CORRESPONDENCE

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Law Society's Hall,
Chancery Lane,
London, W.C. 2.,
5th November, 1945.

THE SECRETARY,
Canadian Bar Association.

At their first meeting after the successful conclusion of hostilities the Council of the Law Society asked me to write to you as Secretary of the Canadian Bar Association and to convey through you to the President and members of your Association, who represent the Bar in Canada, their cordial greetings and best wishes for your continued success and prosperity.

They look forward to co-operating with you upon matters of mutual professional interest and hope that, since in all countries lawyers are supporters of law and order, the opportunity for closer intercourse and exchange of ideas amongst them, brought about by the war, may further the cause of peace and mutual understanding amongst nations in the years which lie ahead.

Yours very truly,

P. G. LUND,
Secretary.

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THE EDITOR,
CANADIAN BAR REVIEW:

I have just read with much interest the comment of Mr A. B. Harvey in the Canadian Bar Review, volume 23, page 698, regarding the decision of the Appeal Court of British Columbia in *Rex* v. *Kearns*, [1945] 2 W.W.R. 477, and his conclusion that the evidence of what the employee Spring told the police officer through the medium of a copy of a written memorandum of goods was hearsay of the most obvious kind.

I had read this decision myself when it was first published in 84 Canadian Criminal Cases 357, but did not take from it the same conclusion as he does. Possibly such divergence in our respective views is due to his impression disclosed in the article in the following sentence, namely:

> It does not appear whether or not Spring was called as a witness.

But it is questionable whether this impression is correct in the face of the following statement also to be found in the above report at page 478:

> Shortly after the paint spray gun and electric saw were stolen from the owner's showroom window, an employee, Spring, gave to a police officer a written list containing their serial numbers which he had made at the time they were placed in the show window. Spring did not keep a copy of the list, and *at the trial* could not remember the serial numbers.

The tenor of this whole statement, and especially of its last sentence, seems to me to admit of no other conclusion than that Spring did give evidence at the trial.

With respect, I presume that Mr. Harvey will agree with me that a proper determination of the question whether any particular statement is hearsay or not must depend upon the purpose for which counsel seeks to adduce it in evidence. Thus, if that purpose be to prove the truth of the matters in question an oral or written statement by a person who is not a party and who is not called as a witness, then it is inadmissible as hearsay (Phipson, 5th edition, page 205). I take it, however, if it be relevant to any other material issue it should be held admissible.

But, as I read the above report, it was not the purpose of Crown counsel, in eliciting from the police officer evidence of Spring's statement to him, to prove the charge against the accused, but to establish Spring's recollection of the description of the goods which had been in the showroom window but were subsequently missing, and so to identify them as the stolen goods.

When, however, Spring proved himself unable to recall their description from memory or to refresh his memory from the memorandum in which he had listed them because he had turned it over to the police officer who was unable to produce it, the task which confronted counsel was to try and prove such recollection by calling the officer. This he succeeded in doing by the use of the typewritten copy which the latter had made of Spring's memorandum immediately after its receipt by him and by which the officer was allowed, I suggest quite properly, to refresh his memory of the information which Spring had given him; or, to put it more tersely, such evidence was admissible because he had become the ultimate repository of Spring's recorded recollection.

The evidentiary principle validating such result appears to have been envisaged by Wigmore when dealing with the method of proving "past recollection recorded" in volume I of the Canadian edition (1905) of his work on evidence. See section 744 at page 836, wherein he makes the following statement:

> It is commonly assumed, as a fundamental condition of using a past recollection, that the thing recollected must have been written down as recollected. The ensuing rules are all corollaries of this assumed axiom.
>
> Yet in theory this is not essential. The tenor of the fact recollected may conceivably be preserved without writing. In practice there is one situation which not only illustrates this theoretical possibility but also demonstrates the wisdom of recognizing it, as an exception to the general rule. That situation is the former oral identification of a person, name, place, or signature, whose identity is now forgotten. The fact recollected being a simple one, it suffices if the witness now knows that he did once orally verify it, even if he did not then preserve in writing the circumstance. The typical illustration is that of the identification of an accused person at the time of arrest.

The learned author, you will note, illustrates his point by the English cases of *R.* v. *Burke*, 2 Cox C.C. 295, *Captain Baillie's Case* (1778), 21 Howell's State Trials 319, *R.* v. *Blackburn* (1853), 6 Cox C.C. 338 and *Jackson* v. *Thompson* (1826), 6 Cowper 178.

Of still closer application to the facts of this case is section 750 at page 844 of the same volume, which indeed seems to cover them almost specifically:

> It is obvious that the process of guaranteeing the accuracy of the record and that of identifying and producing the record are separable. Since in commercial practice there is constantly such a separation of these functions among different persons, there seems to be no reason why the law should not accept and sanction it. Thus, when a witness makes a memorandum and then guarantees on the stand that it was accurate, the process of proving its terms by making and producing a copy of it may often be feasible only with the aid of another person—as where the original is lost and the only copy was made, not by the original writer, but by another person. What difference can it make, if a copy is allowable at all, whether it is verified on the stand by the original maker and witness or by another person? If both take the stand, one guaranteeing the accuracy of the original, and the other verifying the correctness of the copy, this procedure seems entirely proper both on principle and of practical necessity. The result the Courts have generally accepted.

The above exposition is carried forward with some further development to the more recent third edition (1940) of the same work. *Vide* sections 744, 750, 751 and 1130 therein.

The evidence to establish the lost recollection in the present case may, it seem to me, be deemed more cogent than in the cases cited above because in the latter the original statement was in part at least oral, while in this case it was implemented by the particulars preserved by the officer in his copy ofSpring's written memorandum.

P. E. MACKENZIE.

Regina.

Mr. Harvey has made the following comment on Mr. Justice Mackenzie's letter:

> If the sentence quoted by Mr. Justice Mackenzie (which I must have overlooked in writing the original note) means, as it appears to, that Spring was called as a witness at the trial, the whole basis of my original note falls to the ground. It seems unfortunate, however, if that is the case, that it was not expressly so stated in the reasons for judgment, whereupon the very difficult questions suggested by Mr. Justice Mackenzie in his learned letter would come up for (and, it is respectfully suggested, should have received) consideration.

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