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CREDIBILITY OF WITNESSES: REPUTATION FOR VERACITY

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Evidence of reputation for character may be introduced in a legal proceeding for one of two purposes: either

(a) to discredit the testimony of a witness called by the other side; or

(b) to prove the character of a person where it is a fact in issue, or of an accused who has put his character in issue (either directly or by raising the character of the victim in defence).

This paper is concerned with the former use; the latter is dealt with by Professor Sheppard in his paper on "Character of Parties."

The use of reputation evidence to impeach credibility is governed by the common law. The evidence is admitted as a longstanding exception to the hearsay rule. The attack is made by calling a person or persons with knowledge of the witness's reputation in the locality where he resides or carries on business to give an opinion as to whether or not he is believable on his oath. Little more can be said with assurance, for the details of the scope of the rule are elusive.

The approach I have adopted for consideration of the rule is to begin by asking whether its retention can be justified in modern times. (The Alberta Advisory Committee concluded, no.) If the Task Force takes the view that retention is justified, the next question to be addressed is whether the rule should be preserved in its common law form or whether it should be reduced to statute. (The Alberta group favoured the obscurity of the common law over the possibility of revival of the rule by reason of its embodiment in statute.) The decision that it should be reduced to statute, would necessitate examination of the rule in detail for the purpose of fixing its scope. (The Alberta group is firmly opposed to going this far.) In

the event that the Task Force chooses the legislative route, a number of issues are raised for discussion.

ISSUE #1: SHOULD EVIDENCE OF REPUTATION CONTINUE TO BE ADMISSIBLE TO DISCREDIT THE TESTIMONY OF A WITNESS?

The law governing the reception of reputation evidence for the purpose of impeaching the credibility of a witness is the product of judicial pronouncement and text writings. Modern cases are rare, and the nineteenth century English cases which the few cases decided more recently in that jurisdiction purport to interpret expose both subtle and overt inconsistencies of conceptualization and semantic rendering. In short, the law is riddled with confusion. Moreover, justification for the retention of the rule seems to lie more in its antiquity than in the probative value of the evidence. As Lord Pearce observed in Toohey v. Metropolitan Police Commissioner, [1965] A.C. 595 (H.L.), at 605-6:

> From olden times it has been the practice to allow evidence of bad reputation to discredit a witness's testimony. It is perhaps not very logical and not very useful to allow such evidence founded on hearsay. None of your Lordships and none of the counsel before you could remember being concerned in a case where such evidence was called. But the rule has been sanctified through the centuries in legal examinations and the textbooks and in some rare cases, and it does not create injustice.

In favour of the reception of reputation evidence, it can be argued:

(1) If a witness has a motive for lying, a trait of his character for truthfulness or untruthfulness is of obvious value in determining whether his testimony is true or false (L.R.C.C., at 94).

(2) Reputation evidence is one of the oldest hearsay exceptions and there may still be a necessity for it in some trials (L.R.C.C., at 76).

(3) Statements about reputation are likely to be reliable, being the aggregate opinion and judgment of the community (L.R.C.C., at 76). Or, as Erskine is reported to have defined character in 24 St. Tr. 1079 (cited in argument in R. v. Rowton, Le. & Ca. 520, at 523-4):

> Character is the slow-spreading influence of opinion, arising from the deportment of a man in society. As a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion; that general opinion is allowed to be given in evidence.

Or again (Finch J., in Badger v. Badger, 88 N.Y. 546, 552, quoted in Michelson v. U.S. (1948), 69 S.Ct. 213, at 219):

> [Reputation evidence is] the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect. * * * It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusion.

(4) Reputation evidence helps "to prevent juries from being beguiled by the evidence of witnesses who could be shown to be, through defect of character, wholly unworthy of belief" (Toohey, at 607).

(5) Notwithstanding that reputation evidence is, at one and the same time, opinion evidence based on hearsay as to a trait of a witness's character and as such transgresses three general rules of inadmissibility, both the Ontario Law Reform

Commission and the Law Reform Commission of Canada propose that such evidence should continue to be admissible: the former, in its present form (O.L.R.C., at 200); the latter, insofar as it is relevant and of substantial probative value (L.R.C.C., ss. 5, 62 and 63, and commentary, at 92-95). The Criminal Law Revision Committee (U.K.), 11th Report, 1972 would not disturb the exception as it exists at common law (s. 40(2)(e)). In this, the Committee adhered to the precedent set in the Civil Evidence Act 1968 (U.K.), s. 9(3) and (4)(a). The American Law Institute Model Code of Evidence likewise preserves this form of evidence going to credibility (Rule 106(1)), as do the Uniform Rules of Evidence derived from the Model Code (1953, Rule 20; 1974, Rule 608); the Federal Rules of Evidence (Supreme Court Draft, 1972, Rule 608; 1975, Rule 608); the Draft Vermont Rules of Evidence, 1977 (Rule 608); and the California Evidence Code, 1964-65 (s. 780(e)). Recent reforms and recommendations made in Canada, the United Kingdom and the United States are "uniform" to this extent (although they vary considerably in points of detail) and, putting logic to one side, it might be thought that we ought therefore to abide by them.

Arguments against the reception of reputation evidence to impeach credibility include the following:

(1) The rules regulating proof of reputation are "illogical, unscientific, and anomalous, explainable only as archaic survivals of compurgation or of states of legal development when the jury personally knew the facts on which their verdict was based" (32 C.J.S., Evidence, §433, cited in Michelson, at 218, fn. 5). Indeed, we have so far surpassed those times that today over-publication of information within the community is a ground for changing the venue of a trial.

(2) The rule offends the general principle that direct evidence is to be preferred over indirect evidence in cases of

choice ("Character Evidence" by The Honourable E.P. Hartt, in Studies in Canadian Criminal Evidence, edited by Salhaney and Carter, at 265-6).

(3) The logic of the reliability of reputation evidence is specious in that hearsay is the basis for the exclusion of evidence in most instances (Hartt, at 266).

(4) The more complex and mobile the society, the less opportunity there is for a person to acquire a "reputation for speaking the truth" (O.L.R.C., at 200, citing R. v. F., [1968] 1 O.R. 658).

(5) A witness's reputation for character in everyday affairs does not make for truth or lack of it on this occasion.

(6) Hearing evidence on collateral matters may be both time-consuming and confusing. The rule helps

> ...to prevent the trial of a case becoming clogged with a number of side issues, such as might arise if there could be an investigation of matters which had no relevancee to the issue save in so far as they tended to show the veracity or falsity of the witness who was giving evidence which was relevant to the issue. Many controversies which might thus obliquely throw some light on the issues must in practice be discarded because there is not an infinity of time, money and mental comprehension available to make use of them.

(Toohey, at 607).

(7) Reputation evidence is seldom, if ever, called.

(8) Such evidence may cause great embarrassment to the witness.

ISSUE #2: IF ISSUE #1 IS RESOLVED IN FAVOUR OF THE RETENTION OF REPUTATION EVIDENCE, SHOULD THE RULES GOVERNING ITS RECEPTION BE LEFT TO THE COMMON LAW, OR SHOULD THEY BE EMBODIED IN LEGISLATION?

As indicated above, the resolution of this issue will

depend on whether one takes the position that the use of reputation evidence should be discouraged or encouraged. If it is to be discouraged, the less attention brought to its obsolescent existence, the better. If it is to be encouraged, detailed enunciation in statutory form is required. The Civil Evidence Act, 1968 (U.K.) employs the method of statutory preservation of the rule at common law, and the Criminal Law Revision Committee (U.K.), 11th Report, 1972 recommends the same (s. 40(2)(e)). The Ontario Law Reform Commission would leave the common law completely alone. The American formulations, and the recommendations of the Law Reform Commission of Canada, endorse the enactment of legislation setting out the mode and limits of use of reputation evidence.

ISSUE #3: IF ISSUE #2 IS RESOLVED IN FAVOUR OF LEGISLATION, HOW SHOULD EACH OF THE FOLLOWING QUESTIONS BE ANSWERED?

Laying the Foundation

Where a party is dissatisfied with the answers given in testimony by a witness called by the other side, certain forms of evidence may be introduced for the purpose of attacking that witness's veracity. Evidence of reputation is one of these. (Others include proof of previous convictions, previous inconsistent statements, bias of the witness in favour of the other side, interest and corruption, deficiencies in the witness's sensory or mental perceptions, and lack of opportunity for personal knowledge.) The authorities are not clear whether these forms of evidence are admissible as exceptions to the collateral facts doctrine, or whether they are admissible as concerning non-collateral matters. In the case of reputation

evidence, this raises the question whether the party seeking to introduce reputation evidence must first cross-examine the opponent's witness to credit, or whether, because reputation evidence goes to general credibility, no groundwork need be laid.

> Question #3(1): Must a witness have been cross-examined to credit before evidence of reputation may be called to impeach his credibility?

Qualification of the "reputation witness"

Grant, J.A. described the qualifications required of a reputation witness in obiter in Steinberg v. The King, [1931] 4 D.L.R. 8 (Ont. C.A.). He said (at 36):

> A witness called for [the purpose of giving evidence as to another witness's general reputation for veracity] must be one who has lived in or about the neighbourhood in which the impeached witness has resided or carried on business, and as a general rule such evidence has not been permitted to be given by a witness who merely went to the neighbourhood for the purpose of informing himself as to such reputation.

(The authority for the latter proposition is Mawson v. Hartsink, 4 Esp. N.P. 102.)

The Law Reform Commission of Canada (at 76-7) has pointed out that, "Modern day society is so mobile that people seldom acquire reputations in communities where they live. However, they might, for instance, acquire a reputation as to their character among those they work with." Accordingly, section 31(i) of its draft Code admits, as an exception to the general exclusion of hearsay, "reputation of a person's character

arising before the controversy among those with whom he associates or in the community." Rule 526 of the American Law Institute's Model Code of Evidence, 1942 is to the same effect:

> Whenever a trait of a person's character at a specified time is a material matter, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with whom he then habitually associated in his work or business or otherwise is admissible as tending to prove the truth of the matter reputed.

Both of these sections have to do with proof of reputation for character for whatever purpose--character in issue or credibility. Where a witness's credibility is being attacked, it is submitted that the "material point in time" is when the testimony is given and not some prior point in time such as before the controversy arose. In this instance, it is the belief of the witness on his oath when he gives it which is the subject of challenge. A related section of the Supreme Court Draft of the Federal Rules of Evidence 1972 (Rule 608(b)) permits cross-examination concerning specific instances of the conduct of a witness which are "not remote in time" for impeachment purposes. This wording attests to the element of currency in the credibility situation.

> Question #3(2): Should the basis of knowledge of reputation be expanded from the territorial neighbourhood where the witness resides or does business to embrace his reputation among a body of persons with whom he regularly associates, whether in business, socially or otherwise?
>
> Question #3(3): Should the time of association be fixed, for example, as "not remote in time" or "at the material point in time"?

Basis for the opinion

It is not entirely clear whether the opinion as to the belief on oath must be based on the impeached witness's reputation for good or bad character in general, or whether it must be based on reputation for the trait of veracity in particular. As Lord Pearce noted in Toohey (at 606, referring to Taylor on Evidence, 12th ed., Vol. II, para. 1471): "How far the evidence is confined to veracity alone or may extend to moral turpitude general seems a matter of some doubt."

The trend is to emphasize the specific trait. The earlier American formulations use the language of character for "honesty or veracity or their opposites": American Law Institute Model Code, Rule 106(1); Uniform Rules of Evidence 1953, Rule 22(c); California Evidence Code 1964-65, section 786. More recent versions speak of a trait of character for "truthfulness or untruthfulness": Rule 608 of the Supreme Court Draft of the Federal Rules of Evidence 1972, the Uniform Rules of Evidence 1974, the Federal Rules of Evidence 1975, and the Draft Vermont Rules of Evidence 1977; and section 63 of the Code proposed by the Law Reform Commission of Canada. In the notes apppended to the Supreme Court Draft (at 80-1, crediting McCormick §44), the result is seen "to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive."

As an aside, it is curious to note that the fact that the reputation witness has heard nothing bad about the other may be taken as evidence of good character:

> [N]egative evidence, such as "I never heard anything against the character of the man," is the most cogent evidence of a man's good character and reputation, because a man's character is not talked about till there is

> some fault to be found with it. It is the best evidence of his character that he is not talked about at all; and in that sense such evidence is admissible.

(R. v. Rowton (1865), Le. & Ca. 520, at 536, per Cockburn C.J.) Presumedly, this holds as true for character for the particular trait of veracity as it does for character generally.

A second area of controversy has to do with whether the opinion as to belief on oath offered by the reputation witness must be based on his knowledge of the other's reputation in the community, or whether he may give (or also give) an opinion based on his personal knowledge, or on his reputation and personal knowledge combined. The position in England has been clarified by a trilogy of cases decided in the third quarter of this century: R. v. Gunewardene, [1951] 2 All E.R. 290 (C.A.); Toohey v. Metropolitan Police Commissioner, [1965] A.C. 595 (H.L.), accepting the Gunewardene analysis of the older cases on the topics with which they were concerned; and R. v. Richardson, R. v. Longman, [1969] 1 Q.B. 299 (C.A.) wherein, after reference to the two previous cases, the current legal position is summarized as follows (at 304):

> 1. A witness may be asked whether he has knowledge of the impugned witness's general reputation for veracity and whether (from such knowledge) he would believe the impugned witness's sworn testimony.
>
> 2. The witness called to impeach the credibility of a previous witness may also express his individual opinion (based upon his personal knowledge) as to whether the latter is to be believed upon his oath and is not confined to giving evidence merely of general reputation.
>
> 3. But whether his opinion as to the impugned witness's credibility be based simply upon the latter's general reputation for veracity or upon his personal knowledge, the

> witness cannot be permitted to indicate during his examination-in-chief the particular facts, circumstances or incidents which formed the basis of his opinion, although he may be cross-examined as to them.

(The third point is addressed under the next caption of this paper.)

The interpretation granted the earlier cases by the English Court of Appeal in Gunewardene is open to question. It does not reflect the views of many textwriters, nor apparently of the Ontario Law Reform Commission (at 200) and the Law Reform Commission of Canada (at 95). Moreover the sparse judicial discussion in Canadian case law seems to contemplate opinions based on reputation, rather than personal, knowledge (see, e.g., Steinberg v. The King, op. cit., per Middleton, J.A. (at 34), and per Grant, J.A. (at 36-7)). In sum, the Canadian position is open to doubt.

What should the position be? The Law Reform Commission of Canada claims (at 94-5) that its Code permits proof of a witness's character trait for truthfulness or untruthfulness by any relevant means. This means that "qualified witnesses can give their opinion of the credibility of other witnesses straightforwardly, rather than doing so under the guise of giving evidence of that witness's reputation in the community." The personal opinion of the witness should be admissible in the view of the American Law Institute (Model Code of Evidence 1942, Rules 106, 305, and 401), and under the Uniform Rules of Evidence 1953 (Rules 20 and 46). Both opinion and reputation evidence are admissible under Rule 608 of the Supreme Court Draft of the Federal Rules of Evidence 1972, the Uniform

Rules of Evidence 1974, the Federal Rules of Evidence 1975, and the Draft Vermont Rules of Evidence 1977. The commentary to the Supreme Court Draft explains (at 81):

> While modern practice has purported to exclude opinion, witnesses who testify to reputation seem in fact often to be giving their opinions, disguised somewhat misleadingly as reputation. ...And even under the modern practice, a common relaxation has allowed inquiry as to whether the witnesses would believe the principal witness under oath.

The adoption of this view raises a question as to the impugning witness's qualifications to give a personal opinion of the other. It suggests that occasion for intimate personal knowledge may be more pertinent as a qualification than knowledge of reputation through group association. Reception of such evidence belies the traditional justification for reputation evidence which emphasizes the reliability of the collective view of the community.

> Question #3(4): Should the evidence be of reputation for good or bad character generally or for the trait of veracity in particular?
>
> Question #3(5): Should the opinion as to belief on oath be based on
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> (a) the impugning witness's knowledge of the reputation of the other, or
>
> (b) the impugning witness's personal knowledge of the other?
>
> Or ought opinions to be permitted on both bases?
>
> Question #3(6): If opinion based on personal knowledge is to be permitted, should the basis for qualification of an impugning witness be changed,

> or expanded to embrace his length and degree of intimacy with the witness whose testimony it is sought to discredit?

Admissibility of reasons and extrinsic evidence

Whichever basis for the witness's opinion as to whether or not he would believe the other on his oath is the proper one, the reasons for it (including evidence of specific instances of conduct) are inadmissible on examination-in-chief although they may be inquired into on cross-examination for the purpose of challenging the extent of that witness's knowledge of the other ('s reputation) with a view to discrediting him in turn. Extrinsic evidence may not be admitted to prove past acts hearing on credibility. The main reasons for the restriction of the examination-in-chief and of proof by extrinsic evidence would seem to be the practical ones of avoiding prolongation of the trial and the confusion of the main issues likely to be caused by the introduction of innumerable collateral matters. On the other hand, the inability in examination-in-chief to go behind the opinion to the facts upon which it is based severely impairs the usefulness of the evidence to assist the trier of fact in forming his own opinion as to the witness's credibility (as would be usual where opinion evidence is tendered for other purposes). It is arguable that both parties should be placed on the same footing in this regard. A similar impairment flows from the inadmissibility of extrinsic evidence.

Law reformers are not at all unanimous in answer to the question of how much evidence should be receivable either to support or attack reputation and opinion evidence of a witness's

character for veracity. Section 106(1) of the American Law Institute's Model Code permits the introduction of "extrinsic evidence concerning any conduct by [the witness] and any other matter relevant upon the issue of credibility as a witness" on the theory that all evidence having substantial probative value upon the credibility of a witness should be admissible, including evidence of specific acts (at 118,122). In contrast, Rule 22(d) of the Uniform Rules of Evidence 1953 renders inadmissible as affecting the credibility of a witness, "evidence of specific instances of his conduct relevant only as tending to prove a trait of his character." The Supreme Court Draft of the Federal Rules of Evidence 1972, the Uniform Rules of Evidence 1974, the Federal Rules of Evidence 1975, and the Draft Vermont Rules of Evidence 1977 all prohibit proof of specific instances of conduct by extrinsic evidence; however, they permit inquiry in the discretion of the court on cross-examination of the witness either:

> (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. (Rule 608(b))

Under section 787 of the California Evidence Code 1964-65, "evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness."

Section 62 of the Code proposed by the Law Reform Commission of Canada permits any party to "examine a witness and introduce other relevant evidence for the purpose of attacking or supporting his credibility." The commentary on the section includes the statement (at 95) that "[t]his liberalizes the present law ... by permitting extrinsic proof of a witness'

past misconduct that tends to prove his character, if he denies such conduct."

> Question #3(7): Should evidence of specific instances of conduct or other reasons for the reputation witness's opinion, whether based on reputation or personal knowledge, be the subject of inquiry on examination-in-chief (as well as on cross-examination)?
>
> Question #3(8): Should evidence of specific instances of conduct be capable of proof by extrinsic evidence? If yes, should it become admissible only "after denial"?

Form of questioning

The uncertainty of the present law over the admissibility of the personal opinion of the reputation witness may be a product of the form of questioning. The Ontario Law Reform Commission identified the following stereotype (at 200):

> (a) Do you know the reputation of the witness for truth and veracity in the community in which he resides? (If the answer is no, the questioning ceases; if the answer is yes, it may continue.)
>
> (b) Is that reputation good or bad?
>
> (c) From that reputation would you believe that witness on oath?

Professor Schiff (Evidence in The Litigation Process: A Coursebook in Law, at 653) adds that the last two questions apparently may be combined into, "From your knowledge of that reputation, would you believe him on his oath?" In the case of Steinberg v. The King (at 36-7), Grant J.A. notes that "from the statements

of text-writers in England the question has, in practice, been shortened to 'From your knowledge of (the witness) would you believe him on oath?' Although Mr. Justice Grant goes on to assert that the change in wording does not change"the rule that the belief or disbelief of the witness upon oath must be based upon knowledge of his general reputation," it is possible that exposure to the use of a shortened form of questioning contributed to the conclusion of the Court of Appeal in Gunewardene that individual opinion is admissible.

> Question #3(9): If the Task Force adopts a restrictive view of reputation evidence, should the form of questioning be fixed by statute?

Rehabilitation of impugned witness

Once, but not before, one's own witness's credibility has been attacked, the discrediting evidence may be rebutted so as to reinforce the witness's truthfulness (Cross on Evidence, 4th ed. at 239). The testimony of a witness whose credibility has been impeached by evidence of bad reputation may be rehabilitated in any one or more of three ways:

(1) through cross-examination to discredit the discrediting witness, although this carries with it the risk of unearthing detrimental past incidents;

(2) by reputation witnesses who give evidence that the discredited witness is worthy of credit;

(3) by reputation witnesses who discredit the discrediting witness.

(Toohey, at 606, per Lord Pearce, relying on Stephen on Evidence, 12th ed., art. 146; and Taylor on Evidence, 12th ed., Vol. II, para. 1473, citing Rex v. Lord Stafford (1680), 7 St. Tr. 1293, 1484. See also McWilliams on Canadian Criminal Evidence,

at 636, citing R. v. Whelan (1881), 14 Cox C.C. 595.) Cross has remarked (at 238) that, in theory, the introduction of reputation evidence "could lead to an infinite regress because a further witness might be called to impugn the reputation for veracity of the impugning witness, and so on."

> Question #3(10): Should there be any change in the law governing the means of rehabilitating a witness whose credibility has been attacked by the use of reputation evidence?

Impeaching one's own witness

Neither the "adverse" witness provisions of the various Canadian Evidence Acts nor the common law pertaining to "hostile" witnesses opens the door to use of reputation evidence to refute the credibility of one's own witness (O.L.R.C., at 201-5).

The general principle that a party calling a witness must be taken to be putting him forward as a person who intends to tell the truth to the best of his recollection is upheld by the Criminal Law Revision Committee (U.K.) in its 11th Report on Evidence 1972. Although the Committee recognize a case for allowing a party to impeach the credit of his own witness by general evidence of bad character "where it appears to the judge that the witness is trying to avoid helping the case of the party calling him," the Committee nevertheless concludes that "it would be repugnant to principle, and likely to lead to abuse, to enable a party, having called a witness on the basis that he is at least in general going to tell the truth, to question him or call other evidence designed to show that he is

a liar" (at 101).

American reformers take the opposite tack. The American Law Institute, in its comment on Rule 106(1) of its Model Code of Evidence, asserts (at 119) that "the accepted doctrine which forbids a party to impeach his own witness...has had the disapproval of commentators and thoughtful judges, and...has no reason but history to support it." The same line of reasoning is adopted by the National Conference of Commissioners on Uniform State Laws as evidenced by the commentary on Rule 20 of the Uniform Rules of Evidence 1953. They state (at 175):

> [To permit a party to impeach his own witness] appears to be a universally acceptable and desirable concept, to avoid resort to fictions to escape the enachronism that a party is bound by the testimony of a witness which he produces. It makes the witness the witness of the court as a channel through which to get at the truth.

The explanation (at 79) of Rule 607 of the Supreme Court Draft of the Federal Rules of Evidence 1972 contains like reasoning:

> The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary.

Rule 607 of the Uniform Rules of Evidence 1974, the Federal Rules of Evidence 1975, and the Draft Vermont Rules of Evidence 1977 similarly permit the credibility of a witness to be attacked by any party including the party calling him, as does section 785 of the California Evidence Code 1964-65.

In Canada, section 62 of the federal Law Reform Commission's Code eliminates the rule prohibiting a party from impeaching a witness called by him. The Report gives the following reasons (at 93-4):

> The rule may have made sense at a time when witnesses were in effect simply character witnesses. However, today parties often have no choice about whom to call as witnesses and may know little about them except that they witnessed the event. Consequently, the common law rule is no longer justified.

> Question #3(11): Should the party producing a witness be able to call evidence of reputation to impeach his credibility?

Supporting one's own witness

Under the present law a witness's credibility may not be supported unless it first has been attacked. The model Code produced by the American Law Institute in 1942 permits the credibility of a witness to be supported in advance of the introduction of impeaching evidence (Rule 106(1), and commentary at 122). Rule 20 of the Uniform Rules of Evidence 1953 follows suit, and the Law Reform Commission of Canada seems to have adopted the same position.

More recent American materials favour the common law approach of permitting credibility to be supported by reputation evidence only after attack as justified by the enormous needless consumption of time a contrary practice would entail: Rule 608 of the Supreme Court Draft of the Federal Rules of Evidence 1972, the Uniform Rules of Evidence 1974, the Federal Rules of Evidence 1975, and the draft Vermont Rules of Evidence 1977; and section 789 of the California Evidence Code 1964-65.

> Question #3(12): Should reputation be admissible to support the credibility of a witness at any time (or only after it has been attacked)?

Credibility of an accused

When the rules concerning the reception of reputation evidence were established, there could be no question of impeaching the credibility of an accused because he was incompetent to testify. Now that he is competent, the testimony of an accused who takes the stand may be impeached just like that of any other witness. However, the consequences to an accused of an attack upon his credit, which is already suspect by reason of his interest in the outcome, are more far-reaching than is true of an ordinary witness. Because of the narrow limitations currently placed on the use of reputation evidence in examination-in-chief, its introduction poses but modest threat to the merits of his defence when compared, for example, with the introduction of evidence as to his previous convictions. If the Task Force were to recommend the admissibility in examination-in-chief of reasons, including specific instances of conduct, for the opinion of the reputation witness, and of extrinsic evidence to prove such conduct, the position of an accused who has not put his character in issue would be seriously jeopardized because reputation evidence may operate to impugn his character generally.

It is noteworthy that section 64(2) of the evidence Code recommended by the Law Reform Commission of Canada prohibits the introduction of evidence of the accused's character "for the sole purpose of attacking his credibility as a witness, unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."

> Question #3(13): Should reputation evidence be admissible against an accused who takes the stand on his own behalf? Should it matter whether he first has put his character in issue for the purpose of supporting his credibility?

Discretion of trial judge

The provisions of the American models, and of the Law Reform Commission of Canada's Code are subject to the over-riding discretion of the trial judge to exclude relevant evidence if (in the wording of section 5 of the Canadian Code) "its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues, misleading the jury, or undue consumption of time."

> Question #3(14): If the trial judge is not given a general residual discretion to exclude relevant evidence, should a power to limit the number of witnesses called and to restrict the scope of the cross-examination be spelled out for reputation evidence?

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