THE LAW OF EVIDENCE: 1923-1947

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Introduction

The law of evidence is the only branch of the whole body of law that enters into every trial, civil and criminal. The entire matter of proof is governed by rules of evidence. The object of a trial is to arrive at the facts in issue and this purpose cannot be achieved without efficient rules. Good rules alone will not ensure a sound finding on the facts, but they are a *sine qua non*.

The common-law rules of evidence have developed over the centuries. On the whole they have doubtless served their purpose well. They are intended to be "practical rules which experience has shown to be best fitted to elicit the truth without causing undue prejudice".[1] The important question is: Are our rules best fitted to elicit the truth? They are legion and they are complicated, sometimes arbitrary and often obscure.[2] What has been sought in recent years is a simplification and a rationalization of the rules. In Canada the Commissioners on Uniformity of Legislation studied the subject for many years, and in 1945 produced a Uniform Evidence Act,[3] which will probably be adopted by the common-law provinces. Parts of it have already been enacted in them all. In the United States, the American Law Institute in 1942 published a Model Code of Evidence. It is much more comprehensive than the Canadian Uniform Act: "its underlying assumption is that no available relevant evidence should be withheld except for the most weighty reasons".[4]

Frequent reference will be made in this article to the Uniform Act and the Model Code, as well as to Thayer's Preliminary Treatise on the Law of Evidence, Wigmore on Evidence (3rd ed., 1940), Phipson on Evidence, (8th ed., 1942), and Cockle's cases and Statutes on Evidence, (7th ed., 1946). For convenience they will be called, respectively, the Uniform Act, the Model Code, Thayer, Wigmore, Phipson and Cockle.

In the past twenty-five years there have been over five hundred reported cases in Canada dealing with questions of

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[1] *Thompson* v. *R*, [1918] A.C. 221, *per* Lord Dunedin; quoted in *R.* v. *Barbour*, [1938] S.C.R. 465. The passage refers to the rules of evidence in criminal cases, but is applicable generally.

[2] See C. A. Wright, The Law of Evidence: Past and Future (1942), 20 Can. Bar Rev. 714.

[3] Proceedings of the Canadian Bar Association, 1945, p. 271.

[4] E. M. Morgan, Comments on the Proposed Code of Evidence (1942), 20 Can. Bar Rev. 271.

evidence. Mention will be made only of decisions on important points. As to the statute law, the Canada Evidence Act[5] and the various provincial acts[6] deal with isolated matters. One good feature is that there is very little controversy as to whether the Dominion Act or a provincial act applies in a given case. This is largely because the Dominion Act makes applicable to proceedings over which the Dominion has legislative authority the laws of evidence in the province in which such proceedings are taken, subject to the provisions of any Dominion statute.[7]

Degree of Proof Required

It is elementary that in a civil case a party must prove his case by a preponderance of evidence,[8] whereas in a criminal charge guilt must be proved beyond reasonable doubt. The latter rule became firmly established about 1800,[9] and a charge to the jury that did not use the phrase "reasonable doubt" in explaining the burden on the Crown would never be upheld.[10] A curious error crept into two Privy Council decisions,[11] in each of which it was stated that a plaintiff must prove his case "beyond a reasonable doubt", but it was soon pointed out in an Alberta case[12] that this "casual observation" could not have been "intended to arbitrarily wipe out a most important and long-standing distinction in the rules of proof in civil and criminal cases".

There is a special rule in criminal cases where the evidence is "circumstantial".[13] In these cases the jury must be told, in accordance with *Hodge's* case,[14] that in order to find the accused guilty they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the accused was the guilty person".

It seems to the writer that the rule in *Hodge's* case is merely an elaborate way of re-stating the rule as to reasonable doubt. Should not a jury acquit in any case where the test of *Hodge's*

[5] R.S.C., 1927, c. 59.
[6] In Quebec, the Code of Civil Procedure.
[7] Footnote 5 *supra*, section 35.
[8] *R.* v. *Sincennes-McNaughton*, [1928] S.C.R. 84.
[9] Thayer, pp. 551 *et seq.*; Wigmore, § 2497.
[10] *Rex* v. *Labine*, [1937] 3 W.W.R. 241 (Alta.).
[11] *McDaniel* v. *Vancouver General Hospital*, [1934] 3 W.W.R. 619, and *Gray* v. *Caldeira*, [1936] 1 W.W.R. 615.
[12] *De Paoli* v. *Richardson*, [1936] 2 W.W.R. 183.
[13] For a definition see: Smith, Components of Proof (1942), 51 Yale L. J. at p. 562; Wigmore §25; Wills, Circumstantial Evidence (5th ed.), pp. 19-20.
[14] (1838), 2 Lewin 227; 168 E. R. 1136.

case is not met? One of the explanations of proof beyond reasonable doubt is that the evidence must demonstrate guilt "in the sense of excluding to a moral certainty all hypotheses (not in themselves improbable) inconsistent with guilt".[15] In other words, where the evidence is circumstantial the direction as to reasonable doubt must be given, and when it has been given must be re-stated in the formula of *Hodge's* case, which hardly seems logical. However, *Hodge's* rule has become so sanctified that failure to state it is misdirection. The precise words need not be used, but it has been held that they are preferable.[16]

One important question still unsettled concerns the degree of proof that must be adduced in a civil case in which the allegation of a party involves the accusation that the opposing party, or the one through whom he claims, has committed a crime. The question commonly arises in the case of a life insurance company defending an action on a policy on the ground that the insured committed suicide. The problem came before the Supreme Court of Canada in 1929 in *London Life Insurance Co.* v. *Lang Shirt Co.*[17] Mignault J., giving the judgment of three members of the five-man court, stated:

> That there is in the law of evidence a legal presumption against the imputation of crime, requiring before crime can be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made, does not appear to admit of doubt.

His Lordship specifically refrained from deciding whether proof of suicide must be beyond a reasonable doubt, but went on to adopt the statement of Middleton J.A. in the Ontario Court of Appeal that the facts must be inconsistent with any other conclusion than that the evil act was committed, citing *Hodge's* case. In other words, while avoiding the reasonable doubt rule, this case applies the circumstantial evidence rule, which is certainly as strict as the reasonable doubt rule. All the evidence in the *Lang Shirt* case was circumstantial, but even if the rule in *Hodge's* case was properly applied there, which the writer questions, it is submitted that it should not be applied where the evidence is not circumstantial.[18]

[15] *Clark* v. *R.* (1921), 61 S.C.R. 608, *per* Duff J. at p. 618; applied in *R.* v. *Findlay*, [1944] 1 W.W.R 609 (B.C.), *per* O'Halloran J. A.

[16] *McLean* v. *R.*, [1933] S.C.R. 688; *Fraser* v. *R.*, [1936] S.C.R. 1 and 296; *R.* v. *Comba*, [1938] S.C.R. 396; *Cote* v. *R.* (1941), 77 C.C.C. 75 (Can.).

[17] [1929] S.C.R. 117: it had been held in *Moretti* v. *Dom. of Can. Guar.* etc., [1923] 3 W.W.R. 1 (Alta.), that the suicide need be proved only by a preponderance.

[18] Later cases applying the judgment of Mignault J. are: *McPhadyen* v. *Employers' Liability Assce. Co.*, [1933] O.R. 332; on appeal, p. 663, the point was not raised; *Mader* v. *Sun Life Assce. Co.*, [1934] 4 D.L.R. 59 (N.S.);

An extreme case is *Waselash* v. *Chiscon,*[19] which held that one who denies the making of a promissory note thereby imputes that his signature has been forged, and so must prove the forgery to the degree required by the *Lang Shirt* case. It was decided long ago by the Privy Council that, where a party denies that he has executed a deed, there is no burden on him at all; least of all the burden of proving beyond reasonable doubt that his signature has been forged.[20]

Coming back to the general rule, there are some cases since the *Lang Shirt* decision in which it has been held that only a preponderance is required.[21] On the other hand, *State of New York* v. *Phillips,*[22] a Privy Council appeal from Quebec, seems to say that proof beyond reasonable doubt is required. This was an action for damages for conspiracy to defraud. The trial judge stated "that there was a heavy onus on the plaintiffs, and that it was necessary for them to prove their case as clearly as they would have to prove it in a criminal proceeding". In approving this statement, Lord Atkin said that the defendant's criticism of this statement of the law was ill-founded: "The proposition of the learned judge has been laid down time and again in the courts of this country: and it appears to be just and in strict accordance with the law". Is this to be taken as a rule of general application? The Canadian cases do not support any such broad proposition, nor, according to Phipson,[23] do the bulk of the English cases. The reasons for the stringent rule in criminal cases are the stigma and, in most cases, the loss of personal liberty which result from a conviction. These reasons are not applicable to a civil case.[23A]

New York Life v. *Schlitt,* [1945] S.C.R. 289 (alleged suicide); *Earnshaw* v. *Dom. of Can. Gen. Ins. Co.,* [1943] O.R. 385 (alleged drunken driving).

[19] [1945] 1 D.L.R. 497 (Ont.).

[20] *Doe d. Devine* v. *Wilson* (1855), 10 Moore P.C. 502, 14 E.R. 581; quoted in *Clark* v. *R.,* footnote 15 *supra, per* Duff J. at pp. 616-7.

[21] *Italian Realty Co.* v. *Guardian Assce. Co.,* [1935] 2 D.L.R. 425 (N.S.); *Bukowicki* v. *Bukowicki,* [1945] 3 W.W.R. 402 (Alta.); *Davis* v. *Quayle,* [1946] 1 W.W.R. 96 (Alta.).

[22] [1939] 3 D.L.R. 433.

[23] P. 7.

[23A] With respect to matrimonial causes, a judgment of the English Court of Appeal in *Churchman* v. *Churchman,* [1945] P. 44, at p. 51 states that: "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called". This statement had reference to proof of connivance, but has been applied to proof of adultery: *e.g., Ginesi* v. *Ginesi* (1947), 63 T.L.R. 545; *Morrison* v. *Morrison,* [1948] 1 W.W.R. 110 (B.C.). Of the thousands of divorces granted each year in Canada, it would be interesting to conjecture the number in which adultery was proven beyond reasonable doubt.

Burden of Proof

Fifty years ago Thayer[24] showed that the term, "burden of proof" (or "onus of proof"), is used in two senses: firstly, in the sense that on each issue one party or the other has the duty of showing the affirmative. Thus in an action for breach of contract, plaintiff has the burden of proving the contract and the breach; but if the defendant pleads fraud the burden of that issue is on him. This class of burden never shifts, but remains throughout on the same party, and if, when the evidence is all in, the trier of fact is wholly in doubt as to whether the fact has been proved to the degree required by law, he must find against the person on whom the burden lies. This may be called the burden of persuasion.[25] Usually there is no doubt as to which party carries this burden on a given issue: in cases of dispute it becomes important if no evidence is given at all, or if, after all the evidence has been given, the tribunal finds that it cannot say whether the fact has been proved or not.[26] Thus, in a case where a "statutory onus" to show absence of negligence has been placed on the owner or driver of a motor vehicle, he will be held liable unless he shows by a preponderance of evidence that his negligence did not cause the accident.[27]

Turning to the second sense in which the term burden of proof is used, it is often stated in judgments that the burden or onus shifts from one party to the other during the trial; so that, when the same term is used for a burden that never shifts and for one that does, confusion is inevitable.[28] This second type of burden is sometimes called the burden of adducing evidence.[29]

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[24] Cap. 9, pp. 353-389.

[25] Wigmore terms it "the risk of non-persuasion of the jury", §2485; Phipson calls it "the burden of proof on the pleadings", p. 27; Halsbury (2nd ed., Vol. 13, Evidence, 612 at p. 543) uses the term "burden of proof as a matter of substantive law or pleading"; the Model Code, rule 1(3), says "burden of persuasion of a fact"; Mr. Justice Denning, Presumptions and Burdens (1945), 61 L.Q.R. 379, says "legal burden".

[26] *Robins* v. *National Trust Co.*, [1927] A.C. 515, at p. 520; *Harmes* v. *Hinkson*, [1946] 3 D.L.R. 497 (P.C.).

[27] *Geel* v. *Winnipeg Electric*, [1932] A.C. 690. In frustration cases, where one party alleges that frustration was brought about by the other party's default, he must prove it: *Constantine Line* v. *Imperial Smelting Co.*, [1942] A.C. 154; discussed by J. Stone, Burden of Proof and the Judicial Process (1944), 60 L.Q.R. 262. In restraint of trade cases the burden is on the covenantee to show that the covenant is reasonable: *Routh* v. *Jones*, [1947] 1 All E. R. 758; *Connors* v. *Connors Bros. Ltd.*, [1939] S.C.R. 162 (on appeal to the Privy Council the point was left open, *Connors Bros.* v. *Connors*, [1941] 1 D.L.R. 81.

[28] In *Abrath* v. *N. E. Ry.* (1883), 11 Q.B.D. 440, affirmed by (1886), 11 A.C. 247, Brett M. R. at p. 451 uses the term in the first sense, Bowen L. J. at p. 456 in the second.

[29] Phipson, p. 28. The Model Code, rule 1(2), says "burden of producing evidence of a fact". Mr. Justice Denning, footnote 25, *supra*, says

At the start of a trial the plaintiff normally carries the burden in both senses with respect to the facts he must establish. However, if he tenders evidence from which the fact may be found in his favour, then the defendant is faced with the obligation of adducing contrary evidence if he wants to avoid an unfavourable verdict.[30]

The operation of the two burdens is shown in those negligence cases in which *res ipsa loquitur* applies. The burden of persuasion is on the plaintiff but, once he has proved the fact of his injury, the defendant has the burden of adducing evidence.[31]

Chief Justice Duff introduced Thayer's distinction over thirty years ago[32] and it has been applied frequently since in the Supreme Court of Canada.[33] The writer does not know of any Privy Council case, except *Geel* v. *Winnipeg Electric*,[34] that discusses the distinction clearly, though the terms "burden" and "onus" are used over and over again.

In a criminal case, the burden on the Crown to prove guilt is the burden of persuasion. Prior to 1935, juries were sometimes directed that, once the Crown has proved the killing, the accused "has to show" circumstances, such as accident or self-defence, to obtain an acquittal, or provocation to obtain a verdict of manslaughter. In *Woolmington* v. *D. P. P.*[35] the House of Lords held such a direction to be wrong: the Crown must prove the intent as well as the killing. True, intent may be inferred, but it is a different matter to tell the jury that the accused must negative intent. The effect of the incorrect direction is to tell the jury that the accused must give evidence or at least call other witnesses — that he is under a burden, at least that of adducing evidence. The fact is that no burden is placed on him. He need not tender any evidence at all. Certain Canadian cases

"provisional burden"; he has a third class of burden called "ultimate burden".

[30] Wigmore § 2487, explains this burden in relation to a jury trial. The writer has found his discussion difficult, and will not attempt to explain it.

[31] *Malone* v. *T.C.A.*, [1942] O.R. 453; editorial note to *Scrimgeour* v. *Board of Management of American Lutheran Church*, [1947] 1 D.L.R. 677 (Sask.); G. W. Paton, Note (1936), 14 Can. Bar Rev. 480, and (1937), 15 Can. Bar Rev. 45; *Nystedt* v. *Wings Ltd.*, [1942] 3 W.W.R. 39 (Man.) *per* Dysart J. at p. 50.

[32] *Koop* v. *Smith* (1915), 51 S.C.R. 554, at pp. 558-9.

[33] *McKee* v. *Philip* (1916), 55 S.C.R 286, *per* Duff J. dissenting at pp. 299-300; *Smith* v. *Nevins*, [1925] S.C.R. 619, *per* Duff J. dissenting; *Ontario Equitable Life & Accident Co.* v. *Baker*, [1926] S.C.R. 297, at pp. 308-9; *Dillon* v. *Toronto Millstock Co. Ltd.*, [1943] S.C.R. 268.

[34] Footnote 27, *supra*.

[35] [1935] A.C. 462.

had anticipated the *Woolmington* case[36] and it has been applied many times.[37]

An observation might be permitted here: in *Woolmington's* case Lord Sankey said, "throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt", and his judgment has the effect of bolstering this rule against a threatened encroachment which might easily have been permitted to slip into the law. Much concern is shown today over alleged infringements of civil liberties, and proposals are made for constitutional safeguards in the nature of a bill of rights. Here is an example of an important protection to liberty that did not depend on any statute in the beginning and is preserved by the same arm of the government that originated it, namely the judiciary.

There are exceptional cases, as Lord Sankey pointed out, where the onus is placed on the accused: for example, where the defence of insanity is raised, the rule is that the accused must show by a preponderance of evidence that he was insane.[38] Another exceptional case is where a statute says that the burden of proof on a given issue shall be on the accused. Such provisions are now common both in England and in Canada. In these cases, must the defendant merely create a reasonable doubt, or must he prove by a preponderance or beyond reasonable doubt that he is within the exception? The weight of authority is in favour of the second of these, preponderance.[39]

Presumptions

The term "presumption" has been used in different senses and the phrase, "there is a presumption", may mean either that the presumption *may* be made or that it *must* be made.[40] There are few Canadian cases analyzing these matters and this discus-

[36] *Picariello* v. *R.*, [1923] 1 W.W.R. 1489 (Can.), especially the judgment of Duff J.; *Primak* v. *R.*, [1930] 1 W.W.R. 755 (Sask.).

[37] *Manchuck* v. *R.*, [1938] S.C.R. 341, and *R.* v. *Jackson*, [1941] 1 W.W.R. 418 (Sask.) (provocation); *R.* v. *Philbrook*, [1941] O.R. 352 (self-defence); *R.* v. *Cechetto* (1942), 79 C.C.C. 36 (N.S.) (alibi), and cases quoted in the editor's note to that case; *Taylor* v. *R.*, [1947] S.C.R. 462 (provocation and drukenness). A leading case on receiving stolen property, which raises similar questions, is *Richler* v. *R.*, [1939] S.C.R. 101.

[38] *R.* v. *Clark*, footnote 15, *supra*; *Smythe* v. *R.*, [1941] S.C.R. 16; *R.* v. *Gibbons*, [1947] 1 D.L.R. 45 (Ont.).

[39] *R.* v. *Lobbins*, [1940] 3 W.W.R. 301 (Alta.); *R.* v. *Hellenic Colonization Assn.*, [1942] 1 W.W.R. 810 (Alta.); *R.* v. *Carr-Briant*, [1943] K.B. 607 (Eng.); J. C. Martin (1939), 17 Can. Bar Rev. 37. See also: *Attygalle* v. *R.*, [1936] A.C. 338; *Seneviratne* v. *R.*, [1936] 3 All E.R. 36 (P.C.).

[40] Morgan, Some Observations Concerning Presumptions (1931), 44 Harv. L.R. 906; Model Code, pp. 306-312; see generally, Thayer, Cap. 8, pp. 313-352.

sion will be confined to the general rules on the subject and to some of the proposals that have been made to clarify them.

Presumptions are divided into three classes:

(1) Irrebutable presumptions of law. These are in effect substantive rules of law.[41] A classic example is the rule that a child under seven years of age is incapable of committing a crime.[42] This class of presumption needs no comment and will not be further considered.

(2) Rebuttable presumptions of law.

(3) Presumptions of fact.

As to the last two, Mr. Justice Denning says:

> The distinction is not clearly drawn in the books but it would appear that presumptions of law are presumptions of general application recognized by the law; whereas presumptions of fact are presumptions from the facts of a particular case. The division is unsatisfactory because the line between them is difficult to draw, and it does not connote any difference in the legal effect of the presumptions.[43]

His Lordship proposes to discard the use of the terms, "presumption of law" and "presumption of fact", and to divide presumptions into two new classes: firstly, those which unless and until rebutted, *must* be drawn when the basic fact on which the presumption rests has been proved; and, secondly, those which *may* be drawn from a fact that has been proved. He terms the former "compelling presumptions" and the latter "provisional presumptions". It is striking that his proposal is very similar to the distinction adopted in the Model Code,[44] though the terminology differs. The Code uses the single term "presumption" in the sense of a compelling presumption[45] and has no synonym for "provisional presumption".

There might still be difficulty in deciding whether a given "presumption" is a true presumption (compelling presumption) or merely a justifiable inference (provisional presumption), but the classification would be an improvement over the existing ones.[46] It will be noted that Denning J. has in several cases used his own classification of presumptions and burdens. These cases,[47] as well as his original proposal, will repay examination.

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[41] Phipson, p. 661.
[42] Criminal Code, s. 17.
[43] Footnote 25, *supra* at p. 381.
[44] Pp. 306-312.
[45] Rule 701.
[46] See E. M. Morgan, The Law of Evidence: 1941-1945 (1946), 59 H.L.R. 481, at p. 495.
[47] *Emanuel* v. *Emanuel*, [1945] 2 All E.R. 494, at p. 496; *Rowing* v. *Minister of Pensions*, [1946] 1 All E.R. 664, at p. 665; *W.* v. *Minister of Pensions*, [1946] 2 All E.R. 501, at p. 502.

In the United States much learning has been expended on the subject of presumptions, their relations to burden of proof, the effect to be given them, and the rules for deciding when they have been rebutted. The thorough discussion by S. J. Helman, K.C., in this Review, of the competing American views makes further comment unnecessary.[48]

What is the effect, in Canada, of a compelling presumption? What does the person against whom it operates need to do to rebut it? The writer hesitates to generalize, for Canadian courts have theorized very little on the subject. It is suggested that most courts take the view that the party against whom a presumption operates has the burden not only of adducing evidence but of persuasion, the degree being either a preponderance or, as in the case of the presumption against suicide, to some greater degree.[49]

Before leaving this subject, mention should be made of one case in which some systems of law provide a presumption, but in which the common law provides none, namely, as to the time of death of persons who die in a common disaster where there is no evidence as to which one died first. The Uniform Insurance Act has created the artificial presumption that the beneficiary died first and the Uniform Commorientes Act, that the older died first.[50]

Judicial Notice

There is no need to catalogue the classes of matters of which the court will take judicial notice.[51] The examples taken from Canadian cases will suffice.

The court takes judicial notice of the law, but not of the law of another country[52] or of another province.[53] The Supreme Court of Canada will take judicial notice of the laws of all the provinces.[54] Section 29 of the Uniform Act provides for judicial notice of statutes of the Imperial Parliament, of Canada and

[48] Presumptions (1944), 22 Can. Bar Rev. 118.

[49] See *Clark* v. *R.*, footnote 15, *supra; N. Y. Life* v. *Schlitt*, footnote 18, *supra.*

[50] Both Acts are discussed in a note by G. D. Kennedy in (1946), 24 Can. Bar Rev. 720, which points out that the former has been enacted in all common-law provinces and the latter in all but Alberta.

[51] Phipson, pp. 16-23, enumerates them; also Wigmore, §§ 2572-2582. For a thorough discussion see E. M. Morgan, Judicial Notice (1944), 57 Harv. L. Rev. 269.

[52] *Walkerville Brewing Co.* v. *Mayrand* (1929), 63 O.L.R. 573.

[53] *Can. Natl. S. S.* v. *Watson*, [1939] S.C.R. 11; noted in (1939), 17 Can. Bar Rev. 755.

[54] *Ottawa Electric* v. *Letang*, [1924] S.C.R. 470; reversed on other grounds, [1926] A.C. 725.

other dominions and of all Canadian provinces, and of a wide variety of ordinances. Notice will be taken of a proclamation in the Canada Gazette bringing into force a Dominion statute,[55] or in a provincial Gazette,[56] but there is considerable authority for saying that, in the absence of provision to the contrary,[57] the court cannot take judicial notice of an order in council unless a copy is actually produced in court.[58]

On the subject of matters of common knowledge or general notoriety, notice has been taken of the two most important events in the period under review, namely, the depression[59] and World War II.[60] Lesser matters have also received recognition: for example, the fact that (in 1938) women wore high-heeled shoes,[61] but not (in 1923) that a "worm" is an article suitable for the manufacture of spirits.[62] Cases involving spirituous liquor and matters of geography are too numerous to mention.

A striking example of the use of judicial notice is seen in the case holding *ultra vires* the Alberta Bank Taxation Act.[63] Duff C. J. computed that, if all the provinces passed similar taxes, they would total 6¼% of the banks' paid-up capital and 12½% of their undivided profits. He then said that it was the court's duty to take judicial notice of the fact that the profits of banking in Canada could not enable banks to pay such a tax; and, being in effect prohibitive, it was *ultra vires*.

It will be noted that there are certain matters of which the court *must* take judicial notice,[64] whereas of other subjects it *may* take notice. Our courts have not discussed this distinction but it is well recognized.[65]

Can evidence ever be given to dispute matters judicially noticed? This has been debated in the United States,[66] but the writer knows of no case in Canada on the point.

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[55] *R.* v. *St. Peters* (1927), 47 C.C.C. 204 (N.S.).
[56] *R.* v. *Wagner*, [1931] 2 W.W.R. 650 (Man.).
[57] *E.g.*, Criminal Code, s. 1128.
[58] *R.* v. *Kishen Singh*, [1941] 2 W.W.R. 145 (B.C.), *per* O'Halloran J. A. dissenting; *R.* v. *Yee Clun*, [1928] 3 W.W.R. 558 (Sask.); *R.* v. *Rudin & Co. Ltd.*, [1942] 1 W.W.R. 615 (Sask.).
[59] *E.g.*, *Mills* v. *Angus*, [1933] 2 W.W.R. 218 (Sask.).
[60] *E.g.*, *Saskatoon Mtge & Loan Co.* v. *Roton*, [1942] 2 W.W.R. 219 (Sask.) (that Paris was in enemy-occupied territory).
[61] *Gregson* v. *Vancouver*, [1939] 1 W.W.R. 347 (B.C.).
[62] *R.* v. *Holmes*, [1923] 1 W.W.R. 34 (Alta.).
[63] *Re Alberta Statutes*, [1938] S.C.R. 100; affirmed [1939] A.C. 117.
[64] *E.g.*, statutes: s. 29 of the Uniform Act.
[65] Wigmore, § 2583, at p. 580.
[66] Morgan, Judicial Notice, footnote 51 *supra*, at pp. 279-287.

Relevancy and Exclusionary Rules

It is elementary that evidence is not admissible unless it is relevant to the facts in issue; unless it has probative value. One rule is that "transactions" (including lawsuits) should not operate to prejudice a third person who is now party to an action. Does this rule apply so that a party to a civil action cannot tender evidence of a conviction for the purpose of proving that the opposite party, or the person through whom he claims, has committed a crime? There were cases both ways when *Hollington* v. *Hewthorn*[67] was decided in 1943. After a thorough examination of the authorities, it was held that the conviction was irrelevant and consequently evidence of it inadmissible. This judgment is of course not binding in Canada. Dr. C. A. Wright has made a most searching criticism of the decision and concludes that it is illogical.[68]

Another exclusionary rule bars evidence of "similar facts",[69] except to show "design" [70] or "scheme" [71] or "a systematic course of conduct" [72] or "intent" where *mens rea* is denied [73] or "identity",[74] or in cases such as incest "to establish guilty relations and that a sexual passion existed".[75]

These many exceptions are hardly satisfactory. It has been suggested that it would be simpler to provide generally for admission of evidence of similar facts unless it is tendered merely to show bad character or a disposition to commit crimes, or unless the probative value is slight.[76]

A similar exclusionary rule bars evidence of character except where it is in issue, as it may be in libel actions, or in rape charges where the bad character of prosecutrix may be shown, or where an accused has given evidence of his good character: apart from such cases, evidence of bad character, *e.g.* of previous convictions, is excluded unless it is within one of the exceptions to the rule against similar facts.[77]

[67] [1943] K.B. 587.

[68] Note (1943), 21 Can. Bar Rev. 653.

[69] *R.* v. *Brunet*, [1928] S.C.R. 375; *R.* v. *Barbour*, footnote 1 *supra*; *R.* v. *Campbell*, [1946] 3 W.W.R. 369 (B.C.); *Koufis* v. *R.*, [1941] S.C.R. 481.

[70] *R.* v. *Baker*, [1926] S.C.R. 92; *Paradis* v. *R.*, [1934] S.C.R. 165.

[71] *R.* v. *Hamilton* (1931), 66 O.L.R. 537.

[72] *R.* v. *Christakos*, [1946] 1 W.W.R. 166 (Man.); *R.* v. *Stawycnuj*, [1933] 2 W.W.R. 495 (Man.).

[73] *R.* v. *Anderson*, [1935] 3 W.W.R. 272 (B.C.); *R.* v. *Pinsk*, [1934] 3 W.W.R. 752 (Sask.).

[74] *R.* v. *Lyons*, [1944] 2 W.W.R. 129 (B.C.).

[75] *Munro* v. *Krause*, [1931] 2 W.W.R. 685 (Alta.); *R.* v. *Pegelo*, [1934] 1 W.W.R. 573 (B.C.).

[76] Dr. Wright, footnote 2 *supra*, at p. 717.

[77] *E.g.*, *R.* v. *McLaren*, [1935] 2 W.W.R. 188 (Alta); *R.* v. *MacDonald*, [1939] O.R. 606.

The benefit of this rule has however been whittled away by the effect of section 12 of the Canada Evidence Act, which says that a witness may be cross-examined as to previous convictions. Probably Parliament never intended this section to be used as a means of bringing out character evidence against an accused who testifies, but such has been the effect. It is important to note that, in England, questions to an accused as to previous convictions are forbidden except in specified circumstances.[78] It would have been possible for the courts to hold that, notwithstanding the absolute terms of section 12, questions as to convictions should be asked only if relevant, as provided by the English section, but they have not done so. The effect is to compel an accused who has previous convictions to forego the right to give evidence or to run the risk of being confronted with his past record.[79]

The last class of evidence that is excluded is "opinion" evidence: a witness may not express his opinion of the facts, though it is inevitable that he will include in his testimony inferences that are actually opinion. As far as the writer knows, Canadian courts do not forbid a witness stating inferences he has drawn, unless the court considers the witness incompetent to draw them. The same principle is stated in the Model Code.[80] The important exception to the opinion rule is that an "expert" may testify as to his opinion on facts in issue.[81] The current question in connection with expert evidence is whether the court should not appoint experts instead of leaving it to the parties to call their own. It is notorious that witnesses selected by the parties are generally biased, whether intentionally or not,[82] and extreme divergences of opinion between the opposing experts are commonplace.[83]

Little has been done in Canada to find a better method of obtaining expert evidence, though several proposals respecting

[78] Criminal Evidence Act, 1898, 61 and 62 Vic., c. 36, s. 1(f). See *Maxwell* v. *D.P.P.*, [1935] A.C. 309; *Stirland* v. *D.P.P.*, [1944] A.C. 315.

[79] See Dr. C. A. Wright's criticisms in a number of notes: (1934), 12 Can. Bar Rev. 519; (1935), 13 Can. Bar Rev. 605; (1940), 18 Can. Bar Rev. 808; (1941), 19 Can. Bar Rev. 219 and 614.

[80] Rule 401.

[81] As to when a witness is an expert rather than a witness of fact, see: *Buttrum* v. *Udell* (1925), 57 O.L.R. 97; *Leeson* v. *Darlow* (1926), 59 O.L.R. 421.

[82] *Brownlee* v. *Hand* (1930), 65 O.L.R. 646. Wigmore, § 563, is not too critical; nor Lord Macmillan in his chapter, "The Professional Mind", in Law and Other Things (1934). For a good discussion of the whole subject see H. A. Hammelmann, Expert Evidence (1947), 10 Mod. L.R. 32.

[83] *E.g.*, *Powlett* v. *U. of A.*, [1933] 3 W.W.R. 322; varied [1934] 2 W.W.R. 209 (Alta.) (medical experts); *Re Withycombe Estate*, [1945] S.C.R. 267 (real estate valuators).

expert medical testimony have been made in this Review.[84] In Quebec, the court may appoint an expert to investigate and report and the Supreme Court of Canada, in dealing with the evidence of an expert appointed under the Quebec provision, has pointed out that his testimony, being impartial, is entitled to more weight than that of a party's witness.[85] The Uniform Act does not provide for the appointment of experts by the court. The only improvement it makes is to permit an expert to file a report of his findings, which is preferable to a piecemeal verbal statement given in answer to questions: he may of course be cross-examined on his report.[86] By way of comparison, the Model Code empowers the court to appoint its own experts,[87] who may be examined or cross-examined by the parties.[88] In addition the parties may call their own witnesses.[89] In England also there is provision for a court expert.[90]

Provision is often made for appointment by the court of "referees" to investigate and report,[91] for the appointment of medical examiners in negligence and nullity actions,[92] for the obtaining of expert assistants, such as accountants, merchants, etc.[93] and for the trial of cases by a judge sitting with assessors instead of alone or with a jury.[94] The classic use of assessors is of course in admiralty cases.[95] The writer is unable to say why greater use is not made in Canadian courts of the power to try cases with assessors. It might not be a cure-all, but surely is worth an attempt.

Hearsay

Hearsay is evidence of a statement made by someone who is not under oath and is not available for cross-examination. In

[84] D. E. Robertson, Medico-Legal Evidence (1938), 16 Can Bar Rev. 185; Dr. Hubert W. Smith, Scientific Proof and Relations of Law and Medicine (1943), 21 Can. Bar Rev. 707; From an English Office Window: Medical Assessors (1944), 22 Can Bar Rev. 266.

[85] *Citadel Brick Ltd.* v. *Garneau*, [1937] 3 D.L.R. 169 (Can.); *quaere*, whether he should be subject to cross-examination by the parties.

[86] S. 10.

[87] Rule 403.

[88] Rule 407.

[89] Rule 404.

[90] O. 37A, r. 1-11 (1934).

[91] *E.g.*, Alberta Rules of Court, 461 and 491-500.

[92] *E.g.*, Alberta Rules 259-260 and 663.

[93] Alberta Rule 853: Holmstead & Langton, Judicature Act (5th ed.), pp. 901-903.

[94] *E.g.*, Alberta Rule 281; Ontario Judicature Act, R.S.O., 1937, c. 100, ss. 64-69, annotated in Holmstead & Langton, footnote 93 *supra*, at pp. 273-281.

[95] Halsbury (2nd. ed.), Vol. 1, Admiralty, sec. 214 at p. 133; Courts of Admiralty Act, 1934, S.C.c. 31, s. 30; Supreme Court Act, R.S.C., 1927, c. 35, s. 31. It will be noted, however, that even nautical assessors frequently disagree, and in modern cases in the House of Lords it has been stated that today

these circumstances it is considered that the statement is unreliable and therefore should be excluded entirely.[96] Of course it is possible to tender evidence of a statement made by a party who is not a witness where the question is whether the statement was made, not whether it was true. Such a case is not a true exception to the rule against hearsay.[97]

Sometimes judges seem to consider that the rule is based on fundamental principles of justice, but it is significant that the War Crimes Act[98] contains broad provisions for the admission of hearsay evidence against persons charged under it; and the maximum penalty is death.[99]

The cases in Canada on hearsay are merely applications of the rule[100] and of its many exceptions. In sum these cases create a "conglomeration of inconsistencies".[101] The first group of exceptions has to do with statements made by persons since deceased:—

(a) Dying declarations in homicide cases, where the death of the deceased is the subject matter of the charge and where the declaration concerns the circumstances of death.[102]

(b) Statements against pecuniary interest. Canadian courts apply the rule that the statement is admissible even though only prima facie against interest, and all "incidental facts" are admitted along with the statement against interest.[103]

(c) Statements made in the course of duty.[104]

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navigation is mainly a matter of commonsense, so that a judge can decide navigational questions as well as an expert: *S. S. Australia* v. *S. S. Nautilus*, [1927] A.C. 145, and cases appended to the judgment in that case.

[96] Phipson, p. 207, gives additional reasons for the rule. See also E. M. Morgan, Comments on the Proposed Code of Evidence, footnote 4, *supra*, at p. 282.

[97] *R.* v. *Container Materials Ltd.* (1940), 74 C.C.C. 113 (Ont.); affirmed on other grounds (1941), 76 C.C.C. 18; affirmed [1942] S.C.R. 147.

[98] 1946, c. 73 (Can.), Schedule, Regulation 10.

[99] *Ibid.*, Regulation 11(1).

[100] *E.g.*, *National Fire Ins. Co.* v. *Rogers*, [1924] 2 W.W.R. 186 (Sask.) (factory records); *Anthony* v. *Charter*, [1933] 1 W.W.R. 310 (Alta.) (statement by plaintiff as to date of birth).

[101] E. M. Morgan, footnote 4, *supra*, at p. 290.

[102] *Debortoli* v. *R.*, [1926] S.C.R. 492; *Chapdelaine* v. *R.*, [1935] S.C.R. 53; *Schwartzenhauer* v. *R.*, [1935] S.C.R. 367.

[103] *McDonald* v. *Young*, [1934] 4 D.L.R. 172 (N.S.).

[104] *Palter Cap Co.* v. *Great West Life Assce. Co.*, [1936] O.R. 341; Dr. C. A. Wright in a Note in (1936), 14 Can. Bar Rev. 688, points out the difficulty in applying the idea of "duty" and proposes that any statement be admissible if made in the ordinary course of work, even though there was no duty to make it in a narrow sense.

(d) Declarations as to pedigree made by a member of the family of the person whose pedigree is in question.[105] Doubtless this exception will rarely be invoked in future because registration of vital statistics will render it unnecessary.

(e) Declarations as to public and general rights, such as the boundaries of a village or the existence and location of a public highway.[106] This exception too will become of decreasing importance with the extended use of land registry systems.

(f) Declarations by a testator in relation to his will.[107] The extent to which such declarations are admissible is a complicated question and will not be discussed here.

The second group of exceptions does not depend on the death of the declarant:—

(a) Public documents, registers and records such as admiralty charts,[108] and an order of a railway board,[109] but not every report by a public officer made in the course of duty.[110] A great difference of opinion has arisen recently as to whether a soldier's record of service is a public document.[111]

(b) Evidence given in other proceedings between the same parties or their privies where the witness is not available. The leading case is still *Walkerton* v. *Erdman*.[112]

The recent trend is toward broadening the exceptions. This trend is evidenced by the Model Code[113] and to a lesser degree by the English Evidence Act, 1938.[114] The latter was adopted in 1939 in Manitoba[115] and is a part of the Uniform Act.[116] It is

[105] *Pejepscot Paper Co.* v. *Farren*, [1933] S.C.R. 388; *Sewell* v. *Urquhart*, [1930] 2 D.L.R. 547 (N.B.); *Croft* v. *Wamholt*, [1930] 2 D.L.R. 996 (N.S.); *Re Anderson*, [1947] 3 D.L.R. 302 (N.B.).

[106] *Williams & Wilson* v. *Toronto*, [1946] O.R. 309.

[107] *E.g.*, *Walsh* v. *Cruickshank*, [1947] 2 W.W.R. 464 (Alta.).

[108] *R.* v. *Bellman*, [1938] 3 D.L.R. 548 (N.B.): compare *R.* v. *Price Bros.*, [1926] S.C.R. 28, where old maps were held to be of little evidentiary value. See also *Fulton* v. *Creelman*, [1931] S.C.R. 221, where the admissibility of an old registry book was doubted.

[109] *Littley* v. *Brooks & C.N.R.*, [1930] S.C.R. 416.

[110] *Hudson's Bay Co.* v. *Wyrzykowski*, [1938] S.C.R. 278.

[111] *Hare* v. *Hare*, [1943] 3 D.L.R. 579 (Ont.), *per* Fisher J.A., *Bell* v. *Bell*, [1945] O.R. 251, and *Elson* v. *Elson*, [1946] 3 W.W.R. 789 (Sask.) hold it is; *contra*, *Stafford* v. *Stafford*, [1945] 1 D.L.R. 263 (Ont.), and *Tomlinson* v. *Tomlinson*, [1945] 1 W.W.R. 371 (Sask.).

[112] (1894), 23 S.C.R. 352. Later cases are: *Whimbey* v. *Hyde* (1926), 60 O.L.R. 399; *Shumardo* v. *Tor. Gen. Trusts*, [1940] 2 W.W.R. 564 (Man.); *Richey* v. *Richey*, [1941] 2 W.W.R. 91 (Man.).

[113] Cap. VI, Rules 501-531.

[114] 1 & 2 Geo. VI, c. 28; Cockle, p. 582; Phipson, p. 261.

[115] Now R. S. M., 1940, c. 65, ss. 52-54.

[116] Ss. 52-56.

confined to documentary hearsay and is limited to cases where the circumstances in which the document came into being are such as to make it trustworthy. Lord Maugham, who sponsored the Act, has stated that it was felt advisable not to extend it to oral hearsay,[117] though there are others who consider that the extension would be justified.[118] Writing in 1942, Dr. C. A. Wright expressed the fear that the Act would not effect any real improvement,[119] but recent cases show that the English courts are applying it liberally.[120]

Res Gesta

Evidence of what another person said is admissible if it was part of the event or thing or fact or transaction in question. Unlike the exceptions to the hearsay rule, it is not admitted as evidence of its truth, but because it was made. It is a "verbal act".[121] It is hard to define the scope of the term and it has been used as an excuse for admitting almost anything that is more or less contemporaneous[122] with the "events" or "transaction".[123]

Statements showing the declarant's state of mind are sometimes admitted, seemingly as *pars rei gestae*;[124] likewise evidence of complaints made at the first opportunity by a female complainant in sex cases, to show consistency in her story and to negative consent.[125]

Admissions and Confessions

Whether admissions and confessions are exceptions to the hearsay rule is not important. The former are always admissible

[117] Lord Maugham, Observations on the Law of Evidence (1939), 17 Can. Bar Rev. 469.

[118] *E.g.*, S. J. Helman, The Reform of the Law of Hearsay (1939), 17 Can. Bar Rev. 302.

[119] The Law of Evidence: Present and Future, footnote 2, *supra*.

[120] *E.g.*, *Andrews* v. *Cordiner* (1947), 63 T.L.R. 299; *Edmonds* v. *Edmonds* (1947), 63 T.L.R. 327.

[121] *Cassels* v. *Tor. T.C.*, [1938] O.R. 155; Wigmore, § 1745, distinguishes between verbal act and a spontaneous exclamation, which in some jurisdictions is recognized as an exception to the hearsay rule. See also *R.* v. *Deacon* (1947), 87 C.C.C. 271, *per* Bergman J.A. at pp. 320-1; reversed on other grounds (1947), 89 C.C.C. 1 (Can.).

[122] Cases on contemporaneity are: *Chapdelaine* v. *R.*, [1935] S.C.R. 53; *R.* v. *Elliott* (1928), 62 O.L.R. 1; *Gollogly* v. *Pritchard*, [1946] O.W.N. 888.

[123] "Bedingfield's Case" in Thayer's Legal Essays, p. 206, is a classic discussion. See also Wigmore §§ 1766-1769.

[124] *R.* v. *Wysochan* (1930), 54 C.C.C. 172 (Sask.); *R.* v. *Wilkinson*, [1934] 3 D.L.R. 50 (N.S.).

[125] *E.g.*, *R.* v. *Marsh*, [1940] 3 W.W.R. 621 (B.C.).

against the maker and in certain cases against others.[126] Confessions are admissible if shown by the Crown to be voluntary.

The only important problem in connection with admissions is this: When is a statement made in the presence of a party to be treated as involving an admission by him that the statement is true? The effect of *Rex* v. *Christie*[127] is that evidence of the statement need not as a matter of law be excluded where the accused denied it, though the judge may in his discretion exclude it in such circumstances[128] and the statement is evidence against him only to the extent that he adopts it by his words, conduct or demeanour. The *Christie* case has been applied many times in Canada.[129] Mere silence is not an admission unless the statement is made on an occasion when a reply might properly be expected.[130]

With respect to confessions, the writer had intended to consider in detail certain recent cases, particularly *Gach* v. *Rex*[131] and *Rex* v. *Deagle*.[132] However, the whole subject of confessions has been examined thoroughly by T. D. Macdonald and A. H. Hart[133] in recent months and further comment is needless. In deciding whether to admit a confession, the problem is one of striking a balance: on the one hand, exclusionary rules that are too rigid will tend to "sacrifice justice and common sense at the shrine of mercy — or of guilt";[134] and, on the other hand, inquisitional methods, trickery and coercion by police are not to be encouraged. Messrs. Macdonald and Hart[135] propose in effect that these broad principles should govern the admissibility of confessions.

Answers made on oath pursuant to a statute requiring that answers be made are not regarded as confessions and therefore, when the person making such answers is later charged with a criminal offence, the Crown need not show that the answers were voluntary.[136]

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[126] *E.g.*, partners, *Riddell* v. *Botfield*, [1923] 1 W.W.R. 1109 (Man.); and against a principal where made by an agent, *Nagel* v. *C.N.R.*, [1930] 2 W.W.R. 431 (Sask.).

[127] [1914] A.C. 545.

[128] *R.* v. *Harrison*, [1946] 3 D.L.R. 690 (B.C.).

[129] *Hubin* v. *R.*, [1927] S.C.R. 442; *Stein* v. *R.*, [1928] S.C.R. 553; *Chapdelaine* v. *R.*, [1935] S.C.R. 53; *R.* v. *Emele*, [1940] 2 W.W.R. 430 (Sask.).

[130] *R.* v. *Kiewitz*, [1941] 3 W.W.R. 693 (B.C.); *R.* v. *Dimetro & Mitchell*, [1946] 1 D.L.R. 286 (Ont.).

[131] [1943] S.C.R. 250.

[132] [1947] 1 W.W.R. 657 (Alta.).

[133] The Admissibility of Confessions in Criminal Cases (1947), 25 Can. Bar Rev. 823.

[134] This is a combination of the remarks of Parke B. and Erle J. in *Reg.* v. *Baldry* (1852), 5 Cox. C.C. 523.

[135] Footnote 133, *supra*.

[136] *Walker* v. *R.*, [1939] S.C.R. 214; *R.* v. *Mazerall*, [1946] O.R. 511,

Corroboration

(1) *In criminal cases.* Where corroboration is required by statute,[137] the accused cannot be convicted unless there is corroboration "in some material particular by evidence implicating the accused". On the other hand, where the need for corroboration is not mandatory, but is only a matter of practice, as in the case of evidence of an accomplice or the prosecutrix in a rape charge, the jury must be told that it is unsafe to convict on the uncorroborated evidence of the accomplice[138] or the prosecutrix.[139] The proper form of charge is laid down in the leading case of *Vigeant* v. *Rex.*[140] The corroboration must be evidence independent of the person whose evidence needs corroboration,[141] and must implicate the accused.[142] The bulk of case law is huge. A leading text is Graham and Read, Corroboration in Criminal Matters (1928). Tremeear's Criminal Code[143] contains a thorough digest of the cases.

(2) *In civil cases.* The Uniform Act[144] provides that in actions for breach of promise, actions by or against the representatives of a deceased person, actions by or against lunatics and actions where the evidence is that of a child of tender years, corroboration in some material respect is required The majority of the common-law provinces have similar provisions.

The same difficulty arises here as in criminal cases, namely of deciding whether the evidence relied on as corroboration is "material". The decisions are too numerous to analyse, but the recent trend is to put a wide interpretation on "material", to hold that corroboration may be "afforded by circumstances" and to treat probabilities and inferences as corroboration.[145]

It has been suggested that it might be better, at least in claims involving estates, to forego the statutory requirement

762; *R.* v. *Lunan* (1947), 88 C.C.C. 191 (Ont.); and see Report of Royal Commission (the Taschereau or "Espionage" Report), Ch. XI, at pp. 671-3 (Ottawa: King's Printer, 1946).

[137] *E.g.*, Criminal Code, ss. 1002-1003.

[138] *Gouin* v. *R.*, [1926] S.C.R. 539; *Boulianne* v. *R.*, [1931] S.C.R. 621; *Chapdelaine* v. *R.*, [1935] S.C.R. 53.

[139] *Mattouk* v. *Massad*, [1943] A.C. 588; *McIntyre* v. *R.*, [1945] S.C.R. 134.

[140] [1930] S.C.R. 396. See also *Brunet* v. *R.*, [1928] S.C.R. 375, and *Pitre* v. *R.*, [1933] S.C.R. 69.

[141] *Hubin* v. *R.*, [1927] S.C.R. 442.

[142] *Baker* v. *R.*, [1926] S.C.R. 92; R. v. *Silverstone*, [1934] O.R. 94.

[143] (5th ed., 1943), pp. 1259-1285.

[144] Ss. 13-16.

[145] *Cox* v. *Hourigan*, [1941] S.C.R. 251, *per* Kerwin J.; *Ollson* v. *Fraser*, [1945] O.R. 69; *Brown* v. *Rotenberg*, [1946] O.R. 363; *Szczepkowski* v. *Eppler*, [1946] 3 D.L.R. 641 (Can.) (claims against estates); *Mott* v. *Trott*, [1943] S.C.R. 256 (breach of promise); *Smallman* v. *Moore*, [1946] O.R. 867 (both classes).

and merely apply the common-law rule of practice which permits the jury or judge to act on the uncorroborated evidence if convinced it is true.[146] Mr. Justice Bergman of Manitoba favours this view,[147] which is still the rule in England in claims against an estate, though in breach of promise cases corroboration has been required by statute since 1869.[148] There are no cases on the need for corroboration in claims by or against lunatics, and very few respecting the evidence of a child of tender years.[149]

Privilege Against Testifying and Incompetence to Testify

Certain of the so-called espionage cases raised points of interest in connection with section 5 of the Canada Evidence Act, which requires a witness to answer incriminating questions but provides that, if he objects to answer on the ground that his answer may incriminate him, the answer shall not be receivable in evidence against him in any criminal trial. Certain witnesses who refused to answer questions before the Royal Commission on Espionage, on the ground that the answers would incriminate them, were found guilty of contempt.[150] To have found otherwise would have been directly contrary to the section. The term "witness" applies to a person called before a royal commission as well as to a witness in court.[151] Moreover the witness is bound to object flatly and to state the proper ground of his objection[152] and the court or other tribunal is not bound to inform him of his right.[153] The course followed by the Royal Commission has been the subject of criticism which will not be considered here.[154]

As to the competence of an accused to testify, there is an abundance of cases dealing with the proviso that neither judge nor prosecution shall comment on the failure of accused or his wife to testify. The high-water mark of protection to the accused

[146] Phipson, p. 477; *National Trust* v. *Ayton*, [1934] 1 W.W.R. 285 (Man.).
[147] Proceedings of the Canadian Bar Association, 1945, pp. 237-8.
[148] Evidence Further Amendment Act, 32 & 33 Vict., 1869, c. 68, s. 2.
[149] *Cuthbertson* v. *Lethbridge*, [1929] S.C.R. 176; *Robinson* v. *P. Burns & Co.*, [1928] 1 W.W.R. 76 (Alta.).
[150] *Re Gerson & Nightingale*, [1946] S.C.R. 538; *Re Gerson*, [1946] S.C.R. 547.
[151] *R.* v. *Smith*, [1947] O.R. 378. See also: *R.* v. *Harcourt* (1929), 53 C.C.C. 156 (witness before a provincial securities board).
[152] *R.* v. *Smith*, footnote 151, *supra*.
[153] Report of Royal Commission, footnote 136, *supra*, at pp. 672-3; *Tass* v. *R.*, [1947] S.C.R. 103.
[154] M. H. Fyfe, Some Legal Aspects of the Report of the Royal Commission on Espionage (1946), 24 Can. Bar Rev. 777; Report of Civil Liberties Committee of the Canadian Bar Association (1946), 24 Can. Bar Rev. 697, at pp. 705-708.

was reached in *Bigaouette* v. *Rex.*[155] In more recent cases such a remark as "the Crown's evidence is not denied" has been held to be permissible.[156] The statutory provision that a spouse is a competent witness for the accused[157] and in specified cases is competent and compellable for the Crown[158] preserves those exceptional cases in which the spouse might have testified for the Crown at common law. Is a wife compellable in those cases, or merely competent?[159] And is she competent where there is no evidence other than her own against her husband?[160] The protection of communications between husband and wife and the prohibition against questions as to the witness's adultery require no comment.

The abolition of the rule in *Russell* v. *Russell*[161] by statute in nearly all provinces is important.[162] This rule and its exceptions were the subject of an exhaustive and devastating criticism by Dr. C. A. Wright on behalf of the Ontario Commissioners on Uniformity.[163] There is no doubt that this criticism hastened the abolition of the rule.

The privilege given to a witness to refuse to disclose the name of a prosecutor in criminal proceedings needs no comment.

The privilege attaching to communications between solicitor and client has not been extended in Canada to physicians, clergymen, bankers, accountants or others in a confidential relationship, though in *Halls* v. *Mitchell*[164] Duff J. pointed out that eminent judges have stated that there is no logical reason why the privilege should not extend to physician and patient.[165]

Another privilege based on public policy pertains to documents or communications respecting "matters of state".[166]

[155] [1927] S.C.R. 112.
[156] *Wright* v. *R.*, [1945] S.C.R. 319.
[157] But not compellable: *R.* v. *Arneson*, [1930] 3 W.W.R. 163 (Alta.).
[158] Canada Evidence Act, s. 4.
[159] Note *R.* v. *Lapworth*, [1931] 1 K.B. 117; J.A. Weir (1931), 9 Can. Bar Rev. 216.
[160] Note *R.* v. *Schaefer* (B.C.), unreported; George Murray (1946), 24 Can. Bar Rev. 916.
[161] [1924] A.C. 687.
[162] Uniform Act, s. 5.
[163] Proceedings of the Canadian Bar Association, 1945, p. 250; reprinted in (1945), 23 Can. Bar Rev. 536.
[164] [1928] S.C.R. 125, at pp. 136-7.
[165] The Model Code extends the privilege to the priest-penitent relationship (Rule 219) and to the physician-patient relationship (Rules 220-223).
[166] Thus a chartered accountant who investigated a company's affairs for the Dominion Government could not be compelled to testify: *Lund* v. *Walker*, [1931] S.C.R. 597.

It is not every public document that comes within the protection: there may be nothing in the public interest that requires exclusion,[167] and in a recent Alberta case[168] the trial judge refused a claim of privilege on behalf of the provincial government with respect to the verbal testimony of a policeman and a government official who had obtained statements while investigating an accident.

Duncan v. *Cammell Laird*,[169] a leading case on the question of privilege from production of crown documents in actions between private persons, has been criticized in a note in this Review.[170] There the House of Lords held that, if the objection is validly and formally taken on the ground that production of the document would be injurious to the public service, the objection by the Ministers of the Crown is conclusive, and the court should not even look at the document. The learned commentator criticized this judgment as giving unfettered discretion to the executive branch to say whether the privilege exists.

The next privilege to be noted is that protecting communications made "without prejudice" in negotiating settlement of a disputed claim, which otherwise would be admissible as an admission. This privilege has been applied to a verbal offer of settlement which the court said was impliedly without prejudice,[171] and has been extended to the whole of a series of letters,[172] but it has been stated that if a settlement is reached the correspondence is admissible because a new contract has then been made.[173] There is no privilege with respect to articles seized under a search warrant that is invalid or improperly executed.[174]

Conclusion

The importance of a thorough knowledge of the rules of evidence is obvious. Only a fraction of the rulings on questions of admissibility ever reach the law reports. It is sometimes said that in England the barristers know the rules of evidence and realize that the judges know them, and so little time is wasted

[167] *Dufresne Const. Co. Ltd.* v. *R.*, [1935] Ex. C.R. 77, where the documents were excluded on another ground, namely that they were prepared by government officials for the guidance of the Minister of Public Works with respect to suppliant's claim.

[168] *Lengyel* v. *Swanson & Calgary Power Co. Ltd.*, [1947] 2 W.W.R. 648.

[169] [1942] A.C. 624.

[170] (1942), 20 Can. Bar Rev. 805.

[171] *Cook* v. *Nova Scotia L & P. Co.*, [1930] 1 D.L.R. 836 (N.S.).

[172] *McLeod* v. *Pearson*, [1931] 3 W.W.R. 4 (Alta.).

[173] *Fischer* v. *Robert Bell Engine & Thresher Co. Ltd.*, [1923] 3 W.W.R. 320 (Sask.).

[174] *E.g.*, *R.* v. *Hawkins* (1923), 42 C.C.C. 305 (Que.); *R.* v. *Kostachuk*, [1930] 2 W.W.R. 464 (Sask.); *R.* v. *Lee Hai*, [1935] 2 W.W.R. 177 (Man.).

in unwarranted objections. In the United States it appears that the constant use of objections is a real obstacle to the proper trial of cases.[175]

The need for a continuing critical analysis of the rules of evidence with a view to their simplification and rationalization is pressing. The work of the Commissioners on Uniformity of Legislation in Canada in producing the Uniform Act is encouraging. The searching criticisms by Dr. C. A. Wright in this Review, the work of Wigmore and the writings of E. M. Morgan, some of which have been cited in this article, and the reforms effected by the Model Code should be given the most careful study.[176]

Simpler and more efficient rules of evidence will not only check the tendency to substitute other bodies for courts of law but, more important, will benefit immeasureably the whole administration of justice.

[175] Wigmore, § 8c, especially at pp. 267-269, quoting W. Hearn "I Object".
[176] The Model Code has not been adopted in all the States overnight; in fact it may be long before it is generally accepted. See E. M. Morgan, footnote 46, *supra*.