 and 3, every person presented as a witness in a proceeding shall before testifying identify himself and make the following solemn affirmation:

I solemnly affirm that I will tell the truth, the whole truth, and nothing but the truth, well knowing that it is a serious offence to give false evidence with intent to mislead the court.

(2) Where a child seven years of age and under fourteen is presented as a witness in a proceeding, the presiding officer shall conduct an inquiry to determine if, in his opinion, the child is possessed of sufficient intelligence to justify the reception of his evidence, and to determine if he is competent to know the nature and consequences of giving false evidence and to know that it is wrong and where he so finds, he shall permit the child to give evidence upon making the solemn affirmation set out in subsection 1.

(3) Where a child who is,

(a) under seven years of age; or

(b) seven years of age and under fourteen years, and who does not qualify as a witness under subsection 2,

is presented as a witness in a proceeding, the presiding officer shall conduct an inquiry to determine if in his opinion the child is pos-

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[52]R.S.O. 1970, c. 225, ss. 30.26, 30.36.

sessed of sufficient intelligence to justify the reception of his evidence, and understands that he should tell the truth, and where he so finds, he shall permit the child to give evidence upon stating:

I promise to tell the truth.

(4) No case shall be decided upon the evidence of a child who has qualified as a witness under subsection 3 unless his evidence is corroborated by some other material evidence.

(5) In all other cases where a person might heretofore have lawfully taken an oath, he shall hereafter be required to make a solemn affirmation in the following form:

I, A.B., solemnly affirm (followed by the substance of the affirmation).

(6) Where an oath is inadvertently administered after this Act comes into force in a form that would have been binding had this Act not been passed, it has the same force and effect as a solemn affirmation made under this section. [Draft Act, Section 3.]

CHAPTER 9

PRIVATE PRIVILEGE

1. Introduction

The rules of private privilege are exceptions to the general rule that a competent witness sworn to testify is obliged to answer all relevant questions. Where a privilege is lawfully exercised, relevant evidence is excluded on the basis that the interest in securing the truth is neither absolute, nor always paramount to other conflicting interests which the law of privilege safeguards. The social values of loyalty, trust and confidence, protected by a legal privilege, are not easily weighed against the procedural goals of efficient and accurate fact-finding. But, in determining whether a privilege should be recognized in law, this must be done. Private honour alone has never been a deciding factor.

2. Marital Privilege

The matter of privilege concerning communications between spouses was not something that required consideration at common law because both parties and their spouses were incompetent to testify for or against one another.[1] When the rule of incompetence of spouses of parties was abolished by the *Evidence Amendment Act*, 1853[2] a privilege against disclosure of communications between spouses was created in terms similar to those contained in section 11 of *The Evidence Act* (Ontario)[3] which provides:

> 11. A husband is not compellable to disclose any communication made to him by his wife during the marriage, nor is a wife compellable to disclose any communication made to her by her husband during the marriage.

Although the reason for framing the privilege in these terms is unclear, the foundation of the privilege has been asserted to be (1) the common law concept that the spouses are one, and (2) the suspicion of natural bias arising out of affection between the spouses. In addition, two justifications for the continued existence of marital privilege may be advanced:

1. the privilege promotes conjugal confidences by encouraging candour and frankness in marital communications;

2. it preserves marital harmony by avoiding the discord which might arise if spouses were compelled to reveal the content of marital communications.

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[1] *Rumping* v. *D.P.P.*, [1964] A.C. 814. For a contrary view, see 8 Wigmore, *Evidence*, §§2333, 2334 (McNaughton Rev. 1961).

[2] 16 & 17 Vict., c. 83, s. 3.

[3] R.S.O. 1970, c. 151. A similar section is contained in the *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 4(3).

Perhaps because of the absence of agreement concerning the policy the law should seek to advance, the law governing marital privilege is uncertain and inconsistent; indeed it may be seriously contended that the existence of the privilege neither encourages candour during marriage nor protects marital harmony.

(a) *Holder of the privilege*

The purpose of the privilege should determine its nature and who should hold it. However, there has been considerable judicial disagreement as to what the purpose of the privilege is. In *Rumping* v. *D.P.P.*[4] the House of Lords was sharply divided on the policy underlying the doctrines of marital incapacity and marital privilege. The issue in the case was whether a letter written by the accused to his wife and intercepted before it reached her, was in law privileged. After discussing the common law, Lord Radcliffe, dissenting, said:

> So much then for the 'legal policy of marriage' in relation to the law of evidence. Its aim was, I think, the general one 'to ensure conjugal confidence' and it rested on a much wider principle than that of excluding witnesses on the ground of interest in the subject-matter of a suit.[5]

His Lordship came to the conclusion that it was a recognized principle of common law that communications between spouses should be protected from being divulged in evidence.[6]

The other law Lords did not agree, and held that there never was any rule at common law rendering inadmissible communications between spouses during the marriage. Lord Morris of Borth-y-Gest said:

> The conclusion that I deduce from a consideration of the authorities is that prior to the legislative changes of the last century . . . there neither existed nor was there need for any separate rule such as is suggested, and that when the legislative changes were made they were on lines which negatived the existence of any such rule. There was no need for any such rule because the general rule [incompetency of spouses] was adequate to give security against the betrayal of confidences between husband and wife. So also the general rule protected a spouse against the embarrassment of having to give evidence adverse to the interest of the other spouse.[7]

The *Evidence Amendment Act*, 1853, which is almost identical to section 11 of the Ontario legislation, provided that the recipient of a communication between spouses is not compellable to disclose the communication. Discussing the question of who is entitled to exercise the privilege, Lord Morris of Borth-y-Gest stated:

> My Lords, it is to be noted that it was not enacted that communications between husbands and wives should be inadmissible. . . .

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[4]*Supra*, footnote 1.
[5]*Ibid.*, at pp. 840-841.
[6]*Ibid.*, at p. 843.
[7]*Ibid.*, at pp. 848-849.

> After 1853 a husband (whether or not he or his wife was a party in the action) was not compellable to disclose a communication made to him by his wife during the marriage. But if he wished to do so he could. That was quite inconsistent with any rule making such a communication inadmissible in evidence. A privilege against disclosure was given but it was one that could be waived: if waived it would be waived not by the spouse making the communication but by the spouse to whom it was made . . . . [It] would appear that the enactment would protect a husband or wife from being obliged to disclose a communication made to him or her by the other but would not protect him or her from being obliged to disclose a communication made by him or her to the other.[8]

Thus it is the recipient of the marital communication who is not compellable. The communicator, or anyone else who knows of the communication, is compellable.

If the purpose of the privilege is to secure the confidentiality of communications between spouses, it is difficult to understand why the privilege is that of the recipient. In *Rumping* v. *D.P.P.*, Lord Reid said:

> It is a mystery to me why it was decided to give this privilege to the spouse who is a witness: it means that if that spouse wishes to protect the other he or she will use this privilege to conceal communications if they would be injurious, but on the other hand a spouse who has become unfriendly to the other spouse will use this privilege to disclose communications if they are injurious to the other spouse but conceal them if they are helpful.[9]

(b) *Requisite Relationship*

If the purpose of the privilege is to encourage and support candour and confidence as part of the marital relationship, the privilege should attach only to communications made during a subsisting marriage, and should continue to attach to those communications after divorce or the death of one of the parties. This is the view favoured by Wigmore, who would also limit the privilege to confidential communications.[10] If, on the other hand, the supporting policy is to avoid creating marital disharmony and embarrassment as a result of a spouse being called as a witness in judicial proceedings, the status of the marriage at the time of the communication should be irrelevant. A subsisting marriage at the time disclosure is sought, should be the determining factor.

Section 11 provides that the spouses are not compellable to disclose any communication made "during the marriage". No English or Canadian court has extended the privilege to include communications made prior to the marriage and claimed during the existence of marriage.[11] If the privi-

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[8]*Ibid.*, at pp. 858-859.

[9]*Ibid.*, at pp. 833-834.

[10]8 Wigmore, *Evidence*, §§2332-2341 (McNaughton Rev. 1961).

[11]The issue has not, however, arisen for decision. The Quebec Court of Queen's Bench denied the privilege in *R.* v. *Coffin*, but the woman with whom the accused lived at all material times had not become his wife by the time of trial: (1954), 19 C.R. 222.

lege exists to encourage candour and confidentiality within the marriage, there would seem to be no justification for extending the privilege to communications made prior to the marriage. If, however, the purpose of the privilege is to preserve marital harmony, it may be argued that the privilege should extend to communications made prior to the marriage where the privilege is claimed during the marriage.

Although the case law on the subject is not absolutely clear, the weight of authority indicates that marital privilege may not be claimed after the dissolution of the marriage by annulment, divorce or death of a spouse. In *Connolly* v. *Murrell*,[12] the defendant in an action brought by his wife's relatives against him in his capacity as administrator of his wife's estate, testified as to conversations with his wife concerning the ownership of property which the plaintiffs sought to have declared the property of the deceased and distributed as part of her estate. Upon being asked further questions concerning conversations between himself and his wife relative to the property, he declined to answer on the ground of marital privilege. Street, J., held that the defendant was not rendered compellable to disclose communications between himself and wife at one period of their coverture, merely because he was willing to disclose communications which took place at another. Referring in the course of judgment to the predecessor of section 11 of the Ontario Act, Street, J., said:

> . . . I am asked to order the defendant to disclose a communication made to him by his wife during the marriage. I see no way of doing so unless I were to disregard the statute utterly. . . . [T]he death of the husband or the wife did not remove the seal from the lips of the survivor; even their divorce did not compel him to break their silence.[13]

In *Shenton* v. *Tyler*[14] the English Court of Appeal considered whether, in civil cases, the privilege terminates with the death of one of the spouses. In that case, the plaintiff sought to administer interrogatories to the defendant in order to establish that the defendant's late husband had created a trust in her, in favour of the plaintiff. The defendant contended that she was privileged from answering the interrogatories on the ground that they were based on communications between her and her late husband. Sir Wilfrid Greene, M.R., discussed the common law with respect to communications between husband and wife and the effect of section 3 of the English *Evidence Amendment Act*, 1853. He came to the conclusion that there was no common law privilege concerning communications between husband and wife, and that the provisions of section 3 did not create a privilege which extended after the marriage was dissolved by divorce or death.

In *Regina* v. *Kanester*,[15] a decision of the British Columbia Court of Appeal, the accused appealed his conviction on the ground, among others, that his former wife had been compelled to testify as to com-

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[12](1891), 14 P.R. 187, affirmed (1891), 14 P.R. 270.
[13]*Ibid.*, at p. 188.
[14][1939] Ch. 620.
[15](1966), 55 W.W.R. 705 (B.C.C.A.); [1966] S.C.R. v., 57 W.W.R. 576.

munications made by the accused to her during the marriage. MacLean, J.A., in a dissenting judgment, considered the effect of section 4(3) of the *Canada Evidence Act*, which is essentially the same as section 11 of the Ontario Act, and followed *Shenton* v. *Tyler*. He said:

> In the case at bar certain communications were made by the appellant to his then wife Marilyn Ruth Kanester while the marriage still subsisted. She was not his wife at the time she gave her evidence and it follows that, not then being a wife, section 4(3) of the *Canada Evidence Act* does not apply.[16]

The majority of the Court, however, allowed the appeal on other grounds and quashed the conviction.

On appeal to the Supreme Court of Canada, the majority judgment of the Court of Appeal was reversed, and the original conviction and sentence restored. Written reasons were not given, but Taschereau, C.J.C., said at the conclusion of argument, "We find no merit in the points argued before us on behalf of the respondent. We are in agreement with the reasons and conclusion of MacLean, J.A.".

It would appear, therefore, that the Supreme Court approved the decision in *Shenton* v. *Tyler* and that, *Connolly* v. *Murrell* notwithstanding, a former spouse may be compelled to testify in civil cases concerning communications made by his or her deceased or divorced spouse during marriage.[17]

To deny a former spouse the right to claim privilege after the termination of the marriage may be consistent with the policy objective of preserving marital harmony. If, however, the policy justification for the privilege is the encouragement of candour and confidentiality within marriage, then, logically, the privilege should survive the dissolution of the marriage in order that the communication may be made with the assurance that its disclosure cannot be compelled even after the marriage has ceased to exist.

(c) *Subject Matter of the Privilege*

The question, what constitutes a "communication" protected by marital privilege, was considered by the Supreme Court of Canada in *Gosselin* v. *The King*.[18] The accused was charged with murder. He was found to have blood stains on his underclothing. At trial, his wife was compelled to testify that she had discovered the blood-stained underclothing shortly after her husband left the premises, despite her claim that this discovery was a privileged communication. The relevant provision of the *Canada Evidence Act*, as it then was, read:

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[16]*Ibid.*, at p. 712.

[17]In criminal proceedings, however, it would appear that a former spouse remains incompetent to testify against his or her ex-spouse after divorce: *R.* v. *Algar*, [1954] 1 Q.B. 279; *Monroe* v. *Twisleton* (1802), Peake Add. Cas. 219, 170 E.R. 250; see also *R.* v. *Cooper* (*No. 1*) (1975), 5 O.R. (2d) 59 (H.C.J.). For a discussion of this anomaly, see: Cross, *Evidence* (4th Ed. 1974), at pp. 147, 158-160.

[18](1903), 33 S.C.R. 255.

> . . . no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.[19]

On appeal, the majority of the Supreme Court of Canada held that the wife's discovery was not a "communication" within the marital privilege section of the *Canada Evidence Act*. Girouard, J., dissenting, took the view that the privilege should be held to cover the "whole situation" and not only words, letters or gestures:

> . . . the word 'communication' is large enough to comprehend all kinds of relations between husband and wife, whether *de verbo, de facto* or *de corpore*.[20]

Mills, J., also dissenting, agreed and said that "communication" included ". . . anything which she has learned from him as the result of their marital relations. It is not simply what she has learned by words spoken to her".[21]

On any view of the policy underlying marital privilege, the majority definition of communications protected by the privilege appears unnecessarily restrictive. If the privilege seeks to encourage confidences between spouses, it would appear artificial to exclude from the ambit of protected communications, information obtained as a result of the marital relationship. Similarly, it may be said that it is as disruptive to marital harmony to require a spouse to disclose information obtained as a result of the marital relationship, as it is to require disclosure of a conversation or other protected communication.

(d) *Proof of Privileged Communications*

At present, communications between spouses are not generally inadmissible in evidence; as we have indicated, the privilege extends only to the recipient spouse and must be claimed. Communications between husband and wife that have been intercepted or overheard may be proved by evidence other than that of the spouse.[22] To be consistent with the policy objective of protecting marital communications, it may be argued that the law should preclude proof of privileged communications in these circumstances.

In view of the foregoing, it is obvious that marital privilege, as framed at present in Ontario, is ineffective: it neither protects marital harmony nor encourages candour during marriage. Because the privilege may be claimed by the recipient of the communication alone, and waived at will by him, the communicating spouse can have no assurance that his communication will not be divulged. Even if the recipient wishes to

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[19] *Canada Evidence Act*, 1893, 56 Vict., c. 31, s. 4; now R.S.C. 1970, c-E-10, s. 4(3). Although the section of the 1893 Act dealing with marital privilege has been amended to substitute for the word "competent", the word "compellable", the *Gosselin* decision would still appear to govern the law of Ontario.

[20] (1903), 33 S.C.R. 255, 270.

[21] *Ibid.*, at p. 283.

[22] *Rumping* v. *D.P.P.*, footnote 1 *supra*.

respect the communication, he or she may be compelled to disclose a confidence if the marriage has terminated, or if the information obtained does not fall within the definition of communications protected by the privilege. Finally, if the communication is overheard or intercepted by a third party, it is not protected by the law of marital privilege.

(e) *Alternative Approaches to Reform*

In certain American jurisdictions, the privilege belongs to the communicating spouse and may be waived by him alone.[23] This position is clearly preferable to section 11 of *The Evidence Act* (Ontario), as the communicating spouse is assured that his confidences will not be disclosed without his consent.

In our view, however, the privilege, if it were to be retained, should be a joint privilege enabling either spouse to object to the disclosure of marital communications. Such a provision is contained in the California Evidence Code,[24] Section 980, which provides:

> 980. *Privilege for confidential marital communications.* Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

Under this section, the privilege belongs to both spouses, and enables either spouse to refuse to disclose, and to prevent the other spouse from disclosing, a confidential communication. Because the privilege exists only if it is claimed, relevant evidence need not be withheld from the court for the sole reason that a spouse is not available to consent to the disclosure of confidential communications. The privilege is subject to numerous elaborately codified exceptions, reflecting the wide range of factual circumstances in which a claim of privilege may be inappropriate.[25]

In England, marital privilege was abolished by the *Civil Evidence Act 1968*. The relevant section reads as follows:

> Section 3 of the Evidence Amendment Act 1853, (which provides that a husband or wife shall not be compellable to discuss any communication made to him or her by his or her spouse during the marriage) shall cease to have effect except in relation to criminal proceedings.[26]

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[23]8 Wigmore, *Evidence*, §2340(1) (McNaughton Rev. 1961); American Law Institute, Model Code of Evidence (1942), Rules 214, 215; Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform State Laws (1953), Rule 28.

[24]Cal. Evidence Code, §980 (West, 1968).

[25]*Ibid.*, §§981-987.

[26]*Civil Evidence Act 1968*, c. 64, s. 16(3).

This legislation implements the recommendation of the Law Reform Committee in its *Report on Privilege in Civil Proceedings*.[27] The Committee made the following case for abolition of marital privilege:

Marital Relationships: Communications between spouses

42. The Evidence (Amendment) Act 1853, which made spouses of parties competent and compellable witnesses in most civil proceedings, contained the following provision in section 3:

> 'No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage'.

This curious provision, which is repeated in section 1(d) of the Criminal Evidence Act 1898 with reference to criminal proceedings, was presumably intended to prevent use being made of admissions made by one spouse to the other, but if so it gives the liberty to disclose to the spouse in whom confidence was reposed and not to the spouse who reposed the confidence. The communicator has no right to prevent the spouse to whom the communication was made from waiving the privilege. This does not make sense. The Model Code and the Uniform Rules of Evidence in the United States make the privilege that of the communicator alone and exclude the privilege in actions between spouses. The Indian Evidence Act, section 122, makes the privilege a joint one requiring waiver by both spouses and also excludes the privilege in actions between the spouses and some criminal proceedings. But there are practical disadvantages in making the privilege a joint one. One of the spouses may not be present or readily available when the claim for privilege arises. In such a case the evidence would be shut out even although the absent spouse, if asked, would have had no objection to the disclosure. Presumably the absence of the consent of a deceased spouse would be irrelevant, but what is to happen when the marriage between the spouses is dissolved? We see no easy solution to these problems.

43. We have no doubt that this statutory privilege ought to be altered. The decision whether there should be any absolute privilege at all involves a value judgment and depends upon the social and religious importance which one attaches to the institution of marriage. If a privilege for communications between spouses were to be retained, we think that it should clearly be that of the communicator and waivable by the communicator alone. There can be no breach of marital confidence if the spouse who made the communication is willing that it should be disclosed. There would, however, have to be a provision that the privilege should not apply in proceedings between spouses. On the other hand, there is, we think, great force in the contention that such a privilege in civil actions other than actions

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[27]Law Reform Committee, Sixteenth Report, *Privilege in Civil Proceedings*, Cmnd. 3472, (1967); the Criminal Law Revision Committee in its Eleventh Report on *Evidence (General)*, Cmnd. 4991, (1972) recommended that the privilege should also be abolished in criminal proceedings: see p. 106.

> between spouses is of little practical importance and would have a minimal effect upon marital relations. It is unrealistic to suppose that candour of communication between husband and wife is influenced today by section 3 of the Evidence (Amendment) Act 1853, which, as we have pointed out, does not ensure that marital confidences will be respected, or would be enhanced tomorrow by an amendment of the law on the lines indicated above. Other family relationships, such as those between parent and child, are equally close, yet it has never been suggested that communications between parent and child should be privileged. On the whole, we think that the reasonable protection of the confidential relationship between husband and wife is best left to the discretion of the judge and, we may add, the good taste of counsel. We accordingly recommend that section 3 of the Evidence (Amendment) Act 1853 be repealed.[28]

We agree with the conclusion of the English Law Reform Committee concerning the utility of marital privilege. The privilege, as it exists at present in Ontario, accomplishes neither of the policy objectives which might justify its retention. Moreover, we are of the view that, even if the privilege were altered by extending it to both the communicating and recipient spouses and expanding the definition of communications protected by the privilege, its effect upon the matrimonial relationship would be minimal. Any formulation of an altered or expanded privilege would have to be subject to many exceptions, in order to prevent privilege from being claimed in circumstances in which a claim would result in a miscarriage of justice, or would otherwise be clearly inappropriate.[29]

(f) *Recommendation*

For these reasons we have concluded that marital privilege should be abolished. We therefore recommend that section 11 of *The Evidence Act* (Ontario) be repealed.

(g) *Comment and dissent of H. Allan Leal, Q.C.*

I associate myself entirely with what my colleagues have written concerning the shortcomings of the existing law regarding marital privilege. With regret, however, I cannot agree with the solution which they propose. The case for reform is clear but, in my view, the case for abolition of the privilege has not been made.

It is certainly true that one cannot establish, or cannot establish easily, the extent to which candour as between husband and wife and the strengthening of the marital union is enhanced by the existence of the marital privilege. It is equally true that one cannot judge accurately the extent to which candour is indulged in because of the knowledge of the provisions of section 11 of the Ontario Act. But this is as one would expect, and the fact that the case cannot be documented does not mean that the privilege does not serve a useful, indeed an essential, purpose. I

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[28]Law Reform Committee, footnote 27 *supra*, at pp. 17-18.

[29]For example, a claim of privilege should not apply in proceedings between the spouses or concerning the welfare of children. See also the exceptions to marital privilege contained in the California Evidence Code, footnote 25 *supra*.

suspect we will know very quickly the unhappy consequences of removal the moment that abolition is accomplished. I would prefer a power in the court to apply the privilege on a balancing of interests, such as that proposed in the Code recommended in the Report on Evidence by the Law Reform Commission of Canada[30] but better still I would prefer the retention of the privilege, as a right, with amendments as follows:

(i) that the privilege be altered by extending it to both the communicating and recipient spouses;
(ii) that the definition of communications be expanded;
(iii) that the privilege should continue to exist notwithstanding the dissolution of the marriage, and
(iv) that the privilege should not apply in actions between husband and wife.

For the above reasons, I favour the adoption in this jurisdiction, of the relevant provisions of the California Evidence Code referred to in the majority report.[31]

3. Questions concerning Sexual Intercourse

(a) *Discussion*

In Chapter 7, dealing with competence and compellability, we deferred our consideration of section 8(2) *The Evidence Act* (Ontario) providing for the competence of spouses to answer questions concerning marital intercourse. For convenience we repeat section 8 of *The Evidence Act* (Ontario):

> 8.—(1) The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties, and the husbands and wives of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties.
>
> (2) Without limiting the generality of subsection 1, a husband or wife may in an action give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage.[32]

This provision in its original form was first introduced into the law of Ontario in 1946.[33] The legislation was designed to overrule the decision of the House of Lords in *Russell* v. *Russell*.[34] In that case, it was held that the law of legitimacy included a rule of common law and public policy to the effect that neither spouse was competent to give evidence that would bastardize issue born during the marriage. Therefore, a hus-

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[30]Law Reform Commission of Canada, *Report on Evidence* (1975), at p. 79, commenting on section 40 of the Draft Evidence Code.
[31]Cal. Evidence Code, §§980-987 (West, 1968).
[32]R.S.O. 1970, c. 151, s. 8.
[33]S.O. 1946, c. 25, s. 1.
[34][1924] A.C. 687 (H.L.).

band was not allowed to testify that he had not had sexual access to his wife during the relevant period. This evidence could only be given by third parties. The rule, grounded upon general sentiments of decency, was not confined to legitimacy proceedings, but applied to all proceedings including divorce, and applied notwithstanding dissolution of the marriage by death of one of the spouses, or divorce.

As a result of recommendations made concerning the rule in *Russell* v. *Russell*, the law was amended in England by providing:

> (1) Notwithstanding any rule of law the evidence of a husband or a wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period.
>
> (2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.[35]

The provision was re-enacted in the *Matrimonial Causes Act 1965* as follows:

> The evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period; but a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.[36]

It is to be observed that this provision is not restricted to proceedings instituted in consequence of adultery.

It is suggested that the word "may", used in subsection (2) of section 8 of the Ontario Act, and the phrase "without limiting the generality of subsection 1" create ambiguity. Because it is uncertain whether spouses may be compelled to give evidence of marital intercourse, it may be argued that the section not only removes the rule of incompetency in *Russell* v. *Russell*, but creates a new privilege.

If a new privilege is created, the section goes considerably beyond both the facts in *Russell* v. *Russell* and the rule expounded by the majority in that case. It is not confined to matrimonial causes, let alone to proceedings where legitimacy is in issue. Not only does it remove the incompetency of spouses who are litigants; it also confers a privilege on husbands or wives who are witnesses, but who may not be parties. In other words, it removes some obstruction to the judicial search for truth, but substitutes more extensive obstructions which may be waived by either spouse unilaterally.

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[35] *Law Reform (Miscellaneous Provisions) Act*, 1949, 12, 13 & 14 Geo. 6, c. 100, s. 7.

[36] 1965, c. 72, s. 43(1).

Following a recommendation of the Law Reform Committee,[37] the statutory privilege was abolished in England in 1968.[38] The Committee was of the opinion that, apart from legitimacy proceedings, the only justification for the privilege is that of delicacy. Moreover, in legitimacy proceedings, either spouse can give evidence that marital intercourse did not take place within the relevant period, and privilege may therefore prove illusory. We do not think that experience in the courts today dictates that a privilege based only on delicacy should continue to exist; such a privilege should not exist in Ontario. A section should be substituted which merely removes the rule in *Russell* v. *Russell* by providing that persons should not be incompetent in circumstances covered by that rule.

(b) *Recommendation*

We recommend that section 7(2) of *The Evidence Act* be amended to provide:

> In a proceeding a spouse is competent and compellable to give evidence that he or she did or did not have sexual intercourse with the other spouse to the marriage and a married person shall not be excused on the grounds of privilege from answering questions tending to establish that sexual intercourse did not take place between such person and the other party to the marriage at any time prior to or during the marriage. [Draft Act, Section 9(3).]

4. Proceedings in Consequence of Adultery

We have discussed the privilege against self-incrimination as to adultery and recommended changes in the law in Chapter 7 dealing with competence and compellability.[39]

5. Professional Privilege

(a) *Solicitor and Client Privilege*

The solicitor and client privilege arose at common law, and is of ancient origin. The right to have an attorney prosecute and defend all "pleas moved for or against him" goes back to at least the fourteenth century. It is a right fundamental to equality before the law. The privilege does not rest on confidence or a confidential relationship, but on the basis that the solicitor is the *alter ego* of the client in relation to the administration of justice.[40] Lord Brougham clearly defined the rationale of the solicitor and client relationship in *Greenough* v. *Gaskell*:

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. . . . But it is out

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[37]Law Reform Committee, Sixteenth Report, *Privilege in Civil Proceedings*, Cmnd. 3472, (1967), para. 44, at pp. 18-19.

[38]*Civil Evidence Act 1968*, c. 64, s. 16(4).

[39]See Chapter 7, "Competence and Compellability", *supra* at pp. 111-112.

[40]For a more detailed discussion of the nature of the privilege, see *Royal Commission Inquiry Into Civil Rights* (1968), Vol. 2, at pp. 817-821.

> of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.[41]

The scope of the solicitor and client privilege has been stated in this way:

> there is no doubt that legal professional privilege, which has a sure and unshakable foundation in our law, protects from disclosure not only documents which embody communications between a client and his legal adviser which come into existence in the course of litigation, or in anticipation of litigation, but even documents which without contemplation of any litigation at all come into existence in order to enable the client to obtain the legal advice which he requires.[42]

The privilege is essential to the long established right to retain counsel, to a fair hearing as expressed in the Canadian Bill of Rights, and to the right "in full equality to a fair and public hearing by an independent and impartial tribunal", as expressed in the Universal Declaration of Human Rights. It is not necessary for us to enter upon any extensive discussion of the nature and extent of the privilege. We have considered whether it should be extended and whether it should be further limited. Nothing has been drawn to our attention to convince us that the law as it is reasonably well defined is not working satisfactorily in the administration of justice. We are not convinced that an attempt should be made to define the privilege by statute as has been done in some jurisdictions[43] or that there should be any statutory extension of the privilege as defined at common law.

(b) *Other Relationships*

Representations have been made to us that the privilege which exists between a solicitor and his client should be extended to communications between accountants and their clients, newsmen and their sources of information[44], physicians and their patients, and clergymen and members of their congregations. None of these relationships are fundamentally or historically the same as that which exists between the solicitor and his

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[41](1833), 1 My. & K. 98, 103, 39 E.R. 618, 620-621.

[42]*Hobbs* v. *Hobbs and Cousens*, [1960] P. 112, 116.

[43]See, for example, American Law Institute, Model Code of Evidence (1942), Rules 209-13; National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953), Rule 26; Cal. Evidence Code, §950-962 (West, 1968); Federal Rules of Evidence, 28 U.S.C.A., Rule 501.

[44]One of the Commissioners, Mr. Bell, wishes it to be a matter of record that he favours the establishment of a privilege for journalists to decline to disclose the sources of their information. The issues and the law in most jurisdictions are discussed in detail in *Professional Secrecy and the Journalist*, (International Press Institute, Zurich, 1962) and Mr. Bell adopts the conclusions of that study.

client. The argument put forward is that they are all based on confidence; however, as we have pointed out, the solicitor and client relationship is based not on confidence, but arises necessarily out of the basic right of the client to equality before the law. The extension of a statutory privilege to any of the relationships we have mentioned would result in closing to the judicial process wide areas in its search for truth. We have come to the conclusion that this consideration outweighs the arguments put forward in favour of providing statutory protection for the relevant communicants.

Special arguments have been advanced in favour of giving statutory protection to communications between a patent attorney and his clients. No such privilege is recognized by Canadian law.[45] If specific litigation is contemplated and a patent agent prepares a report or opinion for that purpose at the request of the solicitor or the client, the document is privileged. Also, when no specific litigation is contemplated opinions may not be received in evidence over objection if the subject matter of the opinion is the precise issue before the court. There is, however, a residual area where communications between patent agents and inventors or their representatives are not protected from disclosure in court other than by an *ad hoc* exercise of judicial discretion.[46]

We have come to the conclusion that the Legislature ought not to extend a special privilege to patent attorneys that is not enjoyed by other professional groups. If a privilege is to be granted with respect to the duties performed in the exercise of the functions they perform under the *Patent Act*,[47] it is a matter for Parliament. We may point out that many others who perform similar duties and work on a confidential basis, such as copyright agents and taxation agents, do not enjoy privilege as to professional communications.

6. Privilege Concerning Voting

(a) *Discussion*

Under *The Election Act*[48] a person who has voted shall not in any legal proceedings be compelled to state for whom he has voted. Before it was amended in 1969,[49] the provision read: "A person who has voted shall not in any legal proceedings questioning the election or return be compelled to state for whom he voted".

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[45]*Moseley* v. *Victoria Rubber Co.* (1866), 55 L.T.N.S. 482; *Toronto Gravel Road Co.* v. *Taylor* (1875), 6 P.R. 227; *Clopay Corp. and Canadian General Tower Ltd.* v. *Metalix Ltd.* (1959), 31 C.P.R. 63 (Exch. Ct.).

[46]This protection may be reasonably counted upon where a patent application is being prosecuted but the patent has not yet issued: *McKercher* v. *Vancouver-Iowa Shingle Co.*, [1929] 4 D.L.R. 231 (B.C.S.C.).

[47]Patent attorneys are regulated under the *Patent Act*, R.S.C. 1970, c. P-4. Section 15 of the Act provides:

> A register of attorneys shall be kept in the Patent Office on which shall be entered the names of all persons entitled to represent applicants in the presentation and prosecution of applications for patents or in other business before the Patent Office.

[48]R.S.O. 1970, c. 142, s. 69.

[49]S.O. 1968-69, c. 33, s. 69, amending R.S.O. 1960, c. 118, s. 152.

Under *The Municipal Elections Act, 1972*[50] the privilege is restricted to proceedings questioning a municipal election. Hence the law in Ontario would appear to be that a person may not be required to state in any legal proceeding how he voted in a provincial election, but he may be required to state how he voted in a municipal election unless the proceeding is one to question the election.

, Under *The Liquor Licence Act*[51] the local option provisions concerning the sale of liquor in particular areas provide that those entitled to vote are those qualified to vote in provincial elections.[52] The provisions of *The Election Act* are adopted respecting a revision of lists, holding a poll, holding advance polls, forms, oaths, powers and duties of officers, and corrupt practices.[53] However, the provisions of *The Election Act* concerning non-disclosure are not adopted, and there would appear to be no provision concerning privilege as to how a voter has voted.

(b) *Recommendation*

We think that the privilege as now expressed in *The Election Act* should be extended to all voting, whether it be in federal, provincial or municipal elections, and that it should apply as well to referenda and plebiscites authorized by statute. We recommend that *The Evidence Act* be amended by including the following section:

> A person is competent but not compellable in a proceeding to disclose for whom or how he voted in any federal, provincial, municipal or other election to public office or in any referendum or plebiscite authorized by statute. [Draft Act, Section 11.]

7. Evidence Admissible to Prove Privileged Communications

(a) *Discussion*

In Chapter 4 we discussed the subject of illegally obtained evidence, and reviewed the law permitting proof of privileged communications by secondary evidence.

Beyond the desirability of admitting secondary evidence of privileged communications, there are additional matters which concern us. Where a privilege has not been waived, should it be permissible to prove a privileged communication that has been legally intercepted; for example, instructions given by a prisoner to a solicitor legally overheard by a fellow prisoner or a warden? We do not think so. Even more so should proof of privileged communications obtained by illegal means be excluded. There would seem to be no rational basis on which the law concerning privilege should be defeated by permitting proof by indirect means, where direct proof is prohibited.

The privilege protecting such communications should not, however, be confused with the right to prove the content of the communication by

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[50]S.O. 1972, c. 95, s. 93(6).
[51]S.O. 1975, c. 40.
[52]*Ibid.*, s. 32.
[53]*Ibid.*

means other than proof of the communication itself. It is one thing to say that a document is privileged, and another to maintain that the information contained in it may not be proven in any manner. Similarly, a party cannot immunize documents from disclosure merely by depositing them with his solicitor. However, we do not wish to imply that there should be a right to prove documents that have been prepared at the instruction of the client for the purpose of obtaining legal advice.

(b) *Recommendation*

The Evidence Act should be amended to include a section to read as follows:

> Evidence is not admissible in a proceeding to prove a communication which is inadmissible by reason of the fact that it is privileged under this Act, or any other Act or at common law. [Draft Act, Section 12.]

CHAPTER 10

OPINION EVIDENCE

1. Introduction

The rule governing the reception of opinion evidence has been summarized by Cross as follows:

> A witness may not give his opinion on matters which the court considers call for the special skill or knowledge of an expert unless he is an expert in such matters, and he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the ascertainment of the truth.[1]

The admission of expert testimony is commonly regarded as an exception to the general rule forbidding the reception of opinion testimony. An examination of expert evidence would be incomplete, therefore, without a consideration of the supposed rule to which it is labelled an exception. The term 'supposed rule' is used advisedly, as we must first determine whether there does exist *in fact* a general rule in Canada which excludes opinion evidence, that is, testimony in the form of a conclusion, regardless of whether the witness has personal knowledge of the subject of the litigation.

The proper scope of the opinion rule in the law of evidence can be appreciated best by first considering the historical development of the law. The early eighteenth century pronouncements of English courts that witnesses must relate facts and not opinion, when read in the context of that age, forbade quite different testimony from that which is now thought to be foreclosed by the opinion rule. Samuel Johnson's *Dictionary of the English Language* (1st Ed., 1755) defined opinion as "persuasion of the mind without proof or certain knowledge . . . [s]entiments, [j]udgment, [n]otion", and did not refer to 'opinion' in the sense of a reasoned conclusion from facts observed.[2] Up to the end of the eighteenth century there was no opinion rule as we know it today,[3] and statements then made such as Lord Mansfield's in *Carter* v. *Boehm*, "It is mere opinion, which is not evidence"[4], were statements condemning testimony by witnesses who had no personal knowledge of the event. Such testimony was thought to be as unreliable as hearsay. What was being forbidden were notions, guesses and conjectures. They were statements, Wigmore has observed, demanding that "the witness must speak as a knower, not merely a guesser".[5]

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[1]Cross, *Evidence* (4th Ed. 1974), at p. 381.

[2]See King and Pillinger, *Opinion Evidence in Illinois* (1942), at p. 8.

[3]See Phipson, *Evidence* (11th Ed. 1970), at p. 504, noting that Gilbert's *Evidence* written before 1726 and Buller's N.P. written before 1767 make no mention of such a rule. However, it appears in *Peake on Evidence* in 1801.

[4](1776), 3 Burr, 1905, 1918, 97 E.R. 1162, 1168.

[5]7 Wigmore, *Evidence*, §1917 (3rd Ed. 1940).

Expert assistance has been available to the court from very ancient times, but not in the form normally used today.[6] Special juries of experts were commonly used in the fourteenth century to resolve trade disputes,[7] and as early as 1353 we find the court summoning surgeons to give an opinion on whether a wounding amounted to mayhem.[8] The manner in which expert aid was elicited at that time illustrates that the assistance was rendered to the judge rather than to the jury; so that the court summoned the expert and, on considering his advice, directed the jury respecting the premises that could be used by them in assessing particular facts.

Toward the end of the eighteenth century, an exception appears to have been established to this general rule forbidding testimony by witnesses who had no personal knowledge of the facts in issue. As the jury system evolved from an investigatory body to a body informed by witnesses summoned by the parties,[9] experts were called by the parties. These experts, testifying as witnesses, furnished their assistance directly to the jury.[10] To justify this apparent exception to the long-standing rule that witnesses must testify from personal knowledge, the courts reasoned that the reception of such expert evidence was necessary to conclude the trial of technically complex issues. The expert was permitted to give his opinion on scientific matters although he had no personal knowledge of the matters being litigated, where to do so would assist the jury in its decision, and where the major premise or premises of the case had to be tested by information outside the general knowledge possessed by the layman.

This test for the reception of expert testimony, together with the misinterpretation of earlier statements forbidding opinion in the sense of "conjecture", gave rise in the early nineteenth century to the formulation of an opinion rule forbidding the reception of lay opinion generally, whether or not the witness had personal knowledge of the relevant facts.

2. Non Expert Opinion

(a) *Discussion*

The reception of opinion is justified at times as simply a "compendious mode of stating facts", or a "shorthand rendering" or an applica-

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[6]See generally Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901), 15 Harv. L. Rev. 40; see also Thayer, *Cases on Evidence* (2d Ed. 1900), at pp. 672-73; and Rosenthal, "The Development of the Use of Expert Testimony" (1935), 2 Law and Contemporary Problems 403.

[7]See Hand, footnote 6 *supra*, at pp. 41-42. For a more recent example of the empanelling of a special jury see *R.* v. *Anne Wycherley* (1838), 8 Car. & P. 262, 173 E.R. 486: a jury of married women was empanelled to determine if the convicted defendant was quick with child.

[8]Anon. Lib. Ass. 28, pl. 5 (28 Edw. III) as cited in Holdsworth, *A History of English Law*, Vol. IX, at p. 212; see also *Buller* v. *Crips* (1705), 6 Mod. 29, 87 E.R. 793.

[9]See, generally, Holdsworth, *A History of English Law*, Vol. 1, at pp. 33ff.

[10]See *e.g., Folkes* v. *Chadd* (1782), 3 Dougl. K.B. 157, 99 E.R. 589.

tion of the "congeries of circumstances rule" or "collective fact rule".[11] For example, a witness may testify that a person is very old, without specifying in detail the physical characteristics upon which this conclusion is based. The courts recognize that the opinion rule cannot be absolute. For example, in *R.* v. *German*,[12] in denying that any injustice was done by the reception of opinion testimony from lay witnesses respecting the defendant's intoxicated condition, Robertson C.J.O., said:

> No doubt, the general rule is that it is only persons who are qualified by some special skill, training or experience who can be asked their opinion upon a matter in issue. *The rule is not, however, an absolute one.* There are a number of matters in respect of which *a person of ordinary intelligence may be permitted to give evidence of his opinion upon a matter of which he has knowledge.* Such matters as the identity of individuals, the apparent age of a person, the speed of a vehicle, are among the matters upon which witnesses have been allowed to express an opinion, notwithstanding that they have no special qualifications, other than the fact that they have personal knowledge of the subject matter, to enable them to form an opinion.[13] [Emphasis added]

This attitude to the opinion rule may be supported on two grounds: first, the impossibility of restricting testimony to facts, and second, the absence of any justification for totally excluding opinion testimony in the form of reasoned conclusions from witnesses, without regard to their testimonial qualifications as observers of the event.

If we start from a premise that all that is logically probative is receivable unless excluded by some rule of law,[14] then it is clear that there must be some clear ground of policy to justify the exclusion.[15] The theory has sometimes been put forward that to permit the reception of opinion testimony would be to permit the "usurpation of the jury's function".[16] This overlooks the fact that the trier of fact must determine what weight to give to evidence admitted, and is not bound to agree with

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[11]See Tyree, "The Opinion Rule" (1955), 10 Rutgers L. Rev. 601. See also Baron Alderson in *Wright* v. *Tatham* (1838), 5 Clark and Finnelly 670, 721, 7 E.R. 559, 577 ". . . a compendious mode of putting one instead of a multitude of questions to the witness"; relied on in *Robins* v. *National Trust Co.* (1925), 57 O.L.R. 46 in receiving the opinion of witnesses respecting a testator's mental condition when he signed his will.

[12][1947] O.R. 395 (C.A.); relied on and followed on this point in *R.* v. *Pollock*, [1947] 2 W.W.R. 973 (Alta.) and *R.* v. *Nagy* (1965), 51 W.W.R. 307 (B.C.); but see *contra R.* v. *Davies (No. 2)*, [1962] 1 W.L.R. 1111 (C.M.C.A.).

[13][1947] O.R. 395, 409. And see *Porter* v. *O'Connell* (1915), 43 N.B.R. 458 where the court held it permissible for the eye-witness to state, in answer to a question respecting the speed of defendant's horse at the time of the accident, ". . . the horse was going that fast I don't think he could be pulled up immediately".

[14]Thayer, *Preliminary Treatise on the Law of Evidence*, at p. 265.

[15]See Trautman, "Logical or Legal Relevancy — A Conflict in Theory" (1952), 5 Vand. L. Rev. 385.

[16]See, for example, Phipson, *Evidence* (11th Ed. 1970), at p. 504; *Carter* v. *Boehm* (1766), 3 Burr. 1905, 1918, 97 E.R. 1162, 1168-1169.

the opinion expressed by the witness.[17] In addition, the reception of opinion testimony is accepted from expert witnesses whose opinions are the most likely to influence the trier of fact.

We have come to the conclusion that such a broad formulation of the opinion rule cannot be justified on principle and should be reformed to accord with present practice.[18] Lay opinion evidence, as we have indicated, has been received in some cases from witnesses with personal knowledge when it was thought to be helpful to the jury. To do otherwise would render the exercise of giving evidence unduly artificial, since it is often difficult to separate conclusions and inferences from the facts that give rise to them.

In the United States, where the common law rule was said to be capable of "capricious application",[19] the Federal Rules of Evidence now provide:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.[20]

The Advisory Committee in a Note to Rule 701, considered that the adversary system will normally provide adequate safeguards to ensure a satisfactory result:

> . . . since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness.[21]

In England the Law Reform Committee examined the law with respect to non expert evidence of opinion and recommended that:

> The opinion of a non-expert witness on an issue in the proceedings should not be admissible as such, but, subject to the courts' having a discretion to exclude it, should be admissible as evidence of the facts perceived by him on which it is based.[22]

The Committee's recommendation was adopted in the *Civil Evidence Act 1972* in the following form:

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[17]This justification for the opinion rule has been termed "empty rhetoric" in 7 Wigmore, *Evidence*, §1920 (3rd Ed. 1940).

[18]See *e.g.*, Phipson, *Evidence* (11th Ed. 1970), at pp. 526-30, where, after noting a broad exclusionary opinion rule, there are then listed as exceptions thereto, instances in which courts have decided to receive lay opinion; *i.e.*, identity, resemblance, photographs, meaning of words, handwriting, mental and physical conditions such as age, speed, value, *etc.* See also Pepper, "Scientific Proof", [1959] L.S.U.C. 277.

[19]American Law Institute, Model Code of Evidence (1942), at p. 198.

[20]Federal Rules of Evidence, 28 U.S.C.A., Rule 701.

[21]*Ibid.*, at p. 453.

[22]Seventeenth Report of the Law Reform Committee, *Evidence of Opinion and Expert Evidence*, Cmnd. 4489, (1970), at p. 31.

3.—(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section 'relevant matter' includes an issue in the proceedings in question.

(b) *Recommendation*

We recommend that *The Evidence Act* be amended to include the following section:

Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding. [Draft Act, Section 14.]

3. The Ultimate Issue Rule

(a) *Discussion*

The ultimate issue rule states that an expert witness cannot be asked his opinion concerning the very point which the jury must determine. In early decisions on expert evidence no such rule was recognized. In *Beckwith et al. v. Sydebotham*[23] the plaintiffs sued on a policy of insurance covering their ship. The defendants resisted on the basis that the ship was not seaworthy when it sailed. In their defence, the defendants introduced a deposition by a man who had surveyed the ship at the foreign port, and who described a great many deficiencies he had discovered. The defendant then proposed to call several eminent ship surveyors to testify that, in their opinion, the ship could not have been seaworthy if the facts disclosed by the deposition were true. The plaintiffs objected on the basis that an inference such as this was for the jury to draw. Lord Ellenborough reasoned that, where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits. In *Fenwick* v. *Bell*,[24] the plaintiff having called eye witnesses to testify concerning the facts of a collision at sea, proposed to call a nautical expert for the purpose of asking whether, according to his best judgment, having heard the evidence and assuming the facts to be as plaintiff's witnesses had testified, he thought that a collision could have been avoided by proper care on the part of the defendant's servants. The defendant objected that this was the very question which the jury were to try, but Coltman, J., permitted the question on the ground that it was a question having reference to a matter of science and opinion.

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[23](1807), 1 Camp. 116, 170 E.R. 897.
[24](1844), 1 Car. & K. 312, 174 E.R. 825.

In the nineteenth century, a change developed in the judicial attitude towards this type of evidence. The Canadian decision in *British Drug Houses Ltd.* v. *Battle Pharmaceuticals*,[25] illustrates the extent of the change. On a motion to expunge the registration of a trade mark on the ground of similarity to a mark already registered, Thorson, J., said:

> *Kerly on Trade Marks*, 6th ed., p. 290, makes the statement that the evidence of persons who are well acquainted with the trade concerned was formerly constantly tendered by the parties to show that in the opinion of such persons, as experts, the alleged resemblance between the contrasted marks was, or was not, calculated to deceive, and it was constantly admitted, but that, since the decision of the House of Lords in *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A.C. 83, such evidence has frequently been disallowed. In that case Lord Halsbury, L.C., said at page 85: 'Upon the one question which Your Lordships have to decide, whether the one name is so nearly resembling another, as to be calculated to deceive, I am of opinion that no witness would be entitled to say that, and for this reason: that that is the very question which your Lordships have to decide'.[26]

It was accordingly held that a witness' evidence concerning the effect of the use of the mark in dispute on him might be received, but that he could not state his opinion as to the effect it would have on someone else.

The development of the ultimate issue rule is frequently traced to the decision in *R.* v. *Wright*[27] in which a physician gave an opinion respecting the symptoms of insanity and concluded his testimony by saying, "[m]y firm conviction is that it was an act of insanity". The judges, having met and considered the testimony, decided that a medical witness could testify as to whether certain appearances in the accused were symptoms of insanity, and whether a long fast followed by strong liquor was likely to produce a paroxysm of that disorder. However, they expressed strong doubts whether the doctor could say that the act with which the prisoner was charged was an act of insanity, as this was the very point the jury were to decide. However, this case should be regarded as authority for the rejection of opinion testimony on questions of law, rather than for the rejection of opinion on an ultimate issue.

The distinction between an opinion involving interpretation of the law and an opinion as to fact, is illustrated by the decision of the Supreme Court of Canada in *R.* v. *Neil*.[28] The accused had been sentenced to preventive detention on being found to be a criminal sexual psychopath. Counsel for the Crown, in examining a psychiatric expert called by him, had read the then section 659(b) of the *Criminal Code* in which 'criminal sexual psychopath' was defined, and had asked the doctor whether "each one of the isolated requirements set forth in section 659(b) are found affirmatively against the accused?" The doctor had replied, "it is my

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[25][1944] Ex. C.R. 239, [1944] 4 D.L.R. 577.
[26][1944] Ex. C.R. 243, [1944] 4 D.L.R. 580.
[27][1821] Russ. & Ry. 456, 168 E.R. 895.
[28][1957] S.C.R. 685.

opinion that this is so". Cartwright, J., found the objections to the examination obvious:

> The witness is also, in effect, being called upon to interpret the definition contained in s. 659(b), a task the difficulty of which is emphasized by the different submissions as to its meaning made by counsel in the course of the argument before us.[29]

Were the ultimate issue rule narrowly interpreted to prohibit only expressions of opinion on issues which are mixed questions of fact and law, as in the *Wright* and *Neil* cases, it would be generally justifiable on the general basis that opinion testimony ought to be received only when it is necessary and helpful. An expression of opinion that involves the application of a legal standard ought to be excluded as superfluous, since a jury, properly instructed by the trial judge on the law, is as capable of applying the standard as the witness.[30]

The doctrines of relevance and materiality suggest that all evidence given at a trial must concern matters that are necessary to the prosecution or defence of the matter in issue. All testimony relates to an ultimate issue in the sense that failure to prove any element necessary to a successful prosecution must result in an acquittal. In theory, no expert, bound by the rules of relevancy and materiality, would be permitted to testify to *anything* under a broad formulation of the ultimate issue rule.

In practice, expert opinion testimony is received, and the supposed ultimate issue rule has been diluted. For example, in the case of *R.* v. *Jones*[31] the defendant was convicted of murder, although the defendant's daughter testified that she, not the father, had done the killing. A doctor was asked whether the blows described by the defendant's daughter could inflict the fractures found on the deceased. The doctor was permitted to state that the fractures could not have been so caused. On appeal it was held that the doctor's evidence was receivable. Richards, C.J.O., explained:

> The rule seems to be that a skilled witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine; but he may be asked a hypothetical question, which in effect will determine the same question. But here the witness was not asked respecting the very point which the jury were to determine, namely, whether the prisoner caused the death of the deceased, nor even the question of whether, in his opinion, Elizabeth Jones had killed the deceased, but simply whether the blows, as she described them, could produce fractures . . . such questions must in their very

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[29]*Ibid.*, at p. 701. See and compare *R.* v. *Holmes*, [1953] 2 All E.R. 324 (C.C.A.). The fineness of the distinction may also be seen in *Rich* v. *Pierpont* (1862), 3 F. & F. 35, 176 E.R. 16: in a suit for negligence against a doctor, defence counsel asked a medical witness "whether he was of opinion that there has been any want of due care or skill on the part of the defendant". Plaintiff's counsel objected. Erle, C.J., suggested that the question ought to be modified, and defence counsel was then permitted to ask the question, "whether the witness had heard anything (in the evidence) which was improper in the defendant's treatment of the patient from a medical point of view".

[30]See *R.* v. *Fisher*, [1961] O.W.N. 94, 96, *per* Aylesworth, J.A.

[31](1869), 28 U.C.Q.B. 416.

> nature be proper to be asked and answered or how could a jury ever possibly ascertain the true mode in which the death was caused.[32]

The doctor was asked for a scientific opinion as to the results that could flow from the blows inflicted, not what caused the death. The deductions to be drawn from the opinion, together with other facts, were for the jury.

The difficulty of applying the ultimate issue rule is displayed in *D.P.P.* v. *A. & B.C. Chewing Gum Limited*.[33] The accused was charged with selling obscene cards to children. At trial, the justices rejected the evidence of child psychiatrists concerning the likely effect of the cards, taken singly and together, on children of different ages. On appeal by the prosecutors against the dismissal of the information, Lord Parker referred to the "long-standing rule of common law [that] evidence is inadmissible if it is on the very issue the court has to determine". The case was remitted for retrial, as it was held that this opinion evidence was not on the very point to be decided. Lord Parker said:

> There were two matters really for consideration. What sort of effect would these cards singly or together have on children, and no doubt children of different ages; what would it lead them to do? Secondly, was what they were led to do a sign of corruption or depravity? As it seems to me, it would be perfectly proper to call a psychiatrist and to ask him in the first instance what his experience, if any, with children was, and to say what the effect on the minds of children of different groups would be if certain types of photographs or pictures were put before them, and indeed, having got his general evidence, to put one or more of the cards in question to him and ask what would their effect be upon the child. For myself, I think it would be wrong to ask the direct question whether any particular cards tended to corrupt or deprave, because that final stage was a matter which was entirely for the justices.[34]

The American courts have not consistently maintained a broad ultimate issue rule. For many years the courts followed the approach of *U.S.* v. *Spaulding*:

> The medical opinions that respondent became totally and permanently disabled before his policy lapsed are without weight . . . Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phrase, and other questions of law. The experts ought not to have been asked or allowed to state their conclusion on the whole case.[35]

There has been a considerable trend of authority refusing to exclude expert testimony solely because it amounts to an opinion upon ultimate facts. For example, in *Harried* v. *U.S.* the court expressly relaxed the rule:

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[32]*Ibid.*, at pp. 422-23.
[33][1968] 1 Q.B. 159.
[34]*Ibid.*, at p. 164.
[35]293 U.S. 498, 506 (1934).

> There can be no doubt that the question was a violation of *U.S.* v. *Spaulding* . . . but we have long tolerated violation of that rule.[36]

The confusion surrounding the application of the ultimate issue rule, and the consequent need for reform, is demonstrated by a recent decision of the Supreme Court of Canada. In *R.* v. *Lupien*,[37] the accused was charged with gross indecency. By way of defence, he testified that he had thought that the male person with whom he was found was, in fact, female, and sought to introduce psychiatric evidence to the effect that he had a strong aversion to homosexual practices, and would not, therefore, knowingly engage in homosexual acts. Martland, J., and Judson, J., dissenting on this point, rejected the psychiatric opinion, agreeing with the dissenting judgment of Davey, C.J.B.C., in the court below, that:

> The opinion that Lupien would not have knowingly engaged in the acts alleged is in the particular circumstances of this case too dangerous to be admitted, because without any necessity it comes too close to the very thing the jury had to find on the whole of the evidence.[38]

An earlier decision of the court in *R.* v. *Fisher*[39] was distinguished on the ground that in that case the psychiatrist was testifying as to the capacity of the defendant to entertain the requisite intent whereas here:

> . . . the psychiatrist is being asked for an opinion, not as to whether the respondent was mentally capable of formulating an intent, but as to whether he did, on the facts of this case, formulate such intent.[40]

The majority of the Court, on the other hand, held that expert testimony was admissible on the question of whether or not the man was "homosexually inclined or otherwise sexually perverted."[41] Hall, J., put it this way:

> It is true, as Davey, C.J.B.C. points out in his dissent, that the answer which the psychiatrist was expected to give 'comes too close to the very thing the jury had to find on the whole of the evidence'. I do not think that this is a valid reason for rejecting the evidence. Psychiatrists are permitted to testify . . . that the accused was incapable of forming the intent necessary to constitute the crime with which he is charged. That type of evidence is very close, if not identical, to the conclusion the jury must come to in such a case if it is to find that the accused was not guilty because he did not have intent necessary to support conviction. The weight to be given the opinion of the expert is entirely for the jury, and it is the function of the trial judge to instruct the jury that the responsibility for weighing the evidence is theirs and theirs alone.[42]

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[36]389 F. 2d 281, 285 (D.C. Cir., 1967).
[37][1970] S.C.R. 263.
[38]*Ibid.*, at p. 269, quoting Davey, C.J.B.C. in (1968), 64 W.W.R. 721, 724.
[39][1961] S.C.R. 535.
[40][1970] S.C.R. 263, 268.
[41]*Ibid.*, at p. 278.
[42]*Ibid.*, at pp. 279-280.

In 1970 the English Law Reform Committee recommended that:

> the opinion of an expert witness on a matter within his field of expertise should be admissible, notwithstanding that it involves the expression of the witness's opinion upon an issue in the proceedings.[43]

The *Civil Evidence Act 1972* reflects the Committee's recommendations:

> 3.—(1) Subject to any rules of court made in pursuance of Part I of the Civil Evidence Act 1968 or this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

In the United States, the relevant Federal Rule reads as follows:

> 704. Opinion on Ultimate Issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.[44]

(b) *Recommendation*

We have concluded that there is need for clarification of the law in Ontario. We recommend the following be added to *The Evidence Act:*

> Where a witness in a proceeding is qualified to give opinion evidence, his evidence in the form of opinions or inferences is not made inadmissible because it embraces an ultimate issue of fact. [Draft Act, Section 15.]

4. Appointment of Court Experts

(a) *Discussion*

Since the eighteenth century, with the change from the use of court appointed experts and special juries, to the use of experts called by the parties testifying as witnesses,[45] adverse criticism has been directed at the apparent partisanship displayed by experts. Too often, unfortunately, the criticism has been unfairly aimed at the expert and his profession, which is in no way responsible for the present system. Often, counsel seeks not the best expert to elucidate the matter in issue, but rather the best witness for his cause. Jessel, M.R., condemned this practice saying:

> . . . I have, as usual, the evidence of experts on the one side and on the other, and, as usual, the experts do not agree in their opinion. There is no reason why they should . . . the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does sometimes, to half-

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[43]Seventeenth Report of the Law Reform Committee, *Evidence of Opinion and Expert Evidence*, Cmnd. 4489 (1970), at p. 31.

[44]Federal Rules of Evidence, 28 U.S.C.A., Rule 704. See also National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953), Rule 56(4); Cal. Evidence Code, §805 (West, 1968).

[45]See Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901), 15 Harv. L. Rev. 40; and Rosenthal, "The Development of the Use of Expert Testimony" (1935), 2 Law and Contemporary Problems 403.

> a-dozen experts . . . . He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, Will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty . . . I have always the greatest possible distrust of scientific evidence . . . I am sorry to say the result is that the Court does not get the assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.[46]

It has been said that the role of the trier of fact in weighing such evidence is difficult and that it becomes impossible when two experts express diametrically opposed views. His decision turns not on facts proved in evidence, but on which expert he believes. Spellman puts it this way:

> This presents a quandary which, except by coincidence, is remote from any concept of justice. The question at bar should be what is the proper conclusion to be drawn from record facts. By the nature of the case, no external criteria are available to the fact-finder to enable him to work his way out of the presented dilemma. Thus, strange as it may seem, the fact-finder, as to this phase of the litigation, is basing his finding on a conclusion as to *credibility*.[47]

A partial solution to the problem of inherent bias in an expert called by a party, may be a return to providing the necessary assistance through a court appointed expert.[48]

As the adversary system developed, the power of the trial judge to call witnesses of any kind declined, especially in civil cases. The view was favoured that the judge should determine the dispute on the basis of the issues raised by the parties and in accordance with the evidence they saw fit to introduce.[49] Whether there remains in Ontario any inherent common law right in the court to appoint experts as assessors to assist the court on its own motion, is a matter of some doubt.[50] In *Phillips* v.

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[46]On the hearing of a motion in *Thorn* v. *Worthing Skating Rink Co.*, as noted in *Plimpton* v. *Spiller* (1877), 6 Ch. D. 412, 416. But see *More* v. *The Queen*, [1963] S.C.R. 522, at pp. 537-538 (S.C.C.), where the court criticizes the trial judge's instruction to the jury for his "unwarranted disparagement" of the expert evidence: the trial judge had quoted extracts from Phipson, Taylor, and Lord Campbell to the same effect as the statement of Jessel, M.R. See, too, Overholser, *The Psychiatrist and the Law* (1952), at pp. 106-14.

[47]Spellman, *Direct Examination of Witnesses* (1968), at p. 139.

[48]See McCormick, "Some Observations Upon the Opinion Rule and Expert Testimony" (1945), 23 Texas L. Rev. 109, 130-136; and 2 Wigmore, *Evidence*, §563 (3rd Ed. 1940). For statutory recommendations to such effect see Uniform Rules of Evidence (1953), Rules 59, 61; and Model Code of Evidence (1942), Rules 403-10. But see Levy, "Impartial Medical Testimony—Revisited" (1961), 34 Temple L.Q. 416.

[49]See *Jones* v. *National Coal Board*, [1957] 2 Q.B. 55; *Fowler* v. *Fowler and Jackson*, [1949] O.W.N. 244 (C.A.); but seemingly *contra* in criminal cases, see *R.* v. *Dora Harris*, [1927] 2 K.B. 587.

[50]The question appears to have been conclusively resolved in the United States: see Advisory Committee's Note to Rule 706 of the Federal Rules of Evidence, 28 U.S.C.A., at pp. 518-519.

Ford Motor Co. of Canada Ltd.,[51] Evans, J.A., although saying that it was not necessary to his decision, stated:

> I have purposely refrained from referring to Mr. McCaffrey [the expert appointed by the court] as an assessor because I entertain considerable doubt as to the authority of an Ontario Court, since the repeal of s. 101 of *The Judicature Act*, R.S.O. 1897, c. 51, by 1913 (Can.), c. 19, s. 125, to introduce into a trial an assessor or in fact any person who was not a party, a witness, a counsel, a Judge or referee.[52]

The learned judge considered the status and function of McCaffrey as an expert appointed under Rule 267, which reads in part as follows:

> 267(1) The court may obtain the assistance of merchants, engineers, accountants, actuaries, or scientific persons, in such way as it thinks fit, the better to enable it to determine any matter of fact in question in any cause or proceeding and may act on the certificate of such persons.[53]

Of McCaffrey's functions, the learned judge said:

> [I believe] that the purpose of such appointment is solely to assist the Judge in understanding the evidence. I do not conclude that the trial Judge had any difficulty in understanding the evidence. . . . The most that Mr. McCaffrey was entitled to do was to assist in determining the facts from the evidence. The drawing of inferences, the deciding of issues, the interpretation of the so-called phenomenon and the reaching of conclusions are all matters within the exclusive jurisdiction of the trial Judge and cannot be delegated. I do not think that a court can say, in effect, 'I believe that this accident resulted from some unusual circumstance and I propose to call in an expert to assist me in discovering the cause.' . . . While Rule 267 permits the Court to obtain the assistance of experts in such way as it thinks fit, such assistance must be restricted to the purpose of better enabling the Court to determine from the evidence adduced the questions of fact in issue.[54]

The technique followed in civil law jurisdictions is to permit the court to select experts to inform it of their opinion based on their own particular knowledge and experience.[55] Such experts are permitted not

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[51][1971] 2 O.R. 637, 18 D.L.R. (3d) 641.
[52][1971] 2 O.R. at p. 663, 18 D.L.R. (3d) at p. 667.
[53]R.R.O. 1970, Reg. 545, Rule 267(1).
[54][1971] 2 O.R. at pp. 660-661, 18 D.L.R. (3d) at pp. 664-665.
[55]See Hammelmann, "Expert Evidence" (1947), 10 Mod. L. Rev. 32; Ploscowe, "The Expert Witness in Criminal Cases in France, Germany and Italy" (1935), Law and Contemporary Problems 504; and Schroeder, "Problems Faced by the Impartial Expert Witness in Court; The Continental View" (1961), 34 Temple Law Q. 378.

only to give their opinions, but they may also conduct independent investigations for the purpose of preparing their written reports.[56]

Under the federal criminal procedure in the United States, the trial judge is permitted to select an expert[57] in addition to the experts called by the parties. The court's expert may express his opinion and is not confined solely to the role of interpreter.[58] This practice forms the basis for Rule 706 of the Federal Rules of Evidence which reads:

> 706. Court Appointed Experts
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> *(a) Appointment.* The court may on his own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.
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> *(b) Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
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> *(c) Disclosure of appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
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> *(d) Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.[59]

Apparently the rule in federal criminal cases is seldom used.[60] The question arises whether it is a desirable compromise with the civil law system,

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[56]See *e.g.*, Quebec Code of Civil Procedure, S.Q. 1965, ch. 80, ss. 414-25. Compare also the position of assessors in admiralty cases at common law where expert evidence on matters within the sphere of the assessors cannot be led by the parties: See Halsbury's Laws of England, (4th Ed.), Vol. 1, para. 443, at p. 283. For Canadian adoption of the English approach, see: *Montreal Harbour Comm.* v. *The Universe* (1906), 10 Ex. C.R. 305; and *Fraser* v. *Aztec* (1920), 20 Ex. C.R. 39.

[57]See 2 Wigmore, *Evidence*, §563 (3rd Ed., 1940).

[58]See Beuscher, "The Use of Experts by the Courts" (1940), 54 Harv. L.R. 1105.

[59]Federal Rules of Evidence, 28 U.S.C.A., Rule 706.

[60]Wright, *Federal Practice and Procedure, Criminal*, Vol. 2, at pp. 229-33.

since the parties' experts are forced to testify in the face of the testimony of another expert who bears "the accolade flowing from a judicial appointment".[61] As DeParcq, commenting on a similar provision in the Uniform Rules, said:

> Although the rules purport to allow the parties to call other experts of their own, they might just as well save their money. The testimony of the court-appointed expert will be accepted as gospel, while any other expert testimony will be sound and fury, signifying nothing.[62]

This may or may not be true, but the parties may feel that the court's appointed expert is in a preferred evidentiary position to one called by a party.

In England, despite similar rules of the Supreme Court permitting the appointment of independent court experts on the application of the parties,[63] the power is seldom used. Lord Denning, M.R., commented in *Re Saxton:*

> . . . Neither side has applied for the court to appoint a court expert. It is said to be a rare thing for it to be done. I suppose that litigants realize that the court would attach great weight to the report of a court expert: and are reluctant thus to leave the decision of the case so much in his hands. If his report is against one side, that side will wish to call its own expert to contradict him and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well. In the circumstances the parties usually prefer to have the judge decide on the evidence of experts on either side, without resort to a court expert.[64]

In 1970 the Law Reform Committee considered provisions for the appointment of court experts and concluded that the introduction of a "general court expert system is not desirable".[65] The Committee concluded that its recommendations with respect to the simultaneous disclosure by the parties of experts' reports would obviate the need for court appointed experts. It found the following objections to such a system compelling:

> [The exchange of experts' reports] we think, will eliminate the need for oral expert testimony except on matters upon which there is room for a genuine difference of expert opinion or where the expert opinion has to be based upon facts which are in dispute between the parties and of which the true version will only be ascertained in the course of the hearing of the oral evidence of witnesses of fact. The role of a court expert in either type of case presents great practical difficulties. The first problem is the choice of expert. What voice are

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[61]*Per* Hincks, J., in dissent in *Scott* v. *Spanjer Bros. Inc.*, 298 F. 2d 928, 933 (2nd Circ. 1962).

[62]Deparcq, "The Uniform Rules: A Plaintiff's View" (1956), 40 Minn. L. Rev. 301, 334.

[63]R.S.C. 1973, Order 40, Rules 1-6.

[64][1962] 3 All E.R. 92, 95.

[65]Seventeenth Report of the Law Reform Committee, *Evidence of Opinion and Expert Evidence*, Cmnd. 4489, (1970) Rec. 4, at p. 31.

the parties to have in his selection if they are unable to agree upon who should be appointed? How is the judge to assess the validity of their objections to particular appointees nominated by the court? Next, how is the expert once appointed to inform himself of the facts upon which to base his report? If they are in controversy it would be for the judge to find the facts, not for the expert to hear and determine disputed matters of evidence. His report would have to await the judge's findings. The alternative of inviting him to report in advance on various hypotheses of fact would run the risk that the correct hypothesis, which would be known only at the conclusion of the evidence, had not been stated. Finally, there is the problem of the use to be made of his report. Plainly it would be contrary to our system of administering justice if it were final and conclusive on the matters of expertise with which it dealt, without giving to the parties an opportunity in open court to persuade the judge that it was wrong. Is the court expert to be called at the trial to be cross-examined by any party who wishes to do so? And, if so, are the parties to be entitled to call expert evidence in rebuttal?[66]

Assessors are provided for in the Supreme Court Rules[67]. Historically, assessors were seldom used except in admiralty cases. Although in England admiralty cases are no longer tried in a separate Division[68] the Rules of Court still provide for the appointment of nautical assessors in such cases.[69]

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[66]*Ibid.*, at p. 8.

[67]R.S.C. 1973, Order 33, r. 6.

[68]See *Administration of Justice Act 1970*, c. 31, ss. 1(3), 2(1).

[69]Order 75, r. 25(2). The function of assessors in the former Admiralty Division was described by the Law Reform Committee, as follows:

> to advise the judge on matters of nautical skill, knowledge and experience, particularly seamanship. . . . The function of an assessor in an Admiralty action is not to give evidence but to provide the judge with such general information as will enable him to take judicial notice of facts which are notorious to those experienced in seamanship about the corresponding characteristics of ships and of traffic conditions upon navigable waters, so that he may be qualified to reach an informed opinion about the standards of care to be observed by reasonable users of those waters. In effect, the nautical assessor's function is to enlarge the field of matters of which the judge may take judicial notice so as to include matters of navigation and general seamanship.
>
> It lies within the discretion of the court whether or not to admit expert evidence when the judge sits with a nautical assessor. The established practice in Admiralty actions is not to allow the parties to call expert witnesses as such upon matters of general seamanship; but it is to be borne in mind that in this kind of case the main witnesses of fact on each side are usually themselves experts in this general field. Leave, however, is given to call experts in cases involving special types of vessels or equipment about which more esoteric knowledge or experience is needed in order to form a reliable opinion.
>
> Consultation between the judge and the nautical assessor is continual and informal, both in court and in the judge's room. The advice which the judge receives from the assessor is not normally disclosed to counsel during the course of the hearing, although the judge may do so if he thinks fit. In his judgment he does usually state what advice he has received on particular matters and whether he has accepted it or not. But he is under no obligation to do so and the practice is not uniform among all judges: Law Reform Committee, footnote 65 *supra*, paras. 9-10, at p. 6.

In 1965, the Ontario Attorney General's Committee on Medical Evidence in Court in Civil Cases[70] discussed fully the methods of appointing experts in other jurisdictions with particular reference to medical experts. The Committee rejected, in principle, selection of experts by the court, either from panels or otherwise.

However, we have concluded that there is value in giving the court power to appoint an expert, so long as the rights of cross-examination are preserved. Our reasons for this conclusion are essentially the same as those expressed by the Advisory Committee in its Note to Rule 706 of the Federal Rules:

> The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled, . . . the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.[71]

In our view, the approach taken in Rule 706 of the Federal Rules should be adopted. It not only provides that a judge may act on his own motion to appoint an expert, but also provides for appointment on the application of one or both of the parties. In any case, the expert so appointed is subject to cross-examination by any party to the action.

(b) *Recommendation*

We recommend that *The Judicature Act* should be amended by adding the following section:

> (1) In any action, the court, upon the application of any party or upon its own motion, may appoint one or more persons qualified to give opinion evidence concerning the subject matter in issue, to make such investigation as the court considers expedient concerning the matter.
>
> (2) A person so appointed shall report his findings to the parties only and he may be called as a witness by the judge or any party and be subject to cross-examination by any of the parties to the action.
>
> (3) The court shall have the power to fix the compensation to be paid to such person and may direct payment thereof by the

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[70]*Report of the Attorney General's Committee on Medical Evidence in Court in Civil Cases* (1965).

[71]See Advisory Committee's Note to Rule 706, Federal Rules of Evidence, 28 U.S.C.A., at pp. 517-518.

parties in such proportions as the court may direct or out of the consolidated revenue fund.

(4) Where a person has been appointed under this section in an action tried by a jury, the court shall not disclose to the jury that such person was appointed by the court.

(5) Nothing in this section shall affect the rights of the parties to call witnesses to give opinion evidence.

If *The Judicature Act* is so amended, Rule 267 will be redundant and should be repealed.

5. Exchange of Reports of Experts

(a) *Discussion*

The Attorney General's Committee on Medical Evidence,[72] reporting in 1965, concluded that, in actions involving personal injuries, an exchange of medical reports between the parties ought to be a prerequisite to calling medical testimony. The Committee emphasized[73] that their recommendations were "designed to improve the administration of justice and to reduce the inconvenience to the members of the medical profession". As a result of the Committee's recommendations *The Evidence Act* was amended[74] to enact the present section:

52.—(1) Any medical report obtained by or prepared for a party to an action and signed by a legally qualified medical practitioner licensed to practice in any part of Canada is, with the leave of the court and after at least seven days notice has been given to all other parties, admissible in evidence in the action.

(2) Unless otherwise ordered by the court, a party to an action is entitled to obtain the production for inspection of any report of which notice has been given under subsection 1 within five days after giving notice to produce the report.

(3) Except by leave of the judge presiding at the trial, a legally qualified medical practitioner who has medically examined any party to the action shall not give evidence at the trial touching upon such examination unless a report thereof has been given to all other parties in accordance with subsection 1.

(4) Where a legally qualified medical practitioner has been required to give evidence *viva voce* in an action and the court is of opinion that the evidence could have been produced as effectively

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[72]See footnote 70, *supra*.

[73]*Ibid.*, *Conclusion* 13, at pp. 87-88.

[74]S.O. 1968, c. 36, s. 2; now R.S.O. 1970, c. 151, s. 52. The Committee's recommendations were first implemented by an amendment to *The Evidence Act* in 1966 (R.S.O. 1960, c. 125 as am. 1966, c. 51, s. 2) and the Ontario Rules of Practice were altered accordingly (O. Reg. 207/66, s. 7). The relevant rule was held to be *ultra vires* in *Circosta* v. *Lilly* ([1967], 1 O.R. 185 (H.C.J.); appeal allowed [1967] 1 O.R. 398 (C.A.)), since it effected a change in the substantive law.

> by way of a medical report, the court may order the party that required the attendance of the medical practitioner to pay as costs therefor such sum as it deems appropriate.

It appears that section 52 does not go as far as the Committee had hoped, since medical reports need only be exchanged when they are intended to be used by the parties at trial. There is no obligation to disclose where a party decides, perhaps because the report is adverse to his position, not to use a report prepared by a medical practitioner. The conclusions of the Committee do not appear to have contemplated such a limitation on enforced exchange.[75] However, in our view the rationale underlying the present section 52 does not extend necessarily in all its aspects to experts' reports in all proceedings over which the Legislature has jurisdiction.

In 1953 a Committee in England under the chairmanship of Lord Evershed[76] considered the matter of the exchange of experts' reports and made the following recommendations:

> Para. 289 In certain classes of cases the evidence of expert witnesses is necessary to explain the working of a machine or describe some process or other technical matter. Without their assistance counsel might not be able even to explain the case to the Court. At present, the reports and proofs and also the plans and drawings of such experts are privileged. They are not disclosed until the expert goes into the witness box except perhaps in the course of cross-examination. Much time is frequently wasted in cross-examination by counsel trying to understand what the expert witness for the other party is really saying and mastering the technical details of his evidence. A party is apt to rely on his expert's evidence as producing an element of surprise. This often leads to a waste of time and does not assist the Court in coming to an accurate decision as to the facts. The element of surprise is no doubt good tactics under the Rules as they exist at present and on the principles generally adopted today in contesting cases. In our view this element of surprise does not conduce to decisions in accordance with the true facts. The more this element is eliminated, the more correct is likely to be the judgment of the Court. It is, therefore, eminently desirable that each party should know what is the expert evidence to be called for the other side.
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> Para. 290 We recommend that the evidence of an expert should not be receivable in evidence unless a copy of his report has been made available for inspection by the other side at least ten days before the trial, unless for special reasons the Court or a Judge otherwise orders. This Rule should also apply to experts' plans, drawings and sketches. The majority of the witnesses before us

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[75] *Supra* footnote 70, at p. 86. Conclusion 5 simply states: "...other reports obtained by or for the plaintiff that are *relevant* to the injury complained of should be made available..."

[76] *Final Report of the Committee on Supreme Court Practice and Procedure* (*Evershed Committee Report*), Cmnd. 8878, (1953).

agreed with this suggestion. It would save time at the trial, reduce the element of surprise and in some cases might lead to agreement between the experts, if not in full, at least as to a considerable portion of their reports.[77]

The Evershed Committee specified that its views respecting expert evidence in general ought to be applicable to medical witnesses in personal injury actions. No medical evidence would be receivable at trial unless a copy of the witness' report had been previously made available to the other side.[78] A Report of a Joint Committee of the Bar, the Law Society and the British Medical Association[79] fully supported the recommendations of the Evershed Committee respecting the exchange of medical reports, subject to the qualification that it be implemented only after the more general recommendation applicable to expert evidence as a whole had been considered.[80]

Order 30 was added to the Rules of Practice in 1954 to give effect to these recommendations of the Evershed Committee,[81] but its effect was apparently short-lived; it is probably true that "the attempt made by the Evershed Committee to secure the exchange of experts' reports before trial has been almost completely nullified".[82]

In 1968 the Winn Committee, appointed to consider the jurisdiction and procedure of the English courts in actions for personal injury, recommended that in such actions the parties should, as a general rule, be required to disclose the relevant reports of the expert medical witnesses upon whose evidence they propose to rely.[83] The Committee's recommendations were reviewed by the Law Reform Committee in 1970 when

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[77]*Ibid.*, at paras. 289-290.

[78]*Ibid.*, at para. 352. See also para. 320(14) respecting this requirement for *all* experts.

[79]*Report of The Joint Committee on Medical Evidence in Courts of Law*, reproduced as Appendix No. 1 to the *Report of the Attorney-General's Committee*, footnote 70 *supra.*

[80]*Ibid.*, at paras. 23-24.

[81]R.S.C. (Summons for Directions) 1954; see now R.S.C. 1973, Order 25, esp. r. 6.

[82]See Note (1955), 71 L.Q.R. 314. In *Worrall* v. *Reich*, [1955] 1 Q.B. 296 (C.A.), an action for damages for personal injuries, the master, on a summons for directions, ordered the parties to exchange medical reports pursuant to Order 30, r. 6(1). Rule 6(1) conferred wide power on the court to order production of documents and was not confined to medical reports. The Court of Appeal in approving the purpose of the order said at pp. 298-299:

> The object of these provisions clearly is to ensure so far as possible that the parties . . . put all their cards on the table, so that the real issues between them emerge, and the amount of evidence necessary to be given, whether documentary or oral, may be limited to matters which are really in issue and seriously contested by the parties.

However, this object was held to be effectively negatived by Order 30, r. 6(4) which read:

> (4) Notwithstanding anything in the preceding provisions of this rule, no information or documents which are privileged from disclosure shall be required to be given or produced under this rule by or by the advisers of any party otherwise than with the consent of that party.

[83]*Report of the Committee on Personal Injuries Litigation*, Cmnd. 3691, (1968), at pp. 81-83.

it reported on expert and opinion evidence.[84] With respect to the compulsory simultaneous exchange of experts' reports the Committee recommended:

> 10. any compulsory pre-trial disclosure of experts' reports should be limited to cases where the report may be expected to be based on agreed facts or on facts ascertainable by the expert from his own observation or which are within his general professional knowledge and experience;
>
> 11. medical reports made by experts on whose evidence a party intends to rely at the trial should, as a general rule, be subject to compulsory disclosure (whether or not an order for such disclosure is applied for) and the onus of showing that a particular case is unsuitable for compulsory disclosure should be on the party seeking to avoid it;
>
> 15. compulsory disclosure of non-medical experts' reports should be capable of being ordered, but only on the application of the party seeking such disclosure and the onus should be on that party to show that such disclosure is appropriate.[85]

These recommendations were implemented,[86] in the *Civil Evidence Act 1972* as follows:

> 2.—(3) Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings or in connection with the obtaining or giving of legal advice are in certain circumstances privileged from disclosure, provision may be made by rules of court—
>
> (a) for enabling the court in any civil proceedings to direct, with respect to medical matters or matters of any other class which may be specified in the direction, that the parties or some of them shall each by such date as may be so specified (or such later date as may be permitted or agreed in accordance with the rules) disclose to the other or others in the form of one or more expert reports the expert evidence on matters of that class which he proposes to adduce as part of his case at the trial; and
>
> (b) for prohibiting a party who fails to comply with a direction given in any such proceedings under rules of court made by virtue of paragraph (a) above from adducing in evidence by virtue of section 2 of the Civil Evidence Act 1968 (admissibility of out-of-court statements), except with the leave of the court, any statement (whether of fact or opinion) contained in any expert report whatsoever in so far as that statement deals with matters of any class specified in the direction.[87]

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[84]Law Reform Committee, Seventeenth Report, *Evidence of Opinion and Expert Evidence*, Cmnd. 4489, (1970).

[85]*Ibid.*, at pp. 31-32.

[86]The limitation concerning privilege which led to the decision in *Worrall* v. *Reich*, discussed at footnote 82 *supra*, was specifically excluded.

[87]*Civil Evidence Act 1972*, c. 30, s. 2(3).

Under the Rules of Practice of the Federal Court of Canada a full statement of the proposed evidence-in-chief of an expert witness must be put into the form of an affidavit or other written form and a copy must be filed and served at least ten days before the trial.[88] Such evidence must relate to an issue that has been defined by the pleadings or by agreement by the parties filed under Rule 485.

Under *The Expropriations Act*,[89] a party to an application before the Land Compensation Board is required to serve upon the other parties, a copy of any appraisal report upon which he intends to rely at the hearing. We have been advised that this procedure is working quite satisfactorily. Where any attempt is made to escape from the requirement by stating that it is not proposed to rely on the report, but on the oral evidence of the expert, the Board allows an adjournment, if requested, to enable the party to consider the oral evidence. This practice has been salutary in giving effect to the spirit of the statute.

Another method of minimizing the element of surprise in the case of expert evidence is to permit the discovery by both parties of their opponent's expert witnesses. In the United States the Federal Courts have amended their Rules to permit a liberalized discovery of experts. As amended in 1970, Rule 26 provides:

> Rule 26(4): *Trial preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows: (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
>
> (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
>
> (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect

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[88]S.O.R. 71-68, Rule 482(1), (2).
[89]R.S.O. 1970, c. 154, s. 29(1).

> to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.[90]

Although the provisions for disclosure of experts' evidence may appear to be novel incursions into the adversary system, they are not without precedent. As early as 1782, in *Folkes* v. *Chadd*[91] Lord Mansfield permitted the reception of expert opinion evidence from scientists called by the parties. At the first trial, the opinion of Mr. Milne, an engineer, was received as to the cause of the decay of a harbour. The plaintiff obtained a verdict. However,

> . . . a new trial was granted, on the ground that the defendants were surprised by the doctrine and reasoning of Mr. Milne, and the parties were directed to print and deliver over to the opposite side the opinions and reasonings of the engineers whom they meant to produce on the next trial, so that both sides might be prepared to answer them.[92]

The recommendations made by the Evershed Committee, the Law Reform Committee, the English Joint Committee on Medical Evidence, the Attorney General of Ontario's Committee and the Advisory Committee on Federal Rules of Civil Procedure in the United States reflect a concern to avoid injustice by minimizing the element of surprise in adversary proceedings with respect to expert evidence. In our view such a concern is sound; where reports of experts have been prepared they should be made admissible in evidence and exchanged. However, the law should not restrict oral evidence in cases in which no report has been prepared. Where no report has been prepared and oral evidence is called, the rights of the parties may be safeguarded adequately in suitable cases by an adjournment.

The change we recommend may be resisted on the grounds set out by Lord Denning in *Re Saxton*:

> The court would not *order* the report of either expert to be shown to the other side before the trial. That could only be done by agreement. This is the familiar practice in all cases where experts are called, such as patent cases and Factory Act cases (where engineers are employed) or personal injury cases (where doctors are employed). The reports of experts are often exchanged by agreement, but no compulsion on either side is exercised; see *Worrall* v. *Reich*, [1955] 1 Q.B. 296. The reason is because, to our way of thinking,

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[90]Federal Rules of Civil Procedure, 28 U.S.C.A. For a full analysis of the problem, and recommendations for rules similar to that enacted see: Friedenthal, "Discovery and Use of an Adverse Party's Expert Information" (1962), 14 Stan. L. Rev. 455; and Long, "Discovery and Experts under the Federal Rules of Civil Procedure" (1965), 38 F.R.D. 111.

[91](1782), 3 Dougl. K.B. 157, 99 E.R. 589.

[92]*Ibid.*

> the expert should be allowed to give his report fully and frankly to the party who employs him, with all its strength and weakness, and not be made to offer it beforehand as a hostage to the opponent, lest he take unfair advantage of it. In short, it is one of our notions of a fair trial that, except by agreement, one side is not entitled to see the proofs of the other side's witnesses.[93]

The fears expressed by Lord Denning have not been justified by the experience with section 52 of *The Evidence Act* or under the practice in the Federal Courts of Canada.

(b) *Recommendation*

We therefore recommend that *The Evidence Act* be amended to include the following provision:

> (1) Any report, other than one to which section 17 applies, obtained by or prepared for a party to a proceeding and signed by a person entitled according to the law or practice to give opinion evidence is, with the leave of the court and after at least seven days notice has been given to all other parties, admissible in evidence in the proceeding.
>
> (2) Unless otherwise ordered by the court, a party to a proceeding is entitled to obtain the production for inspection of any report of which notice has been given under subsection 1 within five days after giving notice to produce the report.
>
> (3) Except by leave of the judge presiding at the proceeding, a person who has made a report mentioned in subsection 1 shall not give evidence at the proceeding touching upon any matter to which the report relates unless subsection 1 has been complied with.
>
> (4) This section applies only to proceedings in the Supreme Court and the county and district courts. [Draft Act, Section 16.]

6. Summary of Recommendations Dealing with Opinion Evidence.

We recommend the following amendments to *The Evidence Act*:

1. Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding. [Draft Act, Section 14.]
2. Where a witness in a proceeding is qualified to give opinion evidence, his evidence in the form of opinions or inferences is not made inadmissible because it embraces an ultimate issue of fact. [Draft Act, Section 15.]
3. (1) Any report, other than one to which section 17 applies, obtained by or prepared for a party to a proceeding and signed

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[93][1962] 3 All E.R. 92, 94.

by a person entitled according to the law or practice to give opinion evidence is, with the leave of the court and after at least seven days notice has been given to all other parties, admissible in evidence in the proceeding.

(2) Unless otherwise ordered by the court, a party to a proceeding is entitled to obtain the production for inspection of any report of which notice has been given under subsection 1 within five days after giving notice to produce the report.

(3) Except by leave of the judge presiding at the proceeding, a person who has made a report mentioned in subsection 1 shall not give evidence at the proceeding touching upon any matter to which the report relates unless subsection 1 has been complied with.

(4) This section applies only to proceedings in the Supreme Court and the county and district courts. [Draft Act, Section 16.]

We recommend that *The Judicature Act* be amended as follows:

4. (1) In any action the court upon the application of any party or upon its own motion, may appoint one or more persons qualified to give opinion evidence concerning the subject matter in issue, to make such investigation as the court considers expedient concerning the matter.

(2) A person so appointed shall report his findings to the parties only and he may be called as a witness by the judge or any party and be subject to cross-examination by any of the parties to the action.

(3) The court shall have the power to fix the compensation to be paid to such person and may direct payment thereof by the parties in such proportions as the court may direct or out of the consolidated revenue fund.

(4) Where a person has been appointed under this section in any action tried by a jury, the court shall not disclose to the jury that such person was appointed by the court.

(5) Nothing in this section shall affect the rights of the parties to call witnesses to give opinion evidence.

5. Rule 267 should be repealed.

CHAPTER 11

USE OF NOTES AND PAST RECORDS

1. Introduction

As a general rule a witness must give his testimony in court orally from memory, free from suggestion or instruction, in response to questions put to him by counsel. He may not recite from a prepared statement. A witness may, however, in certain circumstances be permitted to refer to notes while testifying.

The use of notes was divided at common law into two categories: notes used to refresh the witness' present memory of past events, and notes or things used to record past events of which the witness has no present memory. The distinction between these two common law categories, which is not always clearly maintained, must be examined before considering relevant legislation.

2. Use of Notes or Things to Revive Memory.

(a) *Discussion*

It is important to distinguish between the use of notes, drawings, maps or other things used to assist the witness to recall a circumstance, and the use of notes which record past events which the witness cannot recall.

If the witness' memory is truly revived by reference to a previously recorded note or other thing, his oral testimony is the evidence received by the court. The only function of the note or other thing is to revive his memory, thus enabling him to testify from his present recollection of previous events. The note or thing is not admissible as evidence *per se* of the matters contained in it and it forms no part of the actual testimony. It is not the authenticity of the written document that is in issue, but rather the witness' ability to recall and testify as to the past events. The principle governing the use of notes to revive memory is stated by Lord Ellenborough, C.J., in *Henry* v. *Lee*:

> It is sufficient if a man can positively swear that he recollected the fact, though he had totally forgotten the circumstance before he came into Court; and if upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference, that the memorandum was written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness.[1]

The writing may have been that of the witness himself or of others, "providing in the latter case that it was read by him when the facts were fresh in his memory and he knew the statement to be correct".[2]

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[1] *Henry* v. *Lee* (1810), 2 Chitty 124, 124-125, *per* Lord Ellenborough.
[2] Phipson, *Evidence* (11th Ed. 1970), para. 1528, at p. 633.

The note need not even be a written note but may be a tape recording of a conversation overheard.[3]

In *Lawes* v. *Reed*[4] Baron Alderson held that a witness can refresh his memory from notes of counsel taken on his brief at a former trial. He observed, however, that the witness must afterwards speak from his refreshed memory, and not merely from the notes. Sir Gregory A. Lewin, in a note to his report of this case clearly sets out the rationale of this rule:

> Where the object is to revive in the mind of the witness the recollection of facts of which he once had knowledge, it is difficult to understand why any means should be excepted to whereby that object may be attained. Whether in any particular case the witness's memory has been refreshed by the document referred to, or he speaks from what the document tells him, is a question of fact open to observation, more or less, according to the circumstances. But if, in truth, the memory has been refreshed, and he is enabled in consequence to speak to facts with which he was once familiar, but which afterwards escaped him, it cannot signify in effect in what manner or by what means those facts were recalled to his recollection.
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> Common experience tells every man, that a very slight circumstance, and one not in point to the existing inquiry, will sometimes revive the history of a transaction made up of many circumstances. The witnesses who come into the box to speak of facts of ancient date are generally schooled beforehand, and the means employed to refresh their memory are such as are deemed best calculated to accomplish that end. These persons afterwards swear to the facts from their own knowledge and recollection of them, and their testimony is received as a thing of course. Why, then, if a man may refresh his memory by such means out of Court, should he be precluded from doing so when he is under examination in Court?[5]

Often, in dealing with cases concerned with refreshing a witness' memory, the courts do not distinguish between cases in which the witness speaks from a revived memory, and cases in which the witness affirms past recollection recorded. Although it is clear that a witness need have no independent recollection of events to which he is prepared to testify on the basis of a document recording the events,[6] it is confusing and inappropriate to use the term "refreshing memory" to refer to cases of past recollection recorded:

> that is a very inaccurate expression; because in nine cases out of ten the witness's memory is not at all refreshed; he looks at it (the document) again and again; and he recollects nothing of the transaction; but, seeing that it is in his own handwriting, he gives credit to the truth and accuracy of his habits, and, though his memory is a perfect blank, he nevertheless undertakes to swear to the accuracy of his notes.[7]

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[3]*R.* v. *Mills, R.* v. *Rose*, [1962] 3 All E.R. 298.
[4][1835] 2 Lewin 152, 168 E.R. 1111.
[5]*Ibid.*, at p. 153.
[6]*Fleming* v. *Toronto Railway Co.* (1912), 25 O.L.R. 317.

Where notes or documents are used to revive memory, the notes or documents should not, logically, be admitted in evidence; in this case it is the oral testimony of the witness upon which the court should rely. In Canada, however, while the courts have stated, generally, that documents used to refresh memory are not themselves evidence, they have not, in enunciating the general principle, distinguished between the two types of cases to which we have referred; as a result, it is not clear to which type of case the prohibition extends. For example, in *Young* v. *Denton and Tate*[8] a witness spoke from a business pad kept as a sort of diary which recorded his activities from day to day. The case, which was one of vicarious liability, turned on whether the employee was travelling on the defendant's business on the date of the accident giving rise to the action. The trial judge considered that the diary, kept as it was on consecutive days recording the services of the employee, was corroborative of the defendant's evidence that the employee had not performed services for him on the relevant date. The Saskatchewan Court of Appeal held that the memorandum was not admissible in evidence and directed a new trial. It is not clear from the judgment whether the witness used the record to revive his memory, or whether he spoke from the record as past recollection recorded.

Cross, dealing with conditions on which memory may be refreshed by reference to documents, says:

> The document must have been made substantially at the same time as the occurrence of the events to which the witness is required to depose, it must have been made or read over by, or under the supervision of, the witness, it must be produced to the court or opposite party on demand, and in one class of case, the document must be the original.[9]

Phipson states:

> A witness may refresh his memory by reference to any writing made or verified by himself concerning, and contemporaneously with, the facts to which he testifies; but such documents are no evidence *per se* of the matters contained.
>
> . . .
>
> The writing [from which the witness refreshes his memory] may have been made either by the witness himself, or by others, providing in the latter case that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct.[10]

However, certain cases dealing with the use of prior depositions to refresh a witness' memory appear to be inconsistent with the requirements of contemporaneity of the document, and verification by the witness. In *Reference Re Regina* v. *Coffin,*[11] the majority of the Supreme Court of

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[7]Hayes, J., in *Lord Talbot de Malahide* v. *Cusack* (1864), 17 I.C.L.R. 213 at p. 220.

[8][1927] 1 D.L.R. 426, [1927] 1 W.W.R. 75.

[9]Cross, *Evidence* (4th Ed. 1974), at p. 204. Cross notes that Wigmore's contention that these conditions need not be met in cases where memory is revived, is not supported by the English cases: *Ibid.*, at p. 206, footnote 2.

[10]Phipson, *Evidence* (11th Ed. 1970), para. 1528, at pp. 632-33.

[11][1956] S.C.R. 191.

Canada were of the view that it was acceptable for Crown counsel to show a witness her deposition taken at the preliminary inquiry for the purpose of refreshing her memory at a subsequent trial. The argument in the case dealt mainly with whether Crown counsel, in showing the prior deposition to the witness and questioning her concerning it, was in effect cross-examining her on the basis of prior inconsistent statements. Cartwright, J., dissented on the ground that the prior deposition was used, not to refresh the witness' memory, but to impeach her by cross-examination.

Kellock, J., stated that the witness' evidence was admissible on the ground that the witness

> [h]aving answered that . . . [her memory of the facts at the time of the preliminary hearing] was 'a little better than they are now' . . . [and] that her memory when she had thus testified was 'not too bad I guess', . . . was adopting as the fact what she had said at the preliminary inquiry and her evidence is to be taken accordingly.[12]

The learned judge continued:

> Moreover, the authorities make it clear that a witness may be allowed to refresh his memory by reference to his earlier depositions and that it is only where the object of the examination is to discredit or contradict a party's own witness that s. 9 of the *Canada Evidence Act* [dealing with impeachment of one's own witness] applies. [13]

In coming to this conclusion, Kellock, J., relied on two nineteenth century English judgments, which some authors[14] regard as frail authority for the *Coffin* decision. In *R.* v. *Williams*[15] a prosecution witness had testified differently from counsel's expectations; counsel was permitted to show the witness an earlier deposition for the purpose of refreshing his memory. When the witness continued to give the same answer after refreshing his memory, the court permitted counsel to put the question in a leading form. Kellock, J., also quoted an extract from the judgment of Coleridge, J., in *Melhuish* v. *Collier,*[16] suggesting that a witness may be asked whether he made the same answer in earlier proceedings, if it is done, not to discredit the witness, but merely to remind him of an earlier answer. The line may often be a difficult one to draw. The case of *Melhuish* v. *Collier* has always been analysed in terms of the law relating to prior inconsistent statements.[17] Neither case, therefore, may be strictly relevant to a discussion of using depositions to refresh memory.

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[12]*Ibid.*, at p. 211.

[13]*Ibid.*, at pp. 211-212.

[14]See Cross, *Evidence* (4th Ed. 1974), at p. 204, footnote 8 and text accompanying.

[15](1853), 6 Cox C.C. 343.

[16](1850), 19 L.J.Q.B. 493, 15 Q.B. (A & Ens.) 878.

[17]In *Wawanesa Mutual Insurance Co.* v. *Hanes* ([1961] O.R. 495, 502, 28 D.L.R. (2d) 386, 393, upheld on appeal (on different grounds) to Supreme Court of Canada ([1963] S.C.R. 154), Porter, C.J.O., analysed the case and concluded that "at common law questions could have been put to a witness by the party calling him as to former inconsistent statements if it were not done with the object of impeaching the credit of the witness, although consequentially it might have this effect. The cases illustrate the obvious difficulties in drawing a line of distinction".

In *R.* v. *Woodcock*[18] a court consisting of Lord Parker, C.J., Ashworth and Winn, J.J., held that a trial judge was wrong in letting a witness refresh his memory from a deposition previously taken since it was not a contemporaneous note or record.

In our view, the approach adopted in the *Woodcock* decision is preferable as being more consistent with the requirement that the note be a contemporaneous record, made or verified by the witness. In addition we think that, where a witness uses a document or note to revive his memory, the document should not itself become evidence.

(b) *Recommendation*

We think that the law concerning the use of writings to revive memory should be clarified by statute. We recommend that *The Evidence Act* be amended by including the following section:

> (1) Where a witness in a proceeding is unable to recall fully any matter upon which he is being questioned, he may use any writing or other thing made or verified by him or under his direction at the time of the event or within a reasonable time thereafter in order to revive his memory.
>
> (2) Where a writing or other thing is used by a witness in a proceeding in order to revive his memory, any adverse party is entitled to inspect the writing or thing and may cross-examine the witness concerning it.
>
> (3) A writing or other thing used by a witness in a proceeding to revive his memory shall not be used as evidence of the facts stated therein. [Draft Act, Section 37.]

3. Past Recollection Recorded

(a) *Discussion*

Fleming v. *Toronto Railway Co. Ltd.*,[19] is the leading Ontario case on the use of a written record, where the witness has no independent recollection. In that case, Middleton, J., refused to permit an inspector to testify as to the inspection of the streetcar in question by looking at an inspection record signed by him, unless the witness could say by refreshing his memory from looking at the sheet that he remembered the inspection. On appeal, Meredith, J.A., remitted the case for a new trial stating:

> If, looking at the report, the witness could have said, 'That is my report, it refers to the car in question, and shews that it was examined at that time, and, though I cannot from memory say that it was then examined, I can now swear that it was, because I signed no report that was untrue, and at the time I signed this report I knew that it was true,' that would, of course, be very good evidence.

The use of past recollection recorded is quite different from the use of notes or things to revive the memory. In cases of past recollection re-

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[18][1963] Crim. L.R. 273.
[19](1911), 25 O.L.R. 317 (C.A.).

corded, a witness does not purport to have a memory of the events in question but introduces the record as evidence of the facts contained therein and sworn to be correct because he recorded them correctly. The record becomes the evidence and is presented to the court as such.[20]

It is often difficult to know how a witness may be using the notes in question. The distinction between present memory revived and past recollection recorded is often a subtle one. Yet the rules relating to the two appear to differ. Notes that may be admissible when a witness' memory has failed completely, will not necessarily be admissible if they are used merely to jog his memory.

The use of notes as past recollection may be classified as an exception to the hearsay rule, or it may be an independent rule that permits a witness to incorporate the written record as his testimony. The analysis depends on how broadly one defines hearsay.[21] However it is analysed, such evidence differs from the standard hearsay testimony because the declarant is himself before the court, and his capacities of perception and his disposition to make an honest use of his own notes may be examined.

Where the notes have been written by two or more people, the task of evaluating the weight to be assigned to the document is more difficult; where one person observes a fact and reports it to another, who makes a record, the document would appear to be almost as reliable as if the observer had himself made the record, so long as he verifies the accuracy of that record while memory of it is still fresh in his mind.[22]

Rules that have been developed concerning the admissibility of records of events now no longer remembered, appear to guarantee a certain *prima facie* trustworthiness. The basic principle is that the writer must have had personal knowledge of the matter recorded, and that the record must have been made at, or close to, the time of the event recorded. Whether the elapsed time between the event and the making of the record will be considered too long depends upon the circumstances of each case, but the recollection must be fresh in the mind of the observer. He must be able to swear to the accuracy of the record by remembering his belief at the time that the record was true, or by relying upon a general habit of correctness. The observer of the event need not be the actual recorder, so long as the observer verifies the record at the time his recollection was fresh. In addition, the original of the record must be produced unless it is no longer available.

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[20]3 Wigmore, *Evidence*, §749(3) (Chadbourn Rev. 1970).

[21]A commonly accepted English definition is:

> evidence of a statement made by a person who is not himself called as a witness, when the object of the evidence is to establish the truth of what is contained in the statement. (*Subramaniam* v. *D.P.P.*, [1956] 1 W.L.R. 965)

If hearsay is limited to statements made by a person other than the witness who is testifying, using notes in this fashion could not be considered hearsay. In the United States, on the other hand, hearsay is sometimes defined more broadly, to include out-of-court statements by the person testifying; on the basis of this definition, the use of notes as past recollection recorded could be considered hearsay.

[22]This problem is particularly relevant to the subject of "business records": see section 4, *infra*.

It can be argued that the use of notes in this way offends the rule against narrative, that oral testimony should be free from suggestion or instruction. It is thought that the testimony will fail to represent the witness' sincere and actual recollection. It is apparent, however, that most jurisdictions permit the use of past recollection recorded, and allow the witness to "adopt" the record, provided it fulfils the criteria set out above. Whether this is regarded as an exception to the hearsay rule or whether the written record merely becomes part of the witness' oral testimony seems to be of only academic significance.

(b) *Recommendation*

We recommend that the law should be clarified by adding the following section to *The Evidence Act*:

> (1) Where a witness in a proceeding is being questioned upon any matter concerning which he had prior knowledge but which he is unable to recall, he may read from any record concerning any fact stated therein of which direct oral evidence given by the witness would be admissible,
>
> (a) if the record was made by him contemporaneously with the occurrence of the matter or subsequently while the matter was still fresh in his mind; or
>
> (b) if, where the record was made by a person other than the witness, it was checked as to its accuracy by the witness subsequently while the occurrence was still fresh in his mind.
>
> (2) Any portion of a record read from under subsection 1 shall be introduced in evidence together with such other portions of the record as the court may direct to be admitted as explanatory thereof.
>
> (3) Where it is not practical to introduce the original record, a copy thereof may be introduced as the court may direct. [Draft Act, Section 38.]

4. Records Made in the Course of Duty

(a) *Business Records*

(i) *Discussion*

The Evidence Act (Ontario) provides:

> 36. (1) In this section,
>
> (a) "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;
>
> (b) "record" includes any information that is recorded or stored by means of any device.
>
> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any

business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

(3) Subsection 2 does not apply unless the party tendering the writing or record has given at least seven days notice of his intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

At common law, statements made in the course of duty are recognized as an exception to the hearsay rule. To render such statements admissible, the declarant must be dead; he must have been under a duty to record the act; the declarations must have been made contemporaneously with the acts to which they relate; and the declarant must have had personal knowledge of the facts so recorded. This exception is, in practice, so narrow that it would frequently be inapplicable to modern business records. For example, in *Myers* v. *D.P.P.*,[23] records of engine serial numbers systematically recorded on the assembly line were nonetheless held to be inadmissible at common law as hearsay evidence.

Before the *Myers* case, some courts in Canada began to admit documents as "business entries". In *J. H. Ashdown Hardware Co. Ltd.* v. *Singer*,[24] the court permitted the plaintiff's credit manager to testify concerning the manner in which delivery records were made, and then admitted the records themselves as proof of the facts contained therein. The court followed *Omand* v. *Alberta Milling Co.*,[25] and referred to the necessity of allowing records of business transactions to be admitted in the light of modern practices. In the *Omand* case, certain passages in *Wigmore* concerning records as past recollection recorded were relied on. In both cases there appears to be some confusion between "business entries" and documents admitted under the rules relating to past recollection recorded.

These cases were reviewed by the Supreme Court of Canada in *Ares* v. *Venner*.[26] The court refused to follow the majority judgment in the *Myers* case and adopted the minority view that judge-made law concerning the hearsay rule "needs to be restated to meet modern conditions". The court held that "hospital records including nurses' notes, made con-

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[23][1965] A.C. 1001.
[24][1952] 1 D.L.R. 33, 3 W.W.R. 145.
[25][1922] 3 W.W.R. 412, 18 Alta. L.R. 383.
[26][1970] S.C.R. 608.

temporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein."[27]

This case settles the common law in Ontario; although the statement refers only to hospital records, it may be inferred that this decision also settles the law applicable to records of other businesses made in similar circumstances.

In an earlier case, *Adderly* v. *Bremner*,[28] Brooke, J., construing section 36 of the Ontario Act, held that it was not broad enough to permit the admission of hospital records in which statements of opinion and impressions were recorded as well as events occurring prior to the admission of the plaintiff to the hospital.

In *Aynsley* v. *Toronto General Hospital*[29] Morand, J., construed the section as applying to:

> . . . such routine entries in a hospital record as the date of admittance, the time of admittance, the name of the attending physician, the routine orders as to care of the patient such as the administration of drugs, notation by the nurse of taking temperatures . . .[30]

However, it would appear that the *Ares* case may be applied to render admissible records which could not be admitted under the strict wording of section 36 of *The Evidence Act*. It is a decision declaring the common law in Canada. Section 36(5) of the Ontario Act contains the following provision:

> 36. (5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

The *Canada Evidence Act* deals exhaustively with the subject of business records in section 30.[31]

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[27]*Ibid.*, at p. 626.
[28][1968] 1 O.R. 621.
[29](1972), 25 D.L.R. (3d) 241 (S.C.C.); [1969] 2 O.R. 829; [1968] 1 O.R. 425.
[30][1968] 1 O.R. 425, 432.
[31]R.S.C. 1970, c. E-10, s. 30, provides:

> 30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding upon production of the record.
>
> (2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may upon production of the record admit the record for the purpose of establishing that fact and may draw the inference that such matter did not occur or exist.
>
> (3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by an affidavit setting out the reasons why it is not possible or reasonably practicable to produce the record and an affidavit of the person who made the copy setting out the source from which the copy was made and attesting to its authenticity, each affidavit having been sworn before a commissioner

or other person authorized to take affidavits, is admissible in evidence under this section in the same manner as if it were the original of such record.

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation, accompanied by an affidavit of that person setting forth his qualifications to make the explanation, attesting to the accuracy of the explanation and sworn before any commissioner or other person authorized to take affidavits, is admissible in evidence under this section in the same manner as if it were the original of such record.

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of such other part thereof be produced by that party as the record produced by him.

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record received in evidence under this section, the court may, upon production of any record, examine the record, receive any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

(7) Unless the court orders otherwise, no record or affidavit shall be received in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by such party.

(8) Where evidence is offered by affidavit under this section it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be
  (i) a record made in the course of an investigation or inquiry,
  (ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,
  (iii) a record in respect of the production of which any privilege exists and is claimed, or
  (iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record the production of which would be contrary to public policy; or

(c) any transcript or recording of evidence taken in the course of another legal proceeding.

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

(a) any other provision of this or any other Act of the Parliament of Canada respecting the admissibility in evidence of any record or the proof of any matter, or

In the United States, the Model Code of Evidence, the Uniform Rules, 1953, and the Federal Rules of Evidence all deal at length with business entries.[32] All three require that witnesses be produced to account for the gathering, transmitting and recording of the information. The Federal Rules, for example, expressly provide that a requisite foundation be laid by "the custodian or other qualified witness".[33]

The Model Code and the Uniform Rules, 1953, provide for the admissibility of records kept "in the regular course of business", with the definition of "business" being broad enough to include activities not carried on for profit.[34] The proposed Federal Rules contained the phrase "regularly conducted activity" which appears to be somewhat broader. For example, regular entries in a personal diary may be a regularly conducted activity, but not an entry made in the regular course of business, as usually defined. However, the Committee on the Judiciary were of the view that there were insufficient guarantees or reliability in records made in the course of activities which were not business activities,[35] and the Federal Rules now refer to "records kept in the course of a regularly conducted business activity", business being defined to include activities not conducted for profit.

The broader the definition of "business", the more frequently difficulties tend to arise concerning the reliability of the source of the information. In addition, in certain cases, as for example where there is a

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(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

(12) In this section

"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

"copy", in relation to any record, includes a print, whether enlarged or not, from a photographic film of such record, and "photographic film" includes a photographic plate, microphotographic film or photostatic negative;

"court" means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

"legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

"record" includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript received in evidence under this section pursuant to subsection (3) or (4).

[32]See American Law Institute, Model Code of Evidence (1942), Rule 514; National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953), Rule 63(13) (now superseded by the Uniform Rules of Evidence (1974)); Federal Rules of Evidence, 28 U.S.C.A., Rule 803(6).

[33]Federal Rules of Evidence, U.S.C.A., Rule 803(6).

[34]See Model Code of Evidence, footnote 32 *supra*, Rule 514; and Uniform Rules of Evidence (1953), footnote 32 *supra*, Rules 62 and 63(13).

[35]See Note of Committee on the Judiciary to Rule 803(6), 28 U.S.C.A. at p. 579.

requirement to report an accident, the recorder may have a strong motive to falsify evidence. The American codifications exhibit concern about the problems of reliability and the motivation of the informant. Rule 63(13) of the Uniform Rules requires the judge to find that "the method and circumstances of their [the entries] preparation were such as to indicate their trustworthiness". Rule 514 of the Model Code requires:

> . . . that it was the regular course of that business for one *with personal knowledge* . . . to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record. [Emphasis added.]

Rule 803(6) of the Federal Rules of Evidence provides for the admissibility in evidence of the following:

> *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The Federal Rules require personal knowledge, and empower the court to exclude a record if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. In contrast, *The Evidence Act* (Ontario) makes the circumstances of preparation of the record a factor affecting weight, but not admissibility.[36]

Generally speaking, entries in the form of opinions are not found in traditional business records, since they tend to be of a purely factual and routine nature. However, there are exceptions such as entries made in hospital records, garage records and mechanics' records. The use of the words "act, transaction, occurrence or event"[37] in the Ontario Act would seem to exclude opinion from admissible records.[38] While the Model Code uses the words "act, event or condition",[39] the *Canada Evidence Act*, section 30(1), has used the more comprehensive term "matter". The Federal Rules specifically provide for the admission of diagnosis and opinion.[40]

Where a record contains data which is not purely factual, it may be persuasively contended that the person giving the diagnosis or opinion

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[36]R.S.O. 1970, c. 151, s. 36(4).
[37]*Ibid.*, s. 36(2).
[38]See *Adderley* v. *Bremner*, footnote 28 *supra*.
[39]Model Code of Evidence, footnote 32 *supra*, Rule 514(1).
[40]*Supra*, footnote 33, Rule 803(6).

ought to be available for cross-examination to permit a proper assessment of the value of his evidence to be made. However, cases in the United States seem to indicate a fairly wide-spread practice of admitting records of opinion where the issue is the performance of well-established functions. We think records containing such matters should be admissible as *prima facie* evidence

We think that, basically, section 30 of the Canada Act is an improvement on section 36 of the Ontario Act, and should be adopted in Ontario with certain changes, modifications and additions.

In the *Canada Evidence Act* there are important provisions that do not appear in the Ontario Act. The qualifying condition "where oral evidence in respect of the matter would be admissible . . ." is an important one and we think this qualification should be included in the Ontario Act. It makes it clear that evidence that would otherwise be inadmissible, for example, second hand hearsay, is not admissible under this section.

There is a second difference between the two Acts. Section 36(2) of the Ontario Act requires that the record be made "at the time of such act, transaction, occurrence or event or within a reasonable time thereafter" and thus appears to incorporate a principle relating to past recollection recorded. Under section 30(6) of the Canada Act a more flexible approach is taken by giving the court power to inquire "into the circumstances" of the making of the record for the purpose of deciding its admissibility or probative value. Certain difficulties may arise in the application of the relevant provisions. In some businesses, permanent records are made a considerable time after temporary records are made, at which time the latter are destroyed. While the latter may comply with section 35 or section 36 of the Ontario Act, it may be difficult for the permanent records to satisfy the requirement of contemporaneity, despite the fact that they may be as fully trustworthy as the temporary records made immediately after the event.

There is another essential difference between the Canada Act and the Ontario Act. The Canada Act uses the words "any matter", whereas the Ontario Act uses the more detailed: "any writing or record made of any act, transaction, occurrence or event". As we have seen, this provision was held in *Adderly* v. *Bremner*[41] to exclude hospital records containing expressions of opinion. In our view the word "matter" is preferable, as being more comprehensive and contemplating the admissibility of records of opinion which we have recommended should be admissible as *prima facie* evidence. It is moreover the very word used by Hall, J., in his judgment in the *Ares* case.[42]

To be admissible in evidence under the Ontario Act, a record must not only be made in the usual and ordinary course of business; it must be part of the usual and ordinary course of business to make such a record. The Canada Act merely requires that the record be made in the usual and ordinary course of business. We think that the additional On-

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[41][1968] 1 O.R. 621.
[42][1970] S.C.R. 608, 626.

tario qualification, that it be in the ordinary course of the business to make the records sought to be introduced in evidence, should be retained as tending to guarantee a routine and, hence, *prima facie* trustworthy entry.

Subsections 2 to 11 of section 30 of the Canada Act are all useful provisions and should be incorporated in the Ontario Act. Subsection 12 containing the interpretative clauses is more comprehensive than section 36(1)(a) of the Ontario Act, and, with appropriate modification, should be adopted.

(ii) *Recommendation*

We recommend that section 36 of *The Evidence Act* be repealed and the following be substituted therefor:

(1) In this section,

(a) "business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

(b) "copy", in relation to any record, includes a print, whether enlarged or not, from a photographic film of such record, and "photographic film" includes a photographic plate, microphotographic film or photostatic negative;

(c) "record" includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections 4 and 5, any copy or transcript received in evidence under this section pursuant to subsection 4 or 5.

(2) Where oral evidence in respect of a matter would be admissible in a proceeding, a record that contains information in respect of that matter is admissible in evidence in a proceeding upon production of the record if it was made in the usual and ordinary course of business and it was in the usual and ordinary course of business to make such a record.

(3) Where a record was made in the usual and ordinary course of business and it was in the usual and ordinary course of business to make such a record, and that record does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may upon production of the record admit the record in a proceeding for the purpose of establishing that fact and may draw the inference that such matter did not occur or exist.

(4) Where it is not possible or reasonably practicable to produce a record described in subsection 2 or 3, a copy of the record accompanied by an affidavit setting out the reasons why it is not

possible or reasonably practicable to produce the record and an affidavit of the person who made the copy setting out the source from which the copy was made and attesting to its authenticity, is admissible in evidence under this section in the same manner as if it were the original record.

(5) Where production of a record or of a copy of a record described in subsection 2 or 3 would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation, accompanied by an affidavit of that person setting forth his qualifications to make the explanation, and attesting to the accuracy of the explanation is admissible in evidence under this section in the same manner as if it were the original record.

(6) Where part only of a record is produced under this section by a party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of such other part be produced by that party.

(7) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in a record admitted in evidence under this section, the court may, upon production of any record, examine the record, admit evidence in respect thereof given orally or by affidavit, including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

(8) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by such party.

(9) Where evidence is tendered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(10) Any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the proceeding.

(11) Nothing in this section makes admissible in evidence in a proceeding,

(a) the part of any record as is proved to be,
  (i) a record made in the course of an investigation or inquiry,
  (ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,
  (iii) a record in respect of the production of which any privilege exists and is claimed, or
  (iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record whose production would be contrary to public policy; or

(c) any transcript or recording of evidence taken in the course of another proceeding.

(12) The provisions of this section shall be deemed to be in addition to and not in derogation of,

(a) any other provision of this or any other Act of the Legislature respecting the admissibility in evidence of any record or the proof of any matter; or

(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved. [Draft Act, Section 39(1)-(12).]

4. (b) *Records Kept by a Computer*
  (i) *Discussion*

The advent of the computer and new technologies of information storage has posed new challenges for law reform, since computer record-keeping differs significantly from conventional procedures. Computers are so widely used for record keeping that it is vital that computer records be available as evidence in today's business litigation. Computerized systems are only justified if more efficient or economic than conventional record systems. Automating the transfer of records can increase efficiency, since mechanical transcription avoids many of the weaknesses of human transcription and filing. Economy can be increased by assembling vast amounts of information into single files to permit fast processing. However increased efficiency not only involves using the computer's speed to eliminate many intermediate steps, but also reduces the contact between human beings responsible for records and the actual records needed to conduct business. Increasingly, clerical tasks of collecting, collating, and calculating have been taken over by machines. Moreover, when individuals are employed they must now handle more information, at greater speed. All these developments pose problems for the law of evidence. The form of computer records adverts to an original human source whose evidence would be, by definition, more authentic and reliable than records passed through the potentially unreliable processes of the computer. Secondly if computer records are used to establish the truth of their contents, they may be said to violate the hearsay rule. Finally it may be difficult to produce computer records in court in an intelligible form.[43]

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[43]See Tapper, *Computers and the Law* (1973), at p. 16; Tapper, "Evidence from Computers" (1974), 5 Georgia L.R. 562, 565-566.

Subsections 3 and 4 of section 30 of the *Canada Evidence Act*, adopted in our proposals, provide for the admission of copies of records in certain conditions:

> 30.—(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by an affidavit setting out the reasons why it is not possible or reasonably practicable to produce the record and an affidavit of the person who made the copy setting out the source from which the copy was made and attesting to its authenticity, each affidavit having been sworn before a commissioner or other person authorized to take affidavits, is admissible in evidence under this section in the same manner as if it were the original of such record.
>
> (4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation, accompanied by an affidavit of that person setting forth his qualifications to make the explanation . . . is admissible in evidence under this section in the same manner as if it were the original of such record.

Record is defined in subsection 12:

> (12) "record" includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript received in evidence under this section pursuant to subsection (3) or (4).

These provisions, together with section 31 dealing with banking records and records of the Government of Canada and any province in Canada, would cover many cases in which it is necessary to prove recorded information, for example, permanent records being transcribed from temporary ones or being stored on tapes. They may encompass circumstances where copies will be admissible, for example, where the originals have been lost or are in a form that does not permit their being introduced in evidence. However, the language may not be sufficiently clear to include the complete process of storing records by computer and their retrieval in intelligible form for use in the courts.

Storage of records in a computer together with their retrieval requires at least three steps: (1) the information to be recorded must be put into an acceptable form for recording in the computer; (2) the computer must be fed with information in the prepared form; (3) what has been stored in the recorded form in the computer must be retrieved in readable and intelligible form.

Each of these steps involves a separate procedure, the performance of which may affect the accuracy and reliability of the information concerning the events to be recorded. In some cases there is a fourth step.

The record stored in the computer is transferred to microfilm or electronic tape from which it is retrieved according to a predetermined process so as to convert the record transferred to readable and intelligible form. After the transfer to tape, the computer's memory of the record is cleared.

From the terminology used in section 30 of the *Canada Evidence Act*, it appears that this provision is not entirely responsive to the procedures used in recording information in computers. The record produced in court would be a "print-out" of the information and calculations stored in the computer, not "a transcript of the explanation of the record or copy". What is retrieved is not necessarily a copy of what is stored, but the data after it has been processed by the computer. Undoubtedly, an explanation of the whole process is required to determine the reliability of the method of storing information, but the ultimate production in a form usable by the courts is the product of a whole series of processing steps performed upon the original record made for the purpose of storing in the computer. The print-out is in effect a mechanical translation of the data fed into the computer and stored.

In England the problem of admissibility of statements produced by computers has been specifically dealt with in recent legislation.[44]

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[44]*Civil Evidence Act 1968*, c. 64, s. 5:

5. *Admissibility of statements produced by computers*

(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are—

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) above was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

Rules of procedure supplement this legislation[45] and require a party desiring to rely on computer records to serve notice of his desire to do so on the other parties. The notice must be given within 21 days after the matter is set down for hearing or an equivalent step taken. In the case of statements in documents produced by computers, the requisite notice must contain particulars of persons who occupied a responsible position with respect to the management of the relevant activities, the supply of information to the computer and its operation. If it is proposed not to call any of these individuals, the notice must set out the reasons relied upon. Reasons provided for excusing a person of whom particulars are given are that he is "dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected . . . to have any recollection of matters relevant to the accuracy or otherwise of the statement".[46] Provision is made for a counter-notice requiring a person

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all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part of this Act—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(6) Subject to subsection (3) above, in this Part of this Act "computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

"Statement" is defined for the purpose of the Act to include "any representation of fact, whether made in words or otherwise".

[45]*Civil Evidence Act 1968*, s. 8.

[46]*Ibid.*, s. 8(2)(b).

of whom particulars have been given to be called; however, if no counter-notice is given the statement is admissible provided that requirements for admissibility set out in the legislation are satisfied.

The Law Reform Commission of New South Wales in its Report on Evidence (Business Records)[47] rejected the English procedure as impractical in New South Wales. We think that the English solution would be equally impractical in Ontario. In a draft bill attached to the Commission's Report dealing with the admissibility of business records generally, the subject of records kept by computer is dealt with specifically. It is unnecessary for our purposes here to go into the general provisions of the proposed bill other than to say that it provided that, "a statement in a record of information made by the use of a computer may be proved by the production of a document produced by the use of a computer containing the statement in a form which can be understood by sight".[48] The effect of this provision would appear to be that if the business record as stored in the computer would be otherwise admissible the print-out produced by the computer would be admissible. The Commission also proposed a section similar to one in the California Evidence Code,[49] removing any doubt that might exist as to whether one can admit evidence concerning the absence of a record; such evidence might technically be considered as not covered by the hearsay provisions in statute law.

The use of computerized records in the business community and in government is so widespread that it can be assumed that there is no greater margin of error in such records than in the case of ordinary commercial records, most of which have been admissible for many years both under the federal and provincial evidence acts.

The provision governing the use of computer records should be a simple one, capable of broad and flexible interpretation to bring the realities of business and professional practices into the court room. At the same time, care must be taken to safeguard against the use of language that would permit the admission of hearsay evidence of a character not contemplated by the rules relating to the admission of business records.

(ii) *Recommendation*

We recommend that *The Evidence Act* (Ontario) be amended to add the following subsection to the proposed draft section dealing with business records:

> (13) Where a record containing information in respect of a matter is made by the use of a computer or similar device, the output thereof in a form which may be understood is admissible in evidence if the record would be admissible under this section if made by other means. [Draft Act, Section 39(13).]

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[47]New South Wales Law Reform Commission, *Report on Evidence (Business Records)* (1973), at p. 7.

[48]*Ibid.*, Appendix A, Draft Evidence (Amendment) Bill, s. 14 CK. (1)(c).

[49]Cal. Evidence Code, §1272 (West, 1968).

CHAPTER 12

CREDIBILITY AND CHARACTER

1. Introduction

As a general rule,

> a witness may, upon cross-examination, be *asked* any question concerning his antecedents, associations, or mode of life, which, although *irrelevant* to the issue, would be likely to discredit his testimony or degrade his character; but he cannot always be *compelled to answer*, and his answers cannot, unless otherwise relevant to the issue, be *contradicted*.[1]

According to Cross, there are four generally recognised exceptions to the rule that a witness' answer to questions on collateral issues or credit cannot be contradicted: the fact that a witness has been convicted of a crime; the fact that he is biased in favour of a party calling him; the fact that he has made statements inconsistent with his present testimony; and the fact that the moral character or physical condition of the witness is such as to militate against his telling the truth.[2] In this chapter we are concerned only with the first of these exceptions.

2. Previous Convictions

(a) *The Ontario Law*

Section 23(1) of *The Evidence Act*[3] provides:

> A witness may be asked whether he has been convicted of any crime, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved . . . .

A witness' previous criminal record may affect his credibility even where he admits it. In *R.* v. *Leforte* the Supreme Court of Canada adopted a dissenting judgment in the British Columbia Court of Appeal, in which Sheppard, J.A. had supported a direction by the trial judge to the jury concerning the cross-examination of an accused who admitted his convictions. The trial judge had said,

> Now, that evidence is led for one purpose only and can be used by you for one purpose only. It is for you to say, on the evidence, as to whether or not these people being [sic], having suffered these convictions, are the kind of people that you would choose to believe. In other words, criminal records go to credibility only, and that is . . . the

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[1]Phipson, *Evidence* (11th Ed. 1970), para. 1548, at pp. 654-655.

[2]Cross, *Evidence* (4th Ed. 1974), at p. 235.

[3]R.S.O. 1970, c. 151, s. 23(1). A similar provision appears in the *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 12(1) as follows:

> A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

exclusive purpose for which the evidence is tendered and for which it may be used by you.[4]

In view of the fact that a contrary view was taken by Norris, J.A., in the British Columbia Court of Appeal and the fact that the Supreme Court allowed the appeal of the Crown and confirmed the conviction, it would appear that the law as stated by the trial judge and quoted by Sheppard, J.A., in his dissenting judgment has been confirmed by the Supreme Court of Canada.

Law reform in this area depends largely on the answers which are to be given to the following questions:

(1) Is it true that a person who has been convicted of an offence of any kind is less likely to tell the truth than a person who has never been convicted?

(2) Is a person convicted of crimes involving some concept of 'untruthfulness' less deserving of belief than a person convicted of other types of crime that involve no element of untruthfulness?

(3) Are some provincial offences more relevant to credibility than some federal offences, for instance, offences against *The Securities Act* as compared with driving while under the influence of alcohol?

(4) Should the time elapsed between the commission of the offence and the date the person is offered as a witness be considered in determining the relevance of the conviction to credibility?

(b) *Other Jurisdictions*

(i) *England*

Until the nineteenth century a person who had been convicted and sentenced for an "infamous" crime, generally interpreted to mean treason and felony, was incompetent as a witness and could not, therefore, testify either in civil or criminal proceedings. In 1828, the *Civil Rights of Convicts Act*[5] made such a person capable of giving testimony after he had served his sentence to completion, unless the offence for which he had been convicted was perjury. The *Evidence Act*, 1843[6] provided that no person should thereafter be excluded as a witness by reason of incapacity from crime or interest. Hence it is only since 1843 that a witness convicted of serious crime has been competent to give evidence. It was not until 1898 that an accused person could give evidence at his own trial.[7]

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[4]*R.* v. *Leforte* (1962), 31 D.L.R. (2d) 1 (S.C.C.), approving in full the reasons of Sheppard, J.A., in (1961), 29 D.L.R. (2d) 459, at p. 470. See also *Street* v. *City of Guelph et al.*, [1964] 2 O.R. 421, 422, *per* Grant, J:

> . . . the purpose of putting such a question is to indicate that the witness is of such a character that his evidence ought to be either not accepted or screened carefully.

[5]9 Geo. 4, c. 32.

[6]6 & 7 Vict., c. 85, s. 1.

[7]*Criminal Evidence Act*, 1898, 61 & 62 Vict., c. 36, s. 1.

By the *Criminal Procedure Act*, 1865,[8] which, despite its title, applies to both criminal and civil cases, a witness may be asked whether he has been convicted of a felony or misdemeanour. The provision is similar to section 23(1) of the Ontario *Evidence Act*, except that in England where the witness is the defendant in a criminal case, the special provisions of the *Criminal Evidence Act*, 1898[9] apply. That Act provides:

> 1.(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless —
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> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
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> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
>
> (iii) he has given evidence against any other person charged with the same offence.

These provisions were designed to safeguard the rights of an accused person in a criminal trial. They are not necessarily appropriate for civil proceedings or investigations under provincial law.

Under the English legislation an accused person may be cross-examined about previous convictions if the "nature and conduct of his defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution". It has been held by the House of Lords in *Selvey* v. *D.P.P.*[10] that, except in cases of rape, an accused may be cross-examined concerning previous convictions, not only when imputations on the character of the prosecutor and his witnesses are cast to show their unreliability as witnesses, independently of the evidence given by them, but also when the casting of such imputations is necessary to enable the accused to establish his defence. Thus, an accused would be unable to put forward a defence, no matter how true, involving imputations on the character of the prosecutor or his witnesses without running the risk of having all previous convictions disclosed.

(ii) *United States of America*

Although there have been some attempts to deal with this area of law in statutes, in the United States the law is generally the same as in Canada. The subject raises many difficult considerations for the trial

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[8] 28 & 29 Vict., c. 18, s. 6.
[9] 61 & 62 Vict., c. 36, s. 1(f).
[10] [1970] A.C. 304.

judge in particular cases. The courts have had to decide what exactly constitutes a crime: does it refer only to felonies or does it extend to cover misdemeanours and police violations? Some courts limit the term to offences involving moral turpitude; others to offences which would affect credibility. The judge has power to disallow questions referring to convictions that fall outside these limits. The courts have also tackled the problem of what constitutes a conviction. There may be difficulties in cases involving confessions or guilty pleas; or when a licence has been revoked, or a person suspended from a profession by a governing body. The courts have also had to decide how far counsel may probe into the previous convictions: can he ask about the punishment or any surrounding circumstances; can the witness himself explain the conviction or show mitigating circumstances? The courts have also had to face the difficult question of how to treat the conviction that dates from many years ago: can they refuse to admit such a conviction, or give less weight to it?

The Model Code of Evidence limits this type of evidence with respect to credibility to convictions involving dishonesty or false statement, and limits the occasions on which convictions can be introduced to impair the credibility of an accused. Rule 106 provides in part:

> 106. Evidence Affecting Credibility
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> (1) Subject to Paragraphs (2) and (3), for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any . . . matter relevant upon the issue of his credibility as a witness . . . except that extrinsic evidence shall be inadmissible
>
> (b) of his conviction of crime not involving dishonesty or false statement.
>
> (3) If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him; if he introduces evidence for the sole purpose of supporting his credibility, all evidence admissible under Paragraph (1) shall be admissible against him.[11]

The Uniform Rules of Evidence, 1953, are to the same effect:

> Rule 21. Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.[12]

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[11]American Law Institute, Model Code of Evidence (1942), Rule 106(1)(b), and (3).

[12]National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953), Rule 21.

Rule 609 of the Federal Rules of Evidence[13] provides in part:

> (a) *General Rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(iii) *Australia and New Zealand*

In Australia and New Zealand, there have been a number of statutory provisions concerning the admissibility of prior convictions. The most typical approach is that taken in Victoria. That state permits questions concerning previous convictions.[14] In addition, by section 37 of their *Evidence Act*, questions during cross-examination whose only relevance is to probe the credibility of the witness need not be answered if the court so decides. The court's decision is to be based on the following considerations:

> (a) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies.
>
> (b) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect or would affect only in a slight degree the opinion of the court as to the credibility of the witness on the matter to which he testifies.
>
> (c) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness' character and the importance of his evidence.[15]

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[13]Federal Rules of Evidence, 28 U.S.C.A., Rule 609.
[14]*Evidence Act*, 1958-1974 (Vic.), s. 33.
[15]*Ibid.*, s. 37.

A similar approach is followed in South Australia,[16] Western Australia,[17] Tasmania,[18] Queensland[19] and New Zealand.[20]

New South Wales, however, adopts a different approach. Although the *Evidence Act*[21] of this state contains no section expressly permitting use of previous convictions as a means of attacking a witness' credibility in civil proceedings, it has been held that questions as to convictions are admissible in cross-examination.[22] There are safeguards, however, which prevent such questions being used to prejudice unfairly a witness or a party. Section 56 limits cross-examination by providing that,

> When any question put to a witness in cross-examination is not relevant to the cause or proceeding, except so far as the truth of the matter suggested by the question affects the credit of the witness by injuring his character, the Court shall have a discretion to disallow the question, if in its opinion the matter is so remote in time, or of such a nature that an admission of its truth would not materially affect the credibility of the witness.[23]

(c) *Conclusions*

It would appear, therefore, that most common law jurisdictions have adopted devices to limit the circumstances in which a witness may be cross-examined as to previous convictions. These take the form of:

> *Limitations as to the type of conviction.* These may relate to the seriousness of the offence as measured by (a) the procedure specified, for example, indictable as opposed to summary conviction offences; (b) the penalty, for example, life or over a specified term of imprisonment; or (c) the nature of the offence, that is, one involving dishonesty or false pretences, and similar offences.
>
> *Limitations as to time.* Questioning is not permitted concerning a conviction for an offence committed prior to a specified time, or in respect of which the penalty has been served prior to a specified time.
>
> *Discretionary Limitations.* The trial judge may be given a discretion, to be exercised with or without guidelines, to disallow a question going solely to credibility.[24]

No jurisdiction has completely denied the right to cross-examine as to previous convictions which are relevant to credibility.

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[16]*Evidence Act*, 1929-1972 (S.A.), ss. 23, 24, 26.
[17]*Evidence Act*, 1906-1967 (W.A.), ss. 23, 25.
[18]*Evidence Act*, 1910-1970 (Tas.), ss. 100, 102.
[19]*Evidence & Discovery Acts*, 1867-1973 (Qld.), s. 19; see also Order 40, R.S.C. (Qld.).
[20]*Evidence Act*, 1908, ss. 12, 13 (as amended).
[21]*Evidence Act*, 1898-1973 (N.S.W.).
[22]See *Bugg* v. *Day* (1949), 79 C.L.R. 442, 457 *per* Latham, C.J.
[23]*Evidence Act*, 1898-1973 (N.S.W.), s. 56.
[24]There may now be such a power in the trial judge under provisions of the *Canada Evidence Act* (see *R.* v. *St. Pierre*, [1973] 1 O.R. 718) although there is clear authority to the contrary (*Clark* v. *Holdsworth* (1968), 62 W.W.R. 1 (B.C.S.C.)).

In the case of a witness who is not a party to the action,[25] there can be no danger of confusing credibility with similar fact evidence[26] relevant to the issue. However, there remains the initial problem of whether a conviction is, in any event, relevant to the issue of credibility. In our view, it does not necessarily follow that a witness with previous criminal convictions, other than perjury, which he has admitted is in all cases less credible than a witness with no previous convictions. To accept such a proposition would tend to raise a presumption that, where a person has been convicted for a breach of the criminal law on one occasion, he will lie under oath on another. We think that there should be some connection between the prior conviction and the issue of credibility; and that there should be no artificial distinction between indictable offences and summary offences. Neither should there be any distinction between criminal offences and offences against the provincial law. There are some indictable offences such as theft, or obtaining by false pretences, that may be relevant to credibility in some cases, and there are others, such as driving offences, or even manslaughter, that may have no relevance to credibility. Similarly, some summary conviction offences, such as offences under the provincial *Securities Act*, may be more relevant to credibility than many indictable offences.

We think that the present practice of cross-examining a witness as to all previous convictions on the ground that they are relevant to the issue of credibility, is both unrealistic and unfair; proof of certain prior convictions may be quite irrelevant to a witness's credibility. We do not think that a party should be permitted to prove prior convictions which cannot be supported as relevant to credibility. Only where the conviction is relevant to credibility by reason of the nature of the offence and the date of its commission, should such cross-examination be permitted.

(d) *Recommendation*

We recommended that section 23 of *The Evidence Act* be repealed and the following section substituted:

> (1) A witness in a proceeding shall not be asked any question tending to show that he has been convicted of any Federal or provincial offence solely for the purpose of attacking his credibility unless the court finds that the conviction is, because of the nature of the offence and the date of its commission, relevant to the witness' credibility.
>
> (2) Notwithstanding subsection 1, a witness in a proceeding may be asked any question tending to show that he has been convicted of an offence under section 121, 122 or 124 of the *Criminal Code* (Canada).
>
> (3) Notwithstanding subsections 1 and 2, a witness in a proceeding shall not be asked any question tending to show that he has been convicted of any offence for which he has been granted a pardon.
>
> (4) Where a witness in a proceeding is asked a question under subsection 1 or 2 and he either denies the allegation or refuses to answer,

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[25]It is accepted that "witness" includes parties to the proceedings.
[26]See *D.P.P.* v. *Boardman*, [1974] 3 W.L.R. 673 (H.L.).

the conviction may be proved, and a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted, or by a deputy of the officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate. [Draft Act, Section 36.]

3. Reputation For Untruthfulness

At common law, the credibility of a witness may be attacked by calling a witness to testify as to his reputation for veracity. The form of questioning of such a character witness has become formalized as follows:

(a) Do you know the reputation of the witness for truth and veracity in the community in which he resides?
(If the answer is no, the questioning ceases; if the answer is yes, it may continue.)

(b) Is that reputation good or bad?

(c) From that reputation would you believe the witness on oath?

The form of questioning has been specifically designed to limit the inquiry into reputation as it relates to veracity. In 1817,[27] extrinsic evidence of general bad character was permitted for the purpose of attacking the credibility of the witness. However, by 1824 this was limited by excluding extrinsic evidence of particular instances of misconduct.[28] From this emerged the form of questioning used today.

General evidence of bad character is seldom led to attack the credibility of a witness. The more complex and mobile the society, the less opportunity there is for a person to acquire a "reputation for speaking the truth".[29] Nevertheless, on some occasions, evidence of bad character is admitted and relied on. For example, as recently as 1968, evidence was received from witnesses who testified that they would not believe the complainant on his oath.[30]

We have come to the conclusion that no amendment to *The Evidence Act* is required to clarify the law concerning the right to submit evidence attacking the credibility of a witness on the ground of bad character.

An analogous problem to this concerns medical evidence of physical or mental conditions which tends to show that the witness is untruthful. In *Toohey* v. *Metropolitan Police Commissioner*,[31] the chief witness for

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[27]*Sharpe* v. *Scoging* (1817), Holt. 541, 171 E.R. 334.
[28]*May* v. *Brown* (1824), 3 B. & C. 113, 107 E.R. 676.
[29]*R.* v. *F.*, [1968] 1 O.R. 658.
[30]*Ibid.* As Lord Pearce said in *Toohey* v. *Metropolitan Police Commissioner*, [1965] A.C. 595, 605-606, "From olden times it has been the practice to allow evidence of bad reputation to discredit a witness's testimony. It is perhaps not very logical and not very useful to allow such evidence founded on hearsay . . . . But the rule has been sanctified, through the centuries in legal examinations and text books and in some rare cases, and it does not create injustice."
[31][1965] A.C. 595.

the prosecution, the complainant, a 16 year old youth, testified that the two accused persons had assaulted him and stolen some money. The House of Lords held that the defence was entitled to call medical evidence to show that the complainant's general instability and hysteric tendency made him more prone than a normal person to exaggerate, and even imagine events that had not taken place, and that his testimony was, therefore, not credible. In so holding, the House of Lords overruled the earlier Court of Criminal Appeal case of *R.* v. *Gunewardene*,[32] which held that defence counsel was not entitled to call a doctor to testify that a previous prosecution witness was suffering from a particular disease of the mind that made him an unreliable witness, on the ground that this extended beyond the traditional evidence of general bad character for veracity. We make no recommendation for an amendment to *The Evidence Act* concerning the matter raised in the *Toohey* case.

4. Impeaching One's Own Witness

(a) *Discussion*

The origin of the common law rule concerning the right of a party to attack credibility of his own witness is obscure. As early as 1681, North, L.C.J., in *Colledge's Case*[33] is reported to have admonished a defendant in these terms, "whatsoever witnesses you call, you call them as witnesses to testify the truth for you . . . let him answer you if he will; but you must not afterwards go to disprove him". In *Adams* v. *Arnold*,[34] Holt, C.J., is reported to have said that he would not "suffer the plaintiff to discredit a witness of his own calling, he swearing against him". By the early part of the nineteenth century, the rule appears to have been established beyond question.

The reason for the rule is obscure. Wigmore[35] suggests that its origin lies in trial by compurgation; it obviously would not be reasonable to permit an "oath-helper" to be impeached. It has also been suggested that it is the natural outcome of the development from an inquisitorial to an adversary system, and of the adoption of a theory that witnesses 'belong' to the parties rather than to the court. There is reference in the cases to a party "guaranteeing the credibility of his witness". However, this appears to mean simply that a party is free to choose whether to call a witness or not, but once having elected to call him, he is bound by what that witness says. A third suggested reason for the rule is the fear that, if a party were allowed to discredit his own witness, he might be able to force him to tell a story beneficial to that party in return for not attacking the witness' credibility. Although Wigmore considers that there is some merit in this reason, the point has been made that the credibility of a witness may be attacked by the other party and that no witness is entirely protected from the possibility of having his credibility attacked.[36]

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[32][1951] 2 K.B. 600.
[33](1681), 8 How. St. Tr. 549, 636.
[34](1700), 12 Mod. 375, 88 E.R. 1389.
[35]3A Wigmore, *Evidence*, §896 (Chad. Rev. 1970).
[36]Schatz, "Impeachment of One's Own Witness: Present New York and Proposed Changes" (1941-42), 27 Cornell L.Q. 377.

The rule against impeaching the credibility of one's own witness, is a limited one. In 1811, Lord Ellenborough said in *Alexander* v. *Gibson*, "If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed. But I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted".[37] In 1831, Tindal, C.J., took a similar view: "The object of all the laws of evidence is to bring the whole truth of a case before a jury . . . [but if this contradicting evidence were excluded] that would no longer be the just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables, and to be bound by the statements of a witness whom he might call without knowing he was adverse, who might labour under a defect of memory, or be otherwise unable to make a statement on which complete reliance could be placed".[38]

Cross comments on the position at common law as follows:

> The judge may allow the examination-in-chief of a hostile witness to be conducted in the manner of a cross-examination to the extent to which he considers it necessary for the purpose of doing justice. The witness may be asked leading questions, challenged with regard to his means of knowledge of the facts to which he is deposing or tested on such matters as the accuracy of his memory and perception; but the party by whom he is called cannot ask about his previous bad conduct and convictions, nor can he adduce evidence of the witness's doubtful veracity. This is the result of the common law, but it used not to be clear whether a statement inconsistent with his present testimony could be proved against a hostile witness. . . .[39]

In 1854, in England, the *Common Law Procedure Act* was passed providing:

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; . . .[40]

Section 24 of *The Evidence Act* (Ontario) which replaced a provision[41] to the same effect as the 1854 English legislation provides:

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made

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[37](1811), 2 Camp. 555, 556, 170 E.R. 1250.
[38]*Bradley* v. *Ricardo* (1831), 8 Bing. 57, 58, 131 E.R. 321, 322.
[39]Cross, *Evidence* (4th Ed. 1974), at pp. 221-222.
[40]*Common Law Procedure Act*, 1854, 17 & 18 Vict., c. 125, s. 22.
[41]See *The Common Law Procedure Act*, C.S.U.C. 1859, c. 22, s. 214.

> at some other time a statement inconsistent with his present testimony. . . .[42]

The Ontario Act makes it clear that a party calling a witness has the right to contradict his evidence by other evidence and, where the court considers the witness to be adverse, counsel may establish that the witness made at some other time a statement inconsistent with his present testimony. Nevertheless, there is still some confusion as to the meaning of "adverse". In some cases , it has been interpreted as "hostile" within the meaning of the common law rule which allowed a party, with leave of the judge, to cross-examine his own witness at large after it has been determined that he did not desire to tell the truth at the instance of the party calling him.[43]

In *Wawanesa Mutual Insurance Co.* v. *Hanes*,[44] the Ontario Court of Appeal held, Roach, J.A., dissenting, that a witness' prior inconsistent statement may be accepted as evidence of adversity, and that a judge in determining whether a witness is adverse, is not limited to a consideration of his demeanour in the witness box. Porter, C.J.O., considered that "adverse" means unfavourable to the party calling the witness, in the sense of the witness assuming, by his testimony, a position opposite to that of the party calling him. According to Porter, C.J.O., the term "adverse" is wider than "hostile", which means displaying hostility of mind by demeanour, language and manner. MacKay, J. A., agreed, stating that "adverse" should be given its ordinary meaning of "opposed in interest". Roach, J. A., dissenting, was of the view that the legislature, in enacting the *Common Law Procedure Act*, did not intend to alter the common law, and that, therefore, "adverse" must be construed to mean "hostile". Hostility, according to the learned judge, should be demonstrated by something more than a witness merely giving answers unfavourable to the party calling him.

The respondent's appeal to the Supreme Court of Canada[45] was dismissed. The appellant's cross appeal was allowed on other grounds, and it did not become necessary to consider the point.

The decision in *Wawanesa* rejected earlier English judicial authority on a similar section.[46] Cases before[47] and after[48] the *Wawanesa* decision construing section 9 of the *Canada Evidence Act*,[49] which was then similar to section 24 of the Ontario Act, have taken a different position and have equated "adverse" with "hostile".

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[42]R.S.O. 1970, c. 151, s. 24.

[43]See *Boland* v. *The Globe & Mail Ltd.*, [1961] O.R. 712, *per* Schroeder, J.A., at pp. 732-33.

[44][1961] O.R. 495.

[45][1963] S.C.R. 154.

[46]*Greenough* v. *Eccles* (1859), 5 C.B. (N.S.) 768, 141 E.R. 315.

[47]See *R.* v. *May* (1915), 21 D.L.R. 728; *R.* v. *Wyman* (1958), 122 C.C.C. 65 (N.B.C.A.).

[48]*R.* v. *McIntyre*, [1963] 2 C.C.C. 380 (N.S.C.A.); and *R.* v. *Collerman*, [1964] 3 C.C.C. 195 (B.C.C.A.).

[49]Now R.S.C. 1970, c. E-10, s. 9(1).

In 1969 the *Canada Evidence Act* was amended to add to section 9 the following subsection:

> (2) Where the party producing a witness alleges that the witness made at other times a statement in writing, or reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse.[50]

It follows that in proceedings governed by the *Canada Evidence Act*, no finding of adversity is necessary to permit cross-examination on a prior inconsistent statement that has been reduced to writing.[51]

Massachusetts and many other states, (for example, Arkansas, California, Idaho, Indiana, Montana, Oregon, Texas, Wyoming, and Hawaii) have removed any requirement of proving adversity.[52]

The Federal Rules of Evidence[53] provide:

> 607. The credibility of a witness may be attacked by any party, including the party calling him.

This rule and similar rules proposed or enacted in other American jurisdictions[54] abolish what has been described by Morgan as "that most senseless of all evidential rules, the rule which forbids a party to impeach his own witness".[55] The provisions abolishing the rule are usually accompanied by a discretion in the judge to exclude evidence where the probative value is slight or there is risk of confusing the jury.

It is said that, if a party were given an unlimited right to impeach his own witness, he would be placed in a position of undue advantage: if the testimony was favourable to him he would not impeach; if it is was disadvantageous, he would try to impeach. To avoid this situation legislation was proposed in New York.[56] The legislation, which was not adopted,

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[50]As enacted by S.C. 1968-69, c. 14, s. 2.

[51]In *R.* v. *Milgaard* (1971), 2 C.C.C. 206, the Saskatchewan Court of Appeal considered the application of section 9(2) and established guidelines to be followed in an application for leave to cross-examine.

[52]See Mass. G.L.A., c. 233, §23; Ark. Stats. 28-706; Idaho Rules of Civil Procedure, Rule 43(b)(7); Mont. Rev. Code. 93-1901-8; Hawaii, H.R.S. §621.25; Wyoming, Code of Civ. Pro. §1-143; Tex. C.C.P. Art. 38.28; Ore. R.S. §45.590; Ind. C.C.P. §34-1-14-15; Cal. Evidence Code, §780.

[53]Federal Rules of Evidence, 28 U.S.C.A., Rule 607.

[54]See for example: Cal. Evidence Code, §785 (West, 1968); American Law Institute, Model Code of Evidence (1942), Rule 106; National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953), Rule 20.

[55]Morgan, "The Jury and The Exclusionary Rules of Evidence", [1936-37] 4 U. of Chi. L. Rev. 247, 257.

[56]The proposed New York legislation provided:

> The party who calls a witness shall not be precluded from impeaching him by proof of prior contradictory statements or by evidence of bias or corruption, or in any other manner, except that the party calling the witness shall not be permitted to prove the bad reputation of the witness for truth and veracity, or to prove that he was convicted of a crime unless

would have required the party to elect, before the witness testified, whether he was going to impeach by evidence of bad character or prior conviction, unless the court was satisfied that the bad reputation or conviction was discovered by the party subsequent to the witness' testimony.

Some suggest that an unlimited right to impeach one's own witness strikes at the heart of the adversary system. A party, it is said, may always choose whether or not to call a particular witness. If he knows that the witness has a prior conviction, or has a bad reputation for veracity, he is aware that the witness' credibility may be attacked by the other party. He also must consider whether such a witness may be trusted to give favourable testimony.

There is, however, one case in which it may be unfair not to permit a party to impeach his own witness, and that is where, by virtue of a previous inconsistent statement, that party is taken by surprise. The requirement that the witness must be ruled "adverse" before the party producing him is allowed to prove a prior inconsistent statement, appears to us to be unnecessary and cumbersome. The vital question in each case then becomes whether or not the previous statement is inconsistent.

(b) *Recommendation*

We have come to the conclusion that a party calling a witness should be permitted to prove that the witness has made a prior inconsistent statement without a finding by the court that a witness is "adverse" or "hostile". The impeachment of one's own witness should be limited to proof of prior inconsistent statements and the introduction of other evidence.

The recommendations we have made in Chapter 3 for amendments to *The Evidence Act* concerning the use of prior inconsistent statements should accomplish this purpose.

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such proof is offered prior to or at the beginning of the examination of the witness or unless the court is satisfied that such bad reputation or conviction was discovered by the party subsequent to the witness' giving his testimony: New York Commission on the Administration of Justice, 1934 Report (Legis. Doc. 1934, No. 50, p. 299). Proposed section 343-a of the Civil Practice Act as quoted in 3A Wigmore, *Evidence*, §899 (Chad. Rev. 1970).

CHAPTER 13

ADMISSIONS

1. Introduction

An admission is an act or statement made by or on behalf of a party to an action and offered in evidence against him at trial. The party who makes the admission may make the statement[1] himself, or adopt a statement made by a third party. He may also make an admission through a third person if that person is authorized expressly or impliedly to make the admission, or if that person is in privity with the party, as, for example, in the case of a predecessor in title.

Informal admissions are to be distinguished from formal admissions made during legal proceedings. A formal admission is binding on the party making it. On the other hand, an informal admission made by words or conduct is admissible in evidence as proof of its contents,[2] but may be explained away or rejected because of the circumstances under which it was made. In this chapter, we are concerned with informal admissions tendered in evidence in civil proceedings.

There is some disagreement concerning the theoretical basis upon which admissions are accepted as evidence. Morgan considered that admissions are received in evidence as an exception to the hearsay rule because they are made out of court, are not subject to cross-examination, and are admitted as proof of the truth of the facts stated therein.[3] If so classified, they are a special exception. Hearsay is excluded because the traditional guarantees of truthfulness built into our legal system are absent, that is, because the declarant was not under oath, and was not subject to cross-examination when he made the statement which is being tendered as evidence. On the other hand, the party whose own admission is offered in evidence can hardly object on the ground that it was not subject to cross-examination at the time it was made; neither can he be heard to complain that he was not under oath.[4]

The view that admissions are admitted in evidence as an exception to the hearsay rule appears to have been generally accepted, although a strong argument has been made by Strahorn that admissions are received as circumstantial evidence, being the relevant conduct of the speaker.[5]

Although the rationale for the reception of admissions in evidence has been stated to be that "what a party himself admits to be true may

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[1]The words may be written or oral—Cross, *Evidence* (4th Ed. 1974), at p. 446. In *R.* v. *Foll* (1956), 19 W.W.R. 661, 25 C.R. 69 (Man.), they were in the form of a tape recording.

[2]Cross, *Evidence* (4th Ed. 1974), at p. 143.

[3]Morgan, *Basic Problems of Evidence* (1962), at p. 265.

[4]*Ibid.*, at p. 266.

[5]Strahorn, "A Reconsideration of the Hearsay Rule and Admissions" (1937), 85 U. Pa. L. Rev. 484, 564.

reasonably be presumed to be so",[6] the admission may not be against interest when made; it may be self-serving.[7] Nor is the declarant required to possess personal knowledge of the facts which he admits.[8] Morgan thought that it was because of the adversary nature of our legal system that admissions are received in evidence, even though traditional guarantees of trustworthiness are absent.[9] It may be assumed that the party has made an adequate investigation before making the statement.[10]

The fact that an admission has been made under threats or pressure does not affect its admissibility[11] but goes to weight. In *Bains et al.* v. *Yorkshire Insurance Co. Ltd.*,[12] a statement made by the plaintiff was accepted as an admission even though the same statement had been excluded as involuntary in a previous criminal trial where the plaintiff was the accused. Admissions have been received in the United States even though made while the party was under the influence of alcohol, or in a state of hysteria.[13]

It is generally agreed that a child may make an admission,[14] but it is not clear whether the age or maturity of the child is a factor going to the admissibility of the admission or entirely to its weight. In *Yorkton Agricultural and Industrial Exhibition Association Ltd.* v. *Morley et al.*,[15] Hall, J.A., discussed at some length the admissions of an eight year old child to an investigating officer concerning a fire which had been caused by the child lighting a match. He said:

> The tender age of the infant respondent by itself does not make his statements any less admissible than those of a more mature infant. The tender age is, however, an important factor to consider, along with all the other circumstances, when determining weight.[16]

After pointing out that the weight of an admission by an infant of tender years is not limited by statute as is the weight of his testimony in court, he went on to say:

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[6]*Slatterie* v. *Pooley* (1840), 6 M. & W. 664, 669, 151 E.R. 579, 581.

[7]*Falcon* v. *Famous Players Film Co.*, [1926] 2 K.B. 474 was a copyright action in which the question raised was whether a play had been performed for the first time in England. A letter written by the author's agent was tendered as an admission. In the letter it was stated that the play had been performed in England first, but when the letter was written it was in the author's interest to make the statement in order to help the sale of his right.

[8]*Stowe* v. *Grand Trunk Pacific Railway Co.* (1918), 39 D.L.R. 127 (Alta. C.A.), affirmed (1918), 59 S.C.R. 665; *R.* v. *Schmidt*, [1948] S.C.R. 333; Cross, *Evidence* (4th Ed. 1974), at p. 447.

[9]Morgan, "Admissions" (1937), 12 Wash. L. Rev. 181, 183.

[10]McCormick, *Evidence* (1st Ed. 1954), at p. 507. This reasoning would not apply to a self-serving admission.

[11]Cross, *Evidence* (4th Ed. 1974), at p. 446.

[12](1963), 38 D.L.R. (2d) 417 (B.C.S.C.). See also *Tompkins* v. *Ternes* (1960), 26 D.L.R. (2d) 565 (Sask. C.A.).

[13]See Morgan, footnote 9 *supra*, at p. 182.

[14]Phipson, *Evidence* (11th Ed. 1970), para. 671, at p. 304.

[15](1968), 66 D.L.R. (2d) 37 (Sask. C.A.).

[16]*Ibid.*, at pp. 44-45.

The proper inquiry to be made does not directly concern the infant's capacity to understand the nature of an oath. The trial Judge should determine such factors as whether:

1. The infant is of sufficient intelligence to recognize what his interest is and how the giving of a statement might affect it.

2. The infant possesses the understanding that will enable him to recall and relate the facts.

3. There was any duress, undue influence or improper inducement involved in giving the statement.[17]

It is not clear whether the learned judge meant that this was an inquiry that went to the weight or the admissibility of the evidence; however, it probably does not matter. If these standards are not met the evidence, if admitted, would be given no weight.

An admission may be based on opinion.[18] "If the want of knowledge of the party does not exclude his admissions . . . it would seem clear that the opinion rule should not."[19]

If an admission is introduced by one party, then the whole statement must be used, or at least everything required to understand that part which is intended to be the admission. Thus it is said that the entire statement must be used, both for and against the party offering it in evidence.[20]

One purpose of an examination for discovery is to secure admissions so that they may be used at trial.[21] These admissions, even though obtained on oath, are treated no differently than other admissions as far as admissibility is concerned, except that an admission made on an examination for discovery by an officer or servant of a corporation is, by statute, admissible against the corporation even where it is not within the scope of the authority of the officer or servant to make an admission.[22] However, the weight to be given to an admission made on an examination for discovery will be greater because it is made under oath.

Although the rule in *Hollington* v. *Hewthorn*,[23] with which we dealt in chapter 6, precludes the subsequent use of a conviction in a criminal trial as proof of the facts upon which the conviction was based, a plea of guilty made in a previous criminal trial may or may not operate as an

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[17]*Ibid.*, at p. 45.

[18]Phipson, *Evidence* (11th Ed. 1970), para. 683, at p. 310; see also *Stowe* v. *G.T.P.R.* (1918), 59 S.C.R. 665.

[19]McCormick, *Evidence* (2nd Ed. 1972), at p. 632.

[20]*Capital Trust Corp.* v. *Fowler* (1921), 50 O.L.R. 48, 64 D.L.R. 289 (Ont. C.A.); R.R.O. 1970, Reg. 545, Rule 329; Cross, *Evidence* (4th Ed. 1974), at p. 447.

[21]*Ontario Marble Co. Ltd.* v. *Creative Memorials Ltd. et al.* (1964), 45 D.L.R. (2d) 244 (Sask. C.A.); *Collins* v. *Belgian Dry Cleaners, Dryers & Furriers Ltd.*, [1952] 1 D.L.R. 712 (Sask. C.A.).

[22]R.S.O. 1970, c. 151, s. 16.

[23][1943] K.B. 587, [1943] 2 All E.R. 35 (C.A.).

admission in a subsequent civil action.[24] Like all other admissions it is not conclusive and the litigant may explain it away.[25] However, the plea is generally considered to be of considerable weight,[26] and any explanation offered for it should be "entirely reasonable and convincing".[27] In a criminal case if the plea of guilty is allowed to be withdrawn, it is then treated as if it had never been made and may not be treated as an admission.[28]

Although, in our view, the law of admissions is satisfactory in most respects, we think that it would be useful to codify some areas of the law. In this chapter, therefore, we propose to set out briefly the major aspects of the law of admissions, and to indicate the ways in which our proposed codification would depart from existing law.

2. Admissions by Conduct

A party's conduct may in some cases constitute an admission. Admissions by conduct are to be distinguished from admissions by adoption, which occur whenever a party, expressly or by inference, acknowledges his acceptance of an adverse statement made by another person. Although admissions by adoption can be established by drawing the inference of adoption from conduct, there is no issue of adoption involved in admissions by conduct. The conduct itself is the admission.[29]

A party fleeing to escape arrest affords one common example of an admission by conduct; the conduct amounts to an admission of a con-

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[24]*English* v. *Richmond*, [1956] S.C.R. 383; *cf. Potter* v. *Swain and Swain*, [1945] O.W.N. 514. For a discussion of these cases and our recommendations concerning the admissibility of a plea of guilty made in a criminal trial in subsequent civil proceedings, see chapter 6, *supra*.

[25]*Cromarty* v. *Monteith* (1957), 8 D.L.R. (2d) 112 (B.C.); *Ferris v. Monohan* (1956), 4 D.L.R. (2d) 539 (N.B.S.C., A.D.). In *Wesley* v. *Toronto General Ins. Co.*, [1939] 3 D.L.R. 783, [appeal dismissed without written reasons: [1939] 4 D.L.R. 731 (C.A.)], McFarland, J., of the Ontario High Court held that a plea of guilty by the plaintiff in a previous criminal trial on the charge of reckless driving was admissible against the plaintiff to show that he had caused the accident in question, and he further held that the plea could not be explained away by the plaintiff. *Ingles* v. *Sun Life Ass'ce Co.*, [1937] 1 D.L.R. 706 (Ont. C.A.), [appeal dismissed [1938] 3 D.L.R. 80 (S.C.C.)] was cited as authority for the conclusiveness of the plea. This case is not authority for the point. It was an action on an insurance policy for double indemnity because of death due to accident. The defendant tendered the deceased's plea of guilty for reckless driving to prove he fell within an exception, that is, violation of law. All that the Ontario Court of Appeal said was that the plea was fatal to the plaintiff's claim, which it would be if not explained, and we must conclude that an explanation was not attempted.

[26]*Cohen & Rudelier* v. *Bates & Genser & Sons Ltd.* (1962), 32 D.L.R. (2d) 763 (Man. C.A.) ("considerable importance"); *Re Charlton*, [1969] 1 O.R. 706, 3 D.L.R. (3d) 623 (C.A.) ("very great weight").

[27]*Campbell* v. *Pickard* (1961), 30 D.L.R. (2d) 152 (Man. C.A.).

[28]*Tibodeau* v. *The Queen*, [1955] S.C.R. 646.

[29]The question whether conduct can ever be hearsay need not be raised at this point, if the circumstantial utterance theory is accepted. Phipson was of the view that an admission by conduct is original evidence. (Phipson, *Evidence* (11th Ed. 1970), para. 688, at p. 313).

sciousness of guilt.[30] Suborning or attempting to suborn a witness has also been held to be an admission that the party did not have a good case.[31]

There is some doubt whether the possession of documents can be an admission. In *R.* v. *Russell*[32] documents found in the possession of the accused were admissible, and were held to be *prima facie* evidence against him, it being inferred that he knew their contents and had acted upon them. In *R.* v. *Famous Players*[33] such documents were admitted as original evidence to show the possessor's knowledge of their contents, although in order for them to be received as an admission it was necessary to show by other circumstantial evidence that he had adopted and acted upon them.

An offer to pay a sum of money by way of settlement to the other party to an action is not an admission,[34] the probable policy of the law being to encourage the settlement of disputes.[35] Sometimes the courts have spoken of compassionate or humanitarian motives for making the offer.[36] McCormick speaks of such offers as privileged,[37] and Wigmore considers that the offer does not imply a belief that the adversary's claim is well founded, but instead implies a desire for peace.[38] In *Kowal* v. *New York Central Railway Co.*,[39] Rinfret, J., referring to Larombiere, *Obligations*,[40] said:

> For an act or a declaration to be considered as an admission there must be the intention of recognizing as legally established the fact to which they apply, and that the person in whose favour they are made shall thereby be exempted from proving the facts of the case.

3. Adoptive Admissions

Whenever a party, expressly or by inference, acknowledges his acceptance of an adverse statement made by another person, he is said to make an adoptive admission. The rule governing the adoption of statements made in the presence of a party is contained in *D.P.P.* v. *Christie*.[41] In order for such a statement to be admitted as an admission, the party must accept the statement "so as to make it, in effect, his own . . . . He may accept the statement by word or conduct, action or demeanour".[42]

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[30]*R.* v. *Wray (No. 2)* (1971), 4 C.C.C. (2d) 378 (Ont. C.A.); Cross, *Evidence* (4th Ed. 1974), at p. 445; McCormick, *Evidence* (2nd Ed. 1972), at p. 655.

[31]*Moriarty et al.* v. *London, Chatham & Dover R. Co.* (1870), L.R. 5 Q.B. 314; *R.* v. *Watt* (1905), 20 Cox C.C. 852.

[32](1920), 51 D.L.R. 1 (Man. C.A.); see also Cross, footnote 30 *supra*, at p. 448.

[33][1932] O.R. 307, [1932] 3 D.L.R. 791.

[34]*Walmsley* v. *Humenick*, [1954] 2 D.L.R. 232 (B.C. S.C.).

[35]McCormick, *Evidence* (2nd Ed. 1972), at p. 663.

[36]*Kowal* v. *New York Central Railway Co.*, [1934] S.C.R. 214; *Nigro* v. *Donati*, [1912] 6 D.L.R. 316, appeal dismissed 8 D.L.R. 213 (Ont. Div. Ct.); *Walmsley* v. *Humenick*, footnote 34 *supra.*

[37]See McCormick, footnote 35 *supra.*

[38]4 Wigmore, *Evidence*, §1061 (Chad. Rev. 1970).

[39][1934] S.C.R. 214, 221, [1934] 4 D.L.R. 442, 445.

[40]Vol. 7, art. 1354, no. 3.

[41][1914] A.C. 545.

[42]*Ibid.*, at p. 554, *per* Lord Atkinson.

To establish an adoptive admission, therefore, it is necessary to adduce evidence of the statement allegedly accepted by the party, and, also, evidence of the party's reaction to the statement, from which acceptance may be inferred.

Express adoption poses little problem since it is in effect an express admission; however, problems arise if the supposed adoption is less than express, for example, if the trier of fact is asked to draw the inference of adoption from silence, an ambiguous reply, or even an express disavowment of the truth of the facts asserted, if made in a certain manner.

Silence can only be considered to amount to an adoption if the statement of the other person would naturally call for a dissent if it were untrue.[43]

Several matters arise whenever the court is required to consider whether that which has been spoken in a party's presence has been adopted. These are: Did the party hear the statement; did he understand it; was the truth of the facts embraced in the statement within the knowledge of the litigant; was he at liberty to make a reply; and was a reply naturally called for?[44]

We think that the law governing adoptive admissions should be codified to provide that, in a civil proceeding, any statement is admissible against a party to the proceeding if he has adopted it expressly, or if, in the circumstances, it would be reasonable to infer that he has adopted it.

4. Admissions in Judicial Proceedings

Although the matter does not appear to have been decided in Canadian cases, it is settled in England that a witness' oral evidence called in judicial proceedings to prove a material fact is not an admission of that fact in subsequent proceedings against the party who tendered the evidence.[45] In *British Thomson-Houston Co. Ltd.* v. *British Insulated and Helsby Cables, Ltd.*,[46] the majority of the Court of Appeal held that evidence of the oral testimony of a witness called by a party in a previous action to prove a certain fact, is not admissible against that party to prove the same fact in subsequent litigation. The proposition that a party who calls a witness declares the witness' evidence to be true and, thus, makes an admission by conduct, was rejected by the majority on the ground that

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[43]*Bessela* v. *Stern* (1877), L.R. 2 C.P.D. 265 (C.A.). In *Wiedemann* v. *Walpole*, [1891] 2 Q.B. 534 (C.A.), a breach of promise to marry action, failure to answer a letter containing statements that the defendant promised to marry the plaintiff was held not to be an admission. *Bessela* v. *Stern* was distinguished on the ground that in the instant case a letter was involved. The court was of the opinion that there may be other circumstances surrounding the sending of a letter, such as a business relationship, which would have the effect of making silence an adoption of the contents as true, and hence an admission. See 2 Wigmore, *Evidence*, §292 (3rd Ed. 1940).

[44]See "Note: Evidence—Admissibility of Adoptive Admissions" (1954), 29 N.Y.U.L. Rev. 1266.

[45]*British Thomson-Houston Co. Ltd.* v. *British Insulated and Helsby Cables, Ltd.*, [1924] 2 Ch. 160 (C.A.).

[46]*Ibid.*

a party to an action cannot be said to guarantee the truth of his witness' evidence. Sargant, L.J., in a dissenting judgment, held that "evidence of specific facts, which has once been definitely adopted and placed before the court as true by a party to previous proceedings, is admissible against him thereafter, as constituting an assertion or statement by him to the effect of those specific facts".[47]

McCormick said of the *British Thomson-Houston* case that "the prevailing opinions seem most unpersuasive but the dissenting opinion of Sargant, L. J., is convincingly cogent".[48] Cross is of the opinion that there is much to be said for the majority's view on principle: "A witness is not an agent for the party calling him who may not even know what he is going to say".[49]

Affidavits or documents which a party has knowingly advanced as true in judicial proceedings for the purpose of proving a particular fact, are admissible against him in subsequent proceedings to prove the same fact.[50] In such a case the party would have had complete knowledge of the contents of the document when he used it to assert the fact.[51] Similarly, evidence given by a party at a previous trial is admissible against him at a subsequent trial as an admission.[52]

Admissions in judicial proceedings are subsumed under 507(b) of the Model Code of Evidence which provides:

> Evidence of a hearsay statement is admissible against a party to the action if the judge finds that . . . the party with knowledge of the content of the statement by words or other conduct manifested his adoption or approval of the statement or his belief in its truth.[53]

This rule deals with conduct from which it could be inferred that the party believed the declaration to be true, although there could be no finding that he adopted the declaration.[54]

Under the Federal Rules of Evidence[55] a statement offered against a party may be received in evidence as an admission, if the party has

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[47]*Ibid.*, at p. 184.

[48]McCormick, *Evidence* (1st Ed. 1954), at p. 527.

[49]Cross, *Evidence* (3rd Ed. 1967), at p. 441.

[50]*Brickell v. Hulse* (1837), 7 Ad. & E. 454, 112 E.R. 541; *Gardner* v. *Moult* (1839), 10 Ad. & E. 464, 113 E.R. 176; *Fleet v. Perrins* (1868), L.R. 3 (Q.B.) 536.

[51]*Richards v. Morgan* (1863), 4 B. & S. 641, 662, 33 L.J.Q.B. 114, 124.

[52]*R.* v. *Drew (No. 2)*, [1933] 4 D.L.R. 592 (Sask. C.A.); *Brown et al.* v. *Winning* (1878), 43 U.C.Q.B. 327 (C.A.).

[53]American Law Institute, Model Code of Evidence (1942), Rule 507(b).

[54]In the Comment to subsection 507(b) it is said:

> The party's conduct may be such that no reasonable person could find therefrom an intention to concede the truth of the declarant's statement; indeed, it may indicate a purpose to convey exactly the opposite impression; and yet one might reasonably conclude from it that the party really believed the declaration to be true. Thus his silence, or his attempted explanation, or even a halting or otherwise suspiciously spoken denial, in the face of a damaging accusation, may furnish ample ground for an inference of consciousness of its truth even though it would afford no sufficient basis for an inference of adoption (at pp. 247-248).

[55]Federal Rules of Evidence, 28 U.S.C.A., Rule 801(d)(2).

manifested his adoption or belief in its truth. Knowledge of the content of the statement is not necessary in all cases, as in the following example in the Advisory Committee's Note[56] to the rule: "X is a reliable person and knows what he is talking about".

Rule 63(3)(b)(i) of the Uniform Rules, 1953,[57] adopts the dissenting view in *British Thomson-Houston Co. Ltd.* v. *British Insulated and Helsby Cables, Ltd.*[58] The party is held to have adopted the evidence he presented at a former trial. The declarant must also be unavailable. The California Law Revision Commission, commenting on this provision, stated that the party's "previous direct and redirect examination should suffice as a substitute for [his] present opportunity to cross-examine".[59]

We find the reasoning of the majority in the *British Thomson-Houston* case persuasive. We do not consider that a party can be said to vouchsafe the credibility of a witness so as to be bound by that witness' evidence in subsequent proceedings, and find ourselves in accord with the following statement of Lord Atkin:

> . . . is it true to say that proffering or using evidence is a declaration that it is true? I imagine that the most optimistic litigant would shy at such a burden. He would say: I assert the affirmative or negative of the issue of fact found between me and my opponent. I tender the evidence of persons who are prepared to swear to facts which, if true, I believe will support my case; but as the facts are not within my own knowledge I have no means of judging whether they are true or not. I do not think that morality requires more from a litigant than a belief that the evidence may be true, and the absence of knowledge or belief that it is false. If he is an experienced litigant there will be many cases where his honest belief may be alleged with some honest distrust. But the evidence given may in fact be obviously exaggerated, or intentionally or unintentionally false. It may be contradicted by other evidence also called by the same litigant, or be conclusively overthrown by the evidence of the opponent. To pledge the party to the truth of evidence under these circumstances seems to me to travesty the facts.[60]

We therefore make no recommendation concerning the matter.

5. Admissions made in a Representative Capacity

Any statement made by a person who is a party to an action in his personal capacity is admissible against him regardless of the capacity in

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[56]Federal Rules of Evidence, 28 U.S.C.A., at p. 530.

[57]National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence, 1953. Rule 63(3)(b)(1) provides that, if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action is admissible when the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party.

[58]See footnote 45, *supra.*

[59]California Law Revision Commission, *Tentative Recommendation and a Study relating to The Uniform Rules of Evidence, Art. VIII. Hearsay Evidence* (Aug. 1962), at pp. 447-48.

[60]*British Thomson-Houston Co. Ltd.* v. *British Insulated and Helsby Cables, Ltd.*, [1924] 2 Ch. 160, 169.

which he made the statement. However, where a person is a party to an action in a representative capacity,[61] that is, where he represents another person or persons as, for example, a trustee, or executor or administrator of an estate, statements made by him in other than a representative capacity are inadmissible against him and the party he represents:

> What a trustee says or does in the exercise of his duties is evidence against his beneficiaries. But what he does in other respects is not.[62]

Admissions made by a representative before or after his term of office are inadmissible.[63]

The principle underlying this rule is that persons other than the maker of the statement should not be bound by it. Cross states that this is a valid principle: ". . . [I]t would clearly be improper to allow those represented by the maker of an admission to be affected by it, at any rate when it does not concern a matter in which his and their interest was identical".[64] However, he notes that such a statement could now be rendered admissible under section 2 of the *Civil Evidence Act 1968*.

The Model Code and Uniform Rules both provide that, where a person is a party to an action in a representative capacity, the admission may be received in evidence only if he was acting in a representative capacity in making the statement.[65] This approach has been rejected by both the Federal Rules of Evidence[66] and the California Evidence Code.[67] The note to the Federal Rules states that the statement need only be relevant to the representative affairs. The California Law Revision Commission gives the following rationale for the dropping of the requirement in the Uniform Rules:

> The basis of the admissions exception to the hearsay rule is that because the statements are the declarant's own he does not need to cross-examine. Moreover, a party has ample opportunity to deny, explain or qualify the statement in the course of the proceeding. These considerations apply to any extrajudicial statement made by one who is a party to a judicial action or proceeding either in a personal or in a representative capacity.[68]

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[61]The term 'representative capacity' is used here in a narrow sense to indicate a trustee, executor or administrator, and is to be distinguished from the use of the term 'agent' at pp. 216-218 *infra*.

[62]*New's Trustee* v. *Hunting*, [1897] 1 Q.B. 607, 611 *per* Vaughan Williams, J., affirmed [1897] 2 Q.B. 19. See also *Legge* v. *Edmonds* (1855), 25 L.J.Ch. 125, 141.

[63]Phipson, *Evidence* (11th Ed. 1970), para. 703, at p. 319.

[64]Cross, *Evidence* (4th Ed. 1974), at p. 447.

[65]American Law Institute, Model Code of Evidence (1942), Rule 506; National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953), Rule 63(7).

[66]Federal Rules of Evidence, 28 U.S.C.A., Rule 801(d)(2) A; see also Advisory Committee's Note at p. 530.

[67]Cal. Evidence Code, §1220 (West, 1968).

[68]California Law Revision Commission, *Tentative Recommendation and a Study relating to The Uniform Rules of Evidence, Art. VIII, Hearsay Evidence* (August 1962), at p. 320.

For the reasons stated by the California Law Revision Commission, we think that any statement made by a person who is a party to a civil proceeding in a representative capacity should be admissible against him and the party he represents regardless of the capacity in which he made the statement; however, in our view the admission should be admissible in evidence only if it was made during the period of time when the party was a representative.

6. Vicarious Admissions

Vicarious admissions are admissions made by third persons which bind the litigant, not because he has adopted them as his own, but because he has expressly or impliedly authorized the third person to make admissions which will bind him.

Although a party can hardly object when his out-of-court statements are offered against him that he was not under oath or that he had no opportunity to cross-examine himself, yet when the out-of-court statement is that of another, such an objection is relevant. These statements carry no stamp of credibility. The admissibility of vicarious admissions is an exception to the broad principle that a person other than the maker of an admission is not bound by it.

If an agent is expressly authorized to speak for the party, any admission made by the agent will be admissible against the party if what was said was within the authority granted. The Model Code, Uniform Rules 1953, and Federal Rules of Evidence segregate these from Vicarious Admissions and call them "Authorized Admissions". The Model Code, Rule 507(a), provides:

> 507 — (a) Evidence of a hearsay statement is admissible against a party to the action if the judge finds that . . . the declarant was authorized by the party to make a statement or statements for him concerning the subject matter of the statement . . .[69]

In the Federal Rules of Evidence, Rule 801(d)(2)(C), the words "for him" are omitted and the rule provides that, "a statement by a person authorized by him to make a statement concerning the subject" is admissible. We think that the addition of the words "for him" makes the provision too restrictive. We think that, in a civil proceeding, any statement of any person that has been authorized by a party to the proceeding, should be admissible against that party.

Difficulties arise where there is no express authorization to speak, and principles of the substantive law of agency invade the realm of the law of evidence. It is usually said that an agent's admission will be received in evidence against his principal whenever it was made within the scope of the agent's authority, or in the course of his employment, if such

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[69]American Law Institute, Model Code of Evidence (1942), Rule 507(a); see also National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953), Rule 63(8)(a); Cal. Evidence Code, §1222 (West, 1968); Federal Rules of Evidence, 28 U.S.C.A., Rule 801(d)(2)(C).

authority included the authority to speak or write on behalf of the principal concerning the matter.

The test to be applied in determining the scope of an agent's authority to make admissions which bind his principal, was considered by the Ontario Court of Appeal in *R.* v. *Strand Electric Ltd.*,[70] in which the accused corporation appealed its conviction under *The Construction Safety Act*[71] for failing to provide a scaffold in good condition at a construction site. One of the main issues for the consideration of the Court was whether an admission made by one of the employees of the accused, a supervisor, to a construction safety engineer that he had directed a workman on to the scaffold was admissible in evidence against the company. In delivering the judgment of the majority, MacKay, J.A., adopted as the correct statement of the law governing the question whether the employee had the authority as agent to make the relevant admission, the test set out in Cross on *Evidence*:

> Statements made by an agent within the scope of his authority to third persons during the continuance of the agency may be received as admissions against his principal in litigation to which the latter is a party . . . *the admission must have been made by the agent as part of a conversation or other communication which he was authorized to have with a third party.*[72]

Because the agent was required under *The Construction Safety Act* to give information to the construction safety inspector, the majority, in dismissing the appeal, held that the accused was "compelled by statute to authorize" its agent to give information such as that given by the supervisor, and that the employee's statements were, therefore, admissible in evidence against the accused.

Laskin, J. A., in a dissenting judgment, eliminated the condition that the agent's admission must have been made as part of a communication he was authorized to have with a third party. He said:

> . . . the admissions of the agent tendered against the principal must have been made to a third party within the scope of his authority during the subsistence of the agency [citing Wigmore and Cross]. The application of . . . [this] proposition has, in the cases, revealed a different attitude of the Courts to the authority of an agent to "act" on behalf of his principal and his authority to "speak" on behalf of his principal, as if speech or conversation was not itself an act. There may, indeed, be justification for viewing authority differently in the two situations, but some of the case law exhibits, in relation to the reception of admissions, the same formal requirement of authority that in earlier days limited the development of vicarious liability in tort; and see also *Restatement of the Law*, Agency, 2d, ss. 286, 288 (1958).

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[70][1969] 1 O.R. 190.

[71]S.O. 1961-62, c. 18; now R.S.O. 1970, c. 81.

[72][1969] 1 O.R. 190, 193, quoting Cross, *Evidence* (2nd Ed. 1963), at pp. 441-442, emphasis added.

> The concept of authority, taken literally, would exclude as against the principal any admission of an agent tending to show liability in tort or penal liability, unless the agent is shown to have been authorized to make admissions to charge his principal. . . . Authority as between agent and principal has in respect of vicarious liability of the principal to third parties, been translated into an issue of the scope of the agent's duties or employment, and I would apply the same test in relation to admissions by an agent which are tendered in evidence against the principal.[73]

Laskin, J.A., dissented on another point. He would have accepted the agent's admission as evidence against the accused, if the Crown had adduced evidence that the agent was acting within the scope of his authority in directing workmen on to the scaffold; however, he was of the view that the appeal should be allowed, on the ground that there was no evidence as to the duties and responsibilities of the agent.

The rule as suggested by Laskin, J.A., in the *Strand Electric* case reflects Rule 508(a) of the Model Code:

> Evidence of a hearsay declaration is admissible against a party to the action if the judge finds that . . . the declaration concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of the agency or employment.[74]

The statement must be one that the declarant could make as a witness at the trial.[75] The Model Code gives no explanation as to why it narrows the common-law, by requiring the element of personal knowledge, but an added guarantee of trustworthiness is compatible with the search for truth. Under the Federal Rules of Evidence this element is excluded.

The declaration must concern a matter which has been authorized. Once the declarant has been authorized to act for the party, any statements made by him concerning the matter are admissible if such statements were made during the existence of the agency. The Model Code does not distinguish between authorization of an agent to act, and authorization to speak.

On balance, we prefer the approach adopted in the Model Code and by Laskin, J.A. We think that a statement made by an agent or employee during the existence of the agency or employment should be admissible against his principal or employer if it concerns a matter within the scope of the agency or employment.

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[73]*Ibid.*, at p. 200.

[74]American Law Institute, Model Code of Evidence (1942), Rule 508(a). See also Uniform Rules (1953), Rule 63(9)(a); Federal Rules of Evidence, 28 U.S.C.A., Rule 801(d)(2)(D).

[75]Model Code of Evidence, *supra*, Rule 501(3): "A hearsay declaration is a hearsay statement which if made in the process of testifying at the present trial would be admissible and would not itself be a hearsay statement". The Uniform Rules (1953), Rule 63(9), begins with the words "a statement which would be admissible if made by the declarant at the hearing".

7. Admissions by Solicitors and Counsel

A solicitor is his client's agent for the conduct of the litigation or potential litigation, but it is a unique kind of agency. The solicitor has authority to speak for his client, but an admission made by him while conducting the litigation is limited to use in that litigation. The concept of authorization is kept within very narrow limits. Admissions made by counsel are treated with more restriction than those made by solicitors. They more nearly resemble "formal" admissions than evidentiary admissions.[76]

In *English* v. *Richmond*[77] the admissibility of a plea of guilty at a previous criminal trial was complicated by the fact that English had not personally made the plea; it was entered by his counsel. The Supreme Court of Canada held that the plea was admissible as an admission. Although it is not clear what the precise reasoning of the Court was, the majority appear to have regarded the plea of guilty as an admission by adoption. Locke, J., said: "I think that the evidence was relevant and admissible as showing conduct of the appellant English which, on the face of it, was inconsistent with his evidence at the trial, directed to showing that he was not at fault".[78] This quotation appears to support the relevant conduct theory of admissions,[79] and implies that there was an admission by adoption because English stood by and made no comment while the plea was made. Kerwin, C.J.C., also stressed that the plea had been made in the presence of the accused.[80] Abbott, J., in a dissenting judgment, held that the plea of guilty was made by counsel in circumstances that "implied no more than a desire for peace and not a concession of wrong done".[81] The case may also be viewed as an example of express authorization to make an admission.[82]

As we have indicated, the extent to which counsel can make an admission which will bind his client in the litigation being conducted has been kept within narrow limits. For example, admissions cannot be made by counsel in out-of-court conversation with the lawyer for the other party.[83] To be binding it would appear that an admission would have to be made as "a step in the cause".[84]

The existing law governing admissions by counsel clearly reflects the unique relationship between a solicitor and his client. We consider the law to be satisfactory in this area and see no reason to alter it. Accordingly we recommend no change.

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[76]Phipson speaks of admissions by a counsel as waiver of proof in the action only: see Phipson, *Evidence* (11th Ed. 1970), para. 740, at pp. 333-334.

[77][1956] S.C.R. 383.

[78]*Ibid.*, at p. 392.

[79]See footnote 5 *supra.*

[80][1956] S.C.R. 383, 385.

[81]*Ibid.*, at p. 398.

[82]For our recommendation concerning the admissibility in evidence in civil proceedings of a plea of guilty in a previous criminal trial, see Chapter 6, *supra.*

[83]*Holman* v. *Hain et al.*, [1970] 1 O.R. 318, 8 D.L.R. (3d) 328. In this case it was held that a statement made by counsel on examination for discovery was not binding on his client.

[84]*Haller* v. *Worman* (1861), 3 L.T. 741.

8. Recommendations

We recommend the following section be included in *The Evidence Act*:

(1) In this section "statement" means any statement against interest, and includes any expression however made and any gesture or other assertive conduct.

(2) In a civil proceeding, without limiting the admissibility of any statement admissible at common law or under this or any other Act,

(a) any statement of a person who is a party to the proceeding in his personal capacity is admissible against him regardless of the capacity in which he made the statement;

(b) any statement of a person who is a party to the proceeding in a representative capacity is admissible against him and the party whom he represents regardless of the capacity in which he made the statement, if the statement was made during the period of time he was a representative;

(c) any statement of any person that has been authorized by a party to the proceeding is admissible against that party;

(d) any statement is admissible against a party to the proceeding if he expressly adopted it or if, in the circumstances, it is reasonable to infer that he adopted it;

(e) any statement made by an agent or employee of a party to the proceeding during the existence of the agency or employment is admissible against that party if the statement concerned a matter within the scope of the agency or employment.

(3) No statement is admissible under this section if it is inadmissible by reason of any privilege conferred by this or any other Act or at common law. [Draft Act, Section 32.]

CHAPTER 14

EXECUTIVE PRIVILEGE

1. Introduction

Executive privilege as it relates to the law of evidence requires consideration of two separate but related aspects of the subjection of the executive to judicial authority. Both of these aspects concern the extent to which substantive law binds the Crown and its agents, and both are deeply rooted in history.

First, at common law the Crown could not be sued or subjected to discovery without its consent. This rule has been extensively altered by federal and provincial statutes.[1] Second, the Crown, whether or not a party to particular legal proceedings, may refuse to produce documents or other information relevant to the litigation on the ground that disclosure would be contrary to public interest. Both common law rules appear to have originated in the prerogative of the Crown as the ultimate source of power vested in both the executive and the judiciary.

It is the second proposition with which we are particularly concerned. Despite the vastly expanded role of government in recent years, the subject of crown privilege has remained to be regulated largely by the common law rules formulated for other conditions.

Executive silence and the degree of secrecy afforded to affairs of government are matters of general political concern. This is particularly true today when government functions extend far beyond the regulation of matters of external and internal security and foreign relations. Governmental expansion into virtually every area of social activity, into areas of commerce, industry, and welfare, to name only a few, together with the increasing role played by government in public administration through tribunals and investigatory bodies, have created conditions far removed from those prevailing when the common law principles concerning executive privilege were first formulated. The questions that arise under these modern conditions are very remote from questions of disclosure relating to peace and war and national security. Conflicting public interests must be balanced: "there is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done".[2] The question is who should hold the balance and how should it be held?

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[1]For example, *Crown Liability Act*, R.S.C. 1970, c. C-38; *The Proceedings Against the Crown Act*, R.S.O. 1970, c. 365.

[2]*Conway* v. *Rimmer and Another*, [1968] A.C. 910, 940, [1968] 1 All E.R. 874, 880.

2. The Case Law

In a comprehensive and painstaking discussion of crown privilege in the Canadian Bar Review[3] Professor Bushnell has relieved us from the task of setting out an exhaustive analysis of all the relevant jurisprudence. For our purposes, the matter can best be considered by first discussing a group of leading English cases, and then considering two cases in the Supreme Court of Canada.

(a) *English Case Law*

It is useful to start with *Robinson* v. *State of South Australia [No. 2]*.[4] In this case the appellant brought an action for damages arising out of alleged negligence in the care of wheat placed under the control of the State under relevant legislation concerning the marketing of wheat. Proof of the plaintiff's case rested mainly on documents in the control of the defendant, and for the plaintiff to succeed it was essential that there be full disclosure by the State. The Judicial Committee examined the basic foundation on which so called crown privilege rests; from the judgment, four essential principles may be extracted:

(a) the privilege is a narrow one;

(b) unless there is some plain overriding principle of public interest which cannot be disregarded, the same discovery should be made by the Crown, as if the Crown were in the position of a subject;

(c) the foundation of the privilege is that the information cannot be disclosed without injury to the public interest;

(d) that the documents are confidential or official is, alone, no reason for their non-production.

The Committee did not consider the procedure which should apply where privilege is claimed in an action to which the Crown is not a party. In cases where the Crown is a party, their Lordships' view was that the privilege should be claimed by a responsible Minister of State whose mind was directed to the question whether on grounds of public interest the document should be withheld.

Having discussed the principles governing crown privilege, Lord Blanesburgh proceeded to consider the power of the court to call for production of documents where privilege is claimed, so that the court may determine whether they come within the principles to be applied. His Lordship held that at common law the court had that power, and went on to quote from the Rules of Court of South Australia,[5] stating that the rule giving the power to call for production for examination applied. Having come to this conclusion, he proceeded to consider whether the power to call for production should be exercised, and concluded that the documents should be produced and examined by a judge on an inter-

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[3](1973), 51 Can. Bar Rev. 551.

[4][1931] A.C. 704.

[5]Similar to Rule 348 of the Rules of Practice of the Supreme Court, R.R.O. 1970, Reg. 545.

locutory application with the caution, "That the judge in giving his decision as to any document will be careful to safeguard the interest of the State, and will not, in any case of doubt, resolve the doubt against the State without further inquiry from the Minister".[6]

Eleven years later the House of Lords considered the *Robinson* case in *Duncan* v. *Cammell, Laird & Co. Ltd.*[7] This case was, however, very different from the *Robinson* case, in which the State was the defendant and the documents referred to commercial transactions and reports arising out of State operations in the marketing of wheat. In the *Duncan* case the State was not a party to the action and the court was concerned with documents and plans relating to the construction of a submarine during wartime. Two questions were considered at length: first, the manner in which the claim of privilege should be made; and secondly, whether when the objection to production is taken in proper form, it should be treated by the court as conclusive, or whether there are circumstances in which the judge should himself look at the documents before ruling on their production. As to the first question the House held:

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, *e.g.*, departmental minutes, to which they belong.[8]

The court held that the objection might be taken by a high official in the department in certain circumstances. Although the objection might be conveyed to the court by a person other than the minister, the court could require the minister to express his view under oath that the production would be against the public interest.

On the second point the House directly disagreed with the decision of the Judicial Committee of the Privy Council in the *Robinson* case and held that "Those who are responsible for the national security must be the sole judges of what the national security requires".[9]

Referring to the South Australian Rule of Court which provided that, where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege,[10] Viscount Simon said, "In my opinion, the Privy Council was mistaken in regarding such a rule as having any application to the subject-matter. . . . The withholding of documents, on the ground that their publication would be contrary to the public interest, is not properly to be regarded as a branch of the law of privilege connected with discovery".[11]

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[6][1931] A.C. 704, 725.
[7][1942] A.C. 624.
[8]*Ibid.*, at p. 638.
[9]*Ibid.*, at p. 641, quoting Lord Parker in *The Zamora*, [1916] 2 A.C. 77, 107.
[10]*Ibid.*, at p. 641.
[11]*Ibid.*

The result was that the House of Lords held that the decision of the minister was conclusive, and that the court had no power to call for the inspection of the relevant documents for the purpose of determining whether the production would or would not be prejudicial to the public interest.

However, Viscount Simon, L.C., took care to indicate the sort of grounds which would not afford the minister adequate justification for objecting to production. He said:

> It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential'. It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration.[12]

He went on to add that although the court was concerned with documents in that case, the same principles would apply to oral evidence.

That part of the speech of Viscount Simon, L.C., in the *Duncan* case which purported to hold that, where crown privilege was claimed in proper form, the court had no right to inspect documents in order to determine whether the claim of privilege was well founded, came under critical examination in *Re Grosvenor Hotel, London (No. 2).*[13] The Court of Appeal regarded that portion of the speech as *obiter dictum* and declined to follow it. Although the court refused to call for the production of documents, Lord Denning stated the law to be as follows:

> The objection of a Minister, even though taken in proper form, should not be conclusive. If the court should be of opinion that the objection is not taken in good faith, or that there are no reasonable grounds for thinking that the production of the documents would be injurious to the public interest, the court can override the objection and order production. It can, if it thinks fit, call for the documents

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[12]*Ibid.*, at pp. 642-43.

[13][1965] Ch. 1210, [1964] 3 All E.R. 354.

> and inspect them itself so as to see whether there are reasonable grounds for withholding them: ensuring, of course, that they are not disclosed to anyone else. It is rare indeed for the court to override the Minister's objection, but it has the ultimate power, in the interests of justice, to do so. After all, it is the judges who are the guardians of justice in this land: and if they are to fulfil their trust, they must be able to call on the Minister to put forward his reasons so as to see if they outweigh the interests of justice.[14]

The result of this case would appear to be that where the minister puts forward a claim that the production of documents falling within a certain class might imperil the safety of the State or diplomatic relations, the claim should be allowed without question. Cabinet minutes and minutes of discussion between heads of departments and dispatches from ambassadors fall into this class as well as communications made to a minister by virtue of a statutory obligation. Secondly, the case decides that where it is not clear that the public interest would be seriously injured by the production of certain documents, such as routine communications between civil servants or documents of a class for which privilege could not reasonably be claimed, the court has residual power to call for the documents for inspection to determine if the minister's claim is well founded.

The English Court of Appeal again considered crown privilege in *Wednesbury Corporation and Others* v. *Ministry of Housing and Local Government*.[15] In that case Lord Denning said:

> . . . [I]n a case where a Minister claims privilege for a class of documents, he must justify his objection with reasons. He should describe the nature of the class and the reason why the document should not be disclosed, so that the court itself can see whether this claim is well taken or not. The very description of the documents in the class may itself suffice, as, for instance, confidential reports on officers in the Army. There it is obvious that candour is necessary and that the documents should not be disclosed; but if it be not obvious, then reasons should be given. The Minister should consider every class of documents on its merits, and only withhold them when he is satisfied that candour can only be secured by complete confidence. 'The proper functioning of the public service' is not enough. This affidavit in common form is to my mind insufficient in itself to give the privilege from production which the Minister claims.
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> But nevertheless, before ordering the production of these documents, I think that we should see whether, in the interests of justice, it is necessary that we should overrule the objection of the Minister.[16]

In this case the production was refused.

A fundamental re-examination of the entire subject of executive privilege was undertaken by the House of Lords in 1968 in *Conway* v.

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[14][1965] Ch. 1245-1246, [1964] 3 All E.R. 361-362.
[15][1965] 1 All E.R. 186.
[16]*Ibid.*, at p. 190.

Rimmer and Another.[17] The relevant cases were analysed and discussed, particularly the speech of Viscount Simon, L.C., in the *Duncan* case. Lord Reid concluded, "that the present position is unsatisfactory and that the House must re-examine the whole question in the light of the authorities". All members of the House disagreed with the conclusion in the *Duncan* case, in so far as it held that the court had no right to inspect documents where crown privilege is claimed, in order to determine whether the claim of privilege was well founded. Lord Reid said:

> I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice.[18]

Having indicated certain classes of documents that ought not to be disclosed, such as cabinet minutes and documents concerned with policy making within the departments of government, he went on to say:

> It appears to me that, if the Minister's reasons are such that a judge can properly weigh them, he must, on the other hand, consider what is the probable importance in the case before him of the documents or other evidence sought to be withheld. If he decides that on balance the documents probably ought to be produced, I think that it would generally be best that he should see them before ordering production and if he thinks that the Minister's reasons are not clearly expressed he will have to see the documents before ordering production.[19]

Lord Morris in clear language said, "I have come to the conclusion that it is now right to depart from the decision in *Duncan's* case",[20] and stated:

> In my view, it should now be made clear that whenever an objection is made to the production of a relevant document is it for the court to decide whether or not to uphold the objection. The inherent power of the court must include a power to ask for a clarification or an amplification of an objection to production though the court will be careful not to impose a requirement which could only be met by divulging the very matters to which the objection related. The power of the court must also include a power to examine documents privately, a power, I think, which in practice should be sparingly exercised but one which could operate as a safeguard for the executive in cases where a court is inclined to make an order for production, though an objection is being pressed. I see no difference in principle between the consideration of what have been

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[17][1968] A.C. 910, [1968] 1 All E.R. 874; see also *Rogers* v. *Secretary of State for the Home Department*, [1973] A.C. 388; *Norwich Pharmacal* v. *Customs and Excise Commissioners*, [1974] A.C. 133; *Alfred Crompton Amusements Machines Ltd.* v. *Customs and Excise Commissioners (No. 2)*, [1974] A.C. 405.

[18][1968] A.C. 952, [1968] 1 All E.R. 888.

[19][1968] A.C. 953, [1968] 1 All E.R. 888.

[20][1968] A.C. 958, [1968] 1 All E.R. 892.

> called the contents cases and the class cases. The principle which the courts will follow is that relevant documents normally liable to production will be withheld, if the public interest requires that they should be withheld. In many cases it will be plain that documents are within a class of documents which by their very nature ought not to be disclosed. Indeed, in the majority of cases I apprehend that a decision as to an objection will present no difficulty. The cases of difficulty will be those in which it will appear that if there is non-disclosure some injustice may result and that if there is disclosure the public interest may to some extent be affected prejudicially. The courts can and will recognise that a view honestly put forward by a Minister as to the public interest will be based upon special knowledge and will be put forward by one who is charged with a special responsibility. As Lord Radcliffe said in the *Glasgow Corporation* case, the courts will not seek on a matter which is within the sphere and knowledge of a Minister to displace his view by their own. But where there is more than one aspect of the public interest to be considered it seems to me that a court, in reference to litigation pending before it, will be in the best position to decide where the weight of public interest predominates. I am convinced that the courts, with the independence which is their strength, can safely be entrusted with the duty of weighing all aspects of public interests and of private interests and of giving protection where it is found to be due.[21]

Lord Hodson, Lord Pearce and Lord Upjohn all agreed that the court had the power to overrule the minister and call for the production of documents to determine whether their contents should be disclosed, and an order was made accordingly.

(b) *Canadian Case Law*

Re R. v. *Snider*[22] was a reference to the Supreme Court of Canada arising out of an objection taken by the Minister of National Revenue to produce income tax returns and documents filed pursuant to the provisions of the *Income Tax Act*. After dealing with the nature of executive privilege Rand, J., said:

> Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the court is whether they might, on any rational view, either as to their contents or the fact of their existence, be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a minister of the Crown avers its existence, then the courts must accept his decision. On the other hand, if the facts, as in the example before us, show that, in the ordinary case, no such interest can exist, then such a declaration of the minister must be taken to have been made under a misapprehension and be disregarded. To eliminate the courts in a function with which the tradition of the common law has invested them and to

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[21][1968] A.C. 971-972, [1968] 1 All E.R. 900-901.
[22][1954] S.C.R. 479.

> hold them subject to any opinion formed, rational or irrational, by a member of the executive to the prejudice, it might be, of the lives of private individuals, is not in harmony with the basic conceptions of our polity. But I should add that the consequences of the exclusion of a document for reasons of public interest as it may affect the interest of an accused person are not in question here and no implication is intended as to what they may be.
>
> What is secured by attributing to the courts this preliminary determination of possible prejudice is protection against executive encroachments upon the administration of justice; and in the present trend of government little can be more essential to the maintenance of individual security. In this important matter, to relegate the courts to such a subserviency as is suggested would be to withdraw from them the confidence of independence and judicial appraisal that so far appear to have served well the organization of which we are the heirs. These are considerations which appear to me to follow from the reasoning of the Judicial Committee in *Robinson* v. *South Australia*.[23]

In *Gagnon* v. *Quebec Securities Commission*,[24] the Supreme Court declined to follow the *Duncan* case and followed the reasoning of Lord Denning, M.R., in the *Grosvenor Hotel* case. It was made clear that the judges "who are guardians of justice" must be reasonably satisfied that the interest of the State goes beyond that of the litigant, or at least that the departmental objection is not unreasonable. Fauteux, J., writing the majority judgment said:

> There is no doubt that Judges will use great caution and will hesitate before exercising this residuary power of review; but the fact that this power is attributed to them necessarily implies that, rare though they may be, there will be cases where the duty to exercise the power will arise. And it goes without saying that in each case the facts raised to justify the use of the power will vary; each case will have to be judged on its merits.[25]

Abbott, J., concluded his dissenting judgment by stating "It may well be that this is out of line with modern day conditions, as to which of course I express no opinion. If that be so, I think the remedy must be sought elsewhere than in the Courts".[26] However, much that was said in this case may be *obiter*, as the basis of the decision was that the objection by the minister was not in adequate or proper form.

From these cases it appears that under Canadian law the court may in certain cases examine the ground on which a minister claims privilege, to determine whether the privilege can be sustained; in other cases the court may determine, from the very nature of the documents for which privilege is claimed, that no examination should be ordered, as for example

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[23]*Ibid.*, at pp. 485-86.
[24][1965] S.C.R. 73, 50 D.L.R. (2d) 329.
[25][1965] S.C.R. 79, 50 D.L.R. (2d) 333-334.
[26][1965] S.C.R. 84, 50 D.L.R. (2d) 338.

in the case of cabinet minutes and diplomatic reports. In the words of Lord Upjohn in *Conway* v. *Rimmer*,

> . . . the principle to be applied can be very shortly stated. On the one side there is the public interest to be protected; on the other side of the scales is the interest of the subject who legitimately wants production of some documents, which he believes will support his own or defeat his adversary's case. Both are matters of public interest, for it is also in the public interest that justice should be done between litigating parties by production of all documents which are relevant and for which privilege cannot be claimed under the ordinary rules. They must be weighed in the balance one against the other.[27]

3. Legislation

We now consider how far legislation concerning executive privilege precludes the court from applying the common law. The provisions of the Ontario *Evidence Act* read:

> 31. Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a department of the public service of Ontario, if the deputy head or other officer of the department has the document in his personal possession, and is called as a witness, he is entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the department, to object to producing the document on the ground that it is privileged, and such objection may be taken by him in the same manner, and has the same effect, as if such member of the Executive Council or head of the department were personally present and made the objection.[28]

This provision does not appear to affect the conclusiveness of an objection to produce, made by a member of the Executive Council. It merely facilitates the manner in which the objection may be made where a deputy head or other officer is called as a witness. A much broader provision in the Quebec *Code of Civil Procedure* did not prevent the Supreme Court of Canada, in the *Gagnon* case, from applying the principles laid down in the *Grosvenor Hotel* case.

At the time of the *Gagnon* case Article 332 of the Quebec *Code of Civil Procedure* provided:

> He cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal advisor, or as an officer of state where public policy is concerned.
>
> The same shall apply to any member, officer or employee of a commission, board or other body the members of which are appointed by the Lieutenant-Governor in Council, whenever the Attorney-General or Solicitor-General of the Province certifies, by a writing

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[27]*Conway* v. *Rimmer and Another*, [1968] A.C. 910, 992, [1968] 1 All E.R. 874, 914.

[28]R.S.O. 1970, c. 151, s. 31.

> in the possession of the witness, who must produce the same, that public order is involved in the facts concerning which it is desired to examine him.[29]

Our interpretation of the majority judgment of the Supreme Court concerning this section is reinforced when it is read with the dissenting judgment of Abbott, J. Referring to some previous Canadian cases dealing with the effect of Article 332, Abbott, J., adopted the words of Casey, J., in *Minister of National Revenue et al.* v. *Die-Plast Co.*[30] where he said:

> It appears to me that these decisions constitute a jurisprudence which supports the contention that it is only the head of a Department of State who is in a position and who has the right to decide whether the disclosure will be against the public interest, and the further proposition that no Court has the right to go behind the decision—in this case—of the Minister of National Revenue. It would require a very compelling reason to warrant any interference with this jurisprudence and to justify an opinion contrary to that expressed in these decisions. Neither in the judgment *a quo* nor elsewhere have I been able to find such a reason.[31]

From the fact that the majority of the court did not agree with Abbott, J., it might be inferred that, even though they did not find it necessary to decide the point, the majority did not consider that the language of Article 332 limited the power of the court to hold the balance concerning the respective interests involved.

In *The Proceedings Against The Crown Act*[32] it is provided that where an action is brought against Her Majesty in the right of Ontario,

> . . . the rules of the court in which the proceedings are pending as to discovery and inspection of documents and examination for discovery apply in the same manner as if the Crown were a corporation, except that,
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> (a) the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest;
>
> (b) the person who shall attend to be examined for discovery shall be an official designated by the Deputy Minister of Justice and Deputy Attorney General; and
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> (c) the Crown is not required to deliver an affidavit on production of documents for discovery and inspection, but a list of the documents that the Crown may be required to produce, signed by the Deputy Minister of Justice and Deputy Attorney General, shall be delivered.[33]

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[29]S.Q. 1957-58, c. 43, s. 2.
[30][1952] 2 D.L.R. 808.
[31]*Ibid.*, at p. 815.
[32]R.S.O. 1970, c. 365.
[33]*Ibid.*, s. 12.

This section was criticized by the Royal Commission Inquiry into Civil Rights[34] on the ground that in actions against the Crown it went further than the common law privilege. It was recommended that the section be repealed and parties to actions coming within it be left to their common law rights.

In the light of our interpretation of the Supreme Court's view of Article 332 of the Quebec *Code of Civil Procedure* in the *Gagnon* case, it is doubtful that the interpretation of the Royal Commission is correct. The better conclusion would appear to be that the section is a procedural one giving the Crown a right to refuse to produce documents or answer questions on discovery on the ground of privilege, but it would still remain for the court in proper cases to determine whether the ground of privilege is well taken.

The latest attempt to deal in statutory form with the topic of executive privilege is contained in the *Federal Court Act*[35] and the *Federal Court Rules*.[36] The Act provides:

> 41(1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

This provision does not apply to oral communications not reduced to documentary form. Rule 464 provides for production and inspection of Crown documents, where the Crown is not a party:

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[34]*Royal Commission Inquiry into Civil Rights* (1971), Vol. 5, Chapter 131, at p. 2213 *et seq.*

[35]S.C. 1970-71-72, c. C-1.

[36]S.O.R./71-68. The relevant rules provide:

> Rule 456. At any state of an action, the Court may order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.
>
> Rule 457. Where on an application for production of any document, privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

Rule 459 reproduces section 41 of the Act.

Rule 464(1) When a document is in the possession of a person not a party to the action and the production of such document at a trial might be compelled, the Court may at the instance of any party, on notice to such persons and to the other parties to the action, direct the production and inspection thereof, and may give directions respecting the preparation of a certified copy which may be used for all purposes in lieu of the original.

(2) This Rule applies in respect of a document in possession of the Crown.

(3) Where an application under paragraph (1) is in respect of a document in the possession of the Crown, the notice to the Crown shall be directed to, and served on, the Deputy Attorney General of Canada.

4. Conclusions

We have come to the conclusion that the law governing executive privilege requires clarification by statute. Although the relevant provisions of the *Federal Court Act* form a basis for consideration, they are not entirely satisfactory for our purposes. They do not refer to oral communications; and it may be argued that the Act does not go beyond production and discovery in the preparation for trial of an action to which the Crown is a party.

We have concluded that, in the provincial context, only the following grounds should form the basis of an unreviewable claim of privilege: injury to the security of the Province or the Nation, or to federal-provincial relations, or disclosure of a Cabinet confidence. Moreover, it is the Commission's view that, because the proposed scheme would broaden the range of matters in respect of which crown privilege may be claimed absolutely, without intervention by the courts, additional safeguards are required against the unwise and arbitrary exercise of the privilege. We recommend, therefore, that a decision as to whether executive privilege should be claimed on any of the grounds on which, under our recommendations, a claim for unreviewable privilege may be based, should be made not by a Minister alone, but collectively by the Executive Council.

We have concluded that the power to inquire into a claim of executive privilege on the ground that disclosure would be contrary to the public interest should be restricted to proceedings in the Supreme and County or District Courts. However, we think that provision should be made for an application to the Divisional Court by way of stated case where a Minister objects to produce documents or other things before a tribunal or court presided over by provincial appointees.

5. Recommendation

We recommend that section 31 of *The Evidence Act* be repealed and the following substituted therefor:

(1) This section applies only to a proceeding in the Supreme Court or a county or district court, whether the Crown is or is not a party.

(2) Subject to subsection 3 and any other Act, where a member of the Executive Council objects to the disclosure of a document or its contents or of an oral communication or other thing on the ground that the disclosure would be against the public interest and certifies to the court by affidavit that the document or oral communication or other thing belongs to a class or contains information which on grounds of public interest specified in the affidavit should not be disclosed, the court may inquire into the matter privately and, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit, it may order, subject to such restrictions or conditions as it deems appropriate, disclosure on discovery or by a witness at trial.

(3) Where a member of the Executive Council certifies to the court by affidavit that the Executive Council is of the opinion that disclosure of any document or its contents or any oral communication or other thing would be injurious to the security of Canada or Ontario or to federal-provincial relations, or that it would disclose a confidence of the Executive Council, disclosure shall be refused without any examination by the court concerning the document, oral communication, or other thing. [Draft Act, Section 42.]

(1) This section applies only to a proceeding other than a proceeding to which section 42 applies.

(2) Where a member of the Executive Council objects to the disclosure of a document or its contents or of an oral communication or other thing on any ground not falling within subsection 3 of section 42 and certifies to the court by affidavit that the document or oral communication or other thing belongs to a class or contains information which on grounds of public interest specified in the affidavit should not be disclosed, the presiding officer at the proceeding may on his own motion or on application of a party to the proceeding state a case to the Divisional Court setting out the facts, and the court may on application by the presiding officer or by such party inquire into the matter privately and make any order concerning production of the matter in question that a court could have made under section 42.

(3) Where a presiding officer refuses to state a case under subsection 2, any party to the proceeding may apply to the Divisional Court for an order that he so state a case and if the order is made, he shall state a case accordingly. [Draft Act, Section 43.]

CHAPTER 15

FORMAL PROOF OF GOVERNMENTAL DOCUMENTS

1. Discussion

Sections 25 to 29 inclusive, section 30 (in part) and section 32 of *The Evidence Act*[1] deal with proof of governmental documents such as letters patent, statutes, orders in council, proclamations, orders, notices and entries in books of account kept by departments of governments.[2] The

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[1]R.S.O. 1970, c. 151.

[2]These sections provide:

25. Letters patent under the Great Seal of the United Kingdom, or of any other of Her Majesty's dominions, may be proved by the production of an exemplification thereof, or of the enrolment thereof, under the Great Seal under which such letters patent were issued, and such exemplification has the like force and effect for all purposes as the letters patent thereby exemplified or enrolled, as well against Her Majesty as against all other persons whomsoever.

26. Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be printed by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within the Queen's dominions, shall be admitted in evidence to prove the contents thereof.

27. *Prima facie* evidence of a proclamation, order, regulation or appointment to office made or issued,

(a) by the Governor General or the Governor General in Council, or other chief executive officer or administrator of the Government of Canada; or

(b) by or under the authority of a minister or head of a department of the Government of Canada or of a provincial or territorial government in Canada; or

(c) by a Lieutenant Governor or Lieutenant Governor in Council or other chief executive officer or administrator of Ontario or of any other province or territory in Canada.

may be given by the production of,

(d) a copy of the *Canada Gazette* or of the official gazette for a province or territory purporting to contain a notice of such proclamation, order, regulation or appointment; or

(e) a copy of such proclamation, order, regulation or appointment purporting to be printed by the Queen's Printer or by the government printer for the province or territory; or

(f) a copy of or extract from such proclamation, order, regulation or appointment purporting to be certified to be a true copy by such minister or head of a department or by the clerk, or assistant or acting clerk of the executive council or by the head of a department of the Government of Canada or of a provincial or territorial government or by his deputy or acting deputy.

28. An order in writing purporting to be signed by the Secretary of State of Canada and to be written by command of the Governor General shall be received in evidence as the order of the Governor General and an order in writing purporting to be signed by the Provincial Secretary and to

language used in some of these sections was relevant to the constitutional structure of the British Empire existing when they were first enacted. But changes since then have made the terminology not only irrelevant, but in some cases probably inapplicable. Section 25 refers to "Her Majesty's dominions". Section 26 refers to the "Parliament of the United Kingdom, or of the Imperial Government" and refers to documents printed "under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within the Queen's dominions". Section 32 is limited to copies of entries of books of account kept in a department of the government of Canada or of Ontario; no reference is made to other provinces in Canada.

We think the scope of this legislation should be much broader than it now is. It seems unreasonable to us that a statute or other governmental order of Nigeria or Hong Kong should be admissible in evidence in Ontario, while formal proof must be demonstrated when a statute of the State of New York or the State of Michigan is relevant to an issue being tried in Ontario.

In our view, where the contents of a statute or other governmental document are relevant to an issue being tried in Ontario, formal proof of the document should be as simple as possible. On the other hand, if the document requires interpretation, the rules applicable to the proof of foreign law should be applied, as they would be on any other question of foreign law. In any case, the applicability of foreign law to an issue being tried in Ontario always rests with the court.

2. Recommendation

In order to facilitate formal proof of foreign statutes and similar governmental documents, we recommend that the substance of the sections of *The Evidence Act* we have referred to should be replaced by a

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be written by command of the Lieutenant Governor shall be received in evidence as the order of the Lieutenant Governor.

29. Copies of proclamations and of official and other documents, notices and advertisements printed in the *Canada Gazette*, or in *The Ontario Gazette*, or in the official gazette of any province or territory in Canada are *prima facie* evidence of the originals and of the contents thereof.

30. Where the original record could be received in evidence, a copy of an official or public document in Ontario, purporting to be certified under the hand of the proper officer, or the person in whose custody such official or public document is placed, or of a document, by-law, rule, regulation or proceeding, or of an entry in a register or other book of a corporation, created by charter or statute in Ontario, purporting to be certified under the seal of the corporation and the hand of the presiding officer or secretary thereof, is receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof.

32. A copy of an entry in a book of account kept in a department of the Government of Canada or of Ontario shall be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of the department that such book was, at the time of the making of the entry, one of the ordinary books kept in the department, that the entry was apparently, and as the deponent believes, made in the usual and ordinary course of business of the department, and that such copy is a true copy thereof.

more comprehensive and relevant provision. If a copy of a foreign governmental document is produced, which the court is satisfied is an authentic copy of the document, and the court finds that the original, if otherwise proved, would be admissible in evidence, a copy should be received as *prima facie* evidence of the contents of the original. If at any time it is disclosed that the copy is not, in fact, a true copy of the original, it would necessarily follow that proof of the original had not been established. We recommend that sections 25 to 30 inclusive[3] and section 32 of *The Evidence Act* be repealed and the following be substituted therefor:

> If the court is satisfied as to its authenticity, a copy reproduced by any means,
>
> (a) of any statute, regulation, rule, by-law, ordinance, proclamation, official gazette or journal, order, appointment, patent, charter or other document of a similar nature enacted, made, issued, published or promulgated by or on behalf of any government or governmental agency in the exercise of any original or delegated authority within or outside Ontario; or
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> (b) of an entry in a book of account kept by or on behalf of any government or governmental agency within or outside Ontario,
>
> is admissible in a proceeding as *prima facie* evidence of the document and of its contents, or of the entry and the matters, transactions and accounts recorded therein. [Draft Act, Section 41.]

[3]The provisions of section 30 dealing with corporate documents are now contained in section 46 of the Draft Act.

CHAPTER 16

THE ENFORCEMENT OF INTERPROVINCIAL SUBPOENAS

Securing the attendance of witnesses from other provinces in Canada presents certain problems in the administration of justice in Ontario. As far as witnesses from Quebec are concerned, the provisions of the pre-Confederation Act of the Province of Canada[1] still apply; these are set out as an appendix to section 20 of *The Evidence Act*.[2]

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[1]S.C. 1854, c. 9.

[2]These provisions read as follows:

20. A witness served in due time with a subpoena issued out of a court in Ontario, and paid his proper witness fees and conduct money, who makes default in obeying such subpoena, without any lawful and reasonable impediment, in addition to any penalty he may incur as for a contempt of court, is liable to an action on the part of the person by whom, or on whose behalf, he has been subpoenaed for any damage that such person may sustain or be put to by reason of such default.

4. If in any action or suit depending in any of Her Majesty's Superior Courts of Law or Equity in Canada, it appears to the Court, or when not sitting, it appears to any Judge of the Court that it is proper to compel the personal attendance at any trial or *enquête* or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or Judge, in their or his discretion, may order that a writ called a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue in special form, commanding such person to attend as a witness at such trial or *enquête* or examination of witnesses wherever he may be in Canada.

5. The service of any such writ or process in any part of Canada, shall be valid and effectual to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it has issued, according to the practice of such Court.

6. No such writ shall be issued in any case in which an action is pending for the same cause of action, in that section of the Province, whether Upper or Lower Canada respectively, within which such witness or witnesses may reside.

7. Every such writ shall have at the foot, or in the margin thereof, a statement or notice that the same is issued by the special order of the Court or Judge making such order, and no such writ shall issue without such special order.

8. In case any person so served does not appear according to the exigency of such writ or process, the Court out of which the same issued, may, upon proof made of the service thereof, and of such default to the satisfaction of such Court, transmit a certificate of such default, under the seal of the same Court, to any of Her Majesty's Superior Courts of Law or Equity in that part of Canada in which the person so served may reside, being out of the jurisdiction of the Court transmitting such certificate, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as they might have done if such person had neglected or refused to appear to a writ of subpoena or other similar process issued out of such last mentioned Court.

9. No such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any

In *Rideout* v. *Rideout*[3] an application was made to commit witnesses in Ontario who had failed to respond to a subpoena served in Montreal. Kelly, J., held that the provisions of the pre-Confederation statute are still in force in Ontario, but refused to make an order to commit because of the unsatisfactory condition of the material filed in support of the application. In this case the learned judge followed a line of cases based on *Moffat* v. *Prentice*[4] in which Spragge, C., upheld a decision of the Registrar that a party living in Hull could be compelled to attend for examination in Ottawa.

Section 129 of the *British North America Act*[5] provides that, except where otherwise provided, all laws in force in Canada at the time of the union should continue in Ontario and Quebec as if the union had not been made, subject, however, to repeal, abolition or alteration "by the Parliament of Canada or by the legislature of the respective province according to the authority of the Parliament or of that legislature under this Act".

In *Dobie* v. *Temporalities Board*[6] Lord Watson dealt with Quebec legislation that affected a fund incorporated prior to Confederation under a statute of Canada, and established principles that do not appear to have been challenged. He said:

> If it could be established that, in the absence of all provincial legislation on the subject the Legislature of Quebec would have been authorized by section 92 of the *B.N.A. Act* to pass an act in terms identical with 22 Vict., c. 66 [the pre-Confederation Act], then it would follow that the Act of 22 Vict., has been validly amended by

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trial or *enquête* or examination of witnesses, in obedience to any such subpoena or other similar process, unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile allowed to witnesses by the law and practice of the Superior Court of Law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence and of returning from giving evidence, had been tendered to such person at the time when the writ of subpoena, or other similar process was served upon him.

10. The service of such writs of subpoena or other similar process, in Lower Canada, shall be proved by the certificate of a Bailiff within the jurisdiction where the service has been made, under his oath of office, and such service in Upper Canada by the affidavit of service endorsed on or annexed to such writ by the person who served the same.

11. The costs of the attendance of any such witness shall not be taxed against the adverse party to such suit, beyond the amount that would have been allowed on a commission *rogatoire*, or to examine witnesses unless the Court or Judge before whom such trial or *enquête* or examination of witnesses is had, so orders.

13. Nothing herein contained shall affect the power of any Court to issue a commission for the examination of witnesses out of its jurisdiction, nor affect the admissibility of any evidence at any trial or proceeding, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court.

[3][1956] O.W.N. 644 (H.C.J.).

[4](1873), 6 P.R. 33.

[5]30 & 31 Vict., c. 3, (1867).

[6](1882), 7 App. Cas. 136.

> 38 Vict., c. 64 [the impugned Act]. On the other hand, if the Legislature of Quebec has not derived such powers of enactment from section 92 the necessary inference is that the legislative authority required in terms of section 129 to sustain its right to repeal or alter the old law of the Parliament of the Province of Canada in this case is wanting . . .".[7]

Referring to the trust set up under the pre-Confederation Act, Lord Watson said,

> The corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority. In every case where an act applicable to the two provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province.[8]

The converse situation arose in *A.G. for Ontario* v. *A.G. for the Dominion*.[9] There the subject matter was one which lay entirely within the jurisdiction of the Province of Ontario, and it was held that the provisions of *The Canada Temperance Act, 1886* insofar as they purported to repeal the prohibition provisions of an 1864 pre-Confederation Act of Canada were *ultra vires*. Lord Watson said "It appears to their Lordships that neither the Parliament of Canada nor the Provincial legislature have authority to repeal statutes they could not directly enact".[10]

Lefroy, in his book on Canada's Federal System,[11] after referring to the *Dobie* case, quoted from a report from the Minister of Justice to the Governor General on November 22, 1900 as follows:

> There can be no doubt that the legislature of either of the provinces of Ontario and Quebec has no power to modify or repeal the provisions of the charter of a corporation created by the legislature of the late province of Canada for the purpose of doing business in Upper and Lower Canada.

Varcoe, in *The Constitution of Canada*,[12] commenting on the cases we have discussed, states:

> section 129, . . . contemplated the continuation of the authority of the United Kingdom Parliament to legislate for Canada. The Statute of Westminster, however, expressly provided that no Act of the United Kingdom Parliament passed after the commencement of that statute should extend to Canada unless it was expressly declared in the Act that Canada had requested and consented to the enactment. And it was further provided that the Parliament of Canada could

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[7] *Ibid.*, at p. 147.
[8] *Ibid.*, at p. 150.
[9] [1896] A.C. 349.
[10] *Ibid.*, at p. 366.
[11] Lefroy, A.H.F., *Canada's Federal System* (1913), at p. 162; quoting Hon. Charles J. Doherty, (cited as Hodgins Provincial Legislation, 1899-1900 at p. 16, in Lefroy, *Canadian Constitutional Law* (1918), at p. 189).
[12] Varcoe, F.P., *The Constitution of Canada* (1965), at p. 24.

repeal or amend any United Kingdom Act in so far as the same was part of the law of Canada, and that this power extended to the powers of the legislatures of the provinces.

. . . In the *Natural Products Marketing Act* case [1937] A.C. 377, Lord Atkin referred to this problem as follows at p. 389:

> 'Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.'

We have concluded that the provisions of the Act of Canada of 1854 appended to section 20 of *The Evidence Act* are in force in Ontario and Quebec. We do not think that they are divisible, as their subject matter is of mutual concern in the administration of justice in both provinces, Quebec and Ontario. Hence, neither the Province of Quebec nor the Province of Ontario can, alone, materially alter these provisions by legislation. They may well be satisfactory as far as Ontario and Quebec are concerned.

However, cases frequently arise in which witnesses from provinces other than Quebec are required to testify at proceedings in Ontario. This is particularly true with respect to witnesses from Manitoba. The Uniform Law Conference of Canada has considered the matter of interprovincial subpoenas and has recommended that all provinces enact an Interprovincial Subpoena Act.[13] We agree in principle with the proposed Act and recommend that appropriate legislation be passed. A copy of the proposed Act is included as an Appendix to this chapter.

If our recommendations are implemented, the appendix to section 20 of *The Evidence Act* should be deleted.

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[13]Uniform Law Conference of Canada, *Proceedings* (1974), at pp. 33, 189.

APPENDIX

The Interprovincial Subpoena Act

Definitions

1. In this Act

(a) "court" means any court in a province of Canada;

(b) "subpoena" means a subpoena or other document issued by a court requiring a person within a province other than the province of the issuing court to attend as a witness before the issuing court.

Note: Provinces may wish to extend definition of court to include a power to enable the Lieutenant Governor in Council to extend to named boards, commissions, or other bodies having power to issue a subpoena, on a reciprocal basis with another province. In provinces where magistrates have power to issue subpoenas in civil matters in their offical capacity and not out of a court, consideration should be given to a change in the definition of "court".

Adoption of interprovincial subpoena

2.(1) A court in (enacting province) shall receive and adopt as an order of the court a subpoena from a court outside (enacting province) if

(a) the subpoena is accompanied by a certificate signed by a judge of a superior, county or district court of the issuing province and impressed with the seal of that court, signifying that, upon hearing and examining the applicant, the judge is satisfied that the attendance in the issuing province of the person subpoenaed

(i) is necessary for the due adjudication of the proceeding in which the subpoena is issued, and

(ii) in relation to the nature and importance of the cause or proceeding is reasonable and essential to the due administration of justice in that province; and

(b) the subpoena is accompanied by the witness fees and travelling expenses in accordance with Schedule "A".

Form of certificate

2.(2) The certificate to which reference is made in clause (a) of subsection (1) may be in the form set out in Schedule "B" or in a form to the like effect.

Immunity by law of other province

3. A court in (enacting province) shall not receive a subpoena from another province under section 2 unless the law of that other province has a provision similar to section 6 providing absolute immunity to a resident of (enacting province) who is required to attend as a witness in the other province from all proceedings of the nature set out in sec-

tion 6 and within the jurisdiction of the Legislature of that other province except only those proceedings grounded on events occurring during or after the required attendance of the person in the other province.

Failure to comply with adopted subpoena

4. Where a person who has been served with a subpoena adopted under section 2 and given the witness fee and travelling expenses in accordance with Schedule "A" not less than 10 days, or such shorter period as the judge of the court in the issuing province may indicate in his certificate, before the date the person is required to attend in the issuing court, fails without lawful excuse to comply with the order, he is in contempt of court and subject to such penalty as the court may impose.

Proceedings in (enacting province)

5.(1) Where a party to a proceeding in any court in (enacting province) causes a subpoena to be issued for service in another province of Canada, the party may attend upon a judge of (the Court of Appeal, or the Court of Queen's Bench, or a County Court, or as the case may be) who shall hear and examine the party or his counsel, if any, and, upon being satisfied that the attendance in (enacting province) of the person required in (enacting province) as a witness

(a) is necessary for the due adjudication of the proceeding in which the subpoena or other document has been issued; and

(b) in relation to the nature and importance of the proceedings, is reasonable and essential to the due administration of justice in (enacting province):

shall sign a certificate which may be in the form set out in Schedule "B" and shall cause the certificate to be impressed with the seal of the court.

Certificate to be attached to and endorsed on subpoena

(2) The certificate shall be either attached to or endorsed on the subpoena.

No submission to jurisdiction

6. A person required to attend before a court in (enacting province) by a subpoena adopted by a court outside (enacting province) shall be deemed, while within (enacting province) not to have submitted to the jurisdiction of the courts of (enacting province) other than as a witness in the proceedings in which he is subpoenaed and shall be absolutely immune from seizure of goods, service of process, execution of judgment, garnishment, imprisonment or molestation of any kind relating to a legal or judicial right, cause, action, proceeding or process within the jurisdiction of the Legislature of (enacting province) except only those proceedings grounded on events occurring during or after the required attendance of the person in (enacting province).

Non-application of Act

7. This Act does not apply to a subpoena that is issued with respect to a criminal offence under an Act of Parliament.

NOTE: Most courts have authority to require the payment of additional witness fees and conduct money where the amount paid on the service of the subpoena is inadequate. If there is any doubt about such authority a provision similar to the following should be added after section 6.

Order for additional witness fees and expenses

6.1 Where a person is required to attend before a court in (enacting province) by a subpoena adopted by a court outside (enacting province) he may request the court to order additional fees and expenses to be paid in respect of his attendance as a witness and the court, if it is satisfied that the amount of fees and expenses previously paid to the person in respect of his attendance is insufficient, may order the party who obtained the subpoena to pay the person forthwith such additional fees and expenses as the court considers sufficient, and amounts paid pursuant to an order made under this section are disbursements in the cause.

NOTE: The following Schedule is recommended for consideration as Schedule of Witness fees and travelling expenses. The amounts might be varied and other items might be added.

SCHEDULE "A"

Witness Fees and Travelling Expenses

The witness fees and travelling expenses required to be given to the witness upon service of an interprovincial subpoena shall be a sum of money or a sum of money together with valid travel warrants, sufficient to satisfy the following requirements:

1. The fare for transportation by the most direct route via public commercial passenger carrier between the witness' place of residence and the place at which the witness is required to attend in court, in accordance with the following rules:

(a) If the journey or part of it can be made by air, rail or bus, that portion of the journey shall be by airline, rail or bus by tourist class or equivalent class via carriers on which the witness can complete his total journey to the place where he is required to attend in court on the day before his attendance is required.

(b) If railway transportation is necessary for part of the journey and sleeping accommodation would normally be obtained for such a journey, the fare for sleeping accommodation shall be included.

(c) In the calculation of the fare for transportation, the most rapid form of transportation by regularly scheduled carrier shall be accorded priority over all other forms.

(d) If the material which the witness is required to produce in court is of such weight or size as to attract extra fares or charges, the amount so required shall be included.

2. The cost of hotel accommodation for not less than three days at the place where the witness is required to attend in court, in an amount not less than $60.00.

3. The cost of meals for the total journey and for not less than three days at the place where the witness is required to attend in court, an amount not less than $48.00.

4. In addition to the amounts described above, an allowance of $20.00 for each day of absence from the ordinary residence of the witness, and the witness shall be paid on account of this allowance not less than $60.00.

SCHEDULE "B"

Interprovincial Subpoena Act
Certificate

I, ... a judge of the
(name of judge)

..... certify that I
(name of superior, county or district court)

have heard and examined .....
(name of applicant party or his counsel)

who seeks to compel the attendance of .....
(name of witness)

to produce documents or other articles or to testify, or both, in a proceeding in (enacting province) in the .....
(name of court in which witness

..... styled .....
is to appear) (style of proceeding)

I further certifiy that I am persuaded that the appearance of .....
(name of

..... as a witness in
witness)

the proceeding is necessary for the due adjudication of the proceeding, and, in relation to the nature and importance of cause or proceeding, is reasonable and essential to the due administration of justice in (enacting province).

The Interprovincial Subpoena Act of (enacting province) makes the following provision for the immunity of .....
(name of witness)

A person required to attend before a court in (enacting province) by subpoena adopted by a court outside (enacting province) shall be

deemed, while within (enacting province) not to have submitted to the jurisdiction of the courts of (enacting province) other than as a witness in the proceedings in which he is subpoenaed and shall be absolutely immune from seizure of goods, service of process, execution of judgment, garnishment, imprisonment or molestation of any kind relating to a legal or judicial right, cause, action, proceeding or process within the jurisdiction of the Legislature of (enacting province) except only those proceedings grounded on events occurring during or after the required attendance of the person in (enacting province).

Dated this ..... day of ....., 19....

(seal of the court)

.....

(signature of judge)

CHAPTER 17

APPLICATION OF SECTION 37 OF THE CANADA EVIDENCE ACT TO THE PROVISIONS OF THE ONTARIO EVIDENCE ACT

In addition to the matters set out in this Report, we have considered how far our recommendations might alter the rules of evidence applicable in criminal trials in Ontario by reason of the provisions of section 37 of the *Canada Evidence Act*. In the event, we have concluded that there would be no alteration. Section 37 provides:

> In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

This section is to be read with section 7(2) of the *Criminal Code*:[1]

> 7.(2) The criminal law of England that was in force in a province immediately before the 1st day of April 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

In *Marshall* v. *The Queen*,[2] the Supreme Court of Canada considered the application of these sections to provincial legislation. The precise question in this appeal was whether statements, made to a police officer by the accused following a motor car accident, were admissible at a criminal trial arising out of the accident, notwithstanding the provisions of *The Highway Traffic Act* of Ontario which read:

> 110. (1) Every person in charge of a motor vehicle who is directly or indirectly involved in an accident shall, if the accident results in personal injuries, or in damage to property apparently exceeding $100, report the accident forthwith to the nearest provincial or municipal police officer, and furnish him with such information or written statement concerning the accident as may be required by the officer or by the Registrar.
>
> (5) Any written reports or statements made or furnished under this section shall be without prejudice, shall be for the information of the Registrar, and shall not be open to public inspection, and the fact that such reports and statements have been so made or furnished shall be admissible in evidence solely to prove compliance with this section, and no such reports or statements, or any parts thereof or

[1] R.S.C. 1970, c. C-34.
[2] [1961] S.C.R. 123.

> statements contained therein, shall be admissible in evidence for any other purpose in any trial arising out of a motor vehicle accident.[3]

It was argued that these provisions made the statements to the police officer inadmissible because of section 36 of the *Canada Evidence Act* (now section 37). Kerwin, C.J.C., held that if the words of subsection 5 of section 110 of *The Highway Traffic Act* purported to alter the rule of evidence as to the admissibility of the statements, its application in a trial under the *Criminal Code* was excluded by the words "subject to this and other Acts of the Parliament of Canada" used in section 37, because of section 7(1) of the *Criminal Code* which retained the old common law.

In referring to an amendment made to the predecessor of section 110(5) the learned judge said:

> If subs. 5 of s. 110 of the present Act purported to alter this rule, its application in a trial under the *Criminal Code* is excluded by that part of s. 36 of the *Canada Evidence Act* which is underlined [subject to this and other Acts of the Parliament of Canada] because s. 7(1) of the *Criminal Code* retains the old common law; but in view of the amendment referred to above, I am satisfied that the Legislature never so intended.[4]

The amendment referred to by Kerwin, C.J.C. was made in 1938. The words "civil or criminal" were struck out from section 94(5), the predecessor of section 110. From this it seems to be quite clear that, in the Chief Justice's opinion, where the Legislature passes laws of evidence intended to apply only to proceedings respecting which the Legislature has jurisdiction, section 37 has no application.

Cartwright, J., agreed with the Chief Justice's view. He said:

> As a matter of construction it is my opinion that the words in s. 110(5) 'any trial' mean 'any trial respecting the proceedings in which the Legislature has jurisdiction'. This follows not only from the history of the subsection and particularly the amendment made by s. 20 of c. 17 of the Statutes of Ontario 1938 set out in the reasons of the Chief Justice but also from the well settled rule of construction that if the words of an enactment so permit they shall be construed in accordance with the presumption which imputes to the Legislature the intention of limiting the operation of its enactments to matters within its allotted sphere.[5]

In the case of our draft legislation, it should be unnecessary for the courts to infer the Legislature's intention as to the scope of its application. Section 2 of the proposed Draft Act provides explicitly for this matter as follows:

> 2. This Act applies to all proceedings respecting which the Legislature has jurisdiction.

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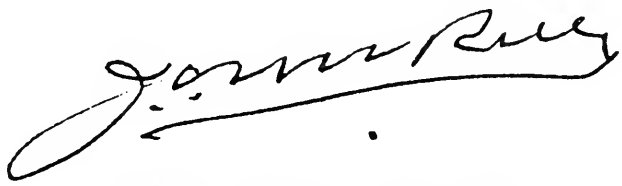
[3]R.S.O. 1950, c. 167, s. 110, as amended by S.O. 1954, c. 35.
[4][1961] S.C.R. 123, 127-128.
[5]*Ibid.*, at p. 128.

CONCLUSION

With the submission of this Report on the Law of Evidence, we bring to a conclusion many years of work and study of the provincial law of evidence. Hopefully we have laid the foundations for a comprehensive and contemporary law which will be of assistance to the courts, to the lawyers, and to the public in future years. Throughout the project we have benefited immeasurably from the sound research and wise counsel of Professor Alan W. Mewett of the Faculty of Law of the University of Toronto and the Research Team which he led. The Research Team consisted of B. C. McDonald, Esq., formerly on the staff of the Faculty of Law, Queen's University; Professor J. D. Morton, Q.C., of the Faculty of Law of the University of Toronto; His Honour Judge Stephen Borins, formerly of the Faculty of Osgoode Hall Law School, York University; His Honour Ronald Joseph Delisle, formerly of the Faculty of Law, Queen's University and Professor S. I. Bushnell of the Faculty of Law of the University of Windsor. We wish to acknowledge with gratitude the high quality of the research material prepared by them. We are also much indebted to L. R. MacTavish, Esq., Q.C., formerly Senior Legislative Counsel for the Province of Ontario for the most competent assistance he has given to the Commission in drafting the proposed revision of *The Evidence Act* which accompanies this Report. Finally, we owe a great debt of gratitude to the Research Staff of the Commission for the dedicated public service they have rendered in the preparation of this Report.

All of which is respectfully submitted.

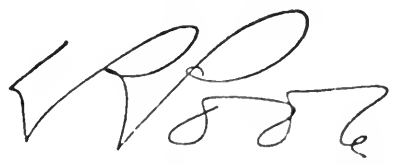
H. ALLAN LEAL, *Chairman*



JAMES C. McRUER, *Commissioner*

RICHARD A. BELL, *Commissioner*

W. GIBSON GRAY, *Commissioner*



WILLIAM R. POOLE, *Commissioner*

29 March, 1976.

APPENDIX A

BILL 00 **197**

The Evidence Act, 197

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation

1. In this Act,

(*a*) "court" includes a judge, arbitrator, umpire, commissioner, justice of the peace or other officer or person having by law or by consent of parties authority to hear, receive and examine evidence; R.S.O. 1970, c. 151, s. 1(b).

(*b*) "proceeding" includes an action, issue, matter, arbitration, reference, investigation, inquiry, a prosecution for an offence committed against a statute of Ontario or against a by-law or regulation made under any such statute, and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Ontario.
R.S.O. 1970, c. 151, s. 1(a), *amended.*

Application of Act

2. This Act applies to all proceedings respecting which the Legislature has jurisdiction. R.S.O. 1970, c. 151, s. 2, *amended.*

Witnesses' affirmation

3.—(1) Except as provided in subsections 2 and 3, every person presented as a witness in a proceeding shall before testifying identify himself and make the following solemn affirmation:

> I solemnly affirm that I will tell the truth, the whole truth, and nothing but the truth, well knowing that it is a serious offence to give false evidence with intent to mislead the court.

Children, 7 - 14

(2) Where a child seven years of age and under fourteen is presented as a witness in a proceeding, the presiding officer shall conduct an inquiry to determine if, in his opinion, the child is possessed of sufficient intelligence to justify the reception of his evidence, and to determine if he is competent to know the nature and consequences of giving false evidence and to know that it is wrong and where he so finds, he shall permit the child to give evidence upon making the solemn affirmation set out in subsection 1.

Other children

(3) Where a child who is,

(*a*) under seven years of age; or

(*b*) seven years of age and under fourteen years, and who does not qualify as a witness under subsection 2,

is presented as a witness in a proceeding, the presiding officer shall conduct an inquiry to determine if in his opinion the child is possessed of sufficient intelligence to justify the reception of his

evidence, and understands that he should tell the truth, and where he so finds, he shall permit the child to give evidence upon stating:

I promise to tell the truth.

Idem, Corroboration

(4) No case shall be decided upon the evidence of a child who has qualified as a witness under subsection 3 unless his evidence is corroborated by some other material evidence.

Affirmation in lieu of oath

(5) In all other cases where a person might heretofore have lawfully taken an oath, he shall hereafter be required to make a solemn affirmation in the following form:

I, A.B., solemnly affirm (followed by the substance of the affirmation).

Oaths inadvertently administered

(6) Where an oath is inadvertently administered after this Act comes into force in a form that would have been binding had this Act not been passed, it has the same force and effect as a solemn affirmation made under this section. *New.*

Recording of evidence, etc.

4.—(1) Any person who is authorized to record evidence and proceedings in a court may record the evidence and the proceedings by any form of shorthand or by any device for recording sound of a type approved by the Attorney General.

Admissibility of transcripts

(2) A transcript of the whole or a part of any evidence that has or proceedings that have been recorded in accordance with subsection 1 and that has or have been certified in accordance with the Act, regulation or rule of court, if any, applicable thereto and that is otherwise admissible by law is admissible in evidence whether or not the witness or any of the parties to the proceeding has approved the method used to record the evidence and the proceedings. R.S.O. 1970, c. 151, s. 5, *amended.*

Witnesses, not incapacitated by crime, etc.

5. No person offered as a witness in a proceeding shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest. R.S.O. 1970, c. 151, s. 6, *amended.*

Administration of affirmations

6.—(1) Where by any Act of the Legislature or order of the Assembly an oath or solemn affirmation is authorized or directed to be administered, an affirmation may be administered by any person authorized to take affidavits in Ontario.

By courts

(2) Every court has power to administer or cause to be administered a solemn affirmation to every witness who is called to give evidence before the court. R.S.O. 1970, c. 151, s. 3, *amended.*

Certification

7. Where a solemn affirmation or declaration is directed to be made before a person, he has power and authority to administer it and to certify to its having been made. R.S.O. 1970, c. 151, s. 4, *amended.*

Admissibility notwithstanding interest or crime

8. Every person offered as a witness in a proceeding shall be admitted to give evidence notwithstanding that he has an interest in the matter in question or in the event of the proceeding and notwithstanding that he has been previously convicted of a crime or offence. R.S.O. 1970, c. 151, s. 7, *amended.*

Evidence of parties and their spouses

9.—(1) The parties to a proceeding and the persons on whose behalf it is brought, instituted, opposed or defended are competent and compellable to give evidence on behalf of themselves or of any

of the parties, and the spouses of such parties and persons are competent and compellable to give evidence on behalf of any of the parties. R.S.O. 1970, c. 151, s. 8(1), *amended.*

Proceeding in consequence of adultery

(2) The parties to and witnesses in a proceeding instituted in consequence of adultery and the spouses of such parties may be asked and shall not be excused from answering any question, including any question tending to show that he or she has committed adultery. R.S.O. 1970, c. 151, s. 10, *amended.*

Evidence of spouses as to sexual intercourse *inter se*

(3) In a proceeding a spouse is competent and compellable to give evidence that he or she did or did not have sexual intercourse with the other spouse to the marriage and a married person shall not be excused on the grounds of privilege from answering questions tending to establish that sexual intercourse did not take place between such person and the other party to the marriage at any time prior to or during the marriage. R.S.O. 1970, c. 151, s. 8(2), *amended.*

Witness must answer questions

10.—(1) A witness in a proceeding shall not be excused from answering any question upon the ground that the answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature. R.S.O. 1970, c. 151, s. 9(1), *amended.*

Protection for witnesses

(2) If with respect to a question or a series of related questions a witness in a proceeding objects to answer upon any of the grounds mentioned in subsection 1 and if, but for this section or any Act of the Parliament of Canada, he would therefore be excused from answering, then, although he is by reason of subsection 1 or by reason of any Act of the Parliament of Canada compelled to answer, the answer shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of the Legislature thereafter taking place. R.S.O. 1970, c. 151, s. 9(2), *amended.*

Objection to answering presumed

(3) Notwithstanding subsection 2, a witness in a proceeding shall be deemed to have objected to answer any question the answer to which may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature. *New.*

Disclosure of vote

11. A person is competent but not compellable in a proceeding to disclose for whom or how he voted in any federal, provincial, municipal or other election to public office or in any referendum or plebiscite authorized by statute. *New.*

Privileged communications

12. Evidence is not admissible in a proceeding to prove a communication which is inadmissible by reason of the fact that it is privileged under this Act, any other Act or at common law. *New.*

Opinion Evidence

13. Where it is intended by a party to a proceeding to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon by any party without the leave of the judge or other person presiding. R.S.O. 1970, c. 151, s. 12, *amended.*

Lay witnesses' answers in form of opinions admissible

14. Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding. *New.*

Where opinion evidence on ultimate issues of fact admissible

15. Where a witness in a proceeding is qualified to give opinion evidence, his evidence in the form of opinions or inferences is not made inadmissible because it embraces an ultimate issue of fact. *New.*

Experts' reports

16.—(1) Any report, other than one to which section 17 applies, obtained by or prepared for a party to a proceeding and signed by a person entitled according to the law or practice to give opinion evidence is, with the leave of the court and after at least seven days notice has been given to all other parties, admissible in evidence in the proceeding.

Production of report

(2) Unless otherwise ordered by the court, a party to a proceeding is entitled to obtain the production for inspection of any report of which notice has been given under subsection 1 within five days after giving notice to produce the report.

Viva voce evidence on matters in report

(3) Except by leave of the judge presiding at the proceeding, a person who has made a report mentioned in subsection 1 shall not give evidence at the proceeding touching upon any matter to which the report relates unless subsection 1 has been complied with.

Application of section

(4) This section applies only to proceedings in the Supreme Court and the county and district courts. *New.*

Medical reports

17.—(1) A medical report obtained by or prepared for a party to a proceeding and signed by a legally qualified medical practitioner licensed to practise in any part of Canada is, with the leave of the court and after at least seven days notice has been given to all other parties, admissible in evidence in the proceeding.

Notice and production

(2) Unless otherwise ordered by the court, a party to a proceeding is entitled to obtain the production for inspection of any report of which notice has been given under subsection 1 within five days after giving notice to produce the report.

Report required

(3) Except by leave of the judge presiding at the trial, a legally qualified medical practitioner who has medically examined a party to the proceeding shall not give evidence at the trial touching upon such examination unless a report thereof has been given to all other parties in accordance with subsection 1.

Where doctor called unnecessarily

(4) Where a legally qualified medical practitioner has been required to give evidence *viva voce* in a proceeding and the court is of opinion that the evidence could have been produced as effectively by way of a medical report, the court may order the party that required the attendance of the medical practitioner to pay as costs therefor such sum as it considers appropriate. R.S.O. 1970, c. 151, s. 52, *amended.*

Corroborative evidence, breach of promise

18. The plaintiff in an action for breach of promise of marriage shall not recover unless his or her testimony is corroborated by

some other material evidence in support of the promise. R.S.O. 1970, c. 151, s. 13.

Proceedings by or against heirs, etc.

19. In a proceeding by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1970, c. 151, s. 14, *amended.*

Proceedings by or against persons of unsound mind

20. In a proceeding by or against a mentally incompetent person so found, or an involuntary patient in a psychiatric facility, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence, unless such evidence is corroborated by some other material evidence. R.S.O. 1970, c. 151, s. 15, *amended.*

Use of examination for discovery of officer or servant of corporation at trial

21. An examination for discovery, or any part thereof, of an officer or servant of a corporation made under the rules of court is admissible in evidence at the trial by any party adverse in interest to the corporation, subject to such protection to the corporation as the rules of court provide. R.S.O. 1970, c. 151, s. 16, *amended.*

Interpretation

22.—(1) In this section "statement" means any representation of fact, whether in words or otherwise, made to a witness called to give evidence.

Where hearsay admissible

(2) In a civil proceeding a statement that would otherwise be inadmissible as hearsay is nevertheless admissible as evidence of any fact stated therein of which direct evidence would be admissible,

(*a*) if the parties to the proceeding agree to its admission with or without admission of the truth of facts; or

(*b*) if the maker of the statement could have testified from personal knowledge and

(i) he has died, or

(ii) he is too ill to testify, or

(iii) he cannot with reasonable diligence be identified or found.

Notice

(3) Notice of intention to introduce evidence under clause *b* of subsection 2 shall be given by the party intending to do so to other parties to the proceeding in accordance with such rules as the Rules Committee may make.

Where corroboration required

(4) Where corroboration is required by law, a statement admitted under this section shall not be taken to be corroborative of the evidence of a witness called to prove the statement.

Credibility of maker of statement

(5) Where a statement is tendered in evidence under this section, the circumstances under which it was made may be investigated by the court, and, where it is admitted, the credibility of the maker of the statement may be impeached to the same extent and in the same manner as if he had been a witness in the proceeding except as to the right to cross-examine him.

Limits upon scope of section

(6) Nothing in this section is to be taken to affect the admission of evidence that would otherwise be admissible under this Act or any other Act or at common law or to make admissible any evidence that would be inadmissible on any ground of privilege under this Act or any other Act or at common law. *New.*

Spontaneous and contemporaneous statements

23. Whether or not a person is called as a witness in a proceeding, a statement made by him is admissible in evidence if it was made in such conditions of spontaneity or contemporaneity in relation to an event perceived by the witness as to exclude the probability of concoction or distortion. *New.*

How far a party may discredit his own witness

24.—(1) A party producing a witness in a proceeding shall not impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or proof that the witness at some other time made a statement inconsistent with his present evidence.

Prior inconsistent statements

(2) Before proof of a prior inconsistent statement is given in a proceeding, the circumstances of it sufficient to designate the particular occasion on which it was made shall be drawn to the attention of the witness and he shall be asked whether or not he made the statement.

Idem

(3) No such prior statement is admissible in evidence in a proceeding to prove any fact contained in it. *New.*

Judicial notice of facts

25. In a proceeding judicial notice may be taken of facts,

(*a*) that are so generally known and accepted within the area pertinent to the event that they cannot reasonably be disputed; or

(*b*) that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *New.*

Refusal of evidence obtained by repugnant methods

26. In a proceeding the court may refuse to admit evidence that otherwise would be admissible if the court finds that it was obtained by methods that are repugnant to the fair administration of justice and likely to bring the administration of justice into disrepute. *New.*

Admissibility of things obtained illegally

27. In a proceeding where it is shown that anything tendered in evidence was obtained by illegal means, the court, after considering the nature of the illegality and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence if the court is of the opinion that because of the nature of the illegal means by which it was obtained its admission would be unfair to the party against whom it is tendered. *New.*

Where previous consistent statements admissible as evidence of facts stated therein

28.—(1) A previous consistent statement made by a witness in a proceeding is admissible in evidence to rebut an allegation that his evidence has been fabricated, and such a statement shall be admitted not only to support the credibility of that witness, but also as evidence of any fact contained therein of which direct oral evidence by him would be admissible.

Corroboration

(2) Where corroboration is required by law, a statement admitted under this section shall not be taken as corroborative of the evidence of the witness who made the statement. *New.*

Inadmissibility of convictions

29. Except as provided in this or any other Act, no plea of guilty to or conviction of an offence under the laws of Canada or any province or territory of Canada or a municipal by-law is admissible in evidence in any civil proceeding as proof of the facts constituting the offence to which the plea of guilty was entered or upon which the conviction was based. *New.*

Conclusiveness of convictions for purposes of defamation actions

30. In an action for libel or slander in which the question whether a person has or has not committed an offence under the laws of Canada or any province or territory of Canada is relevant to an issue in the action, proof that that person was convicted of that offence is conclusive evidence that he committed that offence. *New.*

Finding of adultery as evidence in subsequent proceeding

31.—(1) Where in a proceeding for divorce before a court having jurisdiction in Canada a co-respondent has been found to have committed adultery with a party to the proceeding, proof of the judgment of such court is, in the absence of evidence to the contrary, proof of the adultery of the co-respondent in a subsequent proceeding.

Conviction of bigamy as evidence in subsequent divorce proceeding

(2) Where in a proceeding for divorce it is alleged that the respondent went through a form of marriage with another person after the marriage in issue was entered into, proof that the respondent was convicted of bigamy in Canada is evidence that he was guilty of the offence.

Conviction or rape, etc. as evidence in subsequent divorce proceeding

(3) Where in a proceeding for divorce it is alleged that the respondent has been guilty of sodomy, bestiality or rape after the marriage in issue was entered into, proof that the respondent was convicted of the alleged offence in a court having jurisdiction in Canada is evidence that he was guilty of the offence.

Proceedings under R.S.O. 1970, c. 128 or for alimony

(4) Where in a proceeding under *The Deserted Wives' and Children's Maintenance Act* or for alimony it is relevant to prove adultery, proof of a conviction for bigamy during the marriage of the spouses is evidence of adultery. *New.*

Interpretation

32.—(1) In this section "statement" means any statement against interest, and includes any expression however made and any gesture or other assertive conduct.

Admissibility of statements against interest

(2) In a civil proceeding, without limiting the admissibility of any statement admissible at common law or under this or any other Act,

(*a*) any statement of a person who is a party to the proceeding in his personal capacity is admissible against him regardless of the capacity in which he made the statement;

(*b*) any statement of a person who is a party to the proceeding in a representative capacity is admissible against him and the party whom he represents regardless of the capacity in which he made the statement, if the statement was made during the period of time he was a representative;

(*c*) any statement of any person that has been authorized by a party to the proceeding is admissible against that party;

(*d*) any statement is admissible against a party to the proceeding if he expressly adopted it or if, in the circumstances, it is reasonable to infer that he adopted it;

(*e*) any statement made by an agent or employee of a party to the proceeding during the existence of the agency or employment is admissible against that party if the statement concerned a matter within the scope of the agency or employment.

Idem

(3) No statement is admissible under this section if it is inadmissible by reason of any privilege conferred by this or any other Act or at common law. *New.*

Examination of witnesses, proof of contradictory written statements

33. A witness in a proceeding may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the matter in question, without the writing being shown to him, but, if it is intended to contradict him by the writing, his attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting him, and the judge or other person presiding at the proceeding may require the production of the writing for his inspection, and may thereupon make such use of it for the purposes of the proceeding as he thinks fit. R.S.O. 1970, c. 151, s. 21, *amended.*

Proof of contradictory oral statements

34.—(1) If in a proceeding a witness upon cross-examination as to a former statement made by him relative to the matter in question and inconsistent with his present testimony does not distinctly admit that he did make such statement, proof may be given that he did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R.S.O. 1970, c. 151, s. 22, *amended.*

Idem

(2) Where under this section it is proved that a witness made a statement inconsistent with his present testimony, the statement shall be admitted as evidence of the facts stated therein but only if the witness could have testified as to such facts. *New.*

Protection of witnesses charged with offences

35. A witness in a proceeding shall not be asked any question tending to show that he is or has been charged with any Federal or provincial offence. *New.*

Protection of witnesses convicted of offences

36.—(1) A witness in a proceeding shall not be asked any question tending to show that he has been convicted of any Federal or provincial offence solely for the purpose of attacking his credibility unless the court finds that the conviction is, because of the nature of the offence and the date of its commission, relevant to the witness' credibility. *New.*

Perjury, etc.

(2) Notwithstanding subsection 1, a witness in a proceeding may be asked any question tending to show that he has been convicted of an offence under section 121, 122 or 124 of the *Criminal Code* (Canada). *New.*

R.S.C. 1970, c. C-34

Pardon

(3) Notwithstanding subsections 1 and 2, a witness in a proceeding shall not be asked any question tending to show that he has been convicted of any offence for which he has been granted a pardon. *New.*

Proof of previous conviction

(4) Where a witness in a proceeding is asked a question under subsection 1 or 2 and he either denies the allegation or refuses

to answer, the conviction may be proved, and a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted, or by a deputy of the officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate. R.S.O. 1970, c. 151, s. 23(1), *amended*.

Present memory revived

37.—(1) Where a witness in a proceeding is unable to recall fully any matter upon which he is being questioned, he may use any writing or other thing made or verified by him or under his direction at the time of the event or within a reasonable time thereafter in order to revive his memory.

Rights of adverse parties

(2) Where a writing or other thing is used by a witness in a proceeding in order to revive his memory, any adverse party is entitled to inspect the writing or thing and may cross-examine the witness concerning it.

Writing used to revive memory

(3) A writing or other thing used by a witness in a proceeding to revive his memory shall not be used as evidence of the facts stated therein. *New*.

Past recollection recorded

38.—(1) Where a witness in a proceeding is being questioned upon any matter concerning which he had prior knowledge but which he is unable to recall, he may read from any record concerning any fact stated therein of which direct oral evidence given by the witness would be admissible,

(*a*) if the record was made by him contemporaneously with the occurrence of the matter or subsequently while the matter was still fresh in his mind; or

(*b*) if where the record was made by a person other than the witness, it was checked as to its accuracy by the witness subsequently while the occurrence was still fresh in his mind.

Idem

(2) Any portion of a record read from under subsection 1 shall be introduced in evidence together with such other portions of the record as the court may direct to be admitted as explanatory thereof.

Introduction of copies

(3) Where it is not practical to introduce the original record, a copy thereof may be introduced as the court may direct. *New*.

Interpretation

39.—(1) In this section,

(*a*) "business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

(*b*) "copy", in relation to any record, includes a print, whether enlarged or not, from a photographic film of

such record, and "photographic film" includes a photographic plate, microphotographic film or photostatic negative;

(*c*) "record" includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections 4 and 5, any copy or transcript received in evidence under this section pursuant to subsection 4 or 5.

Business records

(2) Where oral evidence in respect of a matter would be admissible in a proceeding, a record that contains information in respect of that matter is admissible in evidence in a proceeding upon production of the record if it was made in the usual and ordinary course of business and it was in the usual and ordinary course of business to make such a record.

Inference where information not in business record

(3) Where a record was made in the usual and ordinary course of business and it was in the usual and ordinary course of business to make such a record, and that record does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may upon production of the record admit the record in a proceeding for the purpose of establishing that fact and may draw the inference that such matter did not occur or exist.

Copy of records

(4) Where it is not possible or reasonably practicable to produce a record described in subsection 2 or 3, a copy of the record accompanied by an affidavit setting out the reasons why it is not possible or reasonably practicable to produce the record and an affidavit of the person who made the copy setting out the source from which the copy was made and attesting to its authenticity, is admissible in evidence under this section in the same manner as if it were the original record.

Where record kept in form requiring explanation

(5) Where production of a record or of a copy of a record described in subsection 2 or 3 would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation, accompanied by an affidavit of that person setting forth his qualifications to make the explanation, and attesting to the accuracy of the explanation is admissible in evidence under this section in the same manner as if it were the original record.

Production of additional parts of records

(6) Where part only of a record is produced under this section by a party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of such other part be produced by that party.

Power of court to draw inferences

(7) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in a record admitted in evidence under this section, the court may, upon production of any record, examine the record, admit evidence in respect thereof given orally or by affidavit, including evidence as to the circumstances in which the information contained in the

record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Notice of intention to produce

(8) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by such party.

Formalities of affidavits

(9) Where evidence is tendered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Examination of those with knowledge of records

(10) Any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the proceeding.

Rules as to admissibility and privileged documents not affected

(11) Nothing in this section makes admissible in evidence in a proceeding,

(*a*) the part of any record as is proved to be,

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or

(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(*b*) any record whose production would be contrary to public policy; or

(*c*) any transcript or recording of evidence taken in the course of another proceeding.

Scope of section

(12) The provisions of this section shall be deemed to be in addition to and not in derogation of,

(*a*) any other provision of this or any other Act of the Legislature respecting the admissibility in evidence of any record or the proof of any matter; or

(*b*) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

Computer out-put

(13) Where a record containing information in respect of a matter is made by the use of a computer or a similar device, the out-put thereof in a form which may be understood is admissible in evidence if the record would be admissible under this section if made by other means. *New.*

Interpretation

40.—(1) In this section,

(*a*) "person" includes,

(i) the Government of Canada, the government of a province or territory of Canada, and a department, commission, board or branch of the Government of Canada or of the government of any province or territory of Canada,

(ii) a corporation, its successors and assigns, and

(iii) the heirs, executors, administrators or other legal representatives of a person;

(*b*) "photographic film" includes any photographic plate, microphotographic film and photostatic negative, and "photograph" has a corresponding meaning.

Photographic records

(2) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement, document, plan or a record or book or entry therein kept or held by a person,

(*a*) is photographed in the course of an established practice of such person of photographing objects of the same or a similar class in order to keep a permanent record thereof; and

(*b*) is destroyed by or in the presence of such person or of one or more of his employees or delivered to another person in the ordinary course of business or lost,

a print from the photographic film is admissible in evidence in all cases and for all purposes for which the object photographed would have been admissible.

Court may refuse to admit in evidence

(3) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement or other executed or signed document was so destroyed before the expiration of six years from,

(*a*) the date when in the ordinary course of business either the object or the matter to which it related ceased to be treated as current by the person having custody or control of the object; or

(*b*) the date of receipt by the person having custody or control of the object of notice in writing of a claim in respect of the object or matter prior to the destruction of the object,

whichever is the later date, the court may refuse to admit in evidence under this section a print from a photographic film of the object.

Exception

(4) Where the photographic print is tendered by a government or the Bank of Canada, subsection 3 does not apply.

Proof of compliance with conditions

(5) Proof of compliance with the conditions prescribed by this section may be given by any person having knowledge of the facts either orally or by affidavit taken before a notary public, and, unless the court otherwise orders, a notarial copy of any such affidavit is admissible in evidence in lieu of the original affidavit. R.S.O. 1970, c. 151, s. 35, *amended*.

Copies of government documents

41.—(1) If the court is satisfied as to its authenticity, a copy reproduced by any means,

(*a*) of a statute, regulation, rule, by-law, ordinance, proclamation, official gazette or journal, order, appointment, patent, charter or other document of a similar nature enacted, made, issued, published or promulgated by or on behalf of any government or governmental agency in the exercise of any original or delegated authority within or outside Ontario; or

(*b*) of an entry in a book of account kept by or on behalf of any government or governmental agency within or outside Ontario,

is admissible in a proceeding as *prima facie* evidence of the document and of its contents, or of the entry and the matters, transactions and accounts recorded therein. *New.*

Proof of handwriting, when not required

(2) No proof is required of the handwriting or official position of a person certifying to the truth of a copy of or extract from any proclamation, order, regulation or appointment, or to any matter or thing as to which he is by law authorized or required to certify. R.S.O. 1970, c. 151, s. 38.

Application of section

42.—(1) This section applies only to a proceeding in the Supreme Court or a county or district court, whether the Crown is or is not a party.

Disclosure where Crown objects

(2) Subject to subsection 3 and any other Act, where a member of the Executive Council objects to the disclosure of a document or its contents or of an oral communication or other thing on the ground that the disclosure would be against the public interest and certifies to the court by affidavit that the document or oral communication or other thing belongs to a class or contains information which on grounds of public interest specified in the affidavit should not be disclosed, the court may inquire into the matter privately and, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit, it may order, subject to such restrictions or conditions as it deems appropriate, disclosure on discovery or by a witness at trial.

Idem, where no disclosure

(3) Where a member of the Executive Council certifies to the court by affidavit that the Executive Council is of the opinion that disclosure of any document or its contents or any oral communication or other thing would be injurious to the security of Canada or Ontario or to federal-provincial relations, or that it would disclose a confidence of the Executive Council, disclosure shall be refused without any examination by the court concerning the document, oral communication, or other thing. *New.*

Application of section

43.—(1) This section applies only to a proceeding other than a proceeding to which section 42 applies.

Stated case

(2) Where a member of the Executive Council objects to the disclosure of a document or its contents or of an oral communication or other thing on any ground not falling within subsection 3 of section 42 and certifies to the court by affidavit that the document or oral communication or other thing belongs to a class or contains information which on grounds of public interest

specified in the affidavit should not be disclosed, the presiding officer at the proceeding may on his own motion or on application of a party to the proceeding state a case to the Divisional Court setting out the facts, and the court may on application by the presiding officer or by such party inquire into the matter privately and make any order concerning production of the matter in question that a court could have made under section 42.

Idem

(3) Where a presiding officer refuses to state a case under subsection 2, any party to the proceeding may apply to the Divisional Court for an order that he so state a case and if the order is made, he shall state a case accordingly. *New.*

Filing copies of official documents

44.—(1) Where a public officer produces upon a subpoena an original document, it shall not be deposited in court unless otherwise ordered, but, if the document or a copy is needed for subsequent reference or use, a copy thereof or of so much thereof as is considered necessary, certified under the hand of the officer producing the document or otherwise proved, shall be filed as an exhibit in the place of the original. R.S.O. 1970, c. 151, s. 54(1), *amended.*

When original to be retained

(2) Where an order is made that the original be retained, the order shall be delivered to the public officer and the exhibit shall be retained in court and filed. R.S.O. 1970, c. 151, s. 54 (2).

Proof of foreign judgments

45. A judgment, decree or other order of any court of record of any jurisdiction outside Ontario may be proved by a copy thereof under the seal of the court without any proof of the authenticity of the seal or any other proof in the same manner as a judgment, decree or other order of the Supreme Court of Ontario may be proved by a copy thereof. R.S.O. 1970, c. 151, s. 39, *amended.*

Corporation documents

46. Where the charter, any by-law, resolution, rule, regulation, minute or other document or any entry in a register or other book of a corporation created by or under any Act of the Parliament of Canada or the legislature of any province or territory of Canada is unavailable, a copy thereof, purporting to be certified under the seal of the corporation and the hand of its presiding officer or secretary, is admissible in any proceeding without proof of the seal of the corporation or of the signature or official character of the person appearing to have signed the certificate. R.S.O. 1970, c. 151, s. 30, *part amended.*

Interpretation R.S.C. 1970 c. B-1

47.—(1) In this section "bank" means a bank to which the *Bank Act* (Canada) applies, and includes the Province of Ontario Savings Office and any trust company, loan corporation, credit union and any other organization that is authorized by law to receive money on deposit, and includes any branch, agency or office of any of them.

Bank records

(2) A copy of an entry in a book or record kept by a bank is admissible in any proceeding to which the bank is not a party as *prima facie* evidence of the entry and of the matters, transactions and accounts therein recorded if it is established that the book or record was, at the time of the making of the entry, one of the ordinary books or records of the bank, that the entry was apparently made in the usual and ordinary course of business, that the

book or record is in the custody or control of the bank, and that the copy is a true copy of the entry.

Where bank officers not compellable witnesses

(3) A bank or officer of a bank is not, in a proceeding to which the bank is not a party, compellable to produce any book or record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court.

Inspection of bank accounts

(4) On the application of a party to a proceeding to which the bank is not a party, the court may order that the party may inspect and take copies of any entries in the books or records of a bank for the purposes of the proceeding, but a person whose account is to be inspected shall be served with notice of the application at least two clear days before the hearing thereof, and, if it is shown to the satisfaction of the court that such person cannot be notified personally, the notice may be given by addressing it to the bank.

Costs

(5) The costs of an application under subsection 4 and the costs of any thing done or to be done under an order made under subsection 4 are in the discretion of the court which may order the costs or any part of them to be paid to a party by the bank if the costs have been occasioned by a default or delay on the part of the bank, and any such order against a bank may be enforced as if the bank were a party to the proceeding. R.S.O. 1970, c. 151, s. 34, *amended.*

Interpretation

48.—(1) In this section "judge" includes any member of any tribunal however described upon which a statutory power of decision is conferred by or under any Act of the Parliament of Canada or the legislature of any province or territory of Canada.

Judicial notice to be taken of judges' signatures

(2) Every court and every judge, justice, master, registrar, clerk, secretary and other officer of a court shall take judicial notice of the signature of any judge that is appended or attached to any official document. R.S.O. 1970, c. 151, s. 37, *amended.*

Copies of notarial acts in Quebec admissible

49.—(1) A copy of a notarial act or instrument in writing made in Quebec before a notary and filed, enrolled or enregistered by such notary, certified by a notary or prothonotary to be a true copy of the original thereby certified to be in his possession as such notary or prothonotary, may be admitted in evidence in the place of the original and has the same effect as the original would have if produced and proved. R.S.O. 1970, c. 151, s. 40(1), *amended.*

How proof may be rebutted or set aside

(2) The proof of such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a notary, or be filed, enrolled or enregistered by a notary. R.S.O. 1970, c. 151, s. 40(2).

Protests of bills and notes

50.—(1) A protest of a bill of exchange or promissory note purporting to be under the hand of a notary public is admissible in any proceeding as *prima facie* evidence of the allegations and facts therein stated. R.S.O. 1970, c. 151, s. 41, *amended.*

Idem

(2) Any note, memorandum or certificate purporting to be made by a notary public in Canada in his own handwriting or to be

signed by him at the foot of or embodied in any protest or in a regular register of official acts purporting to be kept by him is admissible in any proceeding as *prima facie* evidence of the fact of notice of non-acceptance or non-payment of a bill of exchange or promissory note having been sent or delivered at the time and in the manner stated in the note, certificate or memorandum. R.S.O. 1970, c. 151, s. 42, *amended*.

Proving titles under small claims courts executions

51. In proving a title under a sheriff's conveyance based upon an execution issued from a small claims court, it is sufficient to prove the judgment recovered in the small claims court without proof of any prior proceedings. R.S.O. 1970, c. 151, s. 43.

Solemn declaration

52.—(1) Any person authorized to take declarations in Ontario may receive the solemn declaration of any person in attestation of the truth of any fact or of any account rendered in writing and, subject to subsection 2, the declaration and any declaration authorized or required by any Act of the Legislature shall be in the following form:

I, ..., solemnly declare that *(state the fact or facts declared to)* and I make this solemn declaration well knowing that it is a serious offence to make this statement knowing it to be false.

Declared before me
at the of
this day of
, 19 .

A Commissioner, etc.

R.S.O. 1970, c. 151, s. 44(1), *amended*.

Idem

R.S.C. 1970, c. E-10

(2) A declaration made in the form prescribed by section 38 of the *Canada Evidence Act* shall be deemed to have been made in compliance with subsection 1. R.S.O. 1970, c. 151, s. 44(2).

Affirmations or declarations made before officers in the Canadian Forces

53.—(1) An oath, affidavit, affirmation or solemn declaration administered, sworn, affirmed or made within or outside Ontario before a person who then held a commission as an officer in the Canadian Forces and then was on full-time service is as valid and effectual as if it had been a solemn affirmation or declaration duly made in Ontario.

Admissibility

(2) A document that purports to be signed by a person mentioned in subsection 1 in testimony of an oath, affidavit, affirmation or solemn declaration having been administered, sworn, affirmed or made before him and on which his rank and unit are shown below his signature is admissible in evidence without proof of his signature or of his rank or unit or that he was on full-time service. R.S.O. 1970, c. 151, s. 45, *amended*.

Affirmations or declarations made outside Ontario

54.—(1) An oath, affidavit, affirmation or solemn declaration administered, sworn, affirmed or made outside Ontario before,

(*a*) a judge;

(*b*) a magistrate;

(*c*) an officer of a court of justice;

(*d*) a commissioner for taking affidavits or other competent authority of the like nature;

(e) a notary public;

(*f*) the head of a city, town, village, township or other municipality;

(*g*) an officer of any of Her Majesty's diplomatic or consular services, including an ambassador, envoy, minister, charge d'affaires, counsellor, secretary, attache, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul and acting consular agent;

(*h*) an officer of the Canadian diplomatic, consular or representative services, including, in addition to the diplomatic and consular officers mentioned in clause *g*, a high commissioner, permanent delegate, acting high commissioner, acting permanent delegate, counsellor and secretary; or

(i) a Canadian Government trade commissioner or assistant trade commissioner,

exercising his functions or having jurisdiction or authority as such in the place in which it is adminstered, sworn, affirmed or made, is as valid and effectual as if it had been a solemn affirmation or declaration duly made in Ontario.

Validity

(2) An oath, affidavit, affirmation or solemn declaration administered, sworn, affirmed or made outside Ontario before a notary public for Ontario or before a commissioner for taking affidavits in Ontario is as valid and effectual as if it had been a solemn affirmation or declaration duly made in Ontario.

Admissibility

(3) A document that purports to be signed by a person mentioned in subsection 1 or 2 in testimony of an oath, affidavit, affirmation or solemn declaration having been administered, sworn, affirmed or made before him, and on which his office is shown below his signature and,

(*a*) in the case of a notary public, that purports to have impressed thereon or attached thereto his official seal;

(*b*) in the case of a person mentioned in clause *f* of subsection 1, that purports to have impressed thereon or attached thereto the seal of the municipality;

(*c*) in the case of a person mentioned in clause *g*, *h* or *i* of subsection 1, that purports to have impressed thereon or attached thereto his seal or the seal or stamp of his office or of the office to which he is attached,

is admissible in evidence without proof of his signature or of his office or official character or of the seal or stamp and without proof that he was exercising his functions or had jurisdiction or authority in the place in which the oath, affidavit, affirmation or solemn declaration was administered, sworn, affirmed or made. R.S.O. 1970, c. 151, s. 46, *amended*.

Formal defects

55. No informality in any essential part of any affidavit, solemn affirmation or declaration made before a person authorized to take affidavits in Ontario is any objection to its admission in evidence if the court thinks proper to admit it. R.S.O. 1970, c. 151, s. 47, *amended*.

Copies of depositions admissible

56. A copy of an examination or deposition of a party or witness taken before a judge or other officer or person appointed to take it, certified by the person taking it, is admissible in evidence without proof of the signature, saving all just exceptions. R.S.O. 1970, c. 151, s. 48, *amended.*

Proof of devise of real property, local probate

57. In order to establish a devise or other testamentary disposition of or affecting real estate, letters probate of the will or letters of administration with the will annexed containing such devise or disposition, or a copy thereof, under the seal of the surrogate court granting the letters, are or is *prima facie* evidence of the will and of its validity and contents. R.S.O. 1970, c. 151, s. 49, *amended.*

Proof of devise of real property, foreign probate

58.—(1) Where a person dies outside Ontario having made a will sufficient to pass real estate in Ontario that purports to devise, charge or affect real estate in Ontario, the party desiring to establish such disposition, after giving one month's notice to the opposite party to the proceeding of his intention so to do, may produce and file the letters probate of the will or letters of administration with the will annexed or a certified copy thereof under the seal of the court that granted the letters with a certificate of the judge, registrar or clerk of such court that the original will is filed and remains in the court and purports to have been executed before two witnesses, and such letter or certified copy with such certificate are or is, unless the court otherwise orders, *prima facie* evidence of the will and of its validity and contents.

Effect of certificate

(2) The certificate mentioned in subsection 1 is admissible in evidence as *prima facie* proof of the facts therein stated and of the authority of the judge, registrar or clerk, without proof of his appointment, authority or signature. R.S.O. 1970, c. 151, s. 50, *amended.*

Military records as to date of death R.S.C. 1970, c. N-4

59. A certificate purporting to be signed by an authority authorized in that behalf by the *National Defence Act* or the regulations made thereunder, stating that the person named in the certificate died, or was deemed to have died, on a date set forth therein, is admissible in any proceeding as *prima facie* evidence that the person so named died on that date, and also of the office, authority and signature of the person signing the certificate, without any proof of his appointment, authority or signature. R.S.O. 1970, c. 151, s. 51, *amended.*

Interpretation R.S.O. 1970, c. 409

60.—(1) In this section "instrument" has the same meaning as in *The Registry Act.*

Proof of registered land instruments

(2) A copy of an instrument or memorial certified under the hand and seal of office of the land registrar in whose office it is deposited, filed, kept or registered, to be a true copy is admissible in any proceeding as *prima facie* evidence of the original, except in the cases provided for in subsection 3.

Where certified copies of registered instruments may be used

(3) Where it would be necessary to produce and prove an instrument or memorial that has been so deposited, filed, kept or registered in order to establish such instrument or memorial and the contents thereof, the party intending to prove it may give notice to the opposite party at least ten days before the proceeding in which the proof is intended to be adduced that he intends at

the proceeding to give in evidence, as proof of the instrument or memorial, a copy thereof certified by the land registrar under his hand and seal of office, and in every such case the copy so certified is sufficient evidence of the instrument or memorial and of its validity and contents, unless the party receiving the notice, within four days after such receipt, gives notice that he disputes its validity, in which case the costs of producing and proving it may be ordered to be paid by any party as is considered just. R.S.O. 1970, c. 151, s. 53, *amended.*

Proof of business documents

61.—(1) A party intending to prove the original of a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account or other document used in business or other transactions may give notice to the opposite party, ten days at least before the proceeding in which the proof is intended to be adduced, that he intends to give in evidence as proof of the contents a writing purporting to be a copy of the document, and in the notice shall name some convenient time and place for the inspection thereof.

Inspection

(2) Such copy may then be inspected by the opposite party, and is without further proof sufficient evidence of the contents of the original document, and shall be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned for inspection gives notice that he intends to dispute the correctness or genuineness of the copy at the proceeding, and to require proof of the original, and the costs attending any production or proof of the original document are in the discretion of the court. R.S.O. 1970, c. 151, s. 55, *amended.*

Evidence dispensed with under R.S.O. 1970, c. 478

(3) It is not necessary in a proceeding to produce any evidence that, by section 1 of *The Vendors and Purchasers Act*, is dispensed with as between vendor and purchaser, and the evidence declared to be sufficient as between vendor and purchaser is *prima facie* sufficient for the purposes of the proceeding. R.S.O. 1970, c. 151, s. 59, *amended.*

Where no attestation required

62. It is not necessary to prove, by the attesting witness, an instrument to the validity of which attestation is not requisite. R.S.O. 1970, c. 151, s. 56.

Hand-writing

63. Comparison of a disputed writing with a writing proved to the satisfaction of the court to be genuine shall be permitted to be made by a witness, and such writings and the evidence of witnesses representing them may be submitted to the court or jury as evidence of the genuineness or otherwise of the writing in dispute. R.S.O. 1970, c. 151, s. 57.

Impounding of instruments admitted in evidence

64. Where a document is admitted in evidence, the court may order that it be impounded and kept in such custody for such period and subject to such conditions as to the court seems proper. R.S.O. 1970, c. 151, s. 58, *amended.*

Commission evidence of persons in Ontario for use in foreign courts

65.—(1) Where it is made to appear to the Supreme Court or a judge thereof, or to a judge of a county or district court, that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, the

obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court or judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, and may, by the same or by a subsequent order, command the attendance of a person named therein for the purpose of being examined, or the production of a writing or other document or thing mentioned in the order, and may give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper, and the order may be enforced, and any disobedience thereto punished, in like manner as in the case of an order made by the same court or judge in an action pending in such court or before such judge.

Conduct money, etc.

(2) A person whose attendance is so ordered is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the Supreme Court.

Rights of persons examined on commission

(3) A person examined under such commission, order or process has the like right to object to answer questions tending to criminate himself, and to refuse to answer any questions that, in an action pending in the court by which or by a judge whereof or before the judge by whom the order for examination was made, the witness would be entitled to object or to refuse to answer, and no person shall be compelled to produce at the examination any writing, document or thing that he could not be compelled to produce at the trial of such an action. R.S.O. 1970, c. 151, s. 60(1), (2), (3).

Administration of affirmation

(4) Where the commission, order or other process, or the accompanying instructions, direct that the person to be examined shall be sworn or shall affirm, the person so appointed has authority to take his solemn affirmation. R.S.O. 1970, c. 151, s. 60(4), *amended*.

Conflicts avoided

66. Nothing in this Act renders any evidence inadmissible that would be admissible under any other Act or makes admissible any evidence that would be inadmissible under any other Act of the Legislature. *New*.

Attendance of witnesses

67. A witness in a proceeding served in due time with a subpoena issued out of a court in Ontario, and paid his proper witness fees and conduct money, who makes default in obeying such subpoena, without any lawful and reasonable impediment, in addition to any penalty he may incur as for a contempt of court, is liable to an action on the part of the person by whom, or on whose behalf, he has been subpoenaed for any damage that such person may sustain or be put to by reason of such default. R.S.O. 1970, c. 151, s. 20, *amended*.

Repeal

68. *The Evidence Act*, being chapter 151 of the Revised Statutes of Ontario, 1970, is repealed.

Commencement

69. This Act comes into force on the day of , 19 .

Short title

70. This Act may be cited as *The Evidence Act, 19* .

APPENDIX B

List of Differences Between Draft Act and Present Act

	Draft Act	*R.S.O. 1970, c. 151*	*Differences*
Section	1(*a*)	1(*b*)	No change
	(*b*)	(*a*)	"proceeding" substituted for "action" and "action" added to the list of things included.
	2	2	"proceedings" substituted for "actions and other matters whatsoever".
	3	17, 18, 19	New, replacing former sections 17-19 inclusive: see c. 8, pp. 130-131.
	4	5	Redrafted, no change in principle.
	5	6	"proceeding" substituted for "action".
	6	3	Revised to conform to the provisions of section 3 of the Draft Act.
	7	4	Revised to conform to the provisions of section 3 of the Draft Act.
	8	7	"in a proceeding" added after "witness" in line 1; "proceeding" substituted for "action" in line 3.
	9(1)	8(1)	Revised to conform with recommendations in c. 7.
	(2)	10	Rewritten, see c. 7, pp. 111-112.
	(3)	8(2)	Rewritten, see c. 9, p. 144.
	10(1)	9(1)	"in a proceeding" added after "witness" in line 1.
	(2)	(2)	"or a series of related questions" is added after "question" in line 1; "in a proceedings" is added after "witness" in line 1; "such question" is struck in line 4; "so given" is struck in line 6; "thereafter taking place" is added at end.
	(3)		New, see c. 7, footnote 24.
	11		New, see c. 9, pp. 146-147.
	12		New, see c. 9, pp. 147-148.
	13	12	Redrafted, no change in principle.
	14		New, see c. 10, p. 153.
	15		New, see c. 10, p. 158.

	Draft Act	*R.S.O. 1970, c. 151*	*Differences*
Section	16		New, see c. 10, pp. 164-165.
	17	52	Redrafted, no change in principle.
	18	13	No change.
	19	14	"proceeding" substituted for "action".
	20	15	"proceeding" substituted for "action" in line 1; "or an involuntary" substituted for "or a" after "so found" in line 2. Amended to confine the application of the section to involuntary patients in psychiatric facilities: see *The Mental Health Act*, R.S.O. 1970, c. 69, s. 8.
	21	16	"is admissible in" is substituted for "may be used as".
	22		New, see c. 1, pp. 16-17.
	23		New, see c. 2, p. 38.
	24	24	New, replacing former section 24: see c. 3, pp. 54-55, and c. 12, p. 205.
	25		New; this is an adaptation of Rule 201(b) of the Federal Rules of Evidence of the U.S.A. It is a codification of the common law concerning judicial facts.
	26		New, see c. 5, p. 94.
	27		New, see c. 4, p. 72.
	28		New, see c. 3, p. 54.
	29		New, see c. 6, pp. 102-103.
	30		New, see c. 6, pp. 102-103.
	31		New, see c. 6, pp. 102-103.
	32		New, see c. 13, p 220.
	33	21	"in a proceeding" added after "witness" in line 1; "any time during the trial or" struck in lines 7 and 8; "trial or" struck in line 10; no change in principle.
	34(1)	22	"in a proceeding" added after "if" in line 1; no change in principle.
	(2)		New, see c. 3, p. 55.
	35		New, to ensure that a witness shall not be cross-examined as to charges that have not resulted in conviction.
	36(1)		New, see c. 12, p. 199.
	(2)		New, see c. 12, p. 199.

	Draft Act	*R.S.O. 1970, c. 151*	*Differences*
Section	(3)		New, see c. 12.
	(4)	23(1)	"Where a witness in a proceeding is asked a question under subsection 1 or 2 and" is substituted at the opening for "A witness may be asked whether he has been convicted of any crime, and upon being so asked, if"; "allegation" is substituted for "fact" in line 3.
	37		New, see c. 11, p. 177.
	38		New, see c. 11, p. 179.
	39	36	New, replacing former section 36: see c. 11, pp. 186-188, and 192.
	40	35	"the government of a province or territory" substituted for "and of a province" in line 3; "of the Government of Canada or of the government of any province or territory of Canada" substituted for "of any such government" in line 5.
	41(1)	25-29, part 30, 32	New, replaces former sections 25-29, part section 30, and section 32: see c. 15, pp. 236-237.
	(2)	38	No change.
	42	31	New, replacing former section 31: see c. 14, pp. 232-233.
	43		New, see c. 14, pp. 232-233.
	44	54	Reference to fees deleted.
	45	39	Revised to extend its application to all jurisdictions outside Ontario.
	46	30	Revised in part. Application of section restricted to corporate documents. Government documents dealt with in section 41 of the Draft Act.
	47(1)	34(1)	Section extended to include institutions authorized to receive money on deposit.
	(2)	(2), (3)	Consolidated and rewritten.
	(3)	(4)	"proceeding" substituted for "action"; "or a judge made for special cause" struck in lines 5 and 6.
	(4)	(5)	"proceeding" substituted for "action"; subsection rephrased, no change in principle.
	(5)	(6)	Rephrased, no change in principle.
	48	37	Rewritten, extended to apply to tribunals generally.

	Draft Act	*R.S.O. 1970, c. 151*	*Differences*
Section	49(1)	40(1)	"may be admitted in evidence in the place of" substituted for "is receivable in evidence in the place and stead of" in lines 5 and 6; "force and" is struck in line 6.
	(2)	(2)	No change.
	50(1)	41	"is admissible in any proceeding as *prima facie* evidence" substituted for "is *prima facie* evidence".
	(2)	42	"is admissible in any proceeding as *prima facie* evidence" substituted for "is *prima facie* evidence".
	51	43	No change.
	52(1)	44(1)	Form of solemn declaration rewritten.
	(2)	(2)	No change.
	53(1)	45(1)	"solemn declaration" substituted for "statutory declaration"; "is as valid and effectual as if it had been a solemn affirmation or declaration duly made in Ontario" substituted for "is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario".
	(2)	(2)	"solemn declaration" substituted for "statutory declaration".
	54(1)	46(1)	Same changes as in 45(1) of present Act (see above); "to all intents and purposes" struck in line 28.
	(2)	(2)	Same changes as in 45(1) of present Act (see above); "to all intents and purposes struck in lines 4 and 5.
	(3)	(3)	"solemn declaration" substituted for "statutory declaration".
	55	47	Rewritten; "affidavit, solemn affirmation or declaration" substituted for "affidavit, declaration or affirmation" in line 2.
	56	48	Rewritten.
	57	49	"letters" substituted for "same" in line 5; "or under the seal of the Supreme Court, where the probate or letters of administration were granted by the former court of probate for Upper Canada" struck.

	Draft Act	*R.S.O. 1970, c. 151*	*Differences*
Section	58(1)	50(1)	Rewritten.
	(2)	(2)	"The certificate mentioned in subsection 1 is admissible in evidence as *prima facie* proof" substituted for "The production of the certificate mentioned in subsection 1 is sufficient *prima facie* evidence", at the commencement.
	59	51	"The production of" struck at the commencement; "admissible in any proceeding as *prima facie* evidence" substituted for "*prima facie* proof for any purpose to which the authority of the Legislature extends".
	60(1)	53(1)	"has the same meaning as in *The Registry Act*" substituted for "has the meaning assigned to it in section 1 of *The Registry Act*".
	(2)	(2)	"land registrar" substituted for "registrar or master of titles"; "admissible in any proceeding as *prima facie*" substituted for "*prima facie*".
	(3)	(3)	"trial or other" struck in lines 5, 6 and 7; "land registrar" substituted for "registrar or master of titles" in line 9.
	61(1)	55(1)	"document" substituted for "written instrument" in line 3; "trial or other" struck in line 5.
	(2)	(2)	"such" in line 5 struck; "trial or" struck in line 7.
	(3)	59	"proceeding" substituted for "action".
	62	56	No change.
	63	57	No change.
	64	58	"admitting it" in line 2 struck; "order" substituted for "direct" in line 2; "to the court" inserted after "as" in line 3; "or until the further order of the court or of the Supreme Court or of a judge thereof or of a county or district court, as the case may be" in lines 4, 5, and 6 struck.
	65(1)	60(1)	No change.
	(2)	(2)	No change.
	(3)	(3)	No change.

	Draft Act	*R.S.O. 1970, c. 151*	*Differences*
Section	(4)	(4)	"accompanying instructions" substituted for "instructions of the court accompanying the same" in line 2; "administer the oath to him or" struck in line 4.
	66		New, section designed to avoid conflicts with special evidentiary provisions in particular Acts.
	67	20	Appendix to former section 20 dealing with interprovincial subpoenas (Ontario and Quebec) struck. See recommendations in c. 16.