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THE RULE IN *HOLLINGTON* v. *HEWTHORN*

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TABLE OF CONTENTS

		PAGE NO.
I.	INTRODUCTION	1
II.	SHOULD THE RULE BE CHANGED?.	5
III.	EVIDENTIARY EFFECT OF CONVICTION	11
	1. In General	11
	2. Defamation Actions	14
IV.	KINDS OF OFFENCES.	14
V.	ADMISSIBILITY OF CIVIL JUDGMENTS	16
VI.	SUMMARY OF RECOMMENDATIONS	20
VII.	ACKNOWLEDGEMENTS	21
APPENDIX A		22
APPENDIX B		28

THE RULE IN HOLLINGTON v. HEWTHORN

I
INTRODUCTION

This rule says that evidence of a criminal conviction is not admissible in subsequent civil proceedings to prove the facts on which the conviction is founded, where those facts are an issue in the civil proceedings.

Hollington v. *Hewthorn*, [1943] K.B. 587 was an action for damages arising out of a motor vehicle collision. The driver of the plaintiff's car had died. The defendant had been convicted of driving without due care and attention in connection with the same collision. Plaintiff's counsel tendered the conviction as *prima facie* evidence of the defendant's negligent driving. Lord Goddard, speaking for the Court of Appeal and upholding the trial judgment, held that the conviction is an opinion, and opinion is not relevant. Only the best evidence is admissible. The conviction is *res inter alios acta*, which is another way of saying it is not relevant. The judgment says that if a conviction were admitted as *prima facie* evidence an acquittal should be admitted as well. (We note here that a plea of guilty has always been admissible as an admission.)

The Court of Appeal specifically disapproved *Re Crippen*, [1911] P. 108. In that case Crippen had been convicted of his wife's murder. The question was whether his personal representative should be passed over on a grant of letters of administration to the wife's estate. In *Crippen* evidence of the conviction was admitted. The court in *Hollington* also rejected *Partington* v. *Partington*, [1925] P. 34. That case did not deal with admission of a conviction but of a previous divorce decree in which the petitioner in the present case had

been found guilty of adultery as a co-respondent. The previous decree was admitted. The third case that Hollington rejected was O'Toole v. O'Toole (1926), 42 T.L.R. 245. In that case the respondent in a divorce petition had been convicted of perjury in swearing he had not had connection with a certain woman. The conviction was admitted.

There has been widespread criticism of the rule. The English Court of Appeal expressed its disapproval in Barclay's Bank v. Cole, [1966] 3 All E.R. 948. In that case a convicted bank robber sued the bank for the return of the stolen money and he denied the robbery. Critics of the rule include the late Dean Wright (1943), 21 Can. Bar Rev. 653; Professor Goodhart (1943), 59 L.Q.R. 299; Professor Cowen in Cowen and Carter, Essays on the Law of Evidence (1956), c. vi; Professor Cross, Evidence, 3 ed. (1967) at 373-379.

In New Zealand the Court of Appeal held in Jorgensen v. News Media, [1969] N.Z.L.R. 961 that the rule was not applicable in New Zealand, at least as applied to that case. There a person convicted of murder brought action for libel against a newspaper for describing him as a murderer. Evidence of the conviction was admitted in support of a plea of justification.

The cases cited above illustrate the types of action in which the question of admissibility of a conviction has arisen. Another example is an action on a bill of exchange in which the defense is forgery and the defendant tenders a certificate of conviction for the forgery. The conviction is inadmissible (Castrique v. Imrie (1870), L.R. 4 H.L. 414 at 434: dictum of Blackburn J.).

In Canada there are cases applying the rule and others ignoring it. Long before Hollington the question had arisen in an Ontario Case, Lundy v. Lundy (1895), 24 S.C.R. 650. A devisee of land had been found guilty of manslaughter in connection with the death of the testator. The certificate of conviction was admitted without any discussion of its admissibility.

On the other hand there is a case from Quebec, La Fonciere Compagnie d'Assurance v. Perras, [1943] S.C.R. 165, decided after the trial judgment in Hollington and before the Court of Appeal judgment. In Perras a car driver had been found guilty of causing grievous bodily harm. In an action by passengers against the driver's insurer, the defendant tendered proof of the conviction for the purpose of escaping liability. The defendant argued not only that the conviction was admissible but that the question of the dangerous driving was res judicata. The Supreme Court held that it was not "chose jugée" under the Civil Code. The principal judgment seems to assume that if the conviction is not "chose jugée" it is not admissible at all. It does not specifically consider the possibility that the conviction might be admissible even though not conclusive. The judgment refers to the danger of admitting evidence of a conviction before a jury, where the simple fact of the conviction might exercise on the verdict an influence that it should not have.

Mr. Justice Davis recognized the difference between admissibility and conclusive effect.

> If the record of conviction in the Magistrates' court was admissible at all . . . , it would only be presumptive evidence of the commission of a crime . . . , and the evidence before us establishes that the driver's conduct was not of a criminal nature.

In provincial courts, there is no consistent pattern. In Saskatchewan the court admitted a certificate of conviction in a case where the facts were basically like those in Lundy and Crippen (Re Noble, [1927] 1 W.W.R. 938). Indeed in another Saskatchewan case the court admitted a certificate showing the beneficiary had been acquitted (Re Emele, [1941] 4 D.L.R. 197).

In British Columbia the case of Secretary of State v. Qwon, [1943] 4 D.L.R. 704 was decided immediately after Hollington, but that case was not available to the court. Qwon had been convicted of operating a bawdy house and the landlord tendered Qwon's conviction to show breach of a covenant not to commit a nuisance. The court felt that the recently-decided case of Perras weakened Crippen or at least that Crippen was confined to the case where a criminal seeks to recover the fruits of his crime.

In Nova Scotia a pre-Hollington case in Shaw v. Glen Falls Ins. Co., [1938] 1 D.L.R. 502. The action was on an insurance policy against theft. The plaintiff's car had been driven and wrecked by another person who had later been convicted of theft of the car. The full court applied the dictum in Castrique v. Imrie (mentioned above) and rejected the evidence. The court thought that Crippen was a special class of case.

A post-Hollington Nova Scotia case is Manuel v. Manuel (1956), 1 D.L.R. (2d) 429 where a wife petitioning for divorce tendered a conviction of her husband for rape. The court applied Hollington. Then in G. v. G. (1971), 16 D.L.R. (3d) 107, the facts were similar save that the conviction had been for sodomy. Chief Justice Cowan accepted Hollington but said:

> I agree with the view of [Professor Julien] Payne . . . that legislation of the kind adopted in the United Kingdom and in Australia is desirable in this province. The certificate or other evidence of a conviction should be admissible in evidence but it should, perhaps, not be conclusive evidence of the commission of the offence.

(Professor Payne's article cites the Saskatchewan Evidence Act, R.S.S. 1965, c. 80. Section 27, enacted in 1962, makes admissible as _prima facie_ evidence in matrimonial causes, a certificate of conviction for rape and other specified sexual offences.)

In Manitoba, Chief Justice Williams held in _Kantyluk_ v. _Graham_, [1948] 3 D.L.R. 464 that in an action against the vendor of a car for beach of condition (faulty brakes) the plaintiff could not tender a certificate showing that the vendor had been convicted of operating the car with faulty brakes. He cited _Perras_.

II

SHOULD THE RULE BE CHANGED?

The strongest argument against change is that the trier of fact in the civil action may give to the conviction more weight than it deserves. The risk is particularly great in civil jury trials. One article in support of abolition says:

> . . . the judge should warn the jury of the temptation to regard, and the dangers of regarding, the conviction or finding as conclusive evidence of the facts on which it is based.
>
> (Cowen and Carter, _Essays on the Law of Evidence_, p. 204.)

Another category of case in which there is a risk that undue weight will be given to the conviction is that of traffic offences under provincial law. The person charged may not think it worthwhile to defend or at least to prepare a proper defence. It would be wrong if the conviction were to determine the result of later civil proceedings. Another risk is that the issues may be different, although they arose out of the same event. For example, a person may have been guilty of a traffic offence and yet his wrongful conduct might not have been the cause, or at least the sole cause of the plaintiff's damage.

The danger can be illustrated by Wauchope v. Mordecai, [1970] 1 All E.R. 417. This case was decided after England had abrogated the rule and placed on the convicted person the onus of proving that he had not committed the offence. The defendant's conviction was for opening the door of his car so as to cause injury or danger to another person. The plaintiff on his bicycle had run into the door as the defendant opened it. The trial judge dismissed the action, but the Court of Appeal, examining the conviction and the onus on the defendant to disprove it, entered judgment for the plaintiff. This seems to give an extraordinarily strong effect to admissibility.

Another argument against change is that it will produce a new element in charges made under federal and provincial law. The criminal hearing will be colored by the possibility that a conviction may result in heavy damages.

On the other hand we agree with the basic criticism of the rule. The convicted person has not only been present,

but has all the safeguards that the criminal law provides, including the presumption of innocence. As long as the issues are the same, then the fact of the conviction is logically relevant in the civil proceedings. This is obviously so in cases where a person convicted of murder tries to claim benefits under the will of his victim or where he brings action for defamation against someone who has described him as a murderer.

In England the rule was abolished by the Civil Evidence Act, 1968, and in South Australia by an amendment to the Evidence Act in 1945. In the United States, the Model Code of Evidence (1942) abolished it; also the Uniform Rules of Evidence (1953); and the Rules of Evidence for United States Courts and Magistrates (1973). These provisions are all set out in Appendix A in the order listed here.

We note, too, that in New Zealand a report of the Torts and General Law Reform Committee in 1972 recommended repeal of the rule, though only where the original evidence was unavailable. Also in 1972 the Law Reform Committee of Western Australia recommended abrogation of the rule in connection with defamation actions, but recommended no further change, the reason being that the local Evidence Act makes the evidence itself admissible, so there was no need to go further.

We shall now consider several incidental points on which there have been differences either in legislation or in the opinions of those who favour abrogation or modification of the rule.

(1) Should the conviction be admissible when it is based on a plea of guilty as well as when it follows a

plea of not guilty? Cowen and Carter, Essays on the Law of Evidence, would exclude convictions following a plea of guilty.

> A conviction, following a plea of Guilty, should not be so admissible. Such a conviction does not necessarily possess the high probative value which results from the circumstance of proof beyond reasonable doubt of the facts upon which the conviction is based. This inadmissibility *qua* conviction should, however, be without prejudice to admissibility *qua* admission and subject to the rules governing admissions.
>
> (p. 204)

However, none of the provisions of which we are aware makes a distinction between a plea of guilty and one of not guilty, and we think there is no need so to do.

(2) Should the conviction be admissible even though the witnesses are available or should it be restricted to cases where they are unavailable? As we have said, New Zealand's report would confine admissibility to cases where the witnesses are unavailable; and there is an elaborate definition of "unavailable". The English and American provisions with which we are familiar do not make this distinction and we do not favour it.

(3) Should an order of acquittal or dismissal be made admissible? Lord Goddard in Hollington contended that admissibility of convictions would require admissibility of acquittals. We think not. None of the legislation of which we are aware admits evidence of an acquittal. An order of acquittal is not evidence of innocence in the sense that a conviction is evidence of guilt. The acquittal may

be for lack of proof beyond reasonable doubt, and in a civil case this standard of proof is not required. In England the Law Reform Committee that made the recommendations resulting in the 1968 legislation had thought that at least in defamation actions, evidence of the plaintiff's acquittal as well as of his conviction, should be admitted. In introducing the Bill in the House of Lords, the Lord Chancellor (Lord Gardiner) in speaking to section 13 (the defamation section) said:

> The House will observe that Clause 13, unlike the Law Reform Committee's Report, said nothing about acquittals. An acquittal has, as everyone realises, no probative value at all since it is perfectly consistent with the criminal court's having been of the opinion that the accused was probably guilty. The Committee thought, nevertheless, that as a matter of policy nobody should be entitled with impunity to say that an acquitted person was really guilty. My Lords, one sees the force of that. There is something to be said for finality. On the other hand, it could be greatly in the public interest that a rogue lucky enough to have got off should be publicly exposed. There are arguments either way, but the Bill comes down firmly in favour of not giving any effect to an acquittal.
>
> (H. of L. Debates, v. 288, p. 1347, Feb. 8, 1968.)

We agree with Lord Gardiner's statement: and if an acquittal is to be inadmissible in a defamation action, then *a fortiori* should it be inadmissible in other actions.

(4) Can the legislation contain a provision that will help in identifying the events that were the subject matter of the criminal charge with those in the civil action? England has provided that in addition to the certificate of conviction the information, complaint, indictment or charge sheet is admissible (s. 11(2)(b)). We favour such a provision.

(5) Should the legislation be confined to cases where the convicted person or someone privy to him is a party to the civil proceedings? In most cases the convicted person or someone privy to him is a party, but there are instances, e.g., of a forged bill of exchange, where the convicted person may have no connection with any party to the action. We do not think the legislation should be restricted, as it is in South Australia's section 34a (Appendix A).

(6) Should the legislation extend so as to make a prior conviction admissible in subsequent criminal, as well as civil, proceedings? This problem can arise, for example, where a company has been convicted of an offence and then its President is charged with being a party to that offence. The cases of Reg. v. Anisman, [1969] 1 O.R. 397 and Reg. v. Kuhn (1970), 73 W.W.R. 146 (B.C.) show the law is not clear. While it might be desirable to provide for admissibility of the conviction, we think it would be better to deal with that problem separately and not attempt to cover it in legislation making convictions admissible in civil cases.

(7) Should there be a provision to make it clear that the new legislation does not affect existing provisions whereby a conviction is admissible for a specific purpose? England's section 12(3) says that the provision for admissibility shall not prejudice the operation of any other enactment "whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact." We have not examined all the Alberta statutes to see if there is any such provision. The Legal Profession Act provides

for suspension or striking off the roll of a member who has been convicted of an indictable offence (R.S.A. 1970, c. 203, s. 73(1)); and the Alberta Evidence Act says that where a witness denies that he has been convicted, the conviction may be proved (R.S.A. 1970, c. 127, s. 26). We do not think that any conflicts can arise between existing statutes and the proposed legislation, so it is not necessary to have a special saving clause like England's section 12(3).

III
EVIDENTIARY EFFECT OF CONVICTION

1. In General

This is an important question on which there is a wide difference of opinion. Apart from defamation actions, which we will consider separately, the conviction should not be conclusive. This leaves several other alternatives. The conviction could operate to shift to the person who denies the facts behind the conviction, the legal or primary burden of proof. This is the effect of the onus section in the Highways Act, as was decided in Winnipeg Electric Company v. Geel, [1932] A.C. 690. The English Civil Evidence Act, 1968, has the same effect in connection with convictions. Where the conviction is proved against a party "he shall be taken to have committed that offence unless the contrary is proved."

Since the 1968 Act was passed there have been two cases that show that it is hard to discharge the onus of proving the contrary. In Taylor v. Taylor, [1970] 2 All E.R. 609 a wife petitioned for divorce, alleging her husband had committed incest. He had been convicted of that offence. At trial the Commissioner found that incest had not been

committed. The Court of Appeal reproved him for his "cavalier and airy dismissal of the result of the criminal proceedings", and reversed his judgment.

In Stupple v. Royal Insurance Co., [1970] 1 All E.R. 390, affirmed [1970] 3 All E.R. 230, Stupple had been convicted of bank robbery. Part of the proceeds had been found in his home and turned over to the bank. Stupple then sued for the money and the bank counterclaimed for the whole amount of the stolen money. The trial judge reviewed at length the evidence at the criminal trial and the evidence before him. Then, with some misgivings, he held that Stupple had not disproved his guilt. Stupple's appeal failed on the ground that he had not discharged the onus upon him. However there was a difference of opinion between Lord Denning and Buckley L.J. on one point. Lord Denning thought that "the conviction does not merely shift the burden of proof. It is a weighty piece of evidence in itself." Otherwise a convicted person would merely have to deny his guilt and in the absence of other evidence would have discharged his burden. The section makes him prove his innocence on the balance of probability. Buckley L.J. said that no weight is to be given to the conviction as against other evidence adduced. The conviction merely brings the onus section into play. The presumption will give way to evidence establishing the contrary on the balance of probability.

One writer has suggested that although Lord Denning's interpretation of the statute seems to put a heavy onus on the person attacking the conviction, yet in a sense it imposes a lighter burden for it requires him only to show by a preponderance that the conviction is wrong, not that he is in fact innocent (Zuckerman, Note (1971) 87 L.Q.R. 21).

Another article by Miller, Evidence of Convictions in Civil Proceedings (1971), 121 New L.J. Part II 573, 598, 622 contends (1) that Lord Denning is wrong in suggesting the conviction does more than create a presumption that shifts the primary onus, and that the conviction has served its purpose by bringing the presumption into play and has no further function to perform; (2) to rebut the presumption the evidence must go to establish innocence and not merely that the conviction is unsafe or unsatisfactory.

Instead of providing, as England does, that the legal burden of proof is on the convicted person, it would be possible to provide that the conviction is _prima facie_ evidence of the facts leading to the conviction. We do not favour this alternative. The effect of declaring the conviction to be _prima facie_ evidence cannot be described with certainty. Cross in _Evidence_ (pp. 22-23) says that the Latin term is used in two difference senses: it may mean that the evidence _may be_ sufficient, or may mean that it _is_ sufficient, in the absence of further evidence, to decide the issue. We note that it has been removed from many sections in the Criminal Code in which it formerly appeared.

This leaves the last alternative which is the one employed in a number of provisions--that is, simply to say that the conviction "shall be evidence of the commission of that offence" (South Australia) or "evidence tending to prove the fact" (United States Model Code of Evidence).

We have given lengthy consideration to the question whether the better solution is England's or whether it is that of the other provisions set out in Appendix A. On balance we favour the latter. The legislation should simply

make a conviction admissible without specifying the weight to be attached to it.

2. Defamation Actions

We turn now to the special case of an action for defamation. There have been cases where a person convicted of a crime has brought action for defamation by reason of a statement that he had committed that crime. In England one of the persons convicted of participation in the Great Train Robbery brought such an action (Goody v. Odham's Press, [1966] 3 All E.R. 369), and in New Zealand a convicted murderer brought a libel action against a newspaper that had said the plaintiff was a murderer (Jorgensen v. News Media (Auckland) Ltd., [1969] N.Z.L.R. 961). The English Act provides that evidence of conviction is conclusive. It is not open to the convicted person to have the question of his guilt tried over again in the libel action. Thus if the defence is a plea of justification, proof of the conviction is a complete answer. Needless to say it will not be a complete answer if the defendant's statement had gone beyond the facts leading to the conviction, as in Levene v. Roxhan, [1973] 3 All E.R. 683.

IV
KINDS OF OFFENCES

The next question is whether the conviction should be admissible only if it is for an offence against an Act of Parliament as distinct from a provincial offence, or possibly for indictable offences alone. In England, which is a unitary country, there is no distinction in the 1968 legislation as between different types of offence. The

United States federal Rules of Evidence on the other hand, confine admissibility to convictions for offences punishable by imprisonment for more than one year. The reason given in the Rules is this:

> Practical considerations require exclusion of convictions of minor offences, not because the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or non-existent. . . . Hence the rule includes only convictions of felony grade, measured by federal standards.
>
> (p. 129)

We think that the provisions should apply not only to federal offences, but to provincial offences as well. There might be some doubt as to whether a provision in general terms will extend to municipal by-laws. If there is any doubt on this point, the provision should be made clear. The fact that on a minor charge the accused was not represented by counsel, or did not have his evidence available, or did not for economic reasons treat the matter seriously, are all examples of explanations which can be heard by the court and which go to the weight to be given to the conviction.

If, as proposed, the legislation applies to convictions for any offence, then it is not necessary to refer to specific courts. Convictions by judges in Provincial Court (formerly Magistrates) will be included. The legislation should apply to convictions in any court in Canada.

England's Act includes convictions by court-martial (s. 11(2)). We do not think it necessary to include them.

V
ADMISSIBILITY OF CIVIL JUDGMENTS

If a conviction is to be admitted, then should a judgment in a civil case also be admitted where the defendants are the same person? Let us assume that A and B each asserts that C was negligent in connection with a given event, that each is contemplating an action and that their actions will be on exactly the same basis. A sues C and fails because he cannot prove negligence. B is not bound by this finding and may proceed with his own action and it is open to him to prove negligence. An illustration of this situation can be found in two Manitoba cases that arose out of the same airplane accident (*Galer* v. *Wings*, [1938] 3 W.W.R. 481; *Nystedt* v. *Wings*, [1940] 1 W.W.R. 380).

Let us assume now that A's action against C succeeded. B has brought a separate action. Is it open to C to deny negligence and put B to the proof? On the principles governing *res judicata* it is. In *Northwestern Utilities Ltd.* v. *London Guarantee & Accident Co.*, [1936] A.C. 108, the defendant was held liable in an action brought by a large number of persons who had suffered damage in a hotel fire. Two guests of the hotel had not joined in the action but had brought their own suit. Their trial awaited the Privy Council decision. The defendant did not in fact force them to trial save on the issue of damages (*Reade* v. *Northwestern Utilities*, [1938] 1 W.W.R. 647). However we have no doubt that the defendant could have required the plaintiff to prove the negligence over again, and that the judgment in the principal action would not have been admissible. One might argue that the judgment in the first action should be admissible in the second action to prove negligence. We do not propose, however, in this report to make any general recommendation to this effect.

There are, however, two types of civil litigation that deserve special consideration: (a) matrimonial proceedings and (b) filiation proceedings. In connection with the first, let us assume that A has brought divorce proceedings against Mrs. A alleging adultery with B. It will be remembered that under Alberta's Rules of Court B must be notified and may dispute the allegation (Rule 563(5)). The court finds the adultery proved and grants the decree nisi. Let us next assume that Mrs. B brings divorce proceedings against B alleging the same adultery with Mrs. A. In Partington v. Partington the court admitted the first decree but Hollington disapproved that decision.

In England the Law Reform Commission recommended against admission of a finding of culpability in another civil action, but recommended an exception in connection with a finding of adultery in matrimonial proceedings. The reasons given were the existence of a statutory duty on the court to satisfy itself of valid grounds for the divorce, and the fact that an alleged adulterer may defend. The English Act admits the finding of adultery made in a matrimonial cause by a High Court or a county court, but not in a Magistrate's Court (s. 12(1) and (5)).[1]

It is relevant now to examine the decisions in provincial courts on the question of admissibility of the first decree.

The courts in four Canadian provinces have applied Hollington in this situation.

British Columbia

Lingor v. Lingor (1954), 13 W.W.R. (N.S.) 446.
Meshwa v. Meshwa (1970), 75 W.W.R. 459.

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[1]South Australia's provision to the same effect is set out in Appendix B (s. 34b).

Saskatchewan

Stevenson v. Stevenson (1956), 19 W.W.R. 90.

Manitoba

Campbell v. Campbell, [1944] 1 W.W.R. 349.

In this case the original finding of adultery had been made, not in a divorce action, but in proceedings in Juvenile Court.

Nova Scotia

Manuel v. Manuel (1956), 1 D.L.R. (2d) 430.

The statement here is dictum for the question was whether a conviction for rape was admissible in divorce proceedings.

G. v. G. (1971), 16 D.L.R. (3d) 107.

Here the question was as to a conviction for sodomy, but one can infer that Cowan C.J. accepted the proposition that Hollington would apply to a finding of adultery in the first divorce decree, for he agreed with Professor Payne's article, The Application of the Rule in Hollington v. Hewthorn in Matrimonial Proceedings (1969), 17 Chitty's L.J. 8. That article favours legislation like England's 1968 Act.

In Ontario the position is different. Before Hollington the Court of Appeal in Howe v. Howe, [1937] 1 D.L.R. 508 held the original decree admissible. Henderson J.A. dissented,

following Richardson v. Richardson, [1923] A.C. 1, where Lord Birkenhead held that a finding might be made that A had committed adultery with B without the necessary consequence that B is to be found guilty of adultery with A.

Since the decision in Hollington, Ontario courts have either ignored it as in Thompson v. Thompson, [1948] 2 D.L.R. 798 or distinguished it as in Love v. Love (1969), 2 D.L.R. (3d) 273.

There is no reported case from Alberta and we are not aware of any decision on admissibility of the previous divorce decree in the second divorce proceedings. England has made the original decree admissible for the purpose of proving adultery. We have had some difference of opinion as to whether to recommend a similar provision for Alberta, assuming, as we do, that it would be valid in the absence of specific provision in the Canada Evidence Act. We have decided not to make a special exception of this type of matrimonial proceeding.

The next question is whether an exception should be made in connection with a finding in filiation proceedings that a specified person is father of the child. The authority for these proceedings is the Maintenance and Recovery Act, R.S.A. 1970, c. 223. They are civil rather than criminal (Re Chalifoux (1974), 47 D.L.R. (3d) 51 (Alta. App. Div.)), though the statute requires corroboration of the mother's evidence as to paternity (s. 19(1)). The hearing is before a District Court judge. Where the judge hearing a complaint is satisfied that the putative father caused the pregnancy of the mother, the judge may make an order declaring him to be the father; and where there are two or more putative

fathers and the judge is unable to determine which one caused the pregnancy, he may declare all of them to be the father (s. 18).

England's Act says a finding that a person has been adjudged to be the father of a child in a filiation proceeding before any court in the United Kingdom is admissible in any civil proceedings for the purpose of proving, where relevant, that he was the father of the child (s. 12(1)). We shall not here recommend a provision like England's. The reason is that we are examining the problem of proof of paternity in our study of the law of illegitimate children. In that connection we expect to make recommendations as to the probative effect of a finding of paternity.

VI
SUMMARY OF RECOMMENDATIONS

We recommend

(1) that evidence of the conviction of any person in a Canadian court for an offence whether federal or provincial be admissible to prove that he committed that offence, whether he was convicted on a plea of guilty or otherwise, and whether or not he is a party to the civil proceeding;

(2) that the contents of the information, complaint, indictment or charge sheet also be admissible;

(3) that in actions of defamation, proof of a subsisting conviction be conclusive

evidence that the convicted person
committed the offence; and that in
all other cases it be simply admissible;

Appendix B contains the recommendations in statutory form.

VII
ACKNOWLEDGEMENTS

We acknowledge with thanks a research paper prepared for the Institute by D. C. McDonald, Esq., who at the time was an Edmonton practitioner and who is now Mr. Justice McDonald of the Trial Division of the Supreme Court of Alberta. We also acknowledge our thanks to a former law student, Thomas Matkin, who assisted Mr. McDonald.

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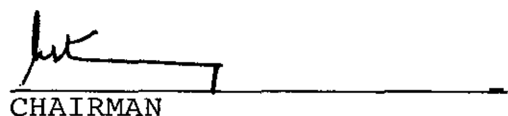
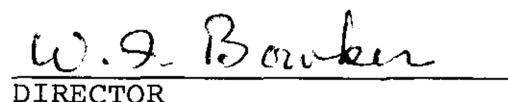
NOTE: Dr. Kreisel is not a lawyer but is a member of the Board of the Institute. He has no responsibility for nor did he participate in the preparation of this Report.

3 February 1975


CHAIRMAN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APPENDIX A

Civil Evidence Act, 1968 (U.K.)

Part II

Miscellaneous and General

Convictions, etc. as evidence in civil proceedings

11. Convictions as evidence in civil proceedings

(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere--

(a) he shall be taken to have committed that offence unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of section 13 of this Act or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (2) above, a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown.

12. Findings of adultery and paternity as evidence in civil proceedings

(1) In any civil proceedings--

(a) the fact that a person has been found guilty of adultery in any matrimonial proceedings; and

(b) the fact that a person has been adjudged to be the father of a child in affiliation proceedings before any court in the United Kingdom,

shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those civil proceedings, that he committed the adultery to which the finding relates or, as the case may be, is (or was) the father of that child, whether or not he offered any defence to the allegation of adultery or paternity and whether or not he is a party to the civil proceedings; but no finding or adjudication other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been found guilty of adultery as mentioned in subsection (1)(a) above or to have been adjudged to be the father of a child as mentioned in subsection (1)(b) above--

(a) he shall be taken to have committed the adultery to which the finding relates or, as the case may be, to be (or have been) the father of that child, unless the contary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court, in the matrimonial or affiliation proceedings in question shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of any enactment whereby a finding of fact in any matrimonial or affiliation proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Subsection (4) of section 11 of this Act shall apply for the purposes of this section as if the reference to subsection (2) were a reference to subsection (2) of this section.

(5) In this section--

"matrimonial proceedings" means any matrimonial cause in the High Court or a county court in England and Wales or in the High Court in Northern Ireland, any consistorial action in Scotland, or any appeal arising out of any such cause or action;

"affiliation proceedings" means, in relation to Scotland, any action of affiliation and aliment;

and in this subsection "consistorial action" does not include an action of aliment only between husband and wife raised in the Court of Session or an action of interim aliment raised in the sheriff court.

13. Conclusiveness of convictions for purposes of defamation actions

(1) In an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that at the time when that issue falls to be determined, that person stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly.

(2) In any such action as aforesaid in which by virtue of this section a person is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which that person was convicted, shall, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, be admissible in evidence for the purpose of identifying those facts.

(3) For the purposes of this section a person shall be taken to stand convicted of an offence if but only if there subsists against him a conviction of that offence by or before a court in the United Kingdom or by a court-martial there or elsewhere.

(4) Subsections (4) to (6) of section 11 of this Act shall apply for the purposes of this section as they apply for the purposes of that section, but as if in the said subsection (4) the reference to subsection (2) were a reference to subsection (2) of this section.

(5) The foregoing provisions of this section shall apply for the purposes of any action begun after the passing of this Act, whenever the cause of

action arose, but shall not apply for the purposes of any action begun before the passing of this Act or any appeal or other proceedings arising out of any such action.

South Australia's Evidence Act (1929-1957)

34a Where a person has been convicted of an offence, and the commission of that offence is in issue or relevant to any issue in a civil proceeding, the conviction shall be evidence of the commission of that offence admissible against the person convicted or those who claim through or under him but not otherwise: Provided that a conviction other than upon information in the Supreme Court shall not be admissible unless it appears to the court that the admission is in the interests of justice.

34b Where in any proceedings in the Supreme Court in its matrimonial causes jurisdiction a person has been found guilty of adultery, the decree or order of the court reciting or based upon that finding shall be admissible in any subsequent proceedings in the Supreme Court in its matrimonial causes jurisdiction as evidence of the adultery as against that person, notwithstanding that the parties to the proceedings in which the finding is tendered are not the same as in the proceedings in which the decree or order was made.

Model Code of Evidence (1942)

Rule 521

Judgments of Conviction

Evidence of a subsisting judgment adjudging a person guilty of a crime or a misdemeanor is admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment.

Uniform Rules of Evidence (1953)

The exceptions to the hearsay rule include the following: Rule 63(20): Evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment.

Rules of Evidence for United States Courts and Magistrates

Effective July 1, 1973

Rule 803

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (22) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

APPENDIX B

Amendment to Evidence Act

Section (1) Where a person has been convicted anywhere in Canada of an offence, and the commission of that offence is relevant to any issue in a civil proceeding, the conviction shall be admissible in evidence for the purpose of proving that he committed that offence, whether he was convicted on a plea of guilty or otherwise and whether or not he is a party to the civil proceeding.

(2) Where the civil proceeding is an action for defamation, the conviction of any person for an offence is conclusive evidence that he committed that offence, and in all other proceedings the trier of fact shall determine the weight to be given to the conviction.

(3) For the purpose of this section, "conviction" means any subsisting conviction, and "offence" means an offence under any law of Canada or of any province or territory of Canada.

(4) Where a conviction is admissible under this section, the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence.