THE REFORM OF THE LAW OF HEARSAY

" Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood and leave the waters pure."—MR. JUSTICE CARDOZO.

Speaking a good many years ago Lord Denman described the law of evidence as it then stood as being "that neglected product of time and accident". The recently enacted English Statute, *The Evidence Act 1938*,[1] represents a serious attempt to correct some of its accidental features. The text of this Statute is to be found in 16 CANADIAN BAR REVIEW at page 633.

Lord Maugham explained when the Act was being dealt with by a Committee of the whole House that the proposed Act was not a hasty or unconsidered production. It had been incubating for seven years and had been considered by a Committee of judges and by various bar organizations. In almost all instances it had met with complete approval. An examination of the provisions of the Act will show that it is indeed a great step forward. It prunes away many quibbling technicalities and it will undoubtedly greatly facilitate the administration of justice. Its provisions should be adopted in all the Provinces of Canada. but there is one important change which should be made in it, This article is written to point out the serious omission which should be rectified if the Evidence Act 1938 is followed in other jurisdictions.

The point at which the Evidence Act 1938 falls short of attaining a complete reform of the law is in the restriction of its benefits in the admission of hearsay to statements contained in documents. An oral statement made by a person who is dead or has become insane should be admitted in evidence. There are in the Evidence Act 1938 ample safegaurds to make certain that such hearsay evidence will not be admitted except where such admission is absolutely necessary for the proper determination of the issues and there exists no valid reason why an oral statement should not be admitted as well as a written one. Indeed, it is in the case of oral statements, made under the circumstances outlined, that the need for reform is so essential. Every practitioner is only too familiar with those unhappy cases where the victim of an accident dies after having made a statement which, under the present state of the authorities, is not admissible because it was made after the accident took place. If the deceased, as often happens, is the only person present

[1] 1 and 2 Geo. VI, c. 28.

when the accident occurred and was therefore the only person who could tell how the accident happened, the representatives of the deceased are deprived of their just claims. Not many of these cases are to be found in the reports because when such a case arises the legal adviser of the claimant must reluctantly tell his client that the proposed litigation will not be successful and so the claimant must either abandon his claim or take such settlement as a generous opponent may see fit to grant him. Justice demands that such statements should be admitted. The provisions of The Evidence Act 1938 are in this regard to be contrasted with the changes in the law of evidence already made or proposed to be made in the United States.

The basis of the difficulty in this regard arises, as do most of the problems encountered in the law of evidence, as a product of the jury system. These rules became crystallized at a time when the degree of intelligence of the average untrained juror was comparatively low. But now, with the great advance in general education, these restrictive rules may safely be relaxed provided proper safeguards as to the circumstances under which the hitherto questionable evidence is to be admitted are carefully indicated. As has been pointed out, such safeguards are to be found in The Evidence Act 1938, as will be evident from an examination of its text.

The difficulty with regard to the problem now under discussion arises from the well known case of *R.* v. *Bedingfield.*[2] It has been stated that "no rational principle" can reconcile this case, and the other equally well known case of *R.* v. *Foster.*[3]

The controversy which arose after the case of *R.* v. *Bedingfield* is recounted in detail in three articles by Professor Thayer appearing in the *American Law Review* in 1880 and 1881 and reprinted as part of the volume of *Thayer's Legal Essays.* The explanation of the admissibility of a statement made by a deceased person as given in the *Bedingfield Case* by Chief Justice Cockburn is that the statement is required to be contemporaneous with the thing done. This requirement that the thing done and the statement should coincide in point of time is the source of the controversy. Chief Justice Cockburn subsequently wrote a pamphlet on the subject, in defence of his ruling, in which he gave a further definition of the term "Res Gestae" which definition slightly extends the rule and has been accepted by the

[2] 14 Cox C.C. 34.
[3] 6 C. and P. 35. See the article by Dr. Julius Stone, *Res Gesta Reagitata* (1939), 55 L.Q.R. 66.

Supreme Court of Canada in *The King* v. *Gilbert*.[4] This definition was stated by Mr. J. Pitt Taylor (the author of *Taylor* on *Evidence*) to have merely "enveloped him in a fog".

In the United States, however, under the influence of Wigmore,[5] the rule has shifted so that admissibility is now recognized as an exception to the hearsay rule based on the utterance being spontaneous. Even this rule has not been universally accepted in the various States, and there is still "a marked tendency in many cases to assume that contemporaneousness of an utterance and event is a requisite of admissibility".[6]

Just how confused the state of law is in the United States will be seen from an examination of the statement in the article on Evidence in 22 Corpus Juris where it appears that on the one hand statements have been admitted which followed the main event by the space of 1 minute, 2 minutes, 3 minutes, 4 minutes, 5 minutes, 6 minutes, 7 minutes, 10 minutes, 15 minutes, 20 minutes, 30 minutes, 1 hour, or under exceptional circumstances (such as statements to physicians) by even a longer period of time. On the other hand courts have rejected statements following the main event by 1 minute, 2 minutes, 3 or 4 minutes, 5 minutes, 7 minutes, 8 minutes, 10 minutes, 15 minutes, 25 minutes, 30 minutes, 45 minutes, 1 hour, 1½ hours, 2 hours, 3 hours, 4 or 5 hours, 10 hours, 12 hours, and a day.

It is time that this uncertainty and confusion was swept away and the law placed on a reasonable footing.

In Scotland the general rule has been that an oral statement by a deceased person is admissable in evidence,[7] and no inconvenience has followed from the adoption of this practice.

That the law in England is deficient in this regard and should be amended has also long been recognized. Indeed, Chief Justice Cockburn in the *Bedingfield Case* expressed regret that "according to the law in England any statement made by the deceased should not be admissible", and in *Sugden* v. *Lord St. Leonards*,[8] Lord Justice Mellish stated: "If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a

[4] 38 S.C.R. 234.
[5] 3 EVIDENCE, secs. 1745 - 1765.
[6] See Morgan, *Utterances Admissible as Res Gestae*, 31 Yale L.J. at p. 239.
[7] *Lauderdale Peerage Case*, 10 App. Cas. 692; *Lovat Peerage Case*, 10 App. Cas. 763; *The Berkeley Claimant*, 4 Camp. 402.
[8] 1 P.D. 154.

highly desirable improvement in the law if the rule was that all statements made by the persons who are dead respecting matters of which they had a personal knowledge and made *ante litem motam*, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence." And in the same case, Jessel M.R. said : "Now, it might well have been that our law, like the law of some other countries, should have admitted as evidence the declarations of persons who are dead in all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, whether in writing or oral, made by deceased persons, are not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule."

The relevant provisions of The Evidence Act 1938 are as follows :

1.—(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say —

(i) if the maker of the statement either —

(a) had personal knowledge of the matters dealt with by the statement; or

(b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(ii) if the maker of the statement is called as a witness in the proceedings;

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it

is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence —

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and where the proceedings are with a jury, the Court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

2.—(1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

It is interesting to note that when the amendment of the law was suggested by Professor Thayer he confined the change to a statement made in writing. In a letter written by him to a committee of the Boston Bar Association in 1896 he suggested

that the law of evidence should be amended by providing that "No declaration of a deceased person made in writing *ante litem motam* shall be excluded as evidence on the ground of hearsay if it appears to the satisfaction of the judge to be made on personal knowledge of the declarant."

The Attorney General for Massachusetts, however, in recommending it to the legislature broadened Professor Thayer's suggestion so as to include oral as well as written declarations and the Act as finally passed did not contain the provision that the declaration had to be mande "in writing". This Statute has been in force in Massachusetts since 1898. In 1927 a distinguished Committee consisting of Edmund M. Morgan, Zechariah Chafee, Jr., Ralph W. Gifford, Edward W. Hinton, Charles M. Hough, William A. Johnson, Edson .R Sunderland and John H. Wigmore made various proposals for reform of the law of evidence (The Law of Evidence: Some Proposals for Its Reform). Amongst other things this Committee recommended was that there should be enacted "a Statute along the lines of the Massachusetts hearsay act but rendering admissible the declarations of insane as well as deceased persons".

At the meeting of the American Bar Association held in Cleveland in July 1938 a Committee of some forty-five eminent judges, practitioners and professors, under the chairmanship of Mr. Wigmore, dealt with improvements to be made in the law of evidence, and this Committee again recommended the enactment of a law similar to the Massachusetts statute. The Committee reported that they had sent out a questionnaire to Massachusetts lawyers seeking answers from those who had had experience with the statute, of those who had used it (or had it used against them). In from 100 to 500 cases, the answers were unanimous that it did more good than harm; of those who had had less experience with it some 80% favoured it as beneficent; while of those who had no experience with it some two-thirds favoured it. It therefore appears that the opposing opinions were in inverse relation to experience with it. The Committee, itself, with one exception, recommended the adoption of the Massachusetts Statute and their report stated that it has "given rise to virtually no technical trouble" and "stands today as endorsed by forty years of trial experience".

Again a Committee appointed to advise the United States Supreme Court on Rules for Civil Procedure recommended that the law should go even further than the provisions of the Massachusetts statute. It was recognized that it was unsatis-

factory to limit the admissibility of hearsay declarations to those made by persons who are unavailable because they are dead, and it was determined to add insanity or other good reasons for absence to the grounds upon which hearsay evidence could be admitted and the rule as recommended by this Committee is as follows :

> "STATEMENTS OR DECLARATIONS OF PERSONS UNAVAILABLE AS WITNESSES. No statement or declaration, whether written or oral, shall be excluded from evidence as hearsay in any proceeding under these rules if the court shall find (1) that the declarant is dead or insane or that after due diligence the party offering such testimony is unable to produce the declarant in court and is unable to take his deposition and (2) that such statement or declaration was made in good faith before the commencement of the proceeding and on the declarant's personal knowledge."[9]

This rule as recommended bears a striking resemblance to the provisions of the Evidence Act 1938, save that the proposed Federal Rule has no requirement that the statement be "in a document".

There is, therefore, ample precedent for the law of hearsay being so altered that oral as well as written statements are admitted where they have been made by a person who is dead or has become insane. It is, therefore, suggested that the Evidence Act 1938 be adopted by the Provinces of Canada but that in doing so its provisions be widened so as to include oral statements as above suggested. Only by so doing will the law be placed on a sound footing.

S. J. HELMAN.

Calgary.

[9] See 47 Yale L.J. at p. 194.