EVIDENCE: A FRESH APPROACH THE AMERICAN UNIFORM RULES OF EVIDENCE (1953)*

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The Uniform Rules of Evidence is a concise code of evidence, consisting of only seventy-two rules, not counting thirty-one carefully drawn exceptions to the hearsay rule. The code was drafted by a Committee of a body known as the National Conference of Commissioners on Uniform State Laws.[1] It was approved by the American Bar Association in August, 1953. The Uniform Rules are straight-forward, clear, concise, and for these very reasons, quite astonishing.[2] When I first read them, I said to myself: is it really possible that this hopelessly intricate subject which we common-law lawyers call evidence, can be effectively simplified to that extent? and: has the code any significance for Canadian evidence law? I discovered—or I think I have discovered—that it is possible to draft rules of evidence which nearly everyone can understand and, what is more important, which the legal profession may look upon with favour. In other words, I learned that the law of evidence as we know it in common-law countries can be simple and sensible. If this is correct, it surely follows that we lawyers in Canada would be wise to find out just what has happened to the law of evidence in the United States.

In the following pages of this article I am not attempting to do much by way of legal analysis. It is not my intention to analyze the

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[1] The Committee included a distinguished judge from Kansas, Judge Spencer A. Gard, as Chairman, three practising lawyers and three law professors. The Committee started working in 1949 and during the four years of its work received considerable assistance from a Committee of those responsible for the earlier attempt at codification—the Model Code of Evidence.

[2] It should be noted that the Uniform Rules are drafted as a pattern for rules that can be readily adopted in individual American states either by statutes or by court rules, in accordance with local requirements.

American Uniform Rules of Evidence as a whole or even to discuss critically a few of the rules about which I shall speak. I simply wish to remind my fellow Canadian lawyers and Canadian judges that the American legal profession has succeeded in codifying many of our difficult common-law rules of evidence, to argue that the Uniform Rules are worthy of our closest scrutiny and, finally, to advocate that the Canadian legal profession give consideration to the preparation of a similar code of evidence for use in this country. For convenience, the article is divided into five parts, as follows:

I. Why our rules of evidence are in urgent need of reformation.

II. Why we Canadian lawyers should look to the American legal profession for assistance in reforming our own rules of evidence.

III. Why the American Uniform Rules have significance for us in Canada.

IV. Same: a brief look at a few of the Uniform Rules.

V. Conclusion.

I

Evidence, as we Canadian lawyers understand it, is a curious subject, even in the patchwork quilt we call the common law. Only our system of law, the common law, has such a thing as a branch of law called evidence.[3] Other systems of law (and in our own system, judicial bodies which are not courts), seem to get along quite well without it. Of course, we of the Anglo-American world are not quite sure what this thing called evidence is. We treat evidence, we study it, as though it were a branch of our law, but we realize that it is more than that—that it enters into every legal subject that we study. We treat evidence rules as procedural, but we realize that many of the rules are somehow different from other procedural rules. We study evidence cases as though they were binding precedents, like cases in property law, and yet we know that they are

[3] "At once, when a man raises his eyes from the common-law system of evidence, and looks at foreign methods, he is struck with the fact that our system is radically peculiar. Here, a mass of evidential matter, logically important and probative, is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else. English-speaking countries have what we call a 'Law of Evidence'; but no other country has it; we alone have generated and evolved this large, elaborate, and difficult doctrine." James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), pp. 1-2.

really not the same thing.[4] The truth is, of course, that it is not possible to classify evidence, as we know it, as we classify other branches of our common law. When it comes to classification, the law of evidence is an *avis rarissima*—a very rare bird.

Because evidence has grown up in our system as a peculiar and, perhaps, a mysterious thing, in the midst of our neat categories of property, torts, contracts, and the like, the rules of this so-called branch of our law have, in the main, resisted change over the centuries. I think a good many Canadian lawyers would be shocked to learn that there is not, or at least should not be, today in our law of evidence, a *general rule* of evidence that the best evidence must be introduced, or that better evidence must be introduced before inferior evidence.[5] A good many of us have, I fear, accepted as an article of faith the maxim that "The best evidence must be given of which the nature of the case permits". In the words of the text-writer Taylor, "This rule, which is as old as any part of the common law of England, has ever been regarded with favour, and mentioned with approbation by the judges."[6] This, it seems to me, is simply an example of an almost reverential approach to the mysteries of evidence law. Doubtless, many other examples can be discovered of rules and so-called rules of evidence which have never been understood but have simply been worshipped and exalted as precedents illustrative of the glory of the common law.[7] Truly, we in this country have been taught to approach our rules of evidence with a feeling akin to reverence. An excellent descrip-

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[4] "From the diversity and multitude of the casual rulings by the judges, —rulings often hastily made, ill-considered, and wrong,—from the endeavour to follow these as precedents and to generalize and theorize upon them, from the forgetting by some courts, in making this attempt, of the accidental and empirical nature of much in these determinations, and the remembering of these facts by others, there has resulted plenty of confusion". Thayer, *ibid.*

[5] "Despite some loose talk by judicial Pollyannas, there is no effective general doctrine that the best available evidence is always admissible. Neither is there any general doctrine that a litigant trying to establish a fact must always adduce the best evidence he can scrape up . . . [the best evidence rule] has to do only with proof of the contents of writings and may be put in this simple form of words: For the purpose of proving the content of a writing, secondary evidence—that is, any evidence other than the writing itself—is inadmissible unless failure to offer the original writing is satisfactorily explained . . . ." Maguire, Evidence, Common Sense and Common Law (1947), pp. 31-2.

[6] 1 Taylor on Evidence (11th ed., 1920), s. 396, at p. 297.

[7] Even what are generally understood as the four great "canons of exclusion": Similar Facts, Hearsay, Opinion and Character, are shown to be very much lesser bars to admissibility of evidence when subjected to the rigorous analysis of modern evidence scholars. To these scholars, it would seem, the word "canon" is to be regarded not with awe but merely as a misleading epithet.

tion of this child-like approach is given by Dean Mason Ladd, of Iowa State Law School, who wrote in 1942:[8]

> During the nineteeenth century [rules of evidence] were looked upon with almost religious sanctity without consideration being given to whether their source was historical accident, a social policy of the time of their origin, an outgrowth of a formalism then found in pleading and procedure generally, or was based upon a sound principle of logic and psychology. Discrimination was not made between principles fundamentally sound and those fantastic in their origin. Generally speaking, it was enough that the rule had been stated and being a rule of evidence its sins were whitewashed and its virtues exalted. In a large measure evidence rules were *learned rather than thought through*, and efforts were directed toward their classification rather than their criticism.

What an eminent American scholar expresses so well, we all realize is true, but the sad thing for us in Canada is that Dean Ladd's description of the process of learning evidence rules in the United States in the nineteenth century is a somewhat frightening portrayal of what has gone on in this country in the twentieth century. It is no wonder, therefore, that we in Canada have done little of significance to reform our evidence rules.

There is another explanation of why our law of evidence has met with more resistance to change than any other subject. I think we all realize that the actual practice in our courts has, in the words of an American judge, "tended to outstrip the theoretical argumentation."[9] This judge, who is held in high esteem by the legal profession in the United States, is Charles E. Clark, Chief Justice of the United States Court of Appeals for the second circuit, and a former dean of the Yale Law School. Judge Clark goes on to say that while scholars and appeal courts have been struggling with the "weight of restrictive precedents from the past, trial courts in the main went ahead with rather sensible reactions."[10] The great American judge, Augustus N. Hand, once said that in his years as a trial judge he always took pains to admit all evidence presented if at all useful or admissible and, in doing so, was never reversed by the appellate court.[11] Trial judges in this country and the United States are quite right in adopting this approach to our present evidence rules. I believe most modern judges and competent trial lawyers would not be disturbed by the conclusion of a distinguished group of lawyers and judges, who appeared recently on a

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[8] Ladd, A Modern Code of Evidence (1942), 27 Iowa L. Rev. 213.
[9] Clark, Foreword to A Symposium on the Uniform Rules of Evidence (1956), 10 Rutgers L. Rev. 479, at p. 480.
[10] *Ibid.* [11] *Ibid.*

panel of evidence sponsored by the Minnesota Bar Association, that:[12]

> . . . rules which were spawned, in whole or in part by the jury system, such as the hearsay rule, the "best evidence" rule, the rule against opinions, and the like, have no logical place in a court trial. Thus while the rules retain a theoretical validity, in practice they are of little effect.

Obviously, American trial judges do what our own judges do, they "admit it for what it is worth" or "subject to objection" in which case, of course, the objection is not heard of again. And the American appeal courts do what our appeal courts do: as the saying goes, they "indulge the gracious presumption"[13] that the trial judge relied only on the evidence which was properly admitted. Appeal courts today are not too disturbed even when evidence is wrongly admitted. This modern attitude is stated clearly in a recent American case:[14]

> In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. . . . On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to but which, on review, the appellate court believe should have been admitted.

This statement, and the conclusion of the panel in Minnesota to which I have just referred, are confined to non-jury trials, but as these are by far the most common form of trial in this country,[15] the comments are, I think, very pertinent to the Canadian scene.

The behaviour of judges, both in Canada and the United States, in freely admitting much evidence which is technically objectionable is, grounded in good common sense and I sometimes smile

[12] Charles Alan Wright, A Primer of Practical Evidence (1956), 40 Minn. L. Rev. 635, at p. 667.

[13] *Ibid.*

[14] *Builders Steel Co.* v. *Commissioner* (1950), 179 F. 2d 337, at p. 379.

[15] ". . . trial by jury is itself on trial today. Guaranteed by the *Criminal Code* in most charges its use is limited to those serious cases where it is mandatory and in most others where the lawyer for the accused demands it. Nevertheless between 92 and 95 percent of criminal cases are tried by judge alone. On the civil side the situation is somewhat different. In most of our Provinces the civil jury trial has fallen into disuse, and it has all but disappeared in England and Australia. It is said there are more jury trials in Ontario than in the rest of the Commonwealth . . . ." Edson L. Haines, Q.C., in Preface to the 1959 Special Lectures of the Law Society of Upper Canada on Jury Trials.

when young practising lawyers tell me that our judges do not know the rules of evidence. If, however, the rather sensible behaviour of our trial judges has made us complacent about our rules of evidence, so that we do not feel we need to change them, it seems to me that it is equally possible to draw another conclusion. What use is served by a mass of intricate and conflicting rules if our good judges refuse to take them seriously? Surely we would be better off as lawyers if we really understood and could clearly present to our courts a few rules of evidence which we could all agree are really fundamental to the conduct of a fair trial in this country.

I do not believe that I need to elaborate on this point, or to argue further that our rules of evidence need reformation. It should be sufficient for me to say, with the great Professor Edmund M. Morgan, that "the law of evidence is now where the law of forms of action and common law pleading was in the early part of the 19th century."[16] That is just another way of saying that our rules of evidence have become so complicated that only persons of very gifted minds have the ability to understand and apply them correctly. This is not an admirable state of affairs. I think we can agree that our rules of evidence should be improved.

II

This brings me to the heart of the matter. If we are going to improve our Canadian rules of evidence—and this we must—so that they will be clear and understandable to every one; so that our courts will not be forced to give ground further to administrative bodies of various kinds; so that our profession will not be condemned by the public as out of step with more efficient methods of discovering truth than we appear to possess (or are prepared to use)—we shall first have to understand them for what they are. To say this more technically, we shall have to try to rationalize them in the light of their purpose. Mr. Justice Holmes once defined rationalization this way:[17]

> A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves and the grounds for desiring that end are stated or are ready to be stated in words.

I fear it is too much to hope from a profession trained to rely on Phipson and his collection of 7000 precedents—by which,

[16] Edmund M. Morgan, Foreword to Model Code of Evidence (1942), p. 5.

[17] Address at Boston, 1897, quoted by Wigmore in Studying Law, (Edited by Arthur T. Vanderbilt, 1945), p. 601.

incidentally, almost anything can be proved inadmissible— [18] will set to work now to think through and simplify and reduce the number of our so-called rules of evidence; that we will modernize them, if you like, to suit present conditions of litigation. But one need not despair. The hard work, the thinking through, the rationalizing has, I discover, been largely done for us. The goal of simplification is practically within our grasp.

As a Canadian, I hesitate to admit it, but it is very clear to me, that in the field of evidence law, a combination of scholarship, determination, good common sense and genius has been at work in the United States for the past half century or more to reform the law, and the fruits of that sustained and combined effort of the bench, bar and teaching profession in that country are now available in convenient form [19] and are being plucked by more than one legally advanced state of the Union.[20] To be more specific, the Uniform Rules are just about ready to be used—with some modification—by American courts as a simple and sensible code of evidence. When I say "just about ready" I am not suggesting that nothing further remains to be done. Just as the Model Code of 1942 has been improved in certain important respects by the Uniform Rules of 1953, so may the Uniform Rules be improved by yet another set of rules. The editor of the Model Code, Edmund M. Morgan said in 1954 that he believes that a set of rules could be drafted by some such body as the Advisory Committee of the United States Supreme Court, which would be an improvement over both the Uniform Rules and the Model Code. But let us be clear on this: whatever form the specific rules finally take, the rules as a whole will certainly be drafted as a code of law, as the Uniform Rules are today. The importance of this is that the effect will be to sweep into limbo the present mess of evidence rules which disgrace both American law and our own.

III

But what have the Uniform Rules to do with us? Our trials have never remotely resembled the shameful spectacles across the border that we have all seen on the screen and read about. Our lawyers

[18] See C. A. Wright, The Law of Evidence: Present and Future (1942), 20 Can. Bar Rev. 714, "The profession will no doubt continue to find the present volume [Phipson] as helpful as past volumes in providing ample authority to prove that almost anything is inadmissible."

[19] The rules, together with most useful comments by the draftsmen, are published in pamphlet form by the National Conference of Commissioners on Uniform State Laws, 1155 East Sixteenth St., Chicago 37, Illinois.

[20] For example, by the great reform State of New Jersey.

have never fought over rules of evidence in the way American lawyers do. Read for instance, Wigmore describing the degeneration of the practice of the rules in the United States: "They are incidentally fought over," he writes, "with irrelevant snarling and yapping—as if two packs of eager hounds on their way to a hunt were allowed by their master to spend the morning in a public dogfight, and thus to spoil the purposes of the hunt."[21] Then too, of course, we smile at the Americans' devotion to the jury trial which does nothing to lessen this sort of nonsense in the practice of evidence rules. We like to believe that our practice is more like that supposedly obtaining in England today where according to the latest editor of Cockle:[22]

> The experience of those who practise in the Courts is, that while evidence points frequently call for discussion during the course of a trial, it is comparatively seldom that any matter arises for decision which cannot be readily solved by a passing reference to a textbook, if not from the knowledge of the Judge and counsel.

The editor continues:

> This is all to the good and shows that on the whole the English law of evidence today, whatever may have been the case in Mr. Pickwick's day, is both clear and practical.

I doubt that the skill displayed by modern English judges and lawyers in handling and also, of course, evading evidence problems is any proof whatever that English law of evidence today is either clear or practical. Certainly, it would take more than "a passing reference" to Phipson or Cockle to satisfy me that such was the case. Furthermore, there is in the passage which I have just quoted more than a suggestion of a complacent attitude which one does not find at all in leading modern American treatises on evidence. It is possible, of course, to conclude from this that, unlike English evidence law, American law is so confused or the practice in American courts professionally so inept, that the Americans are now simply being forced into drafting a code, if only to eliminate the chaotic court scenes which Wigmore so effectively parodies. And, of course, it is comparatively easy to find many examples of American ineptness in the field of evidence law. I, myself, have a mental picture of the American attorney constantly leaping to his feet and uttering the standard American objection, "irrelevant, incompetent, and immaterial." I think also of the abuse by American lawyers of the hypothetical question. In a recent Ameri-

[21] Wigmore, *op. cit., supra*, footnote 17, p. 602.
[22] Cockle's Cases and Statutes on Evidence (8th ed., 1952), Preface.

can case, for example, a hypothetical question was framed and reframed for five hours only to have the witness say that he could not answer it![23]

Aware of such behaviour by Americans in the day-to-day application of rules of evidence, we Canadian lawyers are only too apt, it seems to me, to smugly comment: what a waste of time and what a perversion of our own sound notions of how to efficiently conduct a law suit. We then say to ourselves that that sort of thing does not happen, has never happened, here in Canada. We conclude that we, fortunately, do not need a code of evidence to straighten out *our* practice. I suggest, however, that this conclusion is as fallacious as that of the editor of Cockle. The fact that American lawyers have had a tendency to fight over the self-same rules of evidence that English and, possibly, Canadian lawyers appear to be able to handle with little fuss and bother does not seem to me to prove that the rules themselves as developed by the common law are to be in any way admired, or are not in need of revision.

To talk intelligently about the Uniform Rules, their object and the accomplishment they represent, loose and superficial thinking of the sort I have just been describing not only is of no assistance but represents a failure to appreciate the good work that American lawyers and legal scholars have done in exposing grave weaknesses in our own Canadian law of evidence. If a Canadian lawyer thinks for one moment that these particular rules are simply some sort of makeshift designed to overcome the mistakes of less able lawyers and judges than this country or England has produced, he will have missed completely the significance of the achievement of the Uniform Rules. The Uniform Rules are not just another set of rules designed merely to alleviate confusion in the practice of evidence law. They are, instead, an extraordinarily competent and coherent code of sensible rules, the product of the scholarship and practical wisdom of a great number of highly trained individuals. If you will read them carefully, and also read the lucid comments provided by the draftsmen for each rule, I assure you that you will discover, as I have, that here for the first time in the Anglo-American world are rules of evidence, rules of practice, which make good sense from beginning to end. They make good sense because they are grounded in good sense. The draftsmen of the rules have adopted a consistent policy, running throughout the rules, of

[23] This amusing example is cited by Nathan L. Jacobs, Associate Justice, Supreme Court of New Jersey in his Comments on the Uniform Rules in (1956), 10 Rutgers L. Rev. 485, at p. 486.

making all relevant evidence admissible, unless it is excluded by some rule or principle of law. In adopting this policy the draftsmen put into effect the greatest single concept of evidence which has ever been stated, that is, the concept of the great James Bradley Thayer, who said in 1898, "that unless excluded by some rule or principle of law, all that is logically probative is admissible."[24] That statement of Thayer's, that insight of his, has been the cornerstone of all modern American reform in evidence.[25]

I am sure most of us in Canada, the United States and England have been taught to study evidence as if its principles were designed to impede freedom of proof. In the words of Professor Maguire of Harvard, we have made "a study of calculated and supposedly helpful obstructionism."[26] We have studied evidence in a negative sort of a way.[27] By way of contrast permit me to quote a sample of the new approach to evidence. This is rule 7 of the Uniform Rules, which is the keystone of the new code:

> General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.
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> Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) [possibly most important of all] all relevant evidence is admissible.

That is a rather long rule to read, as it were, in one breath, but notice what the draftsmen have done: they have provided that all relevant evidence is admissible unless excluded by another rule; in addition, they have wiped the slate clean of the many conflicting rules of evidence relating to witnesses—their competency, compellability and privileges. The draftsmen then write back, as it

[24] *Op. cit., supra*, footnote 3, p. 265.

[25] In recent years there are strong indications that Thayers' approach to evidence law, based as it is on a thorough analysis of English precedents, is at last being recognized by English courts and legal writers as fundamental and useful in solving difficult problems of admissibility of evidence. In *R.* v. *Sims*, [1946] K.B. 531, Lord Goddard C.J. read the judgment of the Court of Criminal Appeal, which he stated had been largely prepared by Denning J. (as he then was). "We start", said Lord Goddard, "with the general principle that evidence is admissible if it is logically probative, . . . This is the proper and sensible approach . . . (at p. 537). See also the Preface to Phipson (9th ed., 1952) (pp. v-vi), where the editor deals briefly with the question of how rules of evidence should be approached.

[26] *Op. cit., supra*, footnote 5, p.11.

[27] "The great bulk of the Law of Evidence consists of negative rules dealing with what, as the expression runs, is not evidence," Stephen, A Digest of the Law of Evidence (11th ed., 1931), p. xi.

were, in the remaining rules of the code only those exclusionary rules which they consider are fundamental to evidence law today.[28]

Some indication of the magnitude of the reform of evidence law effected by rule 7 alone may be obtained by glancing at a digest of current Canadian law on the competency of witnesses in criminal cases:

> As regards husbands and wives of defendants in criminal cases, the wife or husband or the person charged may now be examined as a witness on behalf of the person charged; but *probably* not without such wife or husband's own consent, unless expressly so provided by some particular statute. For the prosecution, on the other hand, the wife or husband cannot be called as a witness, at least in cases governed by The Canada Evidence Act; except (1) in those cases where she or he could have been so examined at common law . . . though in such cases the spouse can probably not be examined without his or her own consent; and except (2) in the case of certain offences particularly enumerated in the Act, in which cases the Act says that the wife or husband of the person charged "shall be a competent and compellable witness for the prosecution without the consent of the person charged." *Quaere* whether, because of the use of the word "compellable" in The Canada Evidence Act, the wife or husband is in such cases deprived of the former marital[29] privilege to refuse to testify against the other spouse.

That hodge-podge, that morass, of common-law and statutory rules, English and Canadian: rules relating to competency, compellability and privilege, all mixed together, as in some witch's brew, is an exaggerated but nonetheless useful illustration of the need for reform of our own Canadian rules of evidence. It is only fair to add that one hardly expects assistance in understanding rules of evidence from a mere digest of them. But even the best textbooks on the subject, such as Phipson, offer no real help. As Dean Wright has pointed out, Phipson does nothing to simplify the subject of evidence, he merely adds to the confusion by piling

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[28] See Spencer A. Gard, The Uniform Rules of Evidence (1956), 31 Tulane L. Rev. 19, at p. 24. Judge Gard there comments: "Rule 7 wipes out all disqualifications, privileges and limitations, except the standards of relevancy and materiality, and if we stopped there we would have erased the need for nearly all that the law schools have taught us on evidence and could fall back on logic to determine the only questions which would be left —those of relevancy and materiality.

A prominent federal judge wrote expressing approval of such a broad basis for admissibility and questioned whether it was wise to write back into the rules many restrictions on admissibility, indicating that such matters should be left mostly to the judge's discretion. This liberal point of view is in interesting contrast to the more common demand for greater particularity and more restrictions.

So the Uniform Rules of Evidence have sought to take a middle ground."

[29] 7 C.E.D. (Ont. 2nd), pp. 307-309.

up in one place "authority upon authority . . . isolated case upon isolated case . . . [and] . . . countless distinctions of cases from other cases."[30] The truth seems to be that the time has passed, if indeed it ever existed, when our law of evidence should be hampered in its development by the perpetuation of rules appropriate to another age. In the well-known case of *Hollington* v. *Hewthorn & Co.*[31] Lord Goddard had occasion to discuss the direction which our rules of evidence are taking. After demonstrating that the rules relating to the competency of witnesses belonged to another age, he said this:

> . . . nowadays, it is relevance and not competency that is the main consideration, and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded.[32]

IV

Let me illustrate by reference to a few of the Uniform Rules how magnificent the rationalizing of the American scholars really is. A good starting point is the definition of evidence itself. Phipson defines evidence as "the testimony . . . which may be legally received in order to prove or disprove some fact in dispute."[33] Another modern English textbook on evidence, Nokes *on Evidence*, states "in law evidence is that which makes evident a fact to a judicial tribunal."[34] Both of these definitions are, it seems to me, typical of our unwillingness in England and Canada, to think through our problems of evidence, as they beg the very question to which the reader wants an answer. When Phipson says evidence is what "may be legally received", he is really just raising a question and, presumably, one has to read through some 700 pages and 7000 precedents collected by Phipson to find out just what it is that may be legally received. Now, compare the definition of evidence, to be found in rule 1 of the Uniform Rules. There, relevant evidence, which is all we lawyers should care about, is defined as "evidence having any tendency in reason to prove any material fact." This is simple, accurate, and, in stressing logic, or ordinary horse-sense, rather than legal precedent, it is in keeping with the views of practically all modern writers on the law of evidence, and, with the practice of our own courts.

Then there is the extraordinarily important topic of judicial notice. Modern writers on evidence are impressed by the import-

[30] C. A. Wright, *op. cit.*, *supra*, footnote 18.
[31] [1943] 1 K.B. 587, 112 L.J.K.B. 463.
[32] *Ibid.*, at p. 594.
[33] *Op. cit.*, *supra*, footnote 25, p. 2.
[34] G. D. Nokes, An Introduction to Evidence (2nd ed., 1956), p. 3.

ance and the yet unexplored possibilities for usefulness of the process of judicial notice: a marvellous time and money-saving device. We in this country have been trained to think of judicial notice as something outside of the law of evidence, because when this device is used we are told proof of facts is not needed. But modern American scholars and courts look upon it, really, as a new system of proof by which for instance, "the abundant fruits of new scientific findings"[35] can be made available to our courts. This is one of the ways in which the Americans would finesse, as it were, the costly and time-consuming battle of experts which so often mars the reception of that kind of evidence today.

Judicial notice of the laws of foreign states is not, generally speaking, a legitimate means of proof of those laws in Canadian and English courts. Typically, in Canada, the laws of foreign states (including, curiously enough, the laws of other *provinces*) must be proved in courts by the testimony of witnesses expert in the foreign law in question. In 1952, the province of Manitoba introduced a remarkable amendment to its Evidence Act which reads in part as follows:

> Every court shall take judicial notice of the laws of any part of the British Commonwealth, or of the United States, or any state, territory, possession, or protectorate thereof . . . .[36]

The unexpressed purpose of the Manitoba legislators is clear: they would eliminate at one blow, as it were, the time and money-consuming practice of bringing to the courts of that province experts in the laws of many "foreign" states. The requirement of the statute that every court in Manitoba shall take judicial notice of the laws of any part of the British Commonwealth, or of the United States or any state, *etc.* thereof is, indeed, a very bold reform in the evidence law of this country. In a sense, it is too bold. The provision of the Manitoba statute may prove difficult to apply. How, for example, is the Manitoba court supposed to inform itself of the laws of any particular state? What responsibility for assisting the court has the lawyer of a given litigant? What happens if there is a dispute over the law of a given state? These are troublesome questions to which the draftsmen do not supply answers and, because the problems are new to this country it is unlikely that satisfactory answers to them can be found in Canadian evidence law.

At this point it is useful to turn to the Uniform Rules to see

[35] McCormick on Evidence (1954), p. 712.
[36] See R.S.M., 1954, c. 75, s. 28 (1).

what the Americans have done. Rule 9 on judicial notice reads in part as follows:

> (2) Judicial notice may be taken without request by a party of (a) private acts and resolutions of the Congress of the United States and of the legislature of this state[37] . . . and (b) the laws of foreign countries. (3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

At first sight, paragraph (2) of rule 9 looks to be much like the Manitoba rule transferred to the United States. But, really, there is a world of difference. The Uniform Rules say "*may* take judicial notice", the Manitoba Statute says "*shall* take." At once, the American judge is relieved of an onerous responsibility which, it seems, the Manitoba judge may not shirk: the duty to discover what the law of the foreign state really is. As paragraph (3) of rule 9 makes clear the American judge is not required to take judicial notice of the laws of foreign countries unless a party requests it and (a) furnishes the judge with sufficient information about those laws and (b) has given the adverse party sufficient notice to enable him to prepare to meet the request. It seems to me that there is also a world of difference between this careful approach to an important evidence rule, where nothing is left to chance or dispute, and, in the context of Canadian evidence law, the more dramatic but apparently less thoughtful step in the direction of reform which was taken by the Manitoba legislature. It is perfectly obvious that we have much to learn from the Americans in the matter of simply going about reform.

A sensible and most refreshing approach is adopted by the draftsmen of the Uniform Rules to the so-called rule or doctrine of evidence law known and beloved by trial lawyers as *res gesta*. The rule is frequently resorted to in our courts somewhat in the following manner: a lawyer objects to a certain piece of evidence being admitted. The judge asks the opposing lawyer on what basis he proposes introducing the particular evidence. The lawyers answers, "as part of the *res gesta*". The first lawyer then bows to the inevitable as the evidence slides in. In my short practice I began to feel that one used the phrase *res gesta* in the same way as the phrase "Open Sesame" was used in the story of Ali Baba, and with the same magical results. "The general impression conveyed to

[37] The Uniform Rules are designed for adoption by individual states, *supra*, footnote 2.

lawyers", says an English writer, "is of an idea of great amplitude, and one fraught with tremendous possibilities.[38] A modern English Chancery judge jocularly advised any counsel seeking to obtain admission of a doubtful piece of evidence to pin his faith in *res gesta*.[39]

Strange as it may seem to an evidence lawyer, the Uniform Rules do not even mention *res gesta*. This is right. There is no place in the law of evidence, or anywhere else, for that dreadful Latin phrase. I cannot imagine that there is anything in the law about which such unflattering things have been said by judges and legal scholars. One American judge said in 1913: "Definitions of *res gesta* are as numerous as prescriptions for the cure of rheumatism and generally about as useful." Where did the phrase come from? Thayer says the phrase *res gesta* is found "first in the mouths of Garrow and Lord Kenyon—two famously ignorant men."[40] That would be towards the end of the eighteenth century. This deplorable rule has lasted well, even though few scholars, let alone lawyers (if I may be permitted to make the distinction) can understand it. After reading Phipson's article[41] on the *res gesta* rule, Mr. Justice Ross, an able Nova Scotian judge, said in 1934, "As for me, I still see as through a glass darkly."[42] If we were honest we would all say that about *res gesta*.

I have said more than I should about this pretended doctrine, but the reason for saying it is to emphasize our foolishness in feeling that we have to employ in practice such a wretched tool.[43] But we do even worse than that. Recently in England, an eminent Committee set up to improve the practice of the English Supreme Court was asked, incidentally as it were, to take a look at the rules of evidence. Incredible as it may sound, one of its main suggestions for reform was that the judges would more liberally interpret the rule of evidence known as *res gesta*.[44] This may be a choice example of English muddling through, but in the field of evidence I am prepared to argue that the time for muddling through is long since past. In burying *res gesta*[45] the draftsmen of the Uniform

[38] R. N. Gooderson, Res Gesta in Criminal Cases (1956), p. 199.
[39] *Ibid.*
[40] Morgan and Maguire, Cases on Evidence (3d. ed., 1951), p. 687.
[41] In (1903), 19 L. Q. Rev. 435.
[42] *R.* v. *Wilkinson* (1934), 7 M.P.R. 562.
[43] Two good examples of the unnecessary and altogether unhelpful use of the term *res gesta* are to be found in the judgments of Kerwin C.J. and Kellock J. in the case of *Balcerczyk* v. *the Queen*, [1957] S.C.R. 20.
[44] Final Report of the Committee on Supreme Court Practice and Procedure (The Evershed Committee) 88 (Cmd. 8878, 1953).
[45] Matters commonly admitted as *res gesta* are also admissible under

Rules have for me, at any rate, scored another point and I am once more ashamed of our Anglo-Canadian approach.

As all defence counsel know, we have in our Canada Evidence Act a rather nasty rule to be found in section 12 of that Act. This is the rule which says that a witness (including the accused) may be questioned as to whether he has been convicted of any offence, and if he denies the fact or refuses to answer the opposite party (usually the Crown) may prove the conviction.[46] We have made efforts of a sort to have the rule changed. On this point rule 21 of the Uniform Rules, reads as follows:

> Limitations on Evidence of Conviction of Crime as Affecting Credibility.
> 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 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.

As the draftsmen comment, this rule logically limits evidence of conviction for impeachment purposes to crimes involving dishonesty or false statement. When an accused takes the stand he cannot be impeached in this way until he offers evidence to support his credibility. The policy of this rule is to encourage defendants in criminal actions to take the stand. "The rule,", say the draftsmen, "would correct the abuse of smearing rather than discrediting a defendant who takes the stand". So they have had in the United States the same problem as we have had, but they also appear to have an answer to it in this particular rule.

We all know that, generally speaking, a record of conviction in a criminal case is, in our courts, not even *prima facie* evidence of any fact which was essential to the conviction in a later civil case where that fact may be material. We say, "you cannot use criminal convictions in civil cases." In Nova Scotia, recently, a lawyer sought to introduce in evidence a conviction for rape as evidence of adultery in a divorce action. The trial judge, in orthodox fashion, refused to admit the record of the conviction because he felt he was bound by a leading English case, *Hollington* v. *Hewthorn*.[47] This was an automobile case where someone was killed. The record of conviction sought to be introduced there was from

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the Uniform Rules provided they come within well-defined exceptions to the hearsay rule. See exceptions (4) and (12) to rule 63.

[46] R.S.C., 1952, c. 307 s. 12. [47] [1943] 1 K.B. 587 (C.A.).

a magistrate's court; it was a conviction for careless driving. If we were free to think this way, we would realize that the rape case and the motor vehicle case are quite different. The one case involves a serious indictable offence, where the evidence to secure a conviction must of necessity be pretty overwhelming. We should not balk at using a conviction based on that sort of evidence; but we might very well hedge over using a conviction in a magistrate's court for a relatively minor offence in a later civil case. But we do not think this way; we prefer to think of the precedent of *Hollington* v. *Hewthorn* and the classic utterances of a Lord Goddard on the particular matter. In short, we take refuge in precedent.

Let us look now at the Uniform Rules and see what we find there. We find records of conviction treated under the exceptions to the hearsay rule; quite properly so, because, analytically, a record of conviction *is* hearsay. The exception in question reads as follows:[48]

> Evidence of a final judgment adjudging a person guilty of a felony [is admissible] to prove any fact essential to sustain the judgment.

And the comment to the section states that "the judgment in such a case [that is a case of felony or, as we say, a case of an indictable offence] would seem to have sufficient value to be worth consideration by a trier of fact, and necessarily includes a finding of all facts essential to sustain the judgment in the case in which rendered". The draftsmen at the same time recognized that trials and convictions in traffic courts and in misdemeanour cases generally, are often not as trustworthy as convictions in more serious cases, so the rule is framed narrowly so as not to let in evidence of conviction of a traffic violation, for instance, to prove negligence and responsibility in a civil case. This incidentally, is one of a number of places where the Uniform Rules are an improvement on its predecessor the Model Code which failed in its version of this particular rule to take account of the feelings of the profession against opening the door too widely to this type of evidence.

It has recently been pointed out—if this fact needs underlining — that "nearly one-third of the law of evidence is concerned with the complications arising from the admission of hearsay."[49] As every trial lawyer knows, the orthodox exceptions to the hearsay rule are numerous and they are technical. Reformers of the law of evidence have striven to reduce both the number and the com-

[48] Rule 63 (20).

[49] G. D. Nokes, The English Jury and the Law of Evidence (1956), 31 Tulane L. Rev. 153, at p. 167.

plexity of the existing exceptions. But in this difficult area of evidence law the common-law tradition has resisted radical reform. Doubtless, the sweeping changes in hearsay law proposed in the Model Code of Evidence were largely responsible for the unfavourable reception of that Code by the American legal profession.[50]

Aware of, and sensitive to the unfavourable reaction of the legal profession to sudden and drastic changes in the hearsay rule, the draftsmen of the Uniform Rules here attempted only a modest reform.

> Many of the provisions merely codify the law as it already exists in states where the decisions or statutes are abreast of reasonably progressive professional opinion. Others make only minor modifications in the requirements of particular existing exceptions to the hearsay rule. Only a few effect significant changes in the prevailing law.[51]

Nevertheless, the mere statement (or is it re-statement) of thirty-one clearly defined exceptions to the hearsay rule comes as a shock, I am sure, to Canadian lawyers. Why are there so many? Is one to be expected to keep this hearsay-exception learning in his head for ready reference in trial work? Questions such as these may be anticipated from Canadian lawyers; indeed, it would be altogether remarkable if they were not asked. Prior to the Uniform Rules, the hearsay rule underwent considerable reform both in the United States and in England. There is, for example, the important and influential Massachusetts hearsay statute of 1898,[52] the present version of which reads as follows:

> In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.[53]

Also, of course, there is the well-known English Evidence Act of 1938[54] which substantially liberalized the hearsay rule as to *written*

[50] "It may be said that the opposition to the Model Code of Evidence was principally centered around the broad discretion it gave to the trial judge, and the virtual abolition of the rule against hearsay evidence where the unavailability of the declarant is established." Spencer A. Gard, *op. cit., supra,* footnote 28, at p. 23.

[51] Charles T. McCormick, Hearsay, in A Symposium on the Uniform Rules of Evidence (1956), 10 Rutgers L. Rev. 479, at p. 620.

[52] Mass. Acts, 1898, c. 535. This Act, designed to open the door to trustworthy statements of deceased persons has worked well in the United States. Rule 63(4)(c) of the Uniform Rules is, to some extent, a liberal version of the Massachusetts rule.

[53] Mass. G. L. (Ter. Ed.), c. 233, s. 65, as am. in 1941 and 1943.

[54] 1 & 2 Geo. VI, c. 28, s. 1. Lord Maugham, the sponsor of the Act, has written an interesting account of the reasons for its enactment in an article, Observations on the Law of Evidence (1939), 17 Can. Bar Rev. 469.

hearsay statements. No such legislative reforms of the hearsay rule have taken place in this country and, accordingly, the profession here is scarcely aware of the large area of admissibility of hearsay statements which has been opened up in both the United States and England in the last half-century. One other major legislative reform in the United States should here be mentioned. It is the modern Uniform Business Records as Evidence Act, which was promulgated by the Commissioners on Uniform State Laws in 1936.[55] Under the provisions of this important Act many business records which would be most difficult, if not impossible to have admitted in evidence in Canadian courts, escape the hearsay ban and are freely admitted in evidence in the courts of many of the United States.[56]

It is against this legislative background and in the light of the decisions of "reasonably progressive" [57] American courts that the thirty-one exceptions to the hearsay rule must be explained.[58] To a Canadian lawyer it may look as though the draftsmen of the Uniform Rules have introduced many new exceptions to the hearsay rule. But this is decidedly not so. Instead, deliberately, the draftsmen have retained the traditional[59] exceptions to the hearsay rule. By way of reform, they have simply liberalized and extended a few of them. Caution has been the watchword. The result is far from satisfying to evidence scholars. In an oblique reference to the Uniform Rules, Professor Nokes commented, "A general rule which is riddled with exceptions verges on the farcical." [60] An able American exponent of the law of hearsay, Professor Charles T. McCormick, commented in part as follows: [61]

> Probably the most valid criticism, in the longer view, is that this set of reformative rules about hearsay is not reformative enough. Certainly, they have not removed the complexity. Thirty-one distinct keys

[55] (1951), 9 Uniform Laws Ann. 387.

[56] The text of the Act is as follows:

"1. *Definition.*—The term 'business' shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

2. *Business Records.*—A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other quaified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

[57] The phrase is Professor McCormick's, see *supra*, footnote 51.

[58] *E.g.*, The substance of the Uniform Business Records as Evidence Act is reproduced in rule 63(13).

[59] *I.e.*, traditional in the United States.

[60] *Op. cit.*, *supra*, footnote 49, at p. 167.

[61] *Op. cit.*, *supra*, footnote 51, at p. 630.

> to unlock the hearsay door seem too many. The right one can be picked out when the need is anticipated before trial; but at the trial when unforeseen questions of hearsay evidence come up, it is too much to ask that the counsel and the judge shall swiftly and surely find the right key among so many. The morphology of the exceptions is a wonderful thing.

In another place, Professor McCormick said this:[62]

> The Uniform Rules on hearsay probably are the longest step forward which is now feasible by legislative action.

It appears obvious that the treatment of the hearsay rule found in the Uniform Rules is a carefully thought-through compromise designed to overcome the objections of the American legal profession to the more dramatic attempt at reform found in the Model Code and at the same time meet some, at least, of the criticisms of evidence scholars against the strictness and complexity of the traditional exceptions to the hearsay rule. Dean Mason Ladd[63] has summed up the really great accomplishment of the hearsay provisions of the Uniform Rules as follows:

> The Uniform Rules represent the best judgment and then re-judgment of what is regarded to be desirable in the use of hearsay. The hearsay rule is considered as basically sound, but the need for exceptions is recognized as it has been for years by the common law and by legislation in various states. The new rules organize this material in accord with the growing development of the law into a compact organized unit available for ready reference. Basic principles have been expanded to liberalize admissibility, but to a great extent the Uniform Rules have already been sustained in principal by forward looking opinions. Their impact upon the law should be great.

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It is important to note that the Uniform Rules are not the product of *theoretical* meddlers with the law—that is, law professors. While the American law professor is very much in the picture, as the saying goes, the significant thing for us is, I think, that eminent judges and lawyers played an important part—if not the really important role—in the drafting of these particular rules. Secondly, I should warn you that the Uniform Rules have little if anything to add to the solution of conflicts which arise from differences in reasoning in the areas of relevancy, materiality and weight of evidence. The only solution to problems of that sort, says the Chairman of the Committee "is to demand a higher degree of

[62] *Op. cit., supra*, footnote 35, p. 633.
[63] Ladd, Cases and Material on the Law of Evidence (2d ed., 1955), p. 610.

quality in the reasoning process".[64] That is simply a problem of education. No, the Uniform Rules are confined to solving the problems of admissibility of evidence which we lawyers have created with our exclusionary rules—the hearsay rule, opinion rule, character evidence rule, best evidence rule, and the like. In the past our exclusionary rules have been most troublesome; they have tended to retard rather than promote the ascertainment of truth. The Uniform Rules are a real attempt to solve this problem; and they go about solving it in the only way possible, that is by changing the rules and making them more realistic and acceptable to this day and age.

The production of the Model Code of Evidence and now, the Uniform Rules, appeals to me as one of the most important and exciting stories in law reform in the entire history of the common law. Thinking through rules of evidence is no easy task, and yet this is just what the Americans have done. There is still lots to be done both in that country and our own if our profession is to make the law of evidence what it should be. We have been so busy concentrating on keeping evidence out—with our numerous exclusionary rules—that we have not really given much thought to what it adds up to when we let it in. That is to say, we have yet, as lawyers, to give careful thought to the process of proof—the objective in every judicial investigation. But for the next few years, with the clear rationalization of evidence rules now provided by leaders of the American legal profession, surely we in Canada can make a start —with really ridiculously little effort needed on our part—to draft a code similar to the Uniform Rules for our own use. And please, do not anyone tell me it is not needed; just try to teach a course in evidence. And to those sturdy opponents of reform, of whom our profession seems to have more than its share, may I say that Roscoe Pound once wrote: ". . . not the least warning of legal history is one against confident prophecies of disaster when changes are made in the law."[65]

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[64] Spencer A. Gard, *op. cit., supra,* footnote 17.
[65] Pound, The Problems of the Law (1926), 12 A.B.A.J. 81, at p. 83.