

# COMMON LAW RULES OF EVIDENCE AS APPLIED IN CRIMINAL MATTERS†

Joseph Cohen, Q.C.\*

The subject matter of this brief essay is the distinction between the common law rules of evidence as applied in criminal cases and the rules of evidence applicable to civil matters in the Province of Quebec. That there are distinctions in the rules of evidence is obvious to anyone who has ever practised in the criminal courts. So many circumstances arise during the course of trial insofar as evidence is concerned where the solution cannot be found—and must not be found—in the Code of Civil Procedure, that we must, perforce, go to the common law. One very important example of this is the rule with respect to cross-examination, and I need hardly remind civilians that in civil matters they are restricted in their cross-examination to the facts referred to in the examination-in-chief.<sup>1</sup> Now, insofar as criminal law is concerned, this rule does not apply. In criminal matters, an attorney may cross-examine a witness on any subject that appertains to the case, regardless of whether or not the subject was raised in the examination-in-chief. This was not always so, but the point is now settled. For example, less than a year ago, in the case of *R. v. Bordeleau*,<sup>2</sup> Mr. Justice St. Jacques, referring to the cross-examination of defence witnesses by the crown prosecutor, said this:

“Appellant testified; he gave his version of what happened the day his wife was killed. In cross-examination, the crown had, no doubt, the right to put questions that did not arise directly from the examination-in-chief, provided that the facts were related, directly or indirectly, to the principal fact in the charge.”

In that particular case, the Court of Appeal found that the cross-examination had gone even beyond that point. I cite the case because it is the latest one in which the Court of Appeal laid down, in clear and unequivocal language, that in the cross-examination of a witness in a criminal trial one is not tied to the examination-in-chief.

How important is this rule in criminal matters! In a civil case counsel is at liberty to call as his witness a person subpoenaed by the opposite party or even the opponent himself. But in criminal matters, in virtue of s. 9 of The Canada

---

†Revised Text of a Lecture Delivered at the 1956 Bar Extension Lectures at McGill University.

\*Joseph Cohen, Q.C., of the Bar of Montreal; Lecturer in Criminal Law, McGill University.

<sup>1</sup>Art. 40, Code of Civil Procedure: “When a party has ceased examining a witness he has produced, the opposite party may cross-examine such witness in every shape *upon the facts referred to in the examination-in-chief*; or he may require an entry to be made of his declining to cross-examine.” (Italics added).

<sup>2</sup>(1955), 24 C.R. 181.

Evidence Act,<sup>3</sup> a party producing a witness is not allowed to impeach his credit by general evidence of bad character—and this quite apart from the fact that the Crown cannot, of course, call the accused as a witness. Therefore, if counsel did not have the right to try to impugn the testimony given by a witness during his cross-examination, it can easily be seen how his hands would be tied, because it is part and parcel of his duty—when the circumstances permit—to try to impugn the testimony of witnesses against him.

Another distinction to which I would want to draw your attention is the evidence of what is called “recent complaints”. In sex cases, the complaint of the victim made to someone, anyone, immediately after the act complained of, is admissible into evidence. It is not admissible as proof of the veracity of the victim’s story, but rather to show the consistency of the story told by the complainant. It may be used to disprove a defence of consent, and an interesting case on this point is *R. v. Elliott*.<sup>4</sup> But in practice, when evidence of this nature is made before a jury, then notwithstanding the best efforts of the trial judge to make that very fine distinction, it becomes one of the most dangerous types of evidence that can be admitted because one can well imagine the effect which it will have on the minds of the jury. And yet it is perfectly admissible under the rules of the common law. I need hardly say that in civil law this evidence would be inadmissible as being pure hearsay.

Another dangerous type of evidence which we meet in criminal cases is evidence of similar acts, or, as it is sometimes called, similar facts. It is obvious to anyone who has but the slightest notion of criminal law that the prosecution has not the right to prove derogatory acts committed by the accused on previous occasions and then ask the jury to infer that because the accused had committed those acts he is probably also guilty of the offence with which he stands charged. Yet similar acts are admissible under certain circumstances, chief among them the attempt to negative a defence of accident, or lack of intent, or, if you will, lack of guilty knowledge. The theory is that if the accused has done the same sort of thing on a previous occasion, he cannot now raise any of these defences with any degree of success.

The point is well illustrated in *R. v. Brunet*,<sup>5</sup> a Quebec case which went to the Supreme Court of Canada. In this case, the accused was a doctor who was charged with using instruments in order to bring about an abortion. He did not deny that he had treated the woman, but he pretended that he had treated her

---

<sup>3</sup>“9. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.”

<sup>4</sup>(1928), 49 C.C.C. 302.

<sup>5</sup>(1918), 30 C.C.C. 16.

for some innocuous malady. In other words, his was a defence of innocent purpose. The court held, however, that the Crown, having been met by this defence, was entitled to show that on previous occasions the accused had committed similar acts. I might add that in such cases the crown would be entitled to tender evidence not only of previous convictions, but also of those previous acts by the accused which did not form the basis of a criminal charge. Clearly, this is a rule not applicable in civil law.

In criminal law, the evidence of an accomplice—the evidence of a witness *tainted* because of his connection with the crime—stands in a different light from the testimony of the ordinary witness, and there is no rule stronger in criminal law than that laid down in *R. v. Baskerville*,<sup>6</sup> which makes it imperative that in every case where the testimony of an accomplice is offered the trial judge must explain to the jury the peculiar situation which this type of testimony occupies. Moreover, he must explain to the jury who, in law, can be considered an accomplice. He must also warn them—and this is supported by a number of judgments of the Supreme Court<sup>7</sup>—that the testimony of an accomplice is always dangerous, and that it is desirable that they should seek corroboration of such testimony before convicting. But, having given this warning to the jury, the trial judge must also tell them that they are free to accept this testimony even if uncorroborated. Is there such a rule under the civil law? I know of none. I understand that there is such a thing as the credibility of witnesses, and that a judge sitting in a civil court will be less inclined to believe the testimony of an accomplice than he would the testimony of a disinterested witness. But I know of no rule in the civil law which would require a judge to warn the jury that the testimony of an accomplice is always dangerous and that it is better to search for corroboration.

Let me consider another feature of evidence. We have in criminal law a presumption that he who is found with goods recently stolen can be found guilty of the theft or possession of these goods *unless he can give a reasonable explanation as to how they came into his possession*. In other words, the common law creates a rebuttable presumption, and the leading case on that point is *R. v. Schama & Abramovitch*.<sup>8</sup> This decision has been followed consistently in Canadian courts, most notably in *R. v. Ungaro*,<sup>9</sup> a Supreme Court judgment. In civil law there is no analogous presumption.

Another rule of the common law is the admissibility of certain *ante-mortem* declarations in cases of murder and manslaughter and, although the point has not yet been decided, I would be inclined to believe that this rule would also

---

<sup>6</sup>[1916] 2 K.B. 658.

<sup>7</sup>*E.g. Vigeant v. The King* (1930), 54 C.C.C. 301, and *Boulianne v. The King* (1931), 56 C.C.C. 338.

<sup>8</sup>(1914), 11 Cr. App. Rep. 45.

<sup>9</sup>(1950), 9 C.R. 328; see also *Richler v. The King* (1939), 72 C.C.C. 399, and *R. v. Rozolinsky* (1946), 1 C.R. 89.

apply to the new offence of causing death by criminal negligence. The rule provides that the declaration made by a dying person is acceptable if the victim is on the point of death and has given up all hope of survival. Under such circumstances, the law presumes that a person will tell the truth, and his testimony, though unsworn, will have the same effect as evidence given under oath. If that person actually dies, then his declaration, made to a third person such as a policeman, a nurse or a doctor, despite the fact that it is hearsay and that it was made in the absence of the accused, will be admitted into evidence.<sup>10</sup>

It may be well at this point to consider the question of privilege. The Statutes of Quebec create a privilege for a physician,<sup>11</sup> so that, without the consent of his patient, he cannot be forced to testify about facts which came to his knowledge in a professional capacity. Not so under the common law, where the physician has no privilege. Indeed, the only person who does have a privilege under the common law—and therefore in criminal matters—is a lawyer. And even here, the privilege will only subside so long as the matter under discussion is for a lawful purpose.

And here there is a most peculiar anomaly. The priest or minister has under the Code of Civil Procedure a privilege—and he should have a privilege; because if the lawyer has a privilege, then, surely, the priest, who has a much closer and higher relationship with his communicant than that between client and solicitor, should also have a privilege. In civil matters this is recognized by article 332 C.C.P., which, *inter alia*, also provides for the privilege of the lawyer.<sup>12</sup> But in the common law—and this opinion is supported by an overwhelming majority of the jurisprudence—there is no privilege, and I can find only one English case which enunciated the opposite view.<sup>13</sup> In the Province of Quebec, as in the rest of Canada, the religious adviser has no privilege, though in a number of cases, particularly in Ontario, the judges always found a way to preserve the confidence of this relationship without stultifying the law on this point.

One can easily see some of the great distinctions which exist between the civil law and the criminal law, not only on the point of privilege, but also on a

---

<sup>10</sup>See for example *Chapdelaine v. King* (1934), 63 C.C.C. 5.

<sup>11</sup>R.S.Q., 1941, c. 264, s. 60(2); a similar privilege is created for the notary: R.S.Q. 1941, c. 263, s. 8.

<sup>12</sup>Art. 332, Code of Civil Procedure: "He [a witness] cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal adviser, or as an officer of State where public policy is concerned."

<sup>13</sup>(1953), 6 Cox C.C. 219; but see the opinion of Best, C.J., in *Broad v. Pitt*, where the learned Chief Justice made this remark: "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; if he chooses to disclose them, I shall receive them". A similar opinion, also *obiter*, is attributed to Lord Kenyon, C.J., who reportedly said in *DuBarre v. Livette* (1791), that he would pause before admitting the evidence of a clergyman concerning statements made to him in his professional capacity. Both cases are cited by Joy, *On the Admissibility of Confessions and Challenge of Jurors in Criminal Cases in England and Ireland* (1843).

good many other points. I have insisted on these because of a very peculiar section in The Canada Evidence Act.

There is no doubt that The Canada Evidence Act applies to criminal matters, and s. 2 says so distinctly.<sup>14</sup> But then one finds s. 36 which gives rise to a great deal of controversy in our jurisprudence. It reads as follows:

"In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings."

Now, if this section means exactly what it says, then a reasonable question occurs: Why is it necessary to resort to the common law to find the answers to such points which are not specifically covered by The Canada Evidence Act? For instance, why not apply the provincial rules of cross-examination? Or why does the priest or minister not have a privilege?

Crankshaw, in his 5th Edition, says this:<sup>15</sup>

". . . [it] will be seen that the above section, 35, [now 36], expressly provides that in criminal cases the laws of evidence in force in the province in which the proceedings are taken 'shall, subject to the provisions of this and other acts of the Parliament of Canada, apply to such proceedings.' So that the English rule—will not apply to criminal proceedings in a province whose laws of evidence,—as is the case in the province of Quebec—restrict a witness's cross-examination to the facts referred to in his examination-in-chief."

But in his 6th Edition, Crankshaw changed his mind, as one finds the following remarks:<sup>16</sup>

"What is the meaning of the words: '*the laws of evidence in force in the province in which such proceedings are taken*', as far as matters in the Province of Quebec are concerned? When the Canada Evidence Act was enacted, the laws of England as to proof in criminal matters were in force in Quebec; and the better opinion seems to be that such English laws are in force in Quebec in accordance with the meaning of the above section 35; and that the above English rules as to cross-examination consequently apply in Quebec."

The editors of Crankshaw were not alone in changing their opinion, and a number of authors hold contradictory views.<sup>17</sup> Let us therefore examine one or two of the cases which have dealt with the point. In *Parent v. The King*,<sup>18</sup> a case which dealt with the right of the Crown to make certain rebuttal evidence which admittedly could only be made if the common law rules applied, Mr. Justice Marchand, who is a distinguished jurist and whose opinion is entitled to respect, said this:<sup>19</sup>

---

<sup>14</sup>"2. This Part applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."

<sup>15</sup>At p. 1330.

<sup>16</sup>At p. 1507.

<sup>17</sup>*E.g.* Charles Langelier, *La Procédure Criminelle*, para. 674, favours the application of art. 340 C.C.P. *Per contra*, Sir François Langelier, *De La Preuve*, para. 880. and Fortier, J., at (1934-35), 13 *Revue du Droit* 321.

<sup>18</sup>(1947), 4 C.R. 127.

<sup>19</sup>At p. 143.

"...I cannot come to any other conclusion than to admit for the present case the authority of the laws of evidence of the province of Quebec, for everything on the subject of furnishing evidence that is not regulated by the laws of Canada. In the provinces where it is the regular law of procedure, the common law of England may well govern the furnishing of evidence in the trials that our Canada Evidence Act does not regulate, but it cannot do so in our province, where recourse must be had to our own law of furnishing evidence."

And in *The King v. Long*<sup>20</sup> it was held by the Quebec Court of Appeal that a section of The Canada Evidence Act then in force which required ten days' notice of intention to prove certain official records by certified extracts therefrom, does not apply to a criminal trial in the Province of Quebec, as no such notice is required by the Code of Civil Procedure.

In order to make a confusing situation even more difficult, consider the case of *Holmes et al v. The King*,<sup>21</sup> also a judgment of our own Court of Appeal, with Marchand J., a member of the bench. This case hinged on the admissibility of evidence of similar acts—a type of evidence which derives its authority solely from the common law. The court, by a four to one decision, maintained the appeal on the ground that although proof of similar acts is admissible in virtue of the common law in certain cases, this was not one of them. But Mr. Justice Marchand, in a lone dissent, disagreed and ruled in favour of accepting the evidence of similar acts, and hence the dismissal of the appeal. The only conclusion which one can draw from this opinion is that the learned judge had a change of mind on this point since giving his judgment in the *Parent* case two years earlier.

Judge Irénée Lagarde, in an article in *La Revue du Barreau*,<sup>22</sup> is of the opinion, which I share, that the rules of the common law apply in the Province of Quebec, and this notwithstanding the provisions of s. 36 of The Canada Evidence Act.

In this connection, I think it is important that one should bear in mind that Canada got its first Criminal Code in 1892, and its first Canada Evidence Act a year later. And I wish to believe that what parliament intended at the time was to incorporate as evidence in criminal matters those provincial rules of evidence which applied in 1893. It is my contention that the confusion is due to the fact that in subsequent revisions of The Canada Evidence Act our legislators left the wording as it was—and as it applied—in 1893. To verify this contention, one must consider some historical facts with reference to the introduction of criminal law in the province of Quebec.

After the Treaty of Paris, in October 1763, King George III recommended to what had been French North America the introduction of the English civil and criminal law. His opinion did not entirely prevail, because in 1774 the Quebec Act was passed. However, s. 11 of the Act brought into force, insofar

---

<sup>20</sup>(1902), 5 C.C.C. 493.

<sup>21</sup>(1949), 7 C.R. 323.

<sup>22</sup>(1950), 10 R. du B. 171.

as criminal law is concerned, the common law of England as it existed at that time. Let us look at this section:

"And whereas the Certainty and Lenity of the Criminal Law of England, and the Benefits and Advantages resulting from the use of it, have been sensibly felt by Inhabitants, from an Experience of more than Nine Years, during which it has been uniformly administered; be it therefore further enacted by the Authority aforesaid. That the same shall continue to be administered, and shall be observed as Law in the Province of Quebec, as well in the Description and Quality of the Offence as in the Method of Prosecution and Trial."

So here you have a solemn agreement, whereby the province of Quebec was assured the French civil law on the one hand, and the criminal law of England that existed at the time, on the other. This was followed in 1840 by the Union Act,<sup>23</sup> which provided

"... that all laws, statutes, and ordinances which at the time of the union of the Upper and Lower Canada, shall be in force within the said Province or either of them or any part of the said Provinces respectively, shall remain and continue to be of the same force, authority, and effect in those parts of the Province of Canada which now constitute the said Provinces respectively as if this Act had not been made, and as if the said two Provinces had not been united as aforesaid, except in so far as the same are repealed or varied by this Act, or in so far as the same shall or may hereafter by virtue and under the authority of this Act be repealed or varied by any Act or Acts of the Legislature of the Province of Canada."

Upper Canada adopted the criminal law of England as it stood on September 7, 1792, subject to any alteration.<sup>24</sup> But Quebec was satisfied to administer its criminal law on the common law rules. We now come to the British North America Act, 1867, and it is of course known to all that sub-section 27 of section 91 gives exclusive jurisdiction in criminal matters, save for the administration of criminal law, to the central government. But we must also consider section 129, which reads as follows:

"Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act."

It follows that at Confederation, the criminal law, both substantive and procedural, was that which existed in the provinces prior to the coming into force of the B.N.A. Act, and while it is true that the federal government received exclusive jurisdiction in criminal matters, it was not until 1892 that our legislators at Ottawa exercised this right by the adoption of a Criminal Code. But from 1867 until that time the criminal law which was administered in the province of Quebec was the unwritten common law of England. And I would

<sup>23</sup> 3 & 4 Vic., c. 35.

<sup>24</sup> 40 Geo. III, c. 1, s. 1.

be prepared to go so far as to say that even if there had been any provincial statutes dealing with criminal law in force at that time, they would have been incompatible after 1892.

I hope that this brief historical review will show that when one pleads in our criminal courts one must approach cases in the light of those rules of evidence which are applicable to criminal matters and that one must, temporarily at least, disregard the provisions of the Quebec Code of Civil Procedure, with which we may all be more familiar.