Correspondence

Form of Warning to the Accused

TO THE EDITOR:

The January 1949 number of the Review contains an article by Mr. J. L. Salterio, K.C., of Regina concerning the form of warning to an accused. In the February issue are letters from the Hon. John Doull, Halifax, and Mr. R. B. Graham, K.C., Winnipeg, both commenting on Mr. Salterio's article.

The discussion centers around the application of well-established rules of evidence. The rules involved are those governing admissions, confessions and statements by accused persons. Stephen in his Digest of the Law of Evidence (11th edition, chapter IV, article 14) says *inter alia* that the fact that a statement was made by a person not called as a witness is deemed to be irrelevant to the truth of the matter stated, except in the case of admissions made by a party to the proceedings, which are relevant as against the party by whom they are made but not in his favour, and except confessions, that is admissions made by a party charged with a crime stating or suggesting the inference that he committed it, which are relevant against the person who makes them if they are made voluntarily. He says further that no confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat or promise proceeding from a person in authority and having reference to the charge against the accused person, if such inducement, threats or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. Mr. Salterio points out correctly that the fundamental question to be decided in all cases is whether or not the confession, admission or statement was made voluntarily.

What might be termed an administrative practice has developed of requiring that an accused should first be given a warning containing advice as to his rights. As Mr. Salterio says, the form of warning used, or whether any form of warning was used, is material in deciding whether the confession, admission or statement was voluntary or not. There is no form of warning in the Criminal Code expressly for the guidance of the police in taking statements from accused persons and there is no uniformity in the form actually used in the different provinces of Canada, yet, he says, members of the police are expected to give a proper warning to the accused.

One might assume on reading the article and letters that the form of warning to be given by police officers investigating crimes under the Criminial Code is the only point that remains to be settled. But remarks made in debate

in the present sittings of the House of Commons suggest that there are concurrent enforcement procedures in Canada which are at variance with generally accepted principles of justice, have no authority in law and prejudice an accused in making his defence. The remarks referred to were made on February 1st, 1949, by Mr. G. S. White (Hastings-Peterborough) and are reported in the House of Commons Debates for that date. Mr. White, who is a practising barrister, described his experiences in defending a grocer charged with selling certain items of food at prices in excess of the lawful maximum prices, contrary to the Wartime Prices and Trade Regulations. He said that the investigator obtained a statement from the accused without telling him that he was not obliged to sign it and, what was more serious, without telling him that the statement might be used in court at a later date. According to Mr. White, the investigator said under oath that it was the practice of the Board to obtain statements while conducting their investigations and to file them later in court. The reason usually given for the practice is that it makes enforcement simpler and less expensive. Enforcement is carried out by the Board's own personnel and proceedings in court are conducted by counsel appointed by the Department of Justice, Ottawa.

This special practice in obtaining evidence was adopted under the pressure of war emergency and it now continues by habit. The question is whether there is any justification for continuing it. Crimes in a strict sense, such as robbery, are always an emergency. They make deeper inroads upon the safety of the state than offences against pricing and rental regulations. Why? Because a fixed price or rental is only an arbitrary standard, and a standard that is being changed from time to time, so that frequently what is unlawful today is lawful tomorrow. But in the enforcement of the Criminal Code against persons violating its provisions the formalities and rules of evidence and procedure are complied with notwithstanding that as a result the guilty sometimes obtain their liberty on technicalities. It is worth noting that the government of British Columbia found it sufficient to leave the enforcement of the Government Liquor Act to the ordinary law enforcement machinery of the province, although strict enforcement is as necessary here as under the Wartime Prices and Trade Regulations. In making these strictures I do not lose sight of the fact that in Mr. White's case the signed statement was rejected by the magistrate and that the question of admissibility is always in the discretion of the court.

The letters mentioned are interesting and I feel that good might ultimately be done by keeping the subject alive. Mr. Salterio mentioned proposals made in 1946 for a statutory form of warning to the accused, to be embodied in a new section 684A of the Code, and for rules governing the admission of statements by an accused, to be embodied in two new subsections of the present section 685. These suggested additions are set out in full in his article. Mr. Graham, it seems to me, has succeeded in showing that the proposed section 684A, or the words of it rather, would add nothing, for the reasons given by him, including the objection that the warning embodied in it is defective in its wording. But Mr. Graham also objects generally to a statutory form of warning on the ground that the same words would not be successful with everyone and that, since the purpose of the warning is to impart to an accused a full appreciation of his position, his rights and the danger of making a statement, any words that will accomplish this end are

sufficient. Certainly. But we have already, in the warning set out in section 684(2) of the Code, a settled form of words that will accomplish this.

The police officer should in my opinion be furnished with the words of the warning; it is, I submit with respect, entirely wrong to leave to his discretion the framing of suitable words. It does not follow from this that proof that a statutory warning had been given renders any statement made afterwards by an accused a voluntary one. The officer giving the warning does not adjudicate upon the question of the admissibility of an accused's statement. He is only doing a ministerial act and at the trial all the circumstances, including those attendant upon the giving of the warning, are looked at by the trial judge who alone has power to rule on the admissibility of evidence.

Mr. Graham points out that if the suggested section containing a statutory form of warning is enacted as section 684A it will be embodied in Part XIV of the Criminal Code, which deals only with preliminary inquiry, and so would have no application to any trial. If section 684A were to become law it would still leave a police officer, therefore, without a settled form of warning to assist him in investigating crime in general. Mr. Graham thinks that any amendments of this nature should be made not to the Criminal Code but to the Canada Evidence Act, and I respectfully agree with him. It would seem that the proposed new subsections to be added to section 685, since they affect the law of evidence, should also be put in the Canada Evidence Act.

Mr. Salterio began his article by saying that, although it has been held that a proper form of warning should be used, the question still arises what that form whould be and, particularly, whether it should or should not include the words "against you", and that when the form prescribed for use by magistrates in section 684(2), which contains the words "against you", is adopted by the police some courts have accepted it without question while others have not. Later on he expresses the opinion that the warning used by police officers in Canada should be based on the form in section 684, "so long as this form includes the words 'against you' ". Mr. Justice Doull in his letter has added to the arguments in favour of retaining the words "against you" in the warning.

To recapitulate what I have attempted to say:

(a) safeguards that come from the experience of the past and have been laid down for the protection of those who are accused of crime should be invoked in practice unless there is strong reason to the contrary;

(b) there should be a statutory form of warning to be used by all police officers and investigators, and it should be embodied in the Canada Evidence Act along with any rules governing the admission of statements made after the statutory warning has been given;

(c) the form of warning should be in phraseology similar to that of section 684(2) of the Criminal Code, including the words "against you", and in a setting similar to that given in the section for use by magistrates, so as to be suitable for all police officers and investigators in all circumstances.

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