THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. L MARCH 1972 MARS NO. 1

THE HEARSAY MAZE: A GLIMPSE AT SOME POSSIBLE EXITS

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Introductory

Some good things have been happening in recent years to the hearsay rule. The common law's most important, and most difficult, rule of evidence[1] is rapidly being liberalized so that more and more trustworthy and necessary evidence escapes its ban. The liberalization is the result of an interesting variety of reform measures.

Sometimes, by the imaginative use of common-law technique, a bold court will effect a needed change in hearsay law.[2] Or a law reform committee will get busy, as recently happened in England, and promote legislation aimed at eliminating to a large extent any further operation of the hearsay rule in civil cases.[3] Or, more cautiously, modern American evidence codes[4] will narrowly define hearsay and greatly broaden the area of admissibility of evidence covered by liberalized, yet largely traditional, exceptions to the

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[1] "Nearly one-third of the law of evidence is concerned with the complications arising from the admission of hearsay." G. D. Nokes, The English Jury and the Law of Evidence (1965), 31 Tulane L. Rev. 153, at p. 167.

[2] Two good modern examples of judge-made reform are the American case *Dallas County* v. *Commercial Union Assurance Co.* (1961), 286 F. 2d 388 (5th Cir.) and the Canadian case *Ares* v. *Venner and Seton Hospital et al.*, [1970] S.C.R. 608, 14 D.L.R. (3d) 4, (1970), 73 W.W.R. 347.

[3] See The Civil Evidence Act, Pt. 1 (1968), 17 Eliz. 2, c. 64. Under this Act, "In civil actions, a statement, whether oral or in writing, is made admissible for substantive use, whether or not the declarant is called as a witness, provided there is compliance with specified procedural prerequisites and with 'applicable rules of court.'" Falknor, [1969] Ariz. St. L.J. 593, footnote 13.

[4] Uniform Rules of Evidence (1956); Kansas Code of Civil Procedure (1963), article 4 (Rules of Evidence); California Evidence Code (1965); New Jersey Rules of Evidence (1967).

hearsay rule. In addition, outstanding commentators on evidence law in some of the best of juristic writing in all the common law have long been telling the profession how it can do better in practice with, or without, the hearsay rule.[5]

In this article I propose first to look briefly at the formidable task facing reformers of the hearsay rule in the third and fourth decades of this century, as explained to the Canadian legal profession in 1942 by the late Professor Edmund M. Morgan. I shall then briefly review the subsequent accomplishments in evidence reform by the Morgan-led American codifiers of evidence law. The latest of these accomplishments, a proposed code of evidence rules for the entire federal court system, is I will suggest, worthy of careful study by Canadian lawyers.

The English Civil Evidence Act of 1968 is also, of course, deserving of the attention of Canadian lawyers interested in hearsay reform. But the English Act and the rules of court made under it are as yet little more than a bold, yet surprisingly complicated, experiment to eliminate the evils of the existing hearsay system in civil cases.[6] The experiment, calling for an incredibly intricate system of notices and counter-notices by the parties whenever hearsay evidence is to be used, may possibly be workable by a tightly-knit, highly specialized English Bar, but I suspect it will find little favour within the Canadian legal profession.

"*Application of this Rule.* — This rule makes it obligatory on writings of Wigmore, Thayer, Morgan, Maguire, Ladd, McCormick, Nokes, Falknor, Cross, Gard, Davis, Chadbourn and Weinstein should be mentioned.

[6] Some indication of the complexity of the reform attempted by the Civil Evidence Act, *supra*, footnote 3, and accompanying Rules of Court may be found in the English practice manual, The Supreme Court Practice 1970. There the Court Rule [21] requiring "notice of intention to give certain statements in evidence" is explained to the profession as follows:

> "*Application of this Rule.* — This rule makes it obligatory on the party who desires to adduce hearsay statements admissible under s. 2, 4 or 5 of the Act to serve notice of his intention to do so on every other party. Failure to comply with this requirement may cause serious prejudice to another party, who will be unable to serve the requisite counter-notice under Rule 26, and may, subject to the discretion of the Court under Rule 29, preclude the party from giving in evidence at the trial a statement which would otherwise be admissible under s. 2, 4 or 5 of the Act. Compliance with this rule is therefore of cardinal importance to the party who desires to rely on hearsay statements admissible under s. 2, 4 or 5 of the Act.
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> This rule applies to statements that fall within s. 2, 4 or 5 of the Act, and also to inconsistent statements intended to be given in evidence made by a person mentioned in a Rule 21 Notice who is not to be called as a witness at the trial (see r. 31 (2), *infra*).
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> On the other hand, this rule does not apply to any out-of-Court statement which is admissible in evidence independently of Part I of the Act (para. (2), e.g., admissible by virtue of any other statutory provision or by agreement of the parties (see s. 1(1) of the Act)),. . . ."

Rather than speculate, however, on how the Canadian Bar will react to either the English or the American methods of hearsay reform it is my purpose in this article to suggest that before lawyers in Canada, by whatever method, seriously engage in the reform of hearsay law, they should be aware of the various reform options that are still open to them.

There are at least seven options. The advantages and disadvantages of each of these options have been brilliantly discussed by an eminent American judge and outstanding evidence scholar, the Honourable Jack B. Weinstein. In this article I shall attempt to review Judge Weinstein's main arguments and recommendations. I shall suggest that a look at the options available to the Canadian Bar points to the conclusion that the particular reform introduced by the draftsmen of the latest American code, known as the Federal Rules of Evidence, is deserving of immediate and concentrated study by the Canadian Bench and Bar.

The rational method of hearsay reform presented in the American Federal Rules of Evidence deserves much fuller treatment than I shall be attempting in my very general survey of hearsay reform. In this article I do little more than briefly examine the over-all scheme of the reform proposal of the Federal Rules and discuss only one of the many carefully drafted class exceptions to the hearsay rule to be found in the Federal Rules. The exception discussed — the "Business Entries" exception — well illustrates the skill of the draftsmen displayed throughout the Federal Rules of Evidence.

I. *American Codification of Evidence Law.*

The late Professor Edmund Morgan, the great American scholar and teacher in the field of evidence, wrote the following words in 1942:[7]

> . . . the present law as to hearsay is a conglomeration of inconsistencies due to the application of competing theories haphazardly applied. Historical accidents play their part also.

In the article in which he wrote those words, Professor Morgan, with characteristic sharpness of analysis, provided telling illustrations of the weaknesses of the existing hearsay system as they might be displayed in the course of any "ordinary case". He concluded:[8]

> Any system of rules which produces such absurd results is ripe for reform.

Professor Morgan's article, written for the Canadian legal pro-

[7] E. M. Morgan, Comments on the Proposed Code of Evidence of the American Law Institute (1942), 20 Can. Bar Rev. 271, at p. 290.
[8] *Ibid.*, at p. 291.

fession, was the first authoritative news in this country of a major new development in the law of evidence. Not just the hearsay rule, but all rules of evidence had been examined by the American Law Institute[9] and were about to be stated in succinct and understandable form in a Model Code of Evidence.[10] The Code rules were to supplant all provisions of the common law and all statutes inconsistent with the Code itself.

The Model Code of Evidence was, and remains to this day, a magnificent accomplishment in the field of evidence law. Indeed, as the then editor of the *Canadian Bar Review* commented in his note introducing the Morgan article:[11]

> Such painstaking and scholarly work cannot, or at least should not, be overlooked by any common law jurisdiction in contemplating changes in the law of evidence.

Nevertheless, the Model Code met with a cold reception from the Bar[12] in both the United States and Canada. The lawyers thought its provisions were too liberal and gave too much discretion to the judges.[13] They particularly deplored "the virtual abolition of the rule against hearsay evidence where the unavailability of the declarant is established".[14]

Despite its apparent rejection by the profession, the Model Code was not quite dead. As someone recently said, it rose again! And it received a new name, the Uniform Rules of Evidence, 1953.[15] This time, clever drafting had done the trick, and the new version of the Model Code was favourably received by the American Bar Association in August, 1953. But lawyers are conservative and legislative adoption of the Uniform Rules in individual American states, either by statute or by court rules, has yet to be achieved in all but a few states.[16] Clearly codification of the law of evidence

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[9] An outstanding group of specialists, including academics, practitioners and judges, Professor Morgan being the reporter.

[10] American Law Institute, Model Code of Evidence (1942).

[11] *Supra*, footnote 7, at p. 272.

[12] "Professional reception . . . varied between chilliness and heated antagonism", Maguire, Evidence — Common Sense and Common Law (1947), p. 153.

[13] See Spencer A. Gard, The Uniform Rules of Evidence (1956), 31 Tulane L. Rev. 19, at p. 23.

[14] *Ibid.*

[15] Uniform Rules of Evidence, prepared and published by the National Conference of Commissioners on Uniform State Laws, 1953.

[16] The states that have adopted the Uniform Rules of Evidence are Kansas (1963), New Jersey (1967), California (1967). Incidentally, the first state or territory, to adopt the Uniform Rules was the Virgin Islands. There were few departures from the Uniform Rules in Kansas or New Jersey. There were some significant changes in the California Code. Nevertheless, the Uniform Rules were the foundation of the new California Code (California Evidence Code Manual, 8.).

is not a sport for the short-winded.[17]

The fact that in the eyes of the reformers codification of the American law of evidence has proceeded at a snail's pace[18] is perhaps a point worth making. But far more significant, it seems to me, is the fact that codification of the rules *is* proceeding. In 1965, the distinguished editors of a well-known American casebook on the law of evidence gave the following appraisal of progress to that date:[19]

> Since 1957 [the date of the previous edition of the casebook] the United States law of evidence . . . seems to be moving with no more than deliberate speed toward carefully planned codification. Additional to the codifying process, which frankly partakes of legislative nature even when judges operate it by rules of court, there are manifest here and there in the pattern of the law notable individualized changes made by common law technique. A potentially important liberalization of this kind appears in the Dallas County case.[20]

To a Canadian lawyer, enured to years of timid attempts at reform of evidence law, "deliberate speed" scarcely describes the rapid progress towards codification which has occurred in the United States since 1965. First came the California Evidence Code, effective January 1st, 1967. Then New Jersey enacted the New Jersey Rules of Evidence, effective September 11th, 1967. And, finally, the most remarkable code of all, the proposed Federal Rules of Evidence was submitted to the Bench and Bar in March, 1969.[21]

"Remarkable" may, perhaps, be too strong a word to apply to the most recent American accomplishment in the codification of evidence rules. Clearly, all the American codes that have been mentioned were remarkable accomplishments in their own time and place. The Committee responsible for the latest code readily acknowledges its indebtedness to its predecessors in the field. Nevertheless, in the face of difficulties unique to American constitutional law, the preparation of a code of uniform rules of evidence for the entire federal court system is a tremendous achievement.[22]

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[17] The frequent comment of the great Arthur T. Vanderbilt on the subject of judicial reform.

[18] Edmund M. Morgan, Practical Difficulties Impeding Reform in the Law of Evidence (1960-61), 14 Vanderbilt L. Rev. 725.

[19] Maguire, Weinstein, Chadbourn and Mansfield, Cases and Materials on Evidence (5th ed., 1965), p. ix.

[20] *Dallas County* v. *Commercial Union Assurance Co., supra,* footnote 2.

[21] Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, submitted to the Bench and Bar by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. A revised draft of the Rules was submitted to the Bench and Bar in March of this year for further "comments and suggestions".

[22] In a letter to me written in October, 1960, the Secretary of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States called the task ahead "Herculean".

In any event, Canadian lawyers, most of whom are unaware of, or unimpressed by, the advantages of well-drafted codes of evidence law,[23] ought to discover that there *is* something remarkable in an extraordinarily well-drafted code of evidence rules soon to be in use in the massive federal court system of the United States.[24]

The American Federal Rules of Evidence appear to offer a brilliant solution to our many problems with the hearsay rule. It is a solution deserving the most careful study by the Bench and Bar in Canada. Before, however, I say more about the treatment of hearsay by the draftsmen of the Federal Rules, this latest proposed reform of the hearsay rule must be put in proper perspective.

II. *Methods of Reform Open to Canadian Reformers.*

The need for the reform of the hearsay rule is obvious enough. The rule itself is well-nigh impossible to define in what Professor Maguire once called a "bomb-proof" way.[25] "It takes a team of workers to make a proper definition."[26] Then there is the matter of the many exceptions to the rule — twenty or thirty — depending upon minuteness of classification.[27] When we do become serious about hearsay reform in Canada, we shall have to examine both the hearsay rule itself and its many exceptions. The great American evidence scholars, whether they be judges, lawyers or law professors, have, of course, been doing this for years. Some very good results have followed.[28]

It may be that, for civil cases at least, we in Canada can finesse

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[23] See J. D. Morton, Do We Need a Code of Evidence? (1960), 38 Can. Bar Rev. 35; a reply to my article, Evidence: A Fresh Approach. The American Uniform Rules of Evidence (1953) (1959), 37 Can. Bar Rev. 576. Strange to relate, it is only the armed forces in Canada that enjoy the advantages of a well-drafted code of evidence rules for use in courts-martial. Sections of the code owe much to the Model Code of Evidence.

[24] "Rule 1101 . . . These rules apply to the United States District Courts, the District Court of Guam, the District Court of the Virgin Islands . . . the Canal Zone, the United States Courts of Appeal, and the United States Magistrates . . . ."

[25] "Everybody has heard of this rule and realizes that in court hearsay is most disapprovingly regarded. Oddly enough, mighty few people, laymen or lawyers, can give a definition of hearsay which will stand up under testing. If we tried to fashion a bomb-proof definition we should end up with something — in Kipling's phrase — filthily technical." Maguire, *op. cit.*, footnote 12, p. 11.

[26] Maguire, The Hearsay System: Around and Through the Thicket (1960-61), 14 Vanderbilt L. Rev. 741.

[27] Rupert Cross finds that it is possible to enumerate twenty-one common law exceptions: The Scope of the Rule Against Hearsay (1956), 72 L.Q. Rev. 91. The Uniform Rules list thirty-one.

[28] One notable American reform, in the area of exceptions to the hearsay rule — the "business entries" exception — is so obviously beneficial that it has become the law, by statutory reform, in a number of Canadian provinces. See footnote 51, *infra*.

the difficulties of hearsay by simply enacting in all our common-law provinces legislation (and accompanying rules of court) modelled on the English Civil Evidence Act of 1968. This is an obvious approach that would appear to demand of the Canadian reformer the minimum of effort. Moreover, in both England and Canada today there are few jury trials in civil cases. A number of writers vigorously argue that the traditional court rules of evidence, including the hearsay rule, should find little place today in non-jury cases tried by legally trained judges.[29] Whether or not this point of view is sound, the latest English effort to reform trial practice in the area traditionally covered by the hearsay rule must not be ignored by the Bench and Bar in Canada.[30]

Before we in Canada hurry to enact our own version, or versions, of the English Civil Evidence Act, Pt. I, 1968, however, or before we think of importing into our law the recent American improvements in the area of hearsay, we should take a close look at the various other options in reforming the hearsay rule which are open to us at this time.

The Honourable Jack B. Weinstein,[31] to whom I have referred earlier, has written two useful articles presenting most of the options open to would-be reformers of the hearsay rule.[32] In his second article, written in 1968,[33] the learned judge writes about "alternatives to the present hearsay rules". He finds there are seven choices.[34]

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[29] *E.g.*, Davis, Evidence Reform: The Administrative Process Leads the Way (1950), 34 Minn. L. Rev. 581.

[30] Thus far, in addition to the reforms in hearsay proposed in modern American evidence codes, we in Canada have managed to ignore the two truly significant reforms of the hearsay rule made, first, in Massachusetts in 1898 (see Mass. G.L. (Ter. ed.) c. 233, s. 65, as am. in 1941 and 1943), and, second, in England in 1938 (see English Civil Evidence Act, 1938, 1 & 2 Geo. VI, c. 28, s. 1).

[31] Judge, United States District Court for the Eastern District of New York. Although he is just fifty, some indication of the outstanding qualifications of Judge Weinstein as a lawyer and man is that it took the Senate Judiciary subcommittee just eight minutes to deliberate and ratify his appointment as judge in the Spring of 1967. (New York Times, April 13th, 1967, p. 53, col. 4). Before he was appointed to the Bench Jack Weinstein taught law at Columbia Law School (from 1948 on). The writer of numerous articles on evidence and civil procedure, his name appeared in 1957 as editor, along with Morgan and Maguire, of Cases and Materials on Evidence, 4th ed. He also prepared (with Korn and Miller) a Manual of New York Civil Procedure, 1967.

[32] Jack B. Weinstein, Probative Force of Hearsay (1960-61), 46 Iowa L. Rev. 331, and Alternatives to the Present Hearsay Rules (1968), 44 F.R.D. 375.

[33] From which I shall be quoting freely without supplying specific page references for the many quotations.

[34] The seven choices (or alternatives) are: (1) Exclude all Hearsay; (2) Admit all Hearsay; (3) Liberalize and Codify Present Rules; (4) General Principle Rule; (5) Selective Application; (6) Retain Present Rules and Ignore Them; (7) (Perhaps!) Keep the Status Quo.

Alternative 1 is to Exclude all Hearsay. "No lawyer", says the judge, "can seriously support this alternative". "Just think", he says, "of current trials which are built upon medical and other business records. Excluding all hearsay would substantially decrease the probability of our achieving truth in the courtroom". So much for that approach.

Alternative 2 is to Admit all Hearsay. Unlike the first alternative which "no lawyer can seriously support", many lawyers will support a proposal to admit all hearsay so long as the judge is granted at least a minimum of discretion to exclude for reasons of surprise, prejudice and low probative force (waste of time).

The learned American judge skillfully presents the very good case that can be made for admitting all hearsay. He demonstrates, using examples from his own court, that hearsay evidence has probative value "sufficient to warrant such a rule". He points out that "it is, after all, the system used abroad and at home before administrative agencies, arbitrators and, increasingly, in bench trials". He then argues that the jury system "no longer presents an insuperable objection", adding that "Hearsay exclusionary rules were primarily developed by upper-class English judges — undoubtedly somewhat contemptuous of lower class illiterates who sat as jurors". No doubt there are still a few illiterates in the jury box, but Judge Weinstein believes that "jurors are increasingly well educated and capable, under some guidance from the court, of assessing probative worth".

A final good reason for seriously considering the second alternative — to admit all hearsay — is interestingly developed by the writer: "Judges, trained in law schools where academic criticism of the jungle-like profusion of hearsay rules and exceptions has been widespread, tend to be, as one of them puts it, 'letters in', rather than 'keepers out'."[35]

Conceding that there are some good arguments against elimination of the exclusionary hearsay rule, Judge Weinstein concludes his discussion of "Alternative 2" by offering good suggestions of techniques designed to overcome the real, or supposed, difficulties of this reform option.

Alternative 3 is to Liberalize and Codify Present Rules. This is the approach of the codifiers, illustrated in both the Model Code and the Uniform Rules. This approach keeps "the present formal structure of the rules and their exceptions while limiting the defini-

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[35] Judge Weinstein, in a footnote, cites the well-known generalization of this approach to be found in the case of *United States* v. *25,406 Acres of Land* (1949), 172 F. 2d 990, at p. 995 (4th Cir.): "the modern rule [is] to admit in evidence any matter which throws light on the question in controversy, leaving to the discretion of the judge [the obligation] to hold the hearing within reasonable bounds."

tion of hearsay and expanding the exceptions". An appreciation of this approach by Judge Weinstein includes the following comments: "The Model Code substantially read the hearsay rule out of existence by the breadth of its exceptions. Even the more conservative Uniform Rules have been objected to on that ground." "This alternative of a broadening of exceptions is one likely to find the largest number of proponents."

Alternative 4 Judge Weinstein calls the General Principle Rule. This alternative, in use in a number of good American federal courts, creates "a broad new exception that permits hearsay to come in whenever there is, first, a substantial guarantee of trustworthiness and, second, some good reason why the hearsay declaration cannot be satisfactorily duplicated by present testimony." "These", continues Judge Weinstein, "were the conditions that Wigmore said explained all of the hearsay exceptions".

Application of Alternative 4 is well illustrated in the federal civil case of *Dallas County* v. *Commercial Union Assurance Co.*[36] In this case the well-named Wisdom J. admitted in evidence an old newspaper account to prove that the courthouse in Selma, Alabama, was damaged by fire some fifty years ago. And the learned judge said he admitted the evidence not because it was "a readily identifiable and happily tagged species of hearsay exception, but because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds".

Commenting on the *Dallas County* case, Judge Weinstein made this important and prophetic[37] comment: "Were this general principle adopted explicitly as the main hearsay rule, it would, in effect, make the present twenty or thirty exceptions — depending on how you count them — examples rather than rigid and limiting categories." But there are always lawyers who will object to a "general principle" approach. In the words of Judge Weinstein: "Some lawyers prefer a precise bad rule to a discretionary good one." As a device to overcome the "uncertainty objection", the writer suggests requiring notice in advance when hearsay intended to be used does not fall within one of the standard exceptions.[38]

Alternative 5 is called by Judge Weinstein, Selective Application. This alternative is "to frankly recognize that there is no necessity of applying identical rules with the same degree of stringency

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[36] *Supra,* footnote 2, at pp. 397-398.

[37] "Prophetic" because this is to some extent the approach taken by the draftsmen of the preliminary draft of the Federal Rules of Evidence (1969).

[38] Requiring notice in advance when hearsay is to be used is the approach adopted in the English Civil Evidence Act 1968. But this procedural device has its own problems, which the draftsmen of the Federal Rules of Evidence were not prepared to ignore.

in different kinds of cases. Broadly, we can distinguish among civil non-jury cases, civil jury cases and criminal cases".

"In civil non-jury cases there appears little reason why the court should not be treated with much the same confidence as are our administrative agencies." The case for eliminating the hearsay exclusionary rule in "bench trials" is forcefully argued by Judge Weinstein:[39]

> Some judges will allow almost all hearsay to come in at bench trials if it seems fairly clear that it is the best evidence available and that it does have some probative force. Since, however, we give credence to the theory that trial judges are bound by hearsay rules, many judges receive hearsay evidence with the explanation that they are "taking it for what it is worth". This is a most unsatisfactory technique because it leaves attorneys with no clear idea of whether the court is going to rely upon the hearsay evidence or ignore it on the ground that it is inadmissible.
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> A more direct and satisfactory way of dealing with the matter would be to eliminate the hearsay rule in bench trials so that the judge could draw suitable inferences from any evidence introduced. Attorneys would then know what the court considered and could argue weight and inference. If there is surprise it is always possible to obtain a continuance. If a witness is required in order to contradict hearsay or if the original declarant is needed he can be produced after an adjournment. In civil jury trials where continuances and adjournments are not practicable, and where the jury may be more inclined than a judge to overvalue some hearsay, there is more reason for tighter control.

Elimination of the hearsay rule in criminal cases would meet with little favour in the legal profession. "For some years, therefore, we can foresee application of the present hearsay rules with rather modest changes in criminal cases. . . ."

Alternative 6 is to Retain Present Rules and Ignore Them. "We can, in form, continue the present rules unchanged while courts ignore them whenever they feel moved to do so." American Federal Circuit Courts of Appeal rarely reverse trial courts "for errors in admitting any reasonable form of hearsay". "There is not a single reversal in the more than one thousand cases in [four recent volumes of the *Federal Reporter*] for admitting hearsay, although the average reversal rate for cases in the Courts of Appeals is some twenty percent."

After suggesting as a final possible Alternative — *the Status Quo, that is Change Nothing* — only to dismiss it as "even less practicable than [the first Alternative] of excluding all hearsay", Judge Weinstein concludes:[40]

> Judging the temper of the bar and the bench and what is possible at

[39] Weinstein, Alternatives to the Present Hearsay Rules, *op. cit.*, footnote 32, at p. 380.

[40] Weinstein, *op. cit.*, footnote 38, at p. 388.

this time, a recodification and liberalization of the rules of hearsay with an explicit general statement of principle for admitting useful hearsay which does not fall within a specific exception seems preferable. The court should, in addition, be given greater freedom in civil than in criminal cases and in bench than in jury trials to admit hearsay. The New Jersey statement in its Rule 5[41] is useful:

> "The adoption of these rules shall not bar the growth and development of the law of evidence in accordance with fundamental principles to the end that the truth may be fairly ascertained."

A pointed reference to the courts' power to make meaningful distinctions among kinds of cases where hearsay is involved seems desirable in any new set of rules of evidence.

These, then, are the alternatives to the present hearsay rule, or rules, as seen through the eyes of a great American evidence scholar. The hearsay rule itself just barely survives. To borrow yet once more from Judge Weinstein, "In the sea of admitted hearsay, the rule excluding hearsay, is a small and lonely island".[42] Nevertheless, the American Bench and Bar is, apparently, not yet ready to jettison the rule, even in civil non-jury cases.

III. *The American Federal Rules of Evidence.*

The American Federal Rules of Evidence[43] exemplify much of the reform that Judge Weinstein concludes "is possible at this time". The recodification, the liberalized exceptions, and the statement of general principle for admitting hearsay not coming within a specific exception, are all to be found in this latest set of American rules.

The relevant Note of the Advisory Committee[44] narrows the "Weinstein" alternatives to three: "(1) abolish the rule against hearsay and admit all hearsay; (2) admit hearsay possessing sufficient probative force, but with procedural safeguards; (3) revise the present system of class exceptions."

The note then explains why Alternative 3 was selected as the best approach — being the approach "of the common law". The first approach — to admit all hearsay — was rejected as being too advanced for the profession to accept. "The . . . Advisory Committee has been unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility

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[41] New Jersey Rules of Evidence (1967).

[42] Weinstein, Probative Force of Hearsay, *op. cit.*, footnote 32, at p. 346. In a footnote, Judge Weinstein adds: ". . . it is being constantly eroded by steadily rising waves of exceptions and growing breezes of oversight."

[43] *Supra*, footnote 21.

[44] Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (March 1971), pp. 94-97.

as a condition precedent to admitting the hearsay declaration of an unavailable declarant."[45]

The second approach — the General Principle Rule of Judge Weinstein — was also rejected by the Committee. It was rejected,

> . . . as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pre-trial procedures, and requiring substantially different rules for civil and criminal cases. . . .

The comment of the Committee on the second rejected approach would appear to indicate that the American legal profession is not yet ready to accept any reform measure resembling the English Civil Evidence Act of 1968. It appears that the American reformers are unwilling, also, to take the risk of adding the procedural complications they believe are inherent in the adoption of the General Principle Rule.

The third approach, which the Committee adopted, was "to revise the present system of class exceptions". It is a more sophisticated and liberal reform than the few words chosen by the Committee to characterize it would indicate. A more detailed explanation of the approach is given by the Committee in the following words:

> (3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where the availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions "but having comparable circumstantial guarantees of trustworthiness". . . . This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

This approach of the Committee is, of course, Judge Weinstein's Alternative 3, which he predicted would be the most acceptable of the options. It is essentially the approach of the earlier American codifiers, but with a few notable improvements, justifying, perhaps, my use of the word "sophisticated".

The Federal Rules of Evidence retain most, if not all, of the thirty-one exceptions to the hearsay rule found in the Uniform Rules. But a clever grouping of the exceptions under two principal

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[45] "While not entirely satisfactory, this term [declarant] is ugly enough to be worth using as an alerting tag for hearsay. The term is not uncommon." Weinstein, *op. cit.*, footnote 38, at p. 331. But the term *is* uncommon, I believe, in Canada.

headings, or rules, goes a long way to transform them into "Examples, or illustrations, rather than rigid and limiting categories".[46] The first rule, under which twenty-four of the exceptions (or examples) are grouped deals with situations where the declarant is not required to be a witness even though he is available. The second rule, under which the remaining six exceptions are grouped, deals with situations where the declarant is unavailable as a witness.

In addition, the Federal Rules of Evidence improve upon the Uniform Rules of Evidence by providing for the admission of hearsay statements not coming within one of the specified exceptions. Specifically , the Federal Rules will admit "A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of accuracy". The Advisory Committee's Note explains the significance of the provision for new exceptions to the hearsay rule:

> The preceding 23 exceptions of Rule 803 [declarant not required as a witness] and the first five exceptions of Rule 804 (b) [declarant unavailable] . . . are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b) (6) are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102.[47] See *Dallas County* v. *Commercial Union Assur. Co.*, 286 F. 2d 388 (5th Cir. 1961).

In summary, it seems obvious that the draftsmen of the Federal Rules of Evidence, taking full advantage of the work of earlier codifiers and of some great judicial reforms, have provided, at long last, a sensible and workable rationalization of the many hearsay

[46] See comment by Judge Weinstein on the *Dallas County* case, *op. cit.*, footnote 31. In the 1968 draft of the Federal Rules of Evidence the exceptions were deliberately drafted as illustrations only: "Rule 803 Hearsay Exceptions. . . (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples. . .". But the Revised Draft (1971) abandons the technique of presenting the exceptions as simply "illustrations". The draftsmen of the later draft may have felt that there was merit in Falknor's comment on the "illustration" technique, that "it would seem a pretty good guess that, in view of the number of examples, most courts would be inclined to limit admissibility to situations closely approximating the specifics given": Judson F. Falknor, *op. cit.*, footnote 3.

[47] Rule 102. Purpose and Construction. These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

exceptions of the common law. Even the clear, liberalized statements of the individual class exceptions are a pleasure and relief to read. But the two improvements on some of the earlier efforts at codification of the hearsay rule, which I have attempted to underline, will surely demand the attention of the Canadian legal profession. For is it now possible to say, with at least some justification, that the American reformers have (1) limited the area of hearsay law to a single narrow rule with only two important exceptions,[48] and (2) provided, in a most sensible way, for the admission of hearsay in unanticipated situations. The fact that experienced trial lawyers and judges are not to be expected suddenly to give up their intellectual investment in twenty or thirty exceptions to the hearsay rule[49] does not diminish the contribution towards clarity of analysis of the many exceptions achieved by their sensible grouping in the Federal Rules.

IV. *"Business Entries" Exception.*

Having stressed major improvements in the reformation of hearsay law to be found in the Federal Rules of Evidence, the clever restatement and liberalization of each of the twenty-eight class exceptions listed in the code must not be overlooked as an accomplishment. I have referred already to the exceptions as a pleasure to read. This is anything but true of Canadian (English) common-law exceptions. In his delightful lecture to the Law Society of Upper Canada[50] Mr. J. J. Robinette, Q.C., revealed to the profession how very technical are the common-law exceptions to the hearsay rule. I suspect that even the term "class exceptions" will sound strange to Canadian lawyers. This is so because, unlike the rational presentation of the exceptions in any modern American evidence code, the exceptions recognized in Canadian law reveal all too clearly a total lack of any rationalization whatsoever. Some of our "class" exceptions (for example, declarations against interest, declarations in the course of duty) are so narrow in the way

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[48] The one, where the maker of the out-of-court statement is available as a witness but (to use the language of the Preliminary Draft of the Federal Rules) the nature of the statement and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness; the other, (again using the language of the Preliminary Draft) where the circumstances offer *strong* assurances of accuracy and the declarant is *unavailable* as a witness. Italics mine.

[49] A rarely acknowledged reason for the Hearsay Rule is that "it is, with its sixteen exceptions (more or less), a technicality in which the trial lawyer has an intellectual investment and a valuable exclusive expertise." Hart & McNaughten, Evidence and Inference in the Law (1958), 87 Daedalus 40, at p. 48.

[50] Special Lecture of the Law Society of Upper Canada: Evidence (1956).

of letting in hearsay, and others (for example, the so-called *res gestae* exception) so broad, that the word "class" becomes almost meaningless.

There have been a few — only a few — noteworthy achievements in Canadian evidence law, legislative and judicial, to liberalize one or two of the common-law class exceptions.[51] In contrast, the Wigmore-inspired American reforms, now largely codified, have attempted to liberalize *all* of the class exceptions. The very process of examining with a view to reformation all the common-law exceptions has helped to bring home to the Americans their essential characteristic as *class* exceptions.

American commentators are already at work discussing in depth each of the twenty-eight class exceptions as presented in the Federal Rules of Evidence.[52] Until Canadian lawyers indicate their interest in the American approach to hearsay reform it seems rather pointless for me to add anything to the current American comments on the exceptions. I would like, however, to say a few words about one only of the class exceptions to be found in the Federal Rules of Evidence. This is the exception known to American lawyers for many years as the Business Entries (or Records) exception. Grounded in forward-looking American legislation of the period 1927-1936,[53] and finding its justification in the special reliability of business records, the exception has been an important and useful addition to the hearsay system. The wording of the exception in the Federal Rules is a mirror of the achievement of American judges who understood the vast liberalization of the hearsay rule that imaginative use of the exception made possible. Indicating the breadth of the material intended to be admitted under the exception, the Federal Rules mention neither "business" nor "entries" but state the exception as follows:

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[51] The few reforms effected by judicial action are collected in the recent judgment of the Supreme Court of Canada, *Ares* v. *Venner and Seton Hospital et al.*, which I shall call simply *Ares* v. *Venner, supra,* footnote 2. The most striking instance of legislative reform is the amendment in recent years of the Evidence Acts of the Provinces of New Brunswick (R.S.N.B., 1952, c. 74, as am. S.N.B., 1960, c. 29, s. 42A), British Columbia (R.S.B.C., 1960, c. 134, as am. S.B.C., 1968, c. 16, s. 43a), Saskatchewan (R.S.S., 1965, c. 80, as am. S.S., 1969, c. 51, s. 30a), Ontario (R.S.O., 1970, c. 151, s. 36) and Nova Scotia (R.S.N.S., 1967, c. 94, s. 22), to include some version of the American class exception known as the Business Entries exception.

[52] Of course, the Notes of the Advisory Committee are themselves an exceptionally articulate presentation by experts of the rationale of each of the class exceptions. But, in addition, leading articles in American Law Reviews (including a number of symposia on the Federal Rules) explore each class exception in still greater depth. See, *e.g.,* Hearsay and the Proposed Federal Rules: A Discretionary Approach (1968-69), 15 Wayne L. Rev. 1079-1235 (156 pages!).

[53] The Commonwealth Fund Act (1927) and the Uniform Business Records as Evidence Act (1936).

> (6) *Records of Regularly Conducted Activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

The lengthy Advisory Committee's Note to this exception is a highly readable and instructive review of "an area which has received much attention from those seeking to improve the law of evidence".[54] It is obviously an area of hearsay reform that can no longer be neglected by Canadian lawyers and judges.[55] One or two excerpts from the Note will, perhaps, be enough to explain why. Is opinion evidence admissible under the exception? Many Canadian courts would say "No". But liberal American courts now rule in favour of admission. "Entries in the form of opinions", reads the Note, "were not encountered in traditional business records in view of the purely factual items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas". The Note observes a "reluctance of some federal decisions to admit diagnostic entries" but finds that "other federal decisions . . . experienced no difficulty in freely admitting diagnostic entries". "In state courts," says the Note, "the trend favors admissibility". "In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries."[56]

V. *Canadian Judicial Reform.*

The American experience, legislative and judicial, in achieving the admission of reliable records of a great variety of regularly conducted activities, without the need of much oral testimony, should have careful study by the Canadian legal profession. Even the Supreme Court of Canada, in the recent important case on the

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[54] Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (March 1971), 112-115.

[55] As noted *supra,* footnote 51, a few Canadian provinces now have Business Entries' legislation. But this is only a beginning. The legislation itself can be improved. More important, Canadian courts have yet to learn the art of liberally interpreting a most useful new exception to the hearsay rule. See on this last point the two cases of *Watkins Products Inc.* v. *Thomas* (1965), 54 D.L.R. (2d) 252 (S.C.N.B., App. Div.) and *Adderly* v. *Bremner,* [1968] 1 O.R. 621 (H.C.).

[56] Draft of Federal Rules of Evidence, see *supra,* footnote 54, 113-114 For a masterful presentation of the rationale for the admission of opinion evidence under the exception see Laughlin, Business Entries and the Like (1960-61), 46 Iowa L. Rev. 276.

hearsay rule, *Ares* v. *Venner*,[57] displays little awareness of, or, possibly, interest in, the modern American case law on business records.

Ares v. *Venner* was a case where the leg of an injured skier had to be amputated. Negligence of a doctor was alleged and nurses' notes offered to prove the fact in issue were admitted in evidence. The Appellate Division of the Supreme Court of Alberta held that the notes did not constitute an exception to the hearsay rule and were therefore improperly admitted in evidence. But in the Supreme Court of Canada, Hall J., writing the judgment of a unanimous court, said:[58]

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record, should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so.

Ares v. *Venner* is, I think, an acceptable illustration of wise judicial reform. The court made it clear that while it was prepared, unlike the House of Lords in the much criticized case of *Myers* v. *Director of Public Prosecutions*,[59] to help in the reform of the hearsay rule, it would go no further than was necessary for a just decision of the instant case. In the words of Mr. Justice Hall: "I think it desirable that the Court should deal with the issue as a matter of law and settle the practice in respect of hospital records and nurses' notes as being either admissible and *prima facie* evidence of the truth of the statements made therein or not admissible as being excluded by the hearsay rule."[60]

The leadership in judge-made reform of the hearsay rule taken by the Supreme Court of Canada in *Ares* v. *Venner* is encouraging. Of necessity, as I have indicated, reform is a step-by-step process. I am certain that the Supreme Court itself does not really believe that it has "settled the practice" on the admissibility of hospital records, taken as a class, not to mention the records of other institutions. The court was careful to point out that the nurses were under a duty to make their reports. It ignored the problem of the nurses' opinions. We are left to speculate on the admissibility of the report of a doctor's diagnosis. A step-by-step approach inevitably leaves questions of this sort for later decision.

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[57] *Supra*, footnote 2.

[58] *Ibid.*, at p. 362 (W.W.R.).

[59] [1965] A.C. 1001, [1964] 3 W.L.R. 145, [1964] 2 All E.R. 881. The very general criticism of the majority opinions in the *Myers* case may be a little unfair when it is learned that, to the knowledge of the judges in that case, Parliament was almost ready to reform the hearsay rule in England and Wales in a most substantial way.

[60] *Ares* v. *Venner*, *supra*, footnote 2.

Conclusion

Useful as cases such as *Ares* v. *Venner* may be in encouraging reform of the hearsay rule by judicial action, the time has long passed when judicial reform alone can accomplish the needed extensive revision of hearsay law. Indeed, none of the alternatives to the present hearsay rule discussed in this article can alone achieve the desired result. But, of the methods discussed, the one chosen by the American reformers — codified, liberalized class exceptions to a narrowly defined hearsay rule — is, perhaps, the most deserving of careful examination by Canadian lawyers. It represents no great departure from our common-law tradition, but in its carefully organized, comprehensive and liberal approach to the hearsay system it seeks to eliminate the "absurd results"[61] too often produced by the existing hearsay rules.

It may be that the Canadian legal profession is ready to attempt more radical reform of the hearsay rule than the leaders of the American legal profession believe to be acceptable to American lawyers at this time. Perhaps we in Canada would prefer to enact our own version of the English Civil Evidence Act of 1968. The history of ultra-conservative Canadian reform of hearsay law does not suggest, however, that the English Act is likely to be the model for Canadian reform. Nor is it clear that the procedural complexities inherent in the English reform are an acceptable price to pay for this alternative to the present hearsay system. The American reformers find no advantage in adding procedural difficulties as a means of curing hearsay ills. But these are all matters for the Canadian legal profession to decide. Whatever its decision as to method, the Canadian Bar must no longer delay the reform of hearsay law.

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[61] *Supra,* footnote 8.