THE PRIVILEGE AGAINST SELF-INCRIMINATION

IN ENGLAND AND CANADA

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ABSTRACT

Historically, the concept of protection against testimonial self-incrimination was not an inherent part of the English system of justice. Formal oaths and formal acts to be performed by the defendant were a part of both civil and ecclesiastical trials. The only procedural protection that existed was the requirement that there be "due presentment", i.e., there had to be a specific charge and the solemn accusation before the defendant was required to make any response. When the Church, and subsequently the Star Chamber, adopted an inquisitional procedure, due presentment was by-passed, and there was a great outcry by dissenters. Gradually, the inquisitorial procedure became the focal point of opposition to church and state, and the phrase *nemo tenetur seipsum prodere*, which formed part of a statement of law relating to due presentment, was snatched from its context and used as a slogan of the revolution. Common law courts supported the development of the privilege because it provided a means of controlling the jurisdiction of their rivals - the ecclesiastical courts. The fight against the tyranny of kings and bishops was successful, and the privilege became a fundamental rule of English trial procedure.

Canada inherited the privilege against self-incrimination from England, but in 1893 the right of a witness not to answer incriminating questions was abolished and replaced

by a rule requiring an answer to be given while affording immunity against its use in subsequent proceedings.

A comparison of the privilege in the two countries reveals that while the scope of the privilege is essentially the same, its actual operation is very different. Surveys conducted in conjunction with this research showed that the percentage of accused persons choosing not to enter the witness box is substantially higher in Canada than in England. Likewise, the Canadian immunity provision is used much more frequently by witnesses in Canada than is the common law privilege by witnesses in England. The reasons for and the implications of this difference are examined.

The thesis also includes a study of how the privilege is perceived by ordinary law-abiding citizens on the one hand and by criminal recidivists on the other. Matching samples were selected in England and Canada. The first group was selected from among persons who had served on a simulation jury or (in Canada) an actual jury. The second group was selected from inmates of English and Canadian prisons.

The surveys revealed some surprising similarities as well as significant differences. For example, prisoners and jurors in both countries rejected the notion of making the accused compellable as a witness. There was also substantial agreement between them as to the impact on the defence of certain items of evidence. Of particular significance are the

responses of prisoners to a question on improper police methods. They revealed a considerable difference between the situation in England and Canada. Police violence is the leading complaint in both countries, being mentioned by 54.1% of the English prisoners and 71.0% of the Canadian prisoners; but five other complaints (verballing, planting evidence, putting pressure on the suspect's family, using bail as a lever, and not allowing outside contact until a statement is given) were mentioned by more than 20% of the English prisoners, whereas only violence was mentioned by more than 20% of the Canadian prisoners. Both groups of prisoners were favourable towards the establishment of a procedure for examination of suspects by the police before a magistrate, even though failure to answer questions in those circumstances might lead to an adverse inference being drawn at the trial.

On the basis of the research findings, certain measures are suggested in the final chapter that would contribute towards the development of a fact-finding procedure that is both fair and effective. These measures include provision for examination of the suspect by the police before a judicial officer, pre-trial discovery by both sides, and modifications of certain rules of evidence. It is also suggested that there be improved training for police officers, a more effective procedure for investigating complaints against the police, and removal of police control over the local lock-ups.

E.A. Tollefson.

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Chapter One

HISTORICAL INTRODUCTION

Probably no aspect of the procedural law has such a fascinating history as the common law privilege against self-incrimination. The mixture of social, political and legal forces that shaped its development represent a microcosm of life in mediaeval England. The temptation is great to dwell upon the history of the subject, exploring in detail the actions and reactions, the fears and foibles of each successive generation. But, though it would be most interesting and enjoyable to write a full-length history of the privilege, a less ambitious goal would appear to be more appropriate, i.e. the provision of a short historical introduction which will help place the privilege as we know it today in perspective. Thus equipped, we will be better able to assess the operation and utility of the privilege and to suggest modifications to meet the needs and challenges of the last quarter of the 20th century.

It is artificial to select certain events as turning points in the history of the privilege against self-incrimination, for the development of the privilege was a slow process, with many contributing factors, rather than a series of dramatic changes. However, it is convenient to organize the material around recognizable events, and there are at least three such events which stand out in the history of the privilege against self-incrimination: the Fourth Lateran Council (1215), Henry VIII's break with Rome (1533), and the abolition of the courts of Star Chamber and High Commission (1641). Each of these events, though not having any immediate

effect upon the development of the privilege, began a new era in the relations between church and state, and thereby affected the development of the privilege.

PRIOR TO 1215

There are few written records of procedure in Anglo-Saxon courts prior to the Conquest, but we have a fairly clear view of how the courts functioned at least from the time of Henry I, who introduced a system of royal courts.[1] While actions (whether civil or criminal) were commenced by an individual making an accusation of a specific wrongdoing against the defendant, early trial procedure was conceptually different from modern trial procedure in that it did not involve a process of reconstructing what happened by adducing evidence through witnesses. The Almighty was the best possible witness, and he was called upon to indicate guilt or innocence, or which party had the better cause. Divine guidance was sought basically through three procedures:

1. Wager of Law - formal oaths in which the party asserted the justness of his claim or defence, and which oaths were "burst" if there was any faltering or deviation from the prescribed formula;
2. Ordeals - by fire, hot water, cold water, or morsel - which were used in the more serious criminal cases; and
3. Battle - a public contest between civil litigants (or their champions) to show the righteousness of their cause.

As it was the successful completion of the formal oath or formal act that was important, it was not necessary to develop rules relating to testimonial privilege.[2] Nor did the modern day rule that "He who asserts must prove" apply; indeed, the court frequently decided that the Almighty could speak best through the mouth or acts of the defendant; thus in wager of law or trial by ordeal, it was the defendant who was put to the test and compelled to clear himself if he could.

But the Normans had introduced another investigative procedure - the inquest - which, by the end of the 12th century, was to play an important part in criminal trials. In the inquest, people in the neighborhood who were most likely to have information about the matter under investigation were called to act as witnesses and judges of the facts. Originally, it was used as an administrative tool to assist the King in the collection of taxes: the famous Domesday Book, which listed all landowners, showed the value and extent of their holdings, was prepared from information gained through use of the inquest. Gradually, it also became a normal means of gathering information about crimes in the community, and on the request of the accused it could be employed as a substitute for trial by ordeal in the more serious cases.[3] This was the fountainhead of trial by jury.

Law and morality were closely related, and the Church not only participated in the trials in the King's Courts by administering the oaths and the ordeals, but it also had its own courts, which claimed jurisdiction over cases relating to church property, persons in holy orders, matrimonial and testamentary cases and an amorphous group of matters having a moral or religious aspect. Prior to the 13th century, the procedure in the ecclesiastical courts followed much the same pattern as that in the King's courts, with the exception that ecclesiastical procedure reflected some borrowings from Roman law. A case was commenced by an individual swearing an *accusatio*, alleging that the defendant was guilty of a specific wrongdoing. The accuser assumed a real interest in the case inasmuch as he was subject to punishment if the proofs (by ordeal, etc.) indicated that the defendant was innocent. As a result, people were understandably reluctant to make an accusation against another. In order to overcome this deficiency, the ecclesiastical courts permitted a second form of procedure known as the *denunciato*. Under the *denunciato* all that was required was *fama*, i.e. common report, and it was not necessary for the accuser to assume any obligation for the successful prosecution of the defendant.[4]

Looking at the procedure in the King's courts and the ecclesiastical courts in England during this period, there is little to indicate that the privilege against self-incrimination was an immanent part of either system. There was no objection to compulsory oaths or to placing the burden of proof on the defendant. While the defendant himself was not examined under oath as to his version of the story, this was not due to any solicitude toward him, but rather because the courts had a different conception of what constituted proof. The one procedural protection which existed in both the King's courts and the ecclesiastical courts in England at this time was the requirement of "due presentment", i.e., before the defendant could be placed in jeopardy, there had to be a specific charge against him and a solemn assertion by his accusers, or a presenting jury, that he was suspected of wrongdoing. Only then could he be called upon to do anything in his own defence.[5] In short, the defendant was not required to take the first step of providing the accusation. At a later date, his legal position before the ecclesiastical courts was described in the following terms: *"Licet nemo tenetur seipsum prodere; tamen proditus per famam, tenetur seipsum ostendere, utrum possit suam innocentiam ostendere, et seipsum purgare."*[6] We shall see that in the 16th and 17th centuries the words *"nemo tenetur seipsum prodere"* were snatched from their original context and set up as a maxim of English law.

1215 - 1533

The year 1215 is chiefly remembered in the context of English legal history as the year of Magna Carta. The Great Charter was to have a profound effect on the evolution of the English constitution, and in later years was to be interpreted as guaranteeing individual liberties such as had never been thought of by the feudal barons who humbled King John. At the time, however, Magna Carta had little effect upon trial procedure.

From the standpoint of the privilege against self-incrimination, the important decision that year was not made at Runnymede but in Rome, at the Fourth Lateran Council, where a new set of rules governing criminal procedure in ecclesiastical courts was promulgated. One major change wrought by the Council was to forbid participation by the clergy in the formalities of ordeals, and this had an effect not only in the church courts but the King's courts as well. Deprived of their principal mode of trial in serious cases, the King's courts had no alternative procedure available unless the accused agreed to trial by jury. To encourage him to accept this course, the court began to offer the unattractive alternative of hard imprisonment (*prison forte et dure*) until he did accept. As time passed, a special kind of torture was added (*peine forte et dure*) to extract a plea which recognized the court's right to proceed to trial.

Of even greater consequence was the acceptance by the Council of procedure *per inquisitionem* as a third possible mode of trial in the ecclesiastical courts. By this procedure the court could summon anyone to appear to answer questions under an oath to tell the truth. It was a much more effective method of determining the facts than procedure by way of formal oaths, and Pope Innocent III had authorized its use in the fight against heresy on the Continent even prior to the Fourth Lateran Council.[7] It was not, however, introduced immediately to England, where heresy was not such a problem. The first recorded authorization of the inquisitional oath procedure is found in a constitution of Cardinal Otho in 1236.[8] The requirement of due presentment could have been read into the new procedure, but because of the gravity of the offence of heresy and the difficulty of rooting it out if the Church had to rely upon private citizens initiating the action, the ecclesiastical courts did not require presentment when proceeding by way of inquisition.[9]

The introduction of the inquisitional procedure to England soon led to a confrontation between the King and the Church. As certain bishops began to ferret out heretics and schismatics, requiring them to answer for their views before the ecclesiastical courts, the new procedure became a matter of concern both for the people and for the King.

In 1246 Henry III wrote to the Sheriff of Hertford, commanding him not to permit laymen in his bailiwick to appear before the Bishop or other Church officials to make answer under oath, except in matrimonial and testamentary causes.[10]

The hostility between the King and the ecclesiastical courts, which had come to a head in the dispute between Henry II and Thomas Becket, erupted again as the ecclesiastical courts became more zealous in seeking out persons suspected of heresy, and as they became more effective than their royal counterparts in matters over which both claimed jurisdiction.[11] As a result the King took steps in the 14th century to limit the jurisdiction and power of the ecclesiastical courts. In the statute *prohibitio formata de statuto articuli cleri* the King set forth those matters over which the King's courts had exclusive jurisdiction, and prohibited the ecclesiastical courts from hearing cases involving such matters. It also contained the following direction to the Sheriffs:

> And they suffer not that any Laymen within their Bailiwick, come together in any Places to make any such Recognitions by their Oaths, except in Causes of Matrimony and Testamentary.[12]

There is considerable dispute as to the meaning of this last clause in the statute *de articuli cleri*. In Wigmore's view this clause did not represent any royal opposition to the inquisitional oath *per se*, but rather an

objection to the use of this procedure in areas outside of the jurisdiction cf the ecclesiastical courts. He points out that where jurisdiction was conceded, i.e. in matrimonial and testamentary causes, the King also conceded the Church's right to administer the inquisitional oath.[13] On the other hand, Mary Hume Maguire takes the view that the latter clause of *de articuli cleri* clearly indicates repugnance to the use of the inquisitional oath except in a very limited portion of the ecclesiastical court's jurisdiction - namely, in matrimonial and testamentary causes.[14]

There are persuasive arguments in support of both views. Certainly the King from time to time asserted the exclusive jurisdiction of his courts over laymen, except in matrimonial and testamentary causes.[15] On the other hand, the ecclesiastical courts claimed and exercised jurisdiction over laymen with respect to a large number of other matters relating to religious practice, the faith , and the property of the Church.[16] Whatever the niceties of jurisdiction were, it is undoubtedly true that by the 14th century there had developed a widespread resentment against the inquisitional procedure. However, this resentment does not appear to have been based upon any fundamental principle of English customary law, for oaths and compulsion of the defendant were established features of that law. A more likely explanation is that this procedure affected not only criminals, the poor, and the helpless, but it also affected the gentry, the scholars, and all those who were in a position to make their protests

known. Indeed, heresy and schism are far more likely to be found among people who feel free to think for themselves than among serfs and vassals. It also suited the King's purpose to object to the new oath procedure being employed by the ecclesiastical courts, for these courts were now much more effective - and therefore more attractive to plaintiffs - than were the royal courts. Any major flight of litigants from the royal courts to the ecclesiastical courts would, of course, result in a serious reduction in the revenue of the former.

But the resentment to the inquisitional procedure was not limited to its employment by the ecclesiastical courts. Mary Hume Maguire points out that some of the royal courts, and in particular the King's Council, had begun to experiment with the inquisitional procedure, and that a petition of the Commons in 1347 had requested the King to prohibit the use of this oath in the Council.[17] Indeed, in 1368 the statute of 42 Edward III, c. 3 was passed, which provided that "no man shall be put to answer without presentment before justices, or matter of record, or by due process and Writ original according to the old law of the land".

It should not be assumed, however, that a majority of the people were opposed to what the ecclesiastical courts were doing, and indeed the preachings and activities of reform-minded zealots such as John Wycliffe and his followers led to a reassertion of the pre-eminence of Roman Catholicism

as the only true religion by Henry IV. In 1401, at the instance of the Church, the King introduced the statute *de Haeretico Comburendo*, which was passed by the Commons.[18] The statute reinstated the official position of the Catholic church and gave the bishops power to arrest and imprison anyone "defamed or evidently suspected" and to proceed against them according to canonical decrees. Moreover, state authorities were to co-operate with the Church in rooting out heretics and seeing that they were handed over to the ecclesiastical courts for trial and, if necessary, for punishment by burning at the stake. The only limitations imposed upon the ecclesiastical courts were that they must act within the limits of their jurisdiction, and that they were to provide a libel (a written statement of charges) to a party demanding one so that he could make his answer or seek a writ of prohibition.[19]

Likewise there is evidence that despite the provisions of 42 Edward III, c. 3, justice in the King's courts in the 15th century not only tolerated but employed inquisitorial methods in cases where it was deemed to be necessary. The statute 2 Henry V, c. 4 (1414), which dealt *inter alia* with the failure of servants and labourers to fulfil their statutory obligations to their masters, empowered justices of the peace to examine "all Manner of Labourers, Servants, and their Masters, as Artificers, by their Oaths, of all Things by them done contrary to their said Ordinances and Statutes, and upon that to punish them upon their Confession,

after the Effect of the Statutes and Ordinances aforesaid, as though they were convict by Inquest." This is perhaps the only statute requiring accused persons to answer questions in Court under oath, but there are other examples of inquisitorial methods in the justice of the day. *Prison forte et dure* and *peine forte et dure* imposed to extract a plea and thus an acknowledgement of the court's jurisdiction, have already been mentioned, but torture was also used in other situations and for other purposes. While torture was forbidden by the common law, it could be used under the authority of the royal prerogative, and, indeed, was frequently used in cases involving political crimes. The common law also developed a system of pre-trial inquisition by justices of the peace, designed to elicit confessions (albeit not under oath) for later use in the trial.[20]

In summary, there is no question that the inquisitional techniques developed in this period were unpopular with those who were, or were likely to be, subjected to them. However, they were not considered to be contrary to public policy where a matter of church or state interest was involved.

1533 - 1641

The Protestant Reformation in England was not a doctrinal revolution so much as a nationalization of the Church of Rome. Henry VIII did not invoke radical religious

changes, except in relation to those matters where he had a political reason to do so, and in the unsettled times following his break with Rome it was not politic to comfort or encourage extremists by an expansion of civil liberties. He did repeal the statute *de Haeretico Comburendo*,[21] but heretics continued to be burned at the stake, and there was no turning away from inquisitorial procedures in either the ecclesiastical courts or in the King's courts.

The Reformation did not result in immediate changes, and, indeed, any softening of inquisitional practices during the reign of Henry VIII and Edward VI was more than offset by an acceleration of the trend toward inquisitional procedures in the reign of Philip and Mary. In the latter period, there was a great increase in the number of inquisitions for heresy (with the re-establishment of Roman Catholicism as the state religion, supporters of the Reformation were once again heretics), and statutory provision was made for compulsory pre-trial examination of the accused in cases of felony.[22] Even with the accession of Elizabeth to the throne, the rigors of the inquisition continued both in the ecclesiastical courts (in particular, in the new court of High Commission) and in the Star Chamber. However, 1533 is a crucial date in the development of the privilege against self-incrimination, because it legitimized many beliefs which had previously been regarded as heretical, and

this caused a re-examination of arguments concerning the propriety of compulsory self-incrimination.

The first recorded instance of an accused person arguing that the inquisitional oath procedure was contrary to canon law occurred almost contemporaneously with Henry VIII's break with Rome. The cleric, John Lambert, on inquisition before the Archbishop of Canterbury regarding his conduct and beliefs, responded that ". . . it is written in your own law, 'No man is bound to bewray himself'."[23] Lambert's statement should not be taken out of context, however, for later in his reply he admitted that a judge could require a person to take an oath to say the truth if the judge did so "in lawful wise".[24] Lambert appears to have been referring to the ecclesiastical law concerning due presentment, and the martyrologist, John Foxe, recorded the statement with the footnote *"Nemo tenetur prodere seipsum"*, a misleading contraction of the due presentment rule quoted above.[25] As Foxe's work was published in 1563 and was very popular, it is possible that it contributed to a line of cases, starting in 1568, in which the Latin phrase was alleged to have been used by itself as a legal maxim.

The first case to come before the common law courts on this basis was that of Thomas Leigh in 1568. Leigh was summoned before the Queen's Commissioners for Ecclesiastical Causes (a body later to be known as the Court of High Commission), to answer charges that he had heard mass in the house of the Spanish Ambassador. When Leigh refused to answer this allega-

tion on oath, he was imprisoned for contempt. The Court of Common Pleas issued a writ of *habeas corpus* to have Leigh brought before the court to determine the cause of his imprisonment. Chief Justice Dyer is reported as having said for the court that the Commissioners had the right to try Leigh, but they ought not in a case such as this examine him upon his oath *"quod nemo tenetur seipsum prodere"*. Leigh was therefore released.

In 1576 one Hynde was imprisoned by the ecclesiastical court for refusing to answer "whether he had taken by the year more than 10 l. for the loan of 100 l." The common law court granted *habeas corpus* and discharged Hynde for the same reason as in Leigh's case.

We know of these cases only through citation in other cases decided some forty years later; hence their reliability as a statement of the law is open to question. For example, the Latin phrase in Leigh's case is included in only one citation of the case - the judgment of Coke C.J. in Burrowes, Cox, Dyton et al.[26] in 1615. Coke said that he was quoting from a manuscript of the case in Chief Justice Dyer's own hand, but it is also possible that Coke interpolated the phrase to provide a convenient precedent for his decision in the Burrowes case. Coke was a firm believer in the pre-eminence of the common law over the ecclesiastical law, and he frequently interpreted cases, statutes and history in a manner consistent with his views of the grandeur of the law.[27]

Indeed, the history of the privilege against self-incrimination during the rest of the period ending with the abolition of the courts of Star Chamber and High Commission, is largely the product of Coke's influence as a counsel, judge, reporter and author. The first reported case in a common law court in which the phrase *nemo tenetur seipsum prodere* appears in the original report is Collier v. Colliers, 1590,[28] a case in which Sir Edward Coke was counsel for the petitioner. In that case the defendant was being sued for incontinence in the ecclesiastical court. He refused to answer whether he had had carnal knowledge of a particular woman, and sought a writ of prohibition from the court of Queen's Bench, citing in support the previously mentioned Latin maxim. There is some doubt as to the actual decision, for of the three reports of the case, one says simply that ". . . the Court would advise of it", while the other two say that no one is required to produce evidence against himself to his defamation or discredit except in matrimonial and testamentary causes.[29] If the latter reports are correct, the decision did not establish a landmark, because a year later in Dr. Hunt's Case [30] the court of

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Common Pleas refused a writ of prohibition in a case concerning incontinency, on the grounds that the subject matter was within the jurisdiction of the ecclesiastical court, and the offence had been properly presented by two witnesses.

The number of prohibition applications continued to mount as Catholics and Puritans alike challenged the authority of the court of High Commission to enquire into their lives. The scope of the statutory authority accorded to the High Commission and its procedures were characterized as being contrary to the common law, the natural law, the law of God and Magna Carta.[31] In 1606, James I, who had just appointed Coke as the Chief Justice of the court of Common Pleas, requested him and Chief Justice Popham of the court of King's Bench, to render an advisory opinion on the question whether an Ordinary might examine a person *ex officio* upon oath. Their Lordships replied:

> 1. That the Ordinary cannot constrain any man, ecclesiastic or temporal, to swear generally to answer to such interrogatories as shall be administered unto him; but ought to deliver to him the articles upon which he is to be examined, to the intent that he may know whether he ought by the law to answer to them; the defendant hath the copy of the bill delivered unto him, or otherwise he need not to answer to it.
>
> 2. No man ecclesiastical or temporal shall be examined upon secret thoughts of his heart, or of his secret opinion: but something ought to be objected against him what he hath spoken or done. No lay-man may be examined *ex officio*, except in two causes, and that was grounded upon great reason; for lay-men for the most part are not lettered, wherefore they may easily be inveigled and entrapped, and principally in heresy and errors of faith; and this appears by an ordinance made in the time Edward I. tit. Prohibition, in Rastal.[32]

Coke said the two cases in which laymen might be examined *ex officio* were matrimonial and testamentary causes. The reasons given by him for the exception were that many times these cases involved secrets which could not otherwise be uncovered, and "they do not involve the shame and infamy of the party, as adultery, incontinency, usury, simony, hearing of masses, heresy, etc."[33]

The advisory opinion certainly did not establish the principle *nemo tenetur seipsum prodere* as part of the English law. Indeed, there is no reference to the phrase anywhere in the report of the opinion. Their Lordships merely asserted that the ecclesiastical judges could not use the *ex officio* procedure as a means of ensnaring victims into making damaging admissions. If, however, the ecclesiastical court had some *prima facie* evidence of the defendant's wrongdoing, and gave the defendant beforehand a copy of the questions to be asked at the trial, he could be compelled to answer all questions under oath. Likewise, if the defendant made no objection to the lack of due process, he was taken to have consented and was subject to the ecclesiastical court's inquisitorial procedure.

Coke continued his assault upon the use of the *ex officio* oath by the ecclesiastical courts. In Edwards' Case in 1608 he said that "thought is free", and that no man is bound to answer concerning his religious opinions;[34] while in

Huntley v. Cage, in 1610, he said that the ecclesiastical courts "ought not to examine any man upon his oath, to make him to betray himself, and to incur any penalty pecuniary or corporal . . . ."[35] It should be noted, however, that in both of these cases the comments about the privilege against self-incrimination were in fact *dicta*, as the cases were decided on other grounds. Finally, in 1615, Coke, who was now the Chief Justice of the King's Bench, had an opportunity to set out the law definitively. The case was Burrowes, Cox, Dyton et al.[36] which has been referred to already in connection with the cases of Leigh and Hynde. The plaintiffs had been imprisoned by the Court of High Commission for having refused to give answer under oath to the articles of interrogation, without having a copy of them. They applied to the Court of King's Bench for *habeas corpus*. Referring to a personal note-book of Chief Justice Dyer, who had presided at Leigh's case, which note-book Coke said he had in his possession, he enunciated the principle *nemo tenetur seipsum prodere*. Coke said that while a minister in holy orders might be examined under oath by an ecclesiastical court, laymen could not be examined under oath except in matrimonial and testamentary causes.[37] There was also another reason for deciding in favor of the prisoners, namely, that they had not been given copies of the articles of interrogation as required by the statute of 2 Henry V, c. 3, which Coke said was declaratory of the ancient law.

It is interesting to note that the King's Bench did not free the prisoners - it only bailed them and advised them to conform. The defendants apparently did not conform for they were returned to prison by the High Commission, and this time the King's Bench did nothing, saying that it was satisfied that they were being imprisoned for heresy rather than for refusing to answer upon oath.

It is hard to say whether Coke was more interested in protecting his fellow-man or enhancing the jurisdiction of the common law courts vis-à-vis their ecclesiastical competitors. We do not find Coke thundering about the use of inquisitional procedure by the Star Chamber, and, indeed, as Attorney General, Coke had been a vicious prosecutor, even condoning torture to extract confessions from political prisoners.[38] However, whether his judgments were based on conviction or convenience they established a legal norm that was able to withstand the stormy period following the appointment of William Laud as Archbishop of Canterbury in 1633.

An Anglo-Catholic, who had the complete confidence of Charles I, Laud insisted upon conformity to High Church principles and rituals. Using the twin prongs of heresy and sedition, Laud and the High Commission worked hand in hand with the Star Chamber in a relentless persecution of all who dared to disagree. As the common law courts had no control of the action of the Star Chamber, they were powerless to intervene.

The British middle class, which was becoming increasingly presbyterian and puritan, was not only incensed by Laud's inclination towards the trappings of Catholicism, but they were also angered by the political and economic ineptitude of Charles's administration. In Parliament, they presented the King with a list of grievances, called the Petition of Right, in 1628. Charles seemed to assent to the petition, but in fact largely ignored it, and, as if in contempt, dissolved Parliament in 1629 and ruled as an absolute monarch until 1640.

In this atmosphere of seething discontent, everything associated with the enforcement of unpopular laws was regarded as being contrary to liberty; and in this regard nothing was more obviously instrumental in the suppression of liberty than the Star Chamber and the High Commission. When Charles was forced by circumstances to reconvene Parliament in 1640, its response was swift and clear. Citing the 29th Chapter of Magna Carta, "That no Freeman shall be taken or imprisoned, disseised of his Freehold or Liberties, or Free Customs, or be outlawed or exiled or otherwise destroyed, and that the King will not pass upon him, or condemn him; but by lawful Judgment of his Peers, or by the Law of the Land", and quoting a number of other statutes guaranteeing due presentment and trial in accordance with the common law, Parliament abolished, and forbad forever the re-establishment of the Star Chamber and any court or council

exercising this same or like jurisdiction.[39] Turning to the High Commission, Parliament referred to the statute 1 Elizabeth, c. 1, by which authority the High Commission had been established, and after citing the "insufferable Wrong and Oppression" and "other great Mischiefs and Inconveniencies" that had ensued to the King's subjects by the commissions that had been issued thereupon Parliament "repealed, annulled, revoked, annihilated and utterly made void for ever" the offending provision of the said Act.[40] Moreover, it forbad the other ecclesiastical courts to impose any punishments or penalties for crimes within their jurisdiction, or to employ any corporal oath, either *ex officio* or at the instance or promotion of any other person, whereby a person might be charged or obliged to make any presentment of any crime or offence, or to confess or to accuse himself or herself "of any Crime, Offence, Delinquency or Misdemeanor, or any Neglect, Matter or Thing, whereby or by reason whereof he or she shall or may be liable or exposed to any Censure, Pain, Penalty or Punishment whatsoever".[41]

Thus Parliament struck out at oppression by abolishing the instruments of enforcement. No longer could the King through a chamber of his own Council by-pass the ordinary courts and the ordinary law of the land; no longer could the state-church dictate the way in which men thought of and worshipped their God. What Parliament did was not so much an attack upon inquisitorial procedure per se as an attack upon

those who had abused the procedure to the discomfort and even death of many a loyal subject. It seems clear that Parliament did not have a philosophic objection to inquisitorial procedure, for it did nothing to prevent its continued use by the Chancery or at the pre-trial examination of the accused before two magistrates. Nor did Parliament do anything to prevent the badgering of witnesses and accused persons by judges in the common law courts. However, in the minds of the people there was such an indelible association between the oppressive institutions and their procedure that the procedure also became anathema.

1641

The period following the recall of Parliament was one of the most unsettled in English constitutional history. Relations between the King and the Commons, which had never been good, deteriorated into civil war in 1642. The King's forces were finally defeated in 1648, and the King himself was tried and convicted of "High Treason and other high crimes against the realm of England" by a court specially constituted by the House of Commons.

The claims for protection against having to accuse one's self, which had never been firmly based on authority, were peculiarly in tune with the anarchy of the times. Little

by little Coke's broad dictum in Burrowes, Cox, Dyton et al. that no one was bound to subject himself to the danger of a penal law, came to be accepted by the courts and tribunals as a general rule of procedure. Evidence of this can be found in a number of the famous trials of the period. In the trial of the Twelve Bishops for treason, before the House of Lords, in 1642,[42] the accused bishops, who less than two years earlier had maintained the right of the Court of High Commission to extract evidence from unwilling defendants, claimed that they were not bound to accuse themselves. Their claim was not based on the old argument that the defendants had not been informed of the charges, but was simply an assertion of a general privilege against self-incrimination. It is not clear what the House considered to be the law, but the question was not pressed by the prosecutor.[43] Another instance occurred in the treason trial of King Charles before the special tribunal of the House of Commons in 1649. One of the witnesses called to testify to the fact that Charles had led an army against the parliamentary forces asked to be excused from giving evidence. His request was granted when the commissioners found that he was already a prisoner, and the questions intended to be asked of him would tend to accuse him.[44] This is the first recorded instance in which the claim was made for protection for an ordinary witness. Previously the focus had been on the accused, because he was the chief witness in the inquisitorial proceedings before the ecclesiastical courts and the Star Chamber.

But probably the most significant case in this period of the history of the privilege against self-incrimination was that of the famous Leveller, John Lilburne. In 1638, Lilburne was suspected of importing anti-clerical books, which were deemed to be seditious, and he was brought before the Star Chamber. According to Lilburne's own account of what took place,[45] no bill of presentment was ever made known to him, and he refused to take the Star Chamber oath. Subsequently, the affidavit of Lilburne's accuser was read to him, and Lilburne still refused to take the oath, claiming that it was contrary to the law of God and the law of the land. His refusal led to a citation for contempt which was severe in the extreme: he was fined 500 l., whipped through the streets (estimates of the number of lashes he received ranged from 200 to 1,000) placed in the pillory and remanded to the Fleet prison until he conformed himself to the court's orders. Far from being deterred by the viciousness of the sentence, Lilburne used the pillory as a platform for haranguing the crowd on the injustice of the proceedings, and in particular the injustice of the inquisitional oath which he said was against the law of the land, the law of God, the law of nature and the practice of Christ. Because of his fearless stand, he became something of a celebrity and a folk-hero. Subsequently, both houses of Parliament found his sentence to be "illegal and against the liberty of the subject", and reparations in the amount of 3,000 l. were ordered to be paid to him.

During the civil war, Lilburne distinguished himself in the parliamentary forces, and became a confidant of Oliver Cromwell. However, his free-thinking was to get him into trouble with the new régime too, and he went through two more spectacular trials which attracted a great deal of public attention.[46] Because of his popularity with the people, the judges appear to have treated him with extraordinary charity during the proceedings--a fact which was all the more unusual because of Lilburne's obstreperous and insulting behaviour towards the Bench. In each case, despite the fact that the Crown's evidence appeared to be quite clear, the jury acquitted Lilburne--a testimonial to his popularity.

While Lilburne's cases were not important as precedents for the common law courts, they were important in establishing the public mood upon which the policy of the law was to be founded. His harangues about the liberties of Englishmen though ill-founded historically nevertheless captured the spirit of the times, and it was not long before the common law courts accepted the privilege against self-incrimination as a fundamental procedural rule.

The recognition and acceptance of the testimonial privilege against self-incrimination by the common law courts in the late 1600's, though of key importance in the ultimate course of things, was actually of little moment at the time.

Certainly it did not compare with the abolition of the High Commission and the Star Chamber as a matter of practical significance, for, while the privilege did provide witnesses in common law courts with a protection they did not have formerly, it had no effect upon the actual parties to an action inasmuch as they were not competent witnesses in any event.[47] Indeed, it was not until 1851 [48] that the parties to a civil action were regarded as competent witnesses, and not until 1898 [49] that the accused in a criminal case was deemed competent to testify. Despite all the brave talk associated with the reception of the privilege against self-incrimination by the common law courts in the 17th century, the situation of the accused was ameliorated very little, as there was no cessation of the inquisitorial tactics aimed at inducing him to confess his guilt. Judges continued to question prisoners in the dock until sometime in the 18th century, and the compulsory pre-trial examination of the accused by magistrates remained a part of English criminal procedure well into the 19th century.[50] Any statements made by the accused on either occasion were usable against him so long as they were voluntarily made, and there seems to be little doubt that if he chose to remain silent in the face of an accusation, this fact did not go unnoticed.[51] It is not surprising therefore that there appears to have been little fanfare when the privilege against self-incrimination became an acknowledged rule of common law procedure.

THE PRIVILEGE IN CHANCERY

Quite different forces shaped the development of the privilege in the Chancery courts. Historically, the Chancery had much closer links with the ecclesiastical courts and the King's Council than with the courts of common law, for the Chancellor was one of the most senior officers in the Council and was almost always a cleric. When the Chancellor developed his own court to provide judicial remedies required by conscience though denied by law, it is not surprising that Chancery procedure, like that in the Council, was patterned after procedure in the ecclesiastical court. The problem of self-incrimination did not, however, loom large in the Chancery because it was rare for criminal or ecclesiastical offences to be the subject matter of Chancery cases and, as the proceedings were usually in writing, the defendant was provided with a basic statement of the case which he had to meet. However, in those few cases within Chancery jurisdiction where the problem of self-incrimination did arise, it seems clear that the party was sworn to his plea and required to answer the interrogatories as in ecclesiastical procedure.

Since the Chancery frequently dealt with cases involving interests in property, a more pressing problem was whether a party could be required to answer interrogatories if a truthful answer might result in a penalty or a forfeiture.

From an early date, as keeper of the King's conscience, the Chancellor had granted relief in such cases. The rule therefore was established that a party did not have to answer if he should thereby disclose cause for his incurring a penalty or forfeiture. Wolgrave v. Coe[52] in 1595 is an early case in which the Chancery ruled that the defendant did not need to answer, "because he should thereby disclose cause of forfeiture of the bond." Generally, the Chancery treated the power to relieve against forfeitures as being something separate from the privilege against self-incrimination; however, it appears the two principles were soon blended, for in The Protector v. Lord Lumley,[53] in 1655, it is reported that the defendant demurred to a bill demanding discovery of his estate upon a forfeiture because *nemo tenetur prodere seipsum*.

Thus, it was sometime in the reign of the restored Stuarts that the privilege against self-incrimination was accepted and applied by all courts in England.

CONCLUSIONS

It seems clear that the privilege against self-incrimination was not an indigenous part of either the common law or the ecclesiastical law of England. In early times it was not uncommon for the defendant to be awarded the proof, or to be asked to put his soul in the balance and take an oath as to the righteousness of his cause. Nor were there any qualms

about the use of procedures which endangered the life or limb of the defendant. Why then was there such an outcry against the introduction of what came to be known as the *ex officio* oath?

It is suggested that there were a number of reasons why this new procedure became a lively public issue. First, being a rational system of searching inquiry, it was much more effective than the former system which had been based on mystical rites and superstition. Moreover this effectiveness was enhanced by the fact that the defence was required to show its hand without any real indication of what cards were held by the prosecution. Undoubtedly, this made it extremely difficult to prepare for an inquisition, whether the defendant was innocent or guilty; although it is questionable whether trial by inquisition was any more frightening for the innocent than was the legal lottery which had existed under trial by ordeal or trial by wager of law.

The inquisition, concentrating as it did on a search for heretics, also tended to affect the higher classes and the better educated, who were in a position to give voice to their complaints. It is also fair to say that this group was the least susceptible to control under procedure by way of *accusatio* or *denunciatio*: there was a reluctance on the part of private citizens to accuse or denounce those in positions of power in the community,[54] and even if an action under the oath procedure were commenced, the upper classes were in a favored position with regard to "waging their law".

These complaints struck a responsive chord with the King, because there was a long-standing dispute between the Crown and the Church regarding the jurisdictional limits of ecclesiastical courts. The complaints concerning the *ex officio* oath thus added fuel to an existing fire. It is unlikely, however, that the King opposed the *ex officio* procedure on any clearly perceived philosophical ground, because we see the King's Council and, indeed, the King's courts, resorting to the same and allied procedures when occasion demanded.

It is interesting to note that there is practically no record of philosophical arguments about the propriety of the *ex officio* oath procedure until the 16th century. L.W. Levy, in his Origins of the Fifth Amendment, is only able to cite a few cases prior to that of John Lambert in which objection was made to the taking of the *ex officio* oath, and most of these objections were based upon opposition to taking oaths of any kind.[55] John Lambert did refer to the old proverb "thoughts be free and need pay no toll", but he accepted the use of a compulsory oath procedure so long as there was due presentment.[56] Clearly, many people held a strong feeling that it was harsh to compel a man to accuse himself, but this feeling was not articulated in terms of moral arguments against the *ex officio* oath until the last two decades of the 16th century.[57] It is, of course, possible that philosophical disquisitions did exist at an earlier date and were either lost or suppressed. The number of copies of any such treatise necessarily would have been small, because printing was

not introduced in England until the latter part of the 15th century, and the Church which was the one institution likely to take an active interest in the social issues of the day, would be likely to discourage rather than encourage such thinking. On the other hand, if there were clearly formulated moral objections to the use of the *ex officio* oath by the ecclesiastical courts, one would have expected to find some record of applications to the common law courts for a writ of prohibition or *habeas corpus* based upon these objections; however, such does not appear to be the case.

This leads to the conclusion that the expression *nemo tenetur prodere seipsum*, which was borrowed from a canon law rule relating to due presentment, did not grow out of the philosophy of the law, but the converse was in fact the case. The expression neatly summarized the opposition to the *ex officio* procedure, and gave it a legitimacy and respectability it previously lacked. It became accepted as a rule of law in the minds of those who wished to believe it, and justifications both moral and legal began to appear. Chief Justice Coke, anxious to establish and maintain the pre-eminence of the common law courts, found in the expression a basis for exercising control over the ecclesiastical courts. *Nemo tenetur seipsum prodere* thus became a rallying cry for those opposed to domination by the state church. The excesses of the Court of High Commission and the Star Chamber in the reign of Charles I reinforced the belief that the privilege against self-incrimination ought to be part of the birthright of every Englishman. When these two courts were abolished in 1641,

popular sentiment against them was so great that everything associated with them was anathema. The privilege against self-incrimination thus became a part of the revolution, and a part of the very fabric of English court procedure. Nevertheless, it was not considered to be such a high principle as to merit inclusion in any of the great constitutional charters of the 17th century.

Chapter Two

THE SCOPE AND OPERATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

Having dealt in chapter one with the history of the privilege against self-incrimination, it is appropriate at this point to deal with its scope and operation in English law today.

SCOPE OF THE PRIVILEGE

While there have been a number of minor statutory amendments, it is fair to say that the privilege remains basically the same as it was when it was received into the common law in the latter half of the 17th century. The privilege arose as an objection to giving incriminating answers under oath in court, and that is still its limit and function, even though by virtue of the separation of the investigative and fact-finding function most instances of involuntary self-incrimination now occur outside the courtroom.

There are three types of evidence which contain a substantial element of self-incrimination, but which fall beyond the scope of the privilege, and these should be recognized and dealt with before turning to an examination of the operation of the privilege. They are: (1) self-incriminating, out-of-court statements; (2) objective fact evidence, including non-testimonial actions or conduct; and (3) certain documents.

1. Self-incriminating Out-of-Court Statements

English judges and lawyers have not found it necessary to employ the privilege against self-incrimination in order to exclude this type of evidence, because in the great majority of cases it is excluded on some other basis. In particular, the hearsay rule, which developed a full century and a half earlier than the privilege against self-incrimination,[1] excludes most out-of-court statements. Of those statements that either fall outside the hearsay rule, or fall within the recognized exceptions to it, the former is an extremely small category, and the latter has its own special protective procedures.

The only out-of-court statements falling outside the hearsay rule are statements which are admitted in evidence for some purpose other than "to prove the truth of the matters stated".[2] The principal example of this category is the previous inconsistent statement of the witness, which may be adduced in evidence for, and only for, the purpose of impugning his credibility. The witness, of course, can refuse to answer the question "Is the statement true?", if to give an affirmative answer would tend to incriminate him. He cannot, however, prevent the question being asked, nor can he prevent proof being adduced that he had in fact made the previous statement. If the statement had been made under circumstances which would render it misleading or unfair to permit proof of the statement, it is within the judge's general discretionary power to disallow it.[3]

Of the exceptions to the hearsay rule, by far the most important is the exception regarding incriminating admissions and confessions. For many years it was thought that there were different sets of rules applying to admissions and confessions, but in the case of Commissioners of Customs and Excise v. Harz et al.,[4] the House of Lords concluded that there was in fact no distinction either in law or in logic between the two; hence, the term "confession" is used hereafter to connote both concepts, unless otherwise indicated.

Paradoxically, the tendency to incriminate, which is the basis for excusing an answer (and thus for excluding evidence) under the privilege against self-incrimination, is the basis for receiving the confession in evidence as an exception to the hearsay rule. As stated by the Court of King's Bench in R. v. Warickshall, in 1783:

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[5]

Wigmore sees the Warickshall case as the *fons et origo* of the confessions rule, but there is strong evidence that the rule was recognized and applied long before then.[6]

It is stated by Hardres in A.-G. v. Mico[7] in 1658, and it appears in reported cases in the reign of Henry VIII.[8] It seems likely that the rule originated in the context of the pre-trial examination of the accused by justices. The justices were authorized, and doubtless encouraged, to obtain confessions from the prisoners whom they examined.[9] By virtue of their official status and their ability to transcribe the examination, the chief danger inherent in hearsay was eliminated, and the prisoner's confession was deemed to be virtually conclusive of his guilt. It was recognized, however, that the justice, as a person in authority over the prisoner, could easily subject him to pressures and inducements designed to elicit a confession, whether the prisoner was willing to confess or not. Because of the danger that an involuntary confession was not true, the rule developed that the Crown had to establish that the confession was freely and voluntarily given, and was not the result of threats or inducements held out or made by a person in authority. Indeed, it would be quite natural for the law to develop in this way, because confessions to justices were similar in nature to *confessiones in jure* in ecclesiastical procedure, where involuntary confessions were deemed invalid.[10]

No doubt the rule that involuntary confessions are inadmissible in evidence was not consistently applied until sometime in the 18th century, but it was there in the background nonetheless, and lawyers would tend to call upon it rather than the privilege against self-incrimination in

dealing with out-of-court statements.

The protection of the confessions rule does not extend to involuntary statements made to persons who either were not in authority or who the accused did not know were in authority. This distinction is based on the theory that a person has less reason to incriminate himself when subjected to threats or promises by one who has no authority or control over the proceedings or prosecution. But this is a matter of degree rather than kind, for any involuntary statement is likely to be fashioned so as to satisfy the one who is exerting the physical or psychological pressure. Hence there is little reason to retain the distinction, and its demise would simplify criminal proceedings by eliminating the often thorny questions of whether a person is in authority and whether the accused knew him to be so.[11]

2. Objective Fact Evidence, including Non-Testimonial Actions or Conduct

At the time the privilege against self-incrimination developed, the ecclesiastical courts and the Star Chamber relied almost entirely upon testimonial evidence. It is not surprising, therefore, that the efforts of those who fought for the privilege were directed towards limiting the courts' power to require men to answer incriminating questions under oath.

In modern times, partly due to our ever more sophisticated technology, the range and importance of non-testimonial evidence has greatly increased. Blood samples, handwriting specimens, fingerprints, etc., are frequently produced in evidence, with the same telling effect as evidence of a confession had in the Star Chamber and the High Commission. The question is, therefore, whether the adduction of non-testimonial evidence can be resisted on the basis of the privilege against self-incrimination.

The basic rule in England is that relevant objective fact evidence is admissible if it is available, even if it has been obtained by improper means. Reasoning from the confessions rule, where reliability is the ultimate test of admissibility, the courts have held that if the reliability of objective fact evidence has not been diminished by the means used to obtain it, it should be admissible, subject, however, to the court's discretionary power to exclude the evidence if its reception would operate unfairly against the accused.[12] It is interesting to note that in this regard the English courts hold a middle position between the Canadian rule, which denies the court any discretion to exclude relevant evidence on the ground of unfairness,[13] and the American "fruits of the poisonous tree" doctrine, which excludes all evidence found as a result of an improper procedure.[14]

A more difficult question is whether the accused can be compelled to assist the Crown by furnishing non-testimonial evidence. The English courts apparently have never been confronted with the question whether it is contrary to the privilege against self-incrimination to require a person to submit to tests and examinations for the purpose of determining whether he is the guilty party. However, the American courts on a number of occasions have ruled that non-testimonial evidence was not covered by the privilege against self-incrimination, which is incorporated into the 5th Amendment. Wigmore gives ten examples of procedures which fall outside the protection of the privilege against self-incrimination, and most, if not all of them, are also normal practice in English courts:

(1) Routine fingerprinting, photographing or measuring of a suspect.

(2) Imprinting of other portions of a suspect's body (e.g., foot in mud, nose and cheek on window) for purposes of identification.

(3) Examination of the body of a suspect for identifying characteristics.

(4) Examination of the body of a suspect, including his private parts, for evidence of disease or crime.

(5) Extraction of substance from inside the body of a suspect for purposes of analysis and use in evidence.

(6) Removing from or placing on a suspect shoes or head coverings or other clothing.

(7) Requiring a suspect to speak for identification.

(8) Requiring a suspect to write for identification.

(9) Requiring a suspect to appear in court, stand,

assume a stance, walk or make a particular gesture.

(10) Requiring a suspect to submit to an examination for sanity.

He suggests that the distinction between evidence which is covered by the privilege and evidence which is not is that the latter does not require the person to disclose something from his knowledge. On this basis he suggests that "requiring a suspect to submit to the use of truth serum or the lie detector", may well be contrary to the privilege against self-incrimination.[15]

Wigmore draws a distinction between non-testimonial evidence and "chattels", which he groups with documents, which are generally covered by the privilege, saying that there is a testimonial element in their production in that the person producing same implicitly assures the court that the articles produced are the ones demanded.[16] This distinction is not very convincing. The testimonial element is no greater than it is when the accused is required to put on a coat or speak a few words for purposes of identification. ["This is how I would look wearing this coat," or "This is how I sound when I speak."]

Perhaps the American courts have accepted this as part of the privilege against self-incrimination, but in the absence of clear English authority[17] it is suggested that the practice of not compelling production of chattels in criminal cases is based upon the quite different principle that the onus is upon the Crown to prove every element of

the case. However, the Civil Evidence Act 1968, section 14(1), specifically provides that the privilege against self-incrimination includes the right "to refuse to answer any question or produce any document *or thing* if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty..." (italics added).[18] The provision is based on a draft clause in an annex to the report of the Law Reform Committee on Privilege in Civil Proceedings, but strangely the Committee did not mention the production of things in the body of the report.[19] It seems likely therefore, that the collocation of the words "document or thing" was the result not of an in depth analysis of English law but a facile borrowing from Wigmore.

3. Documents

As a general rule, the privilege against self-incrimination can be claimed with respect to documents in the same manner as it can be claimed with respect to questions in court. This was the position according to the case law and has been made statutory by the Civil Evidence Act 1968.[20] However, there are four exceptions to this general rule:

(1) where the privilege has been withdrawn by a clear, unambiguous statutory provision;

(2) where the documents are of a "public" nature:

(3) where the person holding the document does so in a representative capacity, and production is sought by a member of the group so represented, in relation to litigation concerning the group activities; and

(4) where the document was one that was required to be kept by statute.

Little needs to be said about the first two exceptions. The first exception is only a statement of parliamentary sovereignty. If Parliament withdraws the privilege at any time, however, the courts will scrutinize the legislation with great care to make sure that this was the intention of Parliament, and they will not find the privilege to have been abrogated by vague or indefinite provisions.[21] With regard to the second exception, the courts may in some instances refuse to order production, if to do so would be extremely inconvenient.[22] This is particularly true where reliable secondary evidence of the public document is readily available.

The third exception is based on the principle that one who holds a document in a fiduciary capacity must produce it to a person who has an interest in it. It arises most frequently in relation to trusts, corporations and partnerships,[23] but also can apply to the solicitor-client relationship or relations between two clients jointly consulting a solicitor on the same matter.[24]

The fourth exception is the most difficult to explain. Wigmore suggests that in all but a few cases the public interest in obtaining the information will exceed the private interest in opposing disclosure.[25] English authority on the

point seems to be restricted to the two line decision of Lord Abinger C.B. in Bradshaw v. Murphy.[26] That case, which concerned the contents of a vestry book, perhaps should be looked upon as a case involving a public document, inasmuch as a vestry book is for some purposes intended to be a public record. In any event, it is difficult to believe that the courts would apply this rule with regard to other documents made under statutory obligation - for example, records kept for taxation purposes.

It may be asked why the privilege should attach to documents at all, inasmuch as a demand for their production does not pose the same dilemna of choosing between perjury and possible conviction as is raised by examination under oath. Moreover, even though the word *"prodere"* is broad enough to include production of documents, the maxim *nemo tenetur seipsum prodere* originally was used specifically in opposition to the *ex officio* oath procedure. However, at an early stage it was held that the Privilege did encompass the production of documents. Probably the extension to documents was the result of Chancery influence, for the Chancery would not order production of documents if to do so would tend to subject the party to penalties or forfeitures,[27] and as mentioned in chapter 1, in the 17th century the Chancery began to treat self-incrimination as being in the same category as penalties and forfeitures. As a result, when an objection

was raised to discovery on the basis of self-incrimination, penalties or forfeitures, the Chancery would not grant the discovery. The same policy held true with regard to the *subpoena duces tecum*, which also was originally a Chancery writ. When the common law courts were given the power to use the subpoena, they tended to use it in a manner consistent with the Chancery practice, even though penalties and forfeitures did not trouble their conscience in the same way as they troubled the Chancellor. With the reception of the privilege against self-incrimination by the common law courts in the mid 17th century, and the general public indignation against inquisitorial tactics, it was easy for the courts to exclude incriminating documents without being overly worried about the distinction between documents and testimonial evidence.

OPERATION OF THE PRIVILEGE

In studying the operation of the privilege against self-incrimination today, a distinction must be drawn between the ordinary witness and the accused in criminal cases. For ordinary witnesses, the privilege is that developed in the 17th century, i.e. it excuses the witness from answering certain questions. For the accused, the privilege takes the form of an exemption from legal obligation to testify, thus preserving him from the perils of cross-examination if he chooses to stay out of the witness box.

1. Ordinary Witnesses

Whenever a witness is compelled to answer questions under oath, or to produce documents, the privilege against self-incrimination is available to him, unless he has been deprived of its benefits by the clear and unambiguous words of a statute. This is so whether the proceeding takes the form of a trial, a preliminary examination, a discovery, or even a non-adversarial proceeding such as a commission of inquiry or parliamentary commission.

While the form of the privilege has remained more or less constant since its inception, its content has varied. It always has provided protection against incriminating questions, but its application with respect to questions involving ecclesiastical offences, penalties and forfeitures, scandalous matters, and civil liability has gone through a process of evolution.

(a) *Crimes*

There are serious crimes and trivial crimes, but no attempt appears to have been made to draw any lines of limitation for the purposes of the privilege against self-incrimination. The fact that a criminal charge may arise in connection with a transaction to which the disclosure pertains appears to be sufficient. In relation to the question of jurisdiction the courts have had to consider what is meant by the word "crime", and in Mellor v. Denham[28] the Court of Appeal held

that the contravention of a school board by-law, which was punishable by a penalty of five shillings under the Elementary Act, 1874, constituted a criminal matter. Bramwell L.J., in delivering the judgment of the court, said "... it is disobedience to by-laws, which are enforceable as part of the law of the land, and a person guilty of disobedience to them is liable to a penalty. This is sufficient to constitute a criminal matter...."[29]

The incrimination must be in relation to the domestic law, and not to the law of a foreign state, despite the fact that under the provisions of an extradition treaty with a foreign state the witness might be compelled to return to that state to face a serious criminal charge. Lord Cranworth V.C., in King of the Two Sicilies v. Willcox et al.,[30] explained this limitation on the basis that this was the only law that the judge knew and could assess the effect of: "No judge can know, as a matter of law, what would or would not be penal in a foreign country; and he cannot, therefore, form any judgment as to the force or truth of the objection of a witness, when he declines to answer on such a ground."[31] However, it was held in U.S.A. v. McRae[32] that if the court does know the law of the foreign jurisdiction, or it has been admitted that the particular act to which the question relates would be deemed criminal in the foreign jurisdiction, the court will recognize a claim of privilege and not require an answer. The Law Reform Committee in its Sixteenth Report (Privilege in Civil Proceedings) thought that the difficulties were such that no absolute privilege should be given against

self-incrimination under foreign law, but the matter should be left to the discretion of the trial judge in the particular circumstances in which a claim arose.[33] This recommendation was incorporated into the Civil Evidence Act 1968 by sections 14(1)(*a*) and 18(5)(*a*), and the same position has been recommended for the criminal courts by the Criminal Law Revision Committee in its Eleventh Report on Evidence (General).[34]

Subject to two exceptions the privilege can be claimed only in relation to a crime for which the witness personally can be prosecuted. The first exception relates to incrimination of the spouse of the witness. At common law it is a moot point whether the witness can refuse to answer on the ground of incrimination of his or her spouse. There are no English cases which decide this question as a matter of principle one way or the other. There are, however, *dicta* favoring such an extension of the privilege,[35] and as a matter of policy it may be argued that if it is deemed improper for the state to compel one spouse to testify against the other in a criminal case, likewise it should be improper for the state to compel one spouse to incriminate the other. The Law Reform Committee found that it was even more "repellent" to compel one spouse to incriminate the other than to compel a person to incriminate himself; hence it recommended that the privilege should include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the husband or wife of that person to proceedings for any such criminal offence or for the recovery of

any such penalty. This is now the law in civil cases by virtue of section 14(1)(b) of the Civil Evidence Act 1968, and the Criminal Law Revision Committee has recommended the adoption of the same rule in criminal cases for witnesses whose spouse is not the accused in the case at bar.[36]

The spouse of the accused in criminal cases cannot be classed as an ordinary witness, inasmuch as only exceptionally is he or she competent or compellable at the instance of the Crown. In those exceptional cases a distinction has been drawn between cases where the spouse was a competent witness by virtue of the common law, and those cases where the spouse has been rendered competent with respect to certain statutory offences by section 4 of the Criminal Evidence Act, 1898. In the latter category of cases, the House of Lords in Leach v. R.[37] held that that section only modified the common law position to the extent of rendering the spouse of the accused a "competent" witness. Thus, on the facts of the case, Mrs. Leach was not compellable by the prosecution under section 4 to testify against her husband on a charge under the Incest Act. The House did not deal with the situation where the spouse was competent at common law. There is in fact only one well established common law exception, and that relates to cases

where the accused is charged with assaulting his or her spouse. In R. v. Lapworth,[38] the Court of Criminal Appeal held that the decision in Leach did not apply, and that the spouse was, like all competent witnesses, compellable for the prosecution.

No court yet has decided whether the spouse of the accused, once in the witness box, can refuse to answer specific questions in order to protect the accused from incrimination with regard to the present or other offences. The recommendation of the Criminal Law Revision Committee on this point is that such a privilege not be granted. The Committee reasoned that the rules relating to questions incriminating the accused should be the same for the spouse of the accused as for the accused himself; hence, because the Committee had concluded that the accused as a witness should not be able to protect himself by refusing to answer such questions, neither should his spouse be able to protect him in this manner if she becomes a witness.[39] It is suggested that a better justification exists for refusing privilege than the mere desirability of consistency. In those exceptional criminal cases where the law compels the spouse to testify, it is because a policy decision has been made that the spouse's evidence, incriminating or not, must be obtained. If the witness were allowed to decline to

answer any question which might tend to incriminate the accused-spouse, this policy would be defeated, for practically every relevant question posed by the prosecution is designed to elicit an answer incriminating the accused. In the case of the spouse who is competent but not compellable, and who thus enters the witness box voluntarily, the doctrine of waiver would appear to apply (see *infra*). particularly where the spouse enters the witness box at the bidding of the accused. These reasons do not apply, however, to questions incriminating the accused with respect to other offences, and the normal privilege therefore should apply to them.[40]

The general rule that a witness cannot claim privilege with regard to questions which might tend to incriminate third persons also applies in relation to corporations. Triplex Safety Glass Co. v. Lancegaye Safety Glass (1934) Ltd.[41] is the only reported English case involving this problem. An action was commenced against a company and its directors for libel and slander. The defendant company and a director thereof refused to answer interrogatories on the ground of incrimination. Most of the judgment of the Court of Appeal is devoted to the question of whether the privilege against self-incrimination applied in this case in view of the fact that it was highly unlikely that a prosecution for

criminal libel would take place. On that point, the Court was satisfied that the claim of privilege was made *bona fide*, and that there was a real (if remote) possibility of such a prosecution. On the issue of whether a corporation could claim the privilege against self-incrimination, there appears to have been only a faint argument to the contrary, and the Court concluded that the corporation, being susceptible of punishment for the crime of libel, was entitled to protection against self-incrimination.[42] The authority of the case is, of course, limited to the corporation's responsibility with respect to interrogatories, but the judgment of the Court of Appeal is framed in the broadest terms, and it must be assumed that the privilege also applies at trial. However, presumably it only applies when the privilege is asserted by a director of the corporation, or some agent acting within the scope of his authority.[43]

Wigmore states that almost all American courts have decided that the privilege against self-incrimination cannot be invoked by a collective group. He summarizes the reasons for denying the Privilege to corporations in the following terms:

> The policies underlying the privilege (2251 *supra*) do not require that the privilege apply here. The privilege guards, firstly, against the abuses of physical compulsion which are likely to grow out of the license to interrogate. This danger is of course not applicable where the accused is not a human being, but only an artificial entity.

> Secondly, the privilege reflects a sentiment that requires the government to bear the entire burden of building a criminal case against an accused. This sentiment - although groups (e.g., a church, a proud regiment) are capable of exciting sympathies not unlike those excited by individuals - is almost entirely confined to flesh-and-bone individuals. A practical consideration also militates against application of the privilege in behalf of collective groups. Often the criminal acts of groups - especially of corporations, which virtually can act by written record only - are contained in writings only. They are virtually the sole evidential incriminating material upon which a prosecutor can rely. A rule privileging the group's records from surrender would impose upon the prosecutor a task largely futile.[44]

Perhaps the Triplex Glass case is too well entrenched in English jurisprudence to be disturbed by a re-examination of the historical origins of the privilege against self-incrimination. Nevertheless, Wigmore's arguments seem convincing. Certainly nothing could have been farther from the mind of the cleric, John Lambert, than the protection of soulless enterprise from rightful criminal prosecution. Nor is it likely that John Lilburne thought he was acting on behalf of commercial corporations when he endured being whipped through the streets to the pillory. How does Lambert's assertion that "thoughts be free", and Lilburne's cry on behalf of the liberties of Englishmen, apply to a corporation? If there is an area in which the privilege should be withdrawn, surely this is it.

(b) *Ecclesiastical Offences*

The struggle between the Church and the State in relation to jurisdiction in criminal matters has been dealt with in chapter 1. This struggle culminated in the statute 16 Charles I, c. 11, which not only abolished the Court of High Commission, but also forbad the Church or any official thereof exercising spiritual or ecclesiastical power, authority or jurisdiction to

> ...award, impose, or inflict any Pain, Penalty, Fine, Amerciament, Imprisonment or other corporal Punishment upon any of the King's Subjects, for any Contempt, Misdemeanor, Crime, Offence, Matter or Things whatsoever, belonging to Spiritual or Ecclesiastical Cognizance or Jurisdiction, (2) or...*ex Officio* or at the Instance or Promotion of any other Person whatsoever, [to] urge, enforce, tender, give or minister unto any Churchwarden, Side-man or other Person whatsoever, any corporal Oath, whereby he or she shall or may be charged or obliged to make any Presentment of any Crime, or Offence, or to confess or to accuse himself or herself of any Crime, Offence, Delinquency or Misdemeanor, or any Neglect, Matter or Thing, whereby or by reason whereof he or she shall or may be liable or exposed to any Censure, Pain, Penalty or Punishment whatsoever....[45]

There was some doubt as to what jurisdiction was left to the ecclesiastical courts as a result of the above provision; hence, in 1661, the statute 13 Charles II, c. 12 was passed to clarify the situation. The latter statute confirmed the power of the ecclesiastical courts to enforce all manner of ecclesiastical jurisdiction by all censures and coercions which they had possessed prior to the passage of 16 Charles I, c. 11.[46] However, the statute re-affirmed

the position with regard to the use of any form of oath procedure whereby the person to whom it is tendered or administered "may be charged or compelled to confess or accuse, or to purge him or herself of any criminal Matter or Thing, whereby he or she may be liable to any Censure or Punishment; any Thing in this Statute, or any other Law, Custom or Usage heretofore to the contrary hereof in any wise notwithstanding."[47] In Schultes v. Hodgson[48] in the Court of Arches, this provision was interpreted as meaning that in civil proceedings in the ecclesiastical courts the parties could be asked questions under oath, but no questions could be tendered which might require a self-incriminatory answer. On the other hand, if the proceedings in the ecclesiastical court were penal in nature, no questions at all (incriminatory or otherwise) could be asked or answers given by the defendant. This latter rule was changed, and the defendant became a compellable witness in penal proceedings before the ecclesiastical courts by virtue of the Civil Evidence Act, 1851.[49] The Arches Court held in Bishop of Norwich v. Pearse[50] that the Evidence Act rendered parties competent and compellable to give evidence, except to the extent that the Act specified to the contrary. Section 3 of the said Act made an exception for persons charged in "any criminal proceeding", but the Court interpreted this to mean proceedings "in which the Crown, as guardian of the public weal, is prosecutor; and not suits which the common

law denominates 'criminal', and in which the prosecutor is the ordinary, or the promoter of his office...." [51] The Court held that the Evidence Act, 1851 implicitly repealed the provisions of 13 Charles II, c. 12.

In summary, all persons are now competent and compellable witnesses before the ecclesiastical courts, whether the proceedings are civil or criminal in nature, but they cannot be required to answer any questions to which the privilege against self-incrimination applies. Apart from proceedings against officials of the Church, the jurisdiction of the ecclesiastical courts has fallen into desuetude. The principal question, therefore, is to what extent liability to incur ecclesiastical punishment can be used as a basis for invoking the privilege against self-incrimination in other courts. In the early history of the Privilege, no distinction was drawn between ecclesiastical offences and offences against the State; indeed, the earliest cases in which the phrase *nemo tenetur seipsum prodere* was used all related to ecclesiastical offences such as heresy, usury, incontinence, publication of false doctrine,[52] etc. Punishment at ecclesiastical law continued to be a sufficient ground for claiming the privilege against self-incrimination as late as the middle of the 18th century.[53] However, with the general reduction in the activity of the ecclesiastical courts, the liability to ecclesiastical punishment was less and less frequently raised as a basis for the Privilege.

The first major assault on this ground of privilege occurred in Redfern v. Redfern[54] in 1890. The husband, petitioning for divorce, applied for an order that his wife should make the usual affidavit as to documents. The wife refused to return such an affidavit, pleading *inter alia* the privilege against self-incrimination. In the Court of Appeal the argument based on privilege was accepted. Lindley L.J. said that adultery and other forms of fornication and lewdness exposed the guilty party to ecclesiastical censure and punishment, and while it was true that such punishment was practically obsolete, it could not be said that the jurisdiction of the ecclesiastical courts in this respect had ceased.[55] Bowen L.J. agreed, but expressed some doubts about the continued existence of the privilege with respect to ecclesiastical censure:

> In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form; but adultery is a charge of such gravity as to render it not unnatural that we should find the doctrine still applicable to it - that "no one is bound to incriminate himself". Based upon the traditions of a law belonging to an earlier age, and a fear of ecclesiastical monitions that is now technical and obsolete, the privilege in such a case has never been abrogated.[56]

He went on to say that granting a privilege against discovery with respect to questions relating to adultery was in keeping with the former practice of the ecclesiastical courts, and with the privilege accorded by section 43 of the Divorce Act, 1857,[57] and section 3 of the Evidence Further Amendment Act, 1869,[58] not to answer such questions at trial.

The privilege based upon the possibility of ecclesiastical censure was reviewed by the Court of Appeal in Blunt v. Park Lane Hotel Limited.[59] The action was based upon defamation, and the defendant hotel company sought leave to administer interrogatories to the plaintiff to establish that she had been guilty of unchaste conduct with various men. The plaintiff contested the application alleging (1) that Redfern held that the court would not order discovery to establish adultery; (2) her answers might tend to expose her to punishment in the ecclesiastical courts; and (3) her answers might result in her being refused the sacraments. The Court of Appeal held that the Redfern decision only applied to cases in which evidence of adultery was being sought for purposes of obtaining a divorce, and that the other two grounds were fanciful, except for persons in holy orders.

Finally, the privilege with respect to adultery in divorce cases was abolished by section 16(5) of the Civil Evidence Act, 1968. The Law Reform Committee, in recommending its abolition, said:

> For more than 50 years past no one has had a good word to say for this privilege; and neither have we. As long ago as 1912 its abolition was recommended by the Gorell Commission. The Morton Commission made a similar recommendation as recently as 1956. This privilege may have made good sense in 1869 when adultery (with or without other matrimonial offences) was the only ground for divorce *a vinculo*, and was also regarded as a serious social offence. Under the modern law and practice in matrimonial causes, it operates in an irrational and arbitrary fashion and is, in our view, a hindrance to the administration of justice in those cases in which

it applies. The judges of the Probate, Divorce and Admiralty Division are not in favor of retaining it any longer; we too think that the sooner that it is abolished the better.[60]

Neither the Law Reform Committee nor the Criminal Law Revision Committee makes any reference to the possibility of a privilege being raised by a clergyman or church official with regard to an ecclesiastical offence, even though Blunt v. Park Lane Hotel Limited specifically recognized the continued existence of the privilege in this case. It is a pity that the opportunity was missed to eliminate this anachronism.

(c) *Penalties and Forfeitures*

Much of the development of the privilege against self-incrimination is attributable to the Court of Chancery.

Unlike the situation in the common law courts, the parties in a proceeding in Chancery were competent witnesses, and they were subject to the Court's power to order discovery - i.e. to order them to respond to a request from the other side that they answer searching interrogatories and produce all documents in their possession relevant to the case. A party might demur to discovery on the ground that it might tend to incriminate him or subject him to penalty or forfeiture. By the very nature of Chancery jurisdiction, demurrers were more commonly based on the latter objection.

The bulk of the reported cases on penalties and forfeitures occurred in the 18th and early 19th centuries. Although the Chancellor usually did not have much difficulty

determining whether a particular statutory or contractual provision constituted either a penalty or a forfeiture, certain important distinctions developed. For example, if the amount agreed upon with respect to a breach of contract was deemed to be a genuine pre-estimate of the potential loss rather than an amount *in terrorem*, a claim of privilege would be rejected and disclosure ordered;[61] and if discovery could only result in an order and no penalty, it was not objectionable that penalties might be imposed if the order were disobeyed.[62] With regard to forfeitures, a fine distinction was drawn between an estate being forfeited, and an estate being lost upon the occurrence of certain stipulated conditions.[63] This distinction was carried over (with some regret) to the common law when discovery was introduced by the Common Law Procedure Act in 1854.[64]

The objection to discovery on the basis of penalties or forfeitures became less and less common in the late 19th and early 20th centuries. One reason for this is that there was a trend away from statutory forfeitures and the use of common informers, suing for a penalty, as a means of enforcing statutes. Another reason was that statutory changes in relation to the law of property made it more difficult to enforce a forfeiture, by requiring that notice be given, by providing an opportunity to rectify any breach upon which a forfeiture was based, and by giving the courts the power to relieve against forfeiture.[65]

The Law Reform Committee, reporting in 1967, found that there was no longer any need for a privilege against forfeitures, "Now that the courts possess and exercise full power to grant relief against forfeiture in most cases of any importance...".[66] However, with regard to penalties, the Committee concluded that "so long as penalties are recoverable in some civil proceedings, we think that the existing privilege should continue to apply and should be extended to answers and documents which would render the witness's or party's spouse liable to a penalty."[67] These recommendations were incorporated in the Civil Evidence Act, 1968,[68] and likewise have been approved by the Criminal Law Revision Committee, in its Eleventh Report on Evidence.[69]

Neither Committee gave any substantial reason for preserving the privilege with respect to penalties, and it is submitted that there is none. If the penalty is one imposed by contract, it cannot be enforced in any case;[70] hence there is no prejudice to the party or witness in disclosing information with regard thereto. If, on the other hand, the penalty is imposed by statute, it seems strange that the court should put stumbling blocks in the way of its enforcement. The intention of the legislature clearly was to encourage people to take part in the enforcement of the law by offering them a financial inducement. It is not the court's job to judge the morality of such legislation, particularly as the liberty of the subject is not at stake and no criminal record results from the imposition of a penalty.

The court's role in protecting the citizen should be restricted to assuring that he gets a fair trial.

(d) *Scandal*

There are a number of cases where the courts have either refused to permit a question to be put to a witness, or have excused him from answering a question, if an affirmative answer would have the effect of disgracing him.[71]

The courts do not appear to have had any clear conception of the principle under which they were deciding these cases; however, it would appear that they were greatly influenced by the Chancery practice of expunging from court documents any "scandalous" matter that was not relevant and pertinent to the cause.[72] In so doing, the Chancellor was acting to prevent court records from becoming instruments for the perpetuation of libellous and malignant slanders.[73] Thus, with regard to the evidence in a case, interrogatories could be struck out on the basis that they were irrelevant and scandalous.[74]

In the common law courts where examination of witnesses took place *viva voce*, maintenance of the purity of court records could not be used as a basis for excluding questions which would vilify the witness. Nevertheless, at an early stage the common law judges asserted the authority to exclude questions which were irrelevant and scandalous.[75] Thus, common law and equity arrived at the same conclusion, albeit by different routes.

In many instances the answer to a question will both incriminate and disgrace; hence it is not surprising that the two notions should become associated and that the procedures applicable to the privilege against self-incrimination should be applied to questions that raised matters of a disgraceful nature.[76] Thus, prior to the 19th century questions of this nature usually were excluded, but gradually the practice shifted so that they could be asked but no answer could be demanded.[77] Then, in the mid-19th century the privilege respecting scandal became obsolescent, if not obsolete, as other specific rules - such as those governing questions concerning adultery or previous convictions of the witness - were introduced to cover the principal areas in which the privilege formerly had been asserted.[78]

(e) *Civil Liability*

In the 17th and 18th centuries, when the outer limits of the maxim *nemo tenetur seipsum prodere* were being explored, there were statements from time to time that it protected a person from disclosing information whenever to do so would be against his interests. Thus, in Parson Latters v. Sussex,[79] a prohibition was granted to prevent the Court of High Commission examining the defendant upon his oath touching simony, "that none shall be compelled to accuse himself upon his oath; where he is to incurr a temporal punishment, at the common law, or a *temporal loss*, as in that case of his church...".[80] Likewise in the case of A.-G v. Mico,[81]

Hardres is reported to have argued that the defendant should not be compelled to make discovery on the basis of the rule *nemo tenetur seipsum prodere vel accusare*. He added,

> "upon that rule it is, that if a man will prefer a bill to compel me to answer what trespasses I have committed upon his land, or what other injury I have done him; I shall not be compelled to answer to such a bill, as the common rule in all courts is, because it is a matter of *crime and tort*; for which I am fineable and punishable in another court, over and above what damages the party is to recover against me.[82]

Such a privilege was, however, never clearly established, and when it was claimed by a witness in the impeachment of Lord Melville in 1806, the House of Lords referred the question to the judges for an opinion. The judges were divided in their views - four, including Mansfield L.C.J., being of the opinion that there was such a privilege and seven being of the contrary opinion. The majority view was supported by three of the law lords (Eldon L.C., Ellenborough C.J. and Erskine), and a Bill entitled the Witnesses' Declaratory Bill was passed stating that a witness could not refuse to answer a relevant question by reason only, or on the sole ground, that the answer might establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit.[83] This marked the end of speculation that the privilege might be expanded to protect against other forms of civil loss besides penalties and forfeitures.

Procedure

The onus is cast entirely upon the witness to assert or not to assert the privilege as he sees fit. It is his privilege and his alone, and no one else can claim it for him: in theory, even his counsel cannot claim the privilege on his behalf.[84] Conversely, the witness cannot claim the privilege with regard to disclosures which might have the tendency to incriminate someone else,[85] exceptions being made in the case of spouses and corporations as discussed earlier in this chapter.

There has been a difference of judicial opinion about the proper practice with respect to incriminating questions. Early decisions favoured prohibiting the putting of the question;[86] but gradually judges began to permit the question to be asked, leaving it to the witness to decide whether to answer it, and by the early 19th century the balance appears to have tipped in favour of the latter practice,[87] although occasionally judges continued to assert the proposition that "a question which need not be answered, ought not to be put"[88]

Once it became the established practice to allow the question to be put to the witness, a difference of opinion developed on the issue of whether the judge had to advise the witness of his right not to answer. Many judges did regard this as an obligation, [89] but in R. v. Coote[90] the Judicial Committee of the Privy Council came to the contrary conclusion. In that case it was argued that statements made by the prisoner when he

was a witness in another proceeding ought not to be used against him at his own trial because he possibly was ignorant of the law entitling him to decline to answer incriminating questions. The Privy Council rejected this argument, saying that

> . . . to institute an inquiry in each case as to the extent of the prisoner's knowledge of the law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule recognized as essential to the administration of Criminal Law, "*ignorantia juris non excusat*".[91]

Obviously, a rule requiring the court to make an inquiry after the fact, concerning the witness's knowledge of the law at the time he gave his testimony, would be completely unsatisfactory. Likewise, any rule making it a ground of appeal that the trial judge did not caution the witness with respect to a particular question would be unworkable, because many apparently innocent questions will elicit incriminating responses. However, it would be a fairly simple matter to advise every witness before he commences his testimony that he need not answer questions which would tend to incriminate him. This would not eliminate all problems, but it would serve to put the ignorant and the sophisticated on a more equal footing as witnesses before the courts, and it would also tend to legitimize in the eyes of the jury the claiming of the privilege.

There is a great deal of case law on the subject of who decides whether the question must be answered. Early cases generally supported the view that the word of the witness, that his answer would incriminate him, had to be accepted.[92] The leading case in support of this proposition was Fisher v. Ronald,[93] in 1852, which justified the rule on the basis that only the witness knew the implications of the question, and what the judge might think to be innocent could lead to a criminating result when taken in conjunction with other facts. The courts would, of course, reject a claim of privilege if it appeared that the witness was not acting bona fide, but was "trifling" with the authority of the court - availing himself of the privilege simply to keep back the truth, having in reality no ground whatever for the claim.[94] Indeed, it is highly likely that the courts required some measure of satisfaction that an answer would be incriminatory, even while stating publicly that the word of the witness under oath had to be accepted on the point, for there are *dicta* in cases of the same era as Fisher v. Ronald, suggesting that the witness had to satisfy the judge of circumstances, consistent on the face of them with the existence of the peril alleged.[95] In 1861 the question finally was resolved by the Court of Queen's Bench *in banc* in favour of having the judge decide, but the court made it clear that the judge would be at liberty to accept a low standard of proof:

> . . . to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question.[96]

This subsequently was approved as being the appropriate practice in the Chancery also.[97]

It is not necessary that the answer incriminate the witness directly, for any answer that would assist the Crown in making a case against the witness places him in danger. The courts have held, therefore, that a witness need not answer a question that tends to incriminate him, or that would provide a link in the chain of circumstances leading to a conviction.[98] This same standard was applied with regard to penalties and forfeitures;[99] and while there is some doubt on the issue, the better view would appear to be that it also applied with respect to the privilege against revealing a collateral matter that would disgrace the witness.[100]

When the practice was that even the judge could not question the decision of the witness about the incriminating tendency of a particular question, it followed that neither could the decision be questioned by counsel.[101] There do not appear to be any cases on this point in England since 1831, but it is submitted that there is good reason to suggest that the old authorities no longer prevail. Now that the decision is a judicial one based upon evidence, counsel should be allowed to argue the question like any other matter of

admissibility.[102]

In the event that the judge improperly refuses to excuse the witness from answering a question with respect to which the witness had claimed privilege, the evidence cannot be used against the witness in a subsequent proceeding. It is regarded in the same light as an involuntary confession made to a person in authority.[103] However, as the privilege is a personal one, the evidence is usable against other persons.[104]

Instances where there is no privilege

There are four situations in which the courts will find that the privilege does not exist, or no longer exists: where the danger is passed or illusory; where the privilege has been withdrawn by statute; where the witness has waived the privilege; and (though there is considerable doubt about this one) where granting the privilege would assist the witness to perpetrate or canceal a fraud.

The witness is longer in danger if his answer would only implicate him in an offence for which he has already been convicted, acquitted or pardoned, or on which the limitation period for prosecution has expired. Where prosecution is highly unlikely, though still possible, the witness normally will be excused from answering the question: the Crown can enter a formal *nolle prosequi* if it wants the evidence badly enough. The same considerations apply *mutatis mutandis* to penalties and forfeitures.[105]

In a few instances the privilege has been withdrawn by Parliament. Bankruptcy is the prime illustration of a matter in relation to which from early times the public interest is discovering the truth was deemed superior to the private interest in non-disclosure.[106] However, when the privilege is withdrawn, some alternative form of protection, such as immunity from the use of the evidence in subsequent proceedings, is usually provided to the witness.[107] By way of comparison, in Canada, as will be seen in chapter three, the privilege has been replaced almost entirely by the latter type of immunity.

The third way in which the witness may lose his privilege is by waiver. This may occur by agreement insofar as penalties or forfeitures are concerned, but there is a dispute as to whether a witness can by agreement waive his privilege against self-incrimination, for it would appear to be against public policy to permit a person by contract to waive such a fundamental procedural protection.[108] Even with regard to the waiver of the privilege concerning penalties and forfeitures, the courts presumably would disregard any waiver if it would be inequitable to enforce it. At trial, the witness may also waive the privilege by his conduct. The English position appears to be that this type of waiver has a very limited operation: the witness can answer in part and still claim the privilege whenever he likes.[109] This rule

has the virtue of simplicity, but it could lead to mischievous results unless applied with discretion. If, for example, X is a witness in the trial of Y for burglary and X admits having received the goods from the burglary, knowing them to have been stolen, it would seem illogical to permit him to claim privilege with respect to incidental questions, such as the name of the person from whom he received the goods. There is some old English authority to the effect that having answered in part the witness must answer in whole in order not to leave a misleading impression, but there is a paucity of English authority.[110] In dealing with a similar situation, the American Supreme Court held that the privilege did not apply. Vinson C.J. in Rogers v. U.S., stated that the court must determine "whether the question presented a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures."[111] It is submitted that the English rule is not so inflexible as to prevent a similar interpretation. If the reason for claiming the privilege does not appear to be *bona fide*, or the witness would not be placed in any additional jeopardy, the interest of the public in obtaining the information in question surely must be supreme.

The fourth exception is rather dubious: it is that the court will not grant the privilege if it believes that by so doing it would assist the witness to perpetrate or conceal a fraud. The background to this exception is that the Court of Chancery will not assist a person who is not himself acting in a just and equitable manner - "He who seeks equity must do equity". The question is whether this maxim applies to a person claiming the privilege against self-incrimination. In Chadwick v. Chadwick,[112] Turner V.C. required the party to answer interrogatories which might reveal a fraudulent course of conduct, despite the fact that the privilege against self-incrimination had been asserted. In a short judgment, the Vice-Chancellor justified the requirement of disclosure in the following manner:

> But on looking at the allegations of the Bill, I see nothing in them entitling the defendant to claim exemption from the discovery now sought, which would not equally entitle every defendant charged with fraud to say, "I am charged with fraud, and the discovery now asked would expose me to be indicted for fraud.[113]

The exception presumably must be restricted to cases in which some discretionary equitable proceeding, such as interrogatories or discovery of documents, is concerned. Thus, it would not apply to a claim of privilege by a witness in a trial.

The decision must be regarded as an oddity, reflecting the priorities of the Chancery rather than the policy underlying the privilege against self-incrimination. Whether

it would be followed today is questionable in view of the fact that for more than a century there has not been a decision recognizing the Chadwick exception.[114] Whether it *should* be followed depends upon whether a broad or a narrow view is taken of the scope of the privilege - a question to be dealt with in a later chapter.

2. The Accused

The only persons who are not compellable witnesses today (barring those who have sovereign or diplomatic immunity) are the accused and his or her spouse.

As stated in chapter one, the accused (and spouse) were not even competent witnesses in the criminal courts until the passage of the Criminal Evidence Act, 1898,[115] which still is the governing statute. Section 1 of the Act is so important that it is quoted in full:

> 1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:-
>
> (*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:
>
> (*b*) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:

(*c*) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:

(*d*) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(*e*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witness for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence:

(*g*) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

(*h*) Nothing in this act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

The meaning of the section requires little exposition for purposes of this work; however, some observations are necessary concerning its operation and effect.

First, while the section leaves the choice of whether to enter the witness box entirely up to the accused, it is drafted and applied in such a way as to encourage the accused to do so. The most obvious inducement is the possibility of judicial comment, permitted under clause (*b*), upon the failure of the accused to be a witness. This is a discretionary power, and is not used in every case, but this tends to increase the impact in cases in which comment is made. Moreover, there are no restrictions on the nature of the comment (although presumably comments must meet certain minimum standards of fairness), so that in certain cases it can have a devastating effect.

Second, it seems clear that failure of the accused to submit himself to the perils of cross-examination does lead to unfavorable inferences being drawn. The exact legal effect of such a failure has not been established. In civil cases, the failure of the defendant to deny a fact which it is in his power to deny if false "gives a greater color to other evidence against him", and may be treated as tantamount to an admission.[116] In criminal cases, where the entire onus is supposed to be on the Crown, it is sometimes argued that no adverse conclusions are to be drawn from the fact that the accused has chosen to exercise his right to stay out of the witness box.[117] However, a number of cases indicate that it

is a factor which may be taken into account by the court once the prosecution has adduced a *prima facie* case.[118] Certainly there is ample authority to the effect that the court cannot prevent the jury from drawing logical inferences from the avoidance of cross-examination by the accused,[119] and there are also a number of cases in which appellate courts have taken this fact into account in determining whether there has been any substantial miscarriage of justice.[120]

Third, by forbidding any reference by the prosecution to his criminal record (clause *f*), the section removes one of the greatest deterrents to the accused entering the witness box. The accused feels that he may as well "have a go" at telling his story, particularly inasmuch as Her Majesty does not make a practice of prosecuting people for perjury committed in their own defence.[121]

This combination of circumstances makes the opportunity to testify in the witness box almost irresistible. Indeed, the balance so favors entering the witness box that the common law right to make a statement from the prisoner's dock, free from the dangers of cross-examination, is hardly ever exercised, and the right to remain totally silent is exercised only rarely. In 1969, in a study of seven of the busiest criminal jury courts in England, of 2,855 accused persons standing trial, only 33 (just over 1%) stayed out of the witness box.[122] It can be assumed that a comparable situation would prevail in non-jury trials.

In view of the small number of accused persons who do not enter the witness box, it is interesting that the Criminal Law Revision Committee recommended that the accused be made, in essence, a compellable witness. Under the Committee's proposal, if the court was satisfied on the Crown's evidence that there was a case to answer, the accused would be called upon to enter the witness box.[123] Refusal to be sworn, or without good cause to answer any question, would not result in citation for contempt of court,[124] but such inferences could be drawn therefrom as might appear proper, and the refusal could be treated as corroboration of other evidence against the accused.[125] A refusal to answer would be deemed to be without good cause unless the question offended certain specified limits on cross-examination, the accused was entitled to assert privilege, or the court in its exercise of general discretion excused the accused from answering.[126]

Such a change no doubt would increase the pressure on the accused to enter the witness box, but it is unlikely to have much effect upon the percentage of accused persons choosing to testify. Not only is this percentage very small, but in the vast majority of these cases the accused doubtless was acting on the advice of counsel - who either knew that the accused was guilty, or felt that the perils of an adverse inference based on silence were less than those inherent in the process of cross-examination. These considerations will continue to prevail.

The position of the accused if he enters the witness box also requires some comment, inasmuch as his rights with regard to incriminating questions are different than those of the ordinary witness. Under section 1(*e*) of the Criminal Evidence Act, 1898, the accused can be asked any question in cross-examination, notwithstanding that it would tend to incriminate him as to the offence charged. While the section does not say that the accused must answer such questions, it is interpreted as having that meaning. This interpretation can be justified on two bases. First, by having chosen to enter the witness box, the accused is deemed to have waived his right of silence and to have accepted as a condition of testifying the obligation of answering both favourable and unfavourable questions in relation to the charge.[127] Second, when the statute refers in section 1(*f*) to questions tending to show that the accused had committed offences other than the one wherewith he is charged, it says that the accused "shall not be asked, *and if asked shall not be required to answer*" any such question. If it had been the intention to preserve the privilege against self-incrimination under both paragraphs, surely there was a greater need for the italicized words in (*e*), where incriminating questions are permissible, than in (*f*), where such questions are forbidden.

The interaction between these two provisions is not entirely clear. For example, under section 1(*e*) can the accused

be asked questions about other offences if they tend to incriminate him as to the offence charged, and, if so, does the same marginal degree of incrimination suffice to require an incriminating answer as suffices to establish the privilege under the common law rule? Stated in another way, what is the extent of the waiver under 1(*e*)? In terms of frequency of occurrence, it is not a serious problem, for the number of cases in which evidence of other offences would be relevant is relatively small,[128] and even this number is subject to reduction through the exercise of the court's discretionary power to exclude evidence that is unduly prejudicial to the accused. Whether the problem is small or large, it is submitted that any statutory abrogation or abridgment of the Privilege must be in clear and unambiguous terms, and normally should not be presumed to have taken place unless some alternative form of protection is provided.[129] It is therefore submitted that the accused has the privilege not to answer questions that would tend to incriminate him as to other offences, unless they are directly relevant to the question of whether he committed the offence wherewith he is charged.

The Criminal Law Revision Committee recommended in this connection that the accused have the Privilege only if the other offence is one which in the opinion of the court is relevant "solely or mainly to the accused's credibility as a witness", and is not one about which the accused is liable to be questioned because he has made a claim of good disposition or reputation.[130] The same rule would apply to questions

tending to incriminate the spouse of the accused.[131] This distinction may be hard to apply in certain cases. For example, the Committee said that no privilege would exist in the following case: the accused, charged with shoplifting in shop A, swears he was not in the shop at the material time, but wishes to object to answering where he was on the ground that he was committing a similar offence in another shop at that time. The Committee classed this as an example of a case in which the other offence was directly or indirectly relevant as tending to show that the accused committed the offence charged.[132] However, it is hard to see how an alibi can have such a tendency, unless it is disbelieved - in which case it seems to be more closely related to the issue of credibility than that of culpability.

As the Committee has not proposed any immunity against prosecution for the other offence, or against the use in a subsequent prosecution of the admission by the accused, the accused will face a serious dilemma if the recommendation becomes law: either he answers, and thus provides evidence for a future prosecution, or he refuses to answer and runs the risk of having the court or jury draw an adverse inference from his silence. This raises the spectre of the prosecution charging the accused with one offence simply to get evidence about his involvement in another perhaps more serious offence.

While the out-of-court statements of the accused do not fall within the ambit of the privilege against self-incrimination, the rules governing their use have a profound effect upon the exercise of the privilege by the accused at the trial. If the accused has confessed during the investigation, and the confession can be used against him at his trial, the tactical burden on the accused to give an innocent explanation is significantly increased. The Committee showed no inclination to follow the lead of the American Supreme Court in such cases as Miranda v. Arizona,[133] where the protection of the 5th Amendment was deemed to apply as soon as the investigation focussed upon the accused as the likely suspect. On the contrary, the Committee concluded that the present rules regarding confessions were too favorable to the accused and, accordingly, should be relaxed in favor of the prosecution. In the Committee's view, there should be a duty on a person "when being interrogated by anyone charged with the duty of investigating offences or charging offenders to mention a fact which he afterwards relies on at the committal proceedings or the trial,"[134] and if he fails to do so the court or jury should be entitled to "draw such inference as may appear proper in determining the question before them."[135] Moreover, such failure should be capable of being treated as corroborative of other evidence.[136] In keeping with this proposal, the Committee recommended that the present warning under the Judges' Rules that the suspect or accused need say nothing should be replaced by an

appropriate warning as to the potentially adverse effects of silence.[137]

The Committee also tried to rationalize the law relating to the admissibility of confessions, by eliminating the limitation concerning persons in authority, and by substituting for the former voluntariness test proof that the confession had not been obtained by oppressive treatment or as a consequence of "any threat or inducement of a sort likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof."[138] The intention of the Committee clearly was to prevent reliable confessions being ruled inadmissible just because of some insignificant threat or promise being made by the police,[139] but the test of what is "oppressive treatment" and what conduct in the circumstances would be sufficient to render the resulting confession"unreliable" still contains a very substantial subjective element; hence, the practical effect of such change would not likely be great. In fact, if the Committee's recommendations are acted upon, fewer confessions may be found to be admissible,for under the proposed rule the Crown would have to prove beyond a reasonable doubt the basic facts of admissibility.[140] While there is precedent in England for this standard of proof in relation to the admissibility of confessions, it only is to be found in the unofficial summaries of three cases in the *Criminal Law Review*.[141] It is by no means

clear why the higher standard should apply, for it is not imposed as a test of admissibility with regard to other evidence in criminal cases. As a result, and having regard to the fact that there are persuasive Australian and Canadian authorities for adopting a less rigorous standard,[142] it is possible that English trial judges have felt that some latitude exists in selecting the appropriate quantum. Making the higher standard statutory almost certainly will result in more confessions being rejected, until the judges have lived with the new rule for a while.

CONCLUSIONS

The privilege against self-incrimination has not changed much in form since its reception in the middle of the 17th century; however, its content has undergone a process of evolution. As lawyers tested the limits of the Privilege, there was at first a gradual expansion of its area of operation until the point was reached where it was widely held that a witness could refuse to answer almost any question that would cause him any form of penalty or loss. No doubt this development also reflected the notions of good conscience and fair play which underlay the procedure in Chancery, where most of the cases involving the Privilege were heard.

However, in the 19th century, this trend was reversed. The courts began to exercise a much closer scrutiny over the Privilege so as to ensure that there was no unnecessary interference with the effective cross-examination. Not only

were civil liability, disgrace, and eventually ecclesiastical censure, rejected as bases for claiming privilege, but the courts adopted procedures less favourable to the claimant - permitting rather than disallowing the asking of incriminating questions, and determining whether a claim of privilege was justified rather than leaving that important question to be decided by the witness himself. Changes in the law also contributed to a general decline in the importance of the privilege, by reducing the number of penal actions and by providing more effective protection against forfeitures. Even with regard to the core element of the privilege, *viz.*, self-incrimination per se, the Criminal Evidence Act, 1898, while guaranteeing the right of the accused to remain silent, made it disadvantageous for him to exercise that right.

In the 20th century, the privilege has continued to wither away as its exercise in both civil and criminal cases became more and more infrequent.[143] Indeed, there have been only two important decisions on the privilege this century - the Triplex Glass Case [144] and Jones v. D.P.P.[145] However, the privilege remained immune from any frontal assault until the latter part of the 1960's, when both the Law Reform Committee and the Criminal Law Revision Committee took the question of its continued existence under advisement. Pursuant to the recommendations of the Law Reform Committee, the content of the privilege was reduced by the Civil Evidence Act 1968 by

the limitation of the privilege to offences committed within the United Kingdom, and by deletion of the privilege with respect to adultery and forfeitures. In its turn, the Criminal Law Revision Committee proposed that the privilege should be further restricted by requiring the accused to enter the witness box and answer questions under oath. Only in one area has there been an apparent expansion of the privilege, namely, in relation to questions tending to incriminate (or subject to the penalty) the spouse of the witness; but as has been pointed out above,[146] this may have been the position at common law in any event.

The status of the privilege at the present time is therefore not an entirely happy one. Its frailties are recognized,[147] but it is assumed that there would be a popular outcry at any suggestion that it be abrogated, abridged or replaced. Certainly the reception given to the Criminal Law Revision Committee's Report on Evidence indicates that at least a vocal minority would be horrified by any such action. But the privilege was not developed by theorists; rather it was the product of the demand of the people who were intimately affected by the inquisitorial procedure of the High Commission and the Privy Council. It was a very relevant and practical protection in the 16th and 17th centuries. Would the potential users view it in the same light today? That question will be considered in later chapters after the Canadian experience with immunity legislation has been examined.

Chapter Three

THE PRIVILEGE AGAINST SELF-INCRIMINATION IN CANADA

As a collection of former British colonies and territories, Canada (with the exception of Quebec in civil matters) has inherited its law and legal system from England. The privilege against self-incrimination was, of course, part of this inheritance, and therefore much of what has been said in chapter two about the scope of the privilege is applicable *mutatis mutandis* to Canada. However, uncharacteristically the Canadian legislators have introduced provisions with regard to the privilege that make Canada unique among the common law countries of the world. In brief, the general rule in Canada is that a witness cannot refuse to answer an incriminating question, but he generally can claim some protection against his answer being used in a subsequent proceeding. What led to the development of the Canadian law in this manner, and how it operates, is the subject matter of this chapter.

In the period prior to Confederation, 1867, there was very little difference between the procedure in English courts and that in the courts of the British North American colonies. The decisions of English courts were considered to be either binding or highly persuasive, and while the statute law of the Imperial Parliament did not apply to the colonies without express words or necessary implication, the colonial legislatures usually followed the lead of Westminster within a few years of statutory changes being introduced.

However, with Confederation the picture changed dramatically. By the British North America Act, 1867,[1] a federal constitution was established that made the central government much stronger than the provincial governments. There were a number of reasons for this, not the least of which was that the United States, which had a federal constitution emphasizing state rights, had just gone through a devastating civil war. One manifestation of the centralist emphasis of the Canadian constitution was reflected in the division of powers in relation to the justice system: the general administration of justice was assigned to the provinces, but the means of social control, viz., the criminal law and criminal procedure, were assigned to the exclusive jurisdiction of the federal government.

The initial enthusiasm for law making, which accompanies the birth of a nation, coincided with a truly revolutionary atmosphere in legal circles in England. The mid-Victorian period witnessed some of the most fundamental changes in the history of the English legal system. The Common Law Procedure Act, 1854,[2] and the Judicature Acts of 1873 and 1875[3] were major steps in the process of rationalizing the structure and procedure of the courts, and other moves were afoot to rationalize the law itself. In no small measure these reforms were the result of the work of Jeremy Bentham, whose cogent criticisms and constructive suggestions provided a blueprint for the reformers of the day. His disdain for the privilege against self-incrimination, and for the rule that the accused

was incompetent to testify (which many regarded as a corollary to the Privilege), led to re-examination of the basic rules of criminal procedure and evidence in England.[4] A number of statutes were introduced that made the accused a competent witness for the defence in relation to prosecutions for specific offences, and in the period 1878-80, various efforts were made to codify the criminal law, each of which though differing substantially from one another as to matters of detail, provided for the accused personally to give evidence.[5] The criminal code did not catch the fancy of the parliamentarians of the day, but the question of the competence of the accused as a witness was not forgotten, and after a number of abortive attempts the proponents of competency were successful in bringing about this fundamental change with the enactment of the Criminal Evidence Act, 1898.

It was against this background that the Canadian Parliament turned its attention to the criminal law and criminal procedure. There was a natural desire to emulate the mother country. Statutes were passed in Canada parallel to those on the books in England: in this way a number of provisions, replacing the privilege against self-incrimination with some form of immunity, found their way into Canadian law shortly after Confederation.[6] The debate about the advisability of making the accused a competent witness also took place in Ottawa, with both the proponents and opponents of change sprinkling their arguments with references to the debates in

Westminster. Only a few innovations were attempted at first: one made the defendant a competent witness for the prosecution or on his own behalf in cases of common assault (and later for battery), and a second made the defendant competent and compellable in cases under the Canada Temperance Act.

The Common Assault Bill was proposed by the same person who earlier had unsuccessfully proposed the bill to make the defendant a competent witness on his own behalf in criminal cases generally.[7] He argued that the reason his earlier bill had not been acceptable was that people feared that the defendant would perjure himself. In the case of common assaults, however, this danger existed only to a very limited extent, as the people charged did not, as a rule, belong to the criminal class, but were respectable folk who, owing to some sudden heat of temper, some unusual provocation, over-indulgence in liquor, or some other accidental circumstance, found themselves in the unfortunate position of defendant on a criminal charge. He also pointed out that frequently the incident led to a civil action in which the defendant was competent, or to a cross-summons in the criminal court, in both of which cases the disputants each had an opportunity to tell their own side of the story.[8] His bill was more successful than he had dared to hope, and on debate on third reading, Sir John A. Macdonald, Canada's first Prime Minister and at that time Leader of the Opposition, proposed an amendment to make the defendant competent "for the prosecution or on his own behalf", saying that competence to give evidence for one side only was an anomaly

unknown to English law.[9] The amendment received support from both sides of the House and was passed.

It is clear from the debate on the Common Assaults Bill that the House understood the word "competent" to comprise "compellable" at the instance of the Crown. It is therefore interesting that in the same session, the Canada Temperance Act, 1878, was passed, declaring the defendant be both "competent and compellable".[10] There appear to have been two reasons for the exception in this case. First, the abuse of alcoholic beverages was considered to have reached such massive dimensions that the public interest demanded no less.[11] Second, enforcement of the Act was left largely to private suits for a penalty, and, as a result, the procedure was designed to correspond as closely as possible to the civil procedure in the provinces. Whether the words "and compellable" were considered to be too draconian, or merely redundant, they were struck out by amending legislation in 1888.[12]

The passage of these provisions showed that there was a strong nucleus of members in both Houses who felt the need for modification in the common law position in this regard. One Member of Parliament in particular, Mr. Cameron (West Huron), made a crusade of introducing Bills rendering the accused a competent witness for the defence. Starting in 1882, Mr. Cameron introduced such a Bill on no less than six occasions.

Indeed, in 1885, a Bill rendering the accused a competent witness on his own behalf was passed by a substantial majority in the House of Commons only to be defeated in the Senate.[13] The same Bill was introduced again by Mr. Cameron in 1886, at which time the Minister of Justice, Sir John Thompson, expressed his approval in principle, but urged that the Bill be withdrawn, as a similar Bill with apparently good prospects of passage was before the Parliament at Westminster, and it was desirable that the criminal law in Canada should be consonant with that in England.[14] The English Bill was not successful, however, and in 1891, Mr. Cameron introduced his Bill once more. In the interim, Sir John Thompson had undertaken to consolidate the criminal law and criminal procedure in Canada, and to that end had picked up the Draft Criminal Code, which had been rejected by Westminster, modified it to suit the Canadian scene and introduced it as a Bill early in 1891. He was now ready to add the final component to the framework for criminal trials - a new Evidence Act. Commenting upon Mr. Cameron's Bill, the Minister of Justice again expressed his approval in principle and stated that he was in favour of going even further and making the accused and his spouse not only competent, but compellable. He therefore approved the Bill on second reading but asked that it not proceed further because he wanted to distribute the Honourable Member's Bill to members of the legal profession for consideration along with copies of the Criminal Code.[15]

The Bill was distributed in January, 1892, along with two other Bills relating to elections. The two sections relevant to this work read as follows:

> 1. Every one accused of any offence shall be a competent witness for himself or herself upon any charge or complaint against him or her, or upon his or her trial for such offence; and the wife or husband, as the case may be, of every such accused person shall be a competent witness for him or her upon such charge or complaint or trial: Provided, that no such person shall be liable to be called as a witness by the prosecutor; but every such witness called and giving evidence on behalf of the accused shall be liable to be cross-examined like any other witness on any matter though not arising out of his examination-in-chief: Provided, that so far as the cross-examination relates to the credit of the accused, the justice or justices, or the Court, may limit such cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness.
>
> 2. In case an accused person tried before a jury does not tender himself or herself as a witness, or become a witness on the trial, no observations shall be allowed to be made at the trial by the prosecutor or by the counsel for the prosecution, as to his or her not so tendering himself or herself as a witness, or not being a witness, nor shall the Judge presiding at the said trial make any observations respecting the same.[16]

The extent of the distribution is not clear, but of the responses on record from judges and magistrates seventeen were in favor of making the accused a competent witness on his own behalf, five were opposed, and seven made no comment upon the Evidence Bill. There were a few who even argued that the Bill should go farther as the law was altogether too favorable to the guilty.[17]

On May 3, 1892, the Bill was given second reading and referred to the Select Joint Committee, as Sir John Thompson had promised. The Committee suggested a number of modifications to the substance of the Bill, and incorporated it into a general enactment respecting witnesses and evidence. The pertinent sections of the new Bill read as follows:

> 4. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person: Provided as follows:-
>
> (*a*) A person so charged shall not be called as a witness in pursuance of this Act, without his consent;
>
> (*b*) The wife or husband of the person charged shall not be called as a witness in pursuance of this Act without the consent of the person so charged, save that where a man is charged under any of the provisions of *The Criminal Code of 1892*, specified in schedule A to this Act, his wife may be called as a witness without his consent. *New*
>
> 5. No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person: Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence. *New*.[18]

The effect of the changes wrought by the Committee were: (1) to render the accused and his or her spouse competent witnesses, provided that neither could be called without the consent of the accused (except for cases under Schedule A of the Criminal Code, with respect to which the wife of the accused

could be called without his consent); (2) the proviso respecting the limits to cross-examination of the accused and his or her spouse was omitted; (3) the section forbidding comment by the judge or prosecutor on failure of the accused to enter the witness box was omitted; and (4) a new section, replacing the common law privilege against self-incrimination with an immunity provision, was introduced.

The revised Bill was circulated once again - this time to all judges appointed by the Federal Government. Of the forty-three replies on record, twenty-eight favored the provisions of section 4 and 5; six opposed both; four had reservations about one or the other section; and five did not mention either section. The response was therefore quite clear - the judges generally were in favor of the accused entering the witness box or having an adverse inference drawn if he did not.[19]

When Sir John Thompson re-introduced the Evidence Bill early in 1893, section 4 had been substantially modified, and, in particular, provided for the accused and his or her spouse to be not only competent but compellable witnesses.[20] The addition of the word "compellable" touched off a spirited debate in the House of Commons,but it was ultimately passed, apparently by a narrow margin. However, the provision met almost universal opposition in the Senate. Drawing comparisons between the procedure proposed under section 4 and the procedure employed in the Star Chamber and the French criminal courts, the senators voted to amend the Bill by striking out the words "and compellable". The senators also amended the Bill by

adding thereto a provision prohibiting comment by counsel for the prosecution on the failure of the person charged, or the wife or husband of such person, to testify.[21]

When the Bill was returned to the House of Commons, the members decided that in view of the strong opposition in the Commons and the overwhelming opposition in the Senate, the Senate amendments should be accepted, with the addition of the words "or the judge" to the provision prohibiting comment.[22] Sections 4 and 5 therefore read as follows:

> 4. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.
>
> 2. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury.
>
> 5. No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person: Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence.[23]

The Canada Evidence Act came into effect July 1, 1893, the same day as the Criminal Code - the 26th anniversary of Confederation. Almost immediately problems began to arise concerning the interpretation of sections 4 and 5.

Starting with R. v. Madden[24] in 1894, the courts wrestled with the question whether the protection provided by section 5 with respect to incriminating answers had to be claimed by the witness when he was giving his evidence, or whether it applied automatically. After a series of conflicting decisions, the Ontario High Court, sitting as a court of appeal, concluded in R. v. Hammond[25] in 1898, that since the passage of the Canada Evidence Act claiming the privilege against self-incrimination was "a mere futile form", because the court had no discretion in determining whether the Privilege should or should not be granted. The Hammond decision was, however, negatived almost at once by an amendment in 1898 to section 5, so that the proviso now read:

> provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.[26]

Another problem was that the proviso only protected a witness who had been compelled to make his incriminating response by virtue of section 5 of the Canada Evidence Act. As this Act did not apply to provincial proceedings, an incriminating answer which the witness was compelled to give by virtue of a provincial Evidence Act could be used against him in a subsequent

federal proceeding.[27] This situation was rectified by an amendment to the Act in 1901.[28] In Gosselin v. R.,[29] a murder case, the Crown called the wife of the accused to rebut evidence given by the latter personally at the trial. Defence counsel objected that the Evidence Act did not permit the wife to give evidence for the Crown at all, or, in the alternative, that the court should have instructed her before she gave any evidence of her right not to give evidence. On a case reserved, the majority of the Court of King's Bench for the Province of Quebec agreed that the wife was a competent and compellable witness for the Crown. On a further appeal to the Supreme Court of Canada, the majority held that if the Legislature had intended to limit the competent to competence "for the defence", it would have said so explicitly(as the Parliament at Westminster had done in the Criminal Evidence Act, 1898). Nor did the majority accept the argument that the absence of the word "compellable" meant that the witness could elect to testify or not as he or she pleased. In their view, a competent witness was also compellable. While the question was not before the court, the clear effect of the ruling was to render the accused a compellable witness for the Crown also.

There can be no doubt that the decision was inconsistent with the intention of Parliament, and it is a prime example of the ridiculous results of a too strict adherence to the rule of statutory interpretation forbidding reference to the debates preceding the passing of the legislation in question.[30]

In 1906, to overcome the effects of the Gosselin decision, Parliament repealed section 4 of the 1893 Act and substituted a new section[31] which made the accused and his or her spouse a competent witness "for the defence" except in relation to certain specified offences where the spouse of the accused was both competent and compellable as a witness for the Crown. The new section also changed the law relating to matrimonial communications to make the receiver "not compellable" rather than "not competent" to relate the communication in court, and it added a new subsection declaring that "Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person." With minor changes, the section has retained its 1906 form.

THE SCOPE OF THE PRIVILEGE IN CANADA

In Canada the privilege against self-incrimination has both a federal and a provincial aspect - civil procedure in provincial courts is a matter for the provincial legislatures, while criminal procedure in all courts and civil procedure in federal courts is within the jurisdiction of the federal government.[32] There are some nice constitutional questions (largely unresolved) as to whether it is the federal or the provincial Evidence Act that governs certain types of proceedings. For example, are proceedings to punish infractions of provincial statutes civil or criminal? They have all the earmarks of

criminal proceedings, yet it is generally considered that it is within the competence of the provincial legislatures to determine the procedure to be followed in enforcing their own statutes.[33] In fact, however, despite the enormous number of provincial prosecutions where the problem theoretically could arise, the courts are rarely confronted with the constitutional question, because all provinces have followed the lead of the federal government and have introduced immunity provisions similar to section 5 of the Canada Evidence Act. Moreover, section 37 of that Act adopts the laws of evidence in the province where the proceedings are taken to the extent that federal statutory provisions do not cover the point.[34] As a result, it can be said that whether the proceedings are governed by federal or provincial legislation the same general approach is taken to a claim of privilege against self-incrimination.

Whether one is referring to the Privilege as found in the Canada Evidence Act or in one of the provincial Evidence Acts, there is a great deal of carry-over from the common law.[35] This carry-over does differ from jurisdiction to jurisdiction, largely due to differences in the terminology used in the various Evidence Acts, but also partly due to the fact that the date at which English law was received varies from province to province.[36] Thus in some provinces, the scope of the Privilege may be more akin to that which existed in the early 19th century in England rather than the common law privilege of today.

As in England, certain types of self-incriminatory evidence fall outside the protection of the Privilege, namely, out-of-court statements, objective fact evidence (including non-testimonial actions or conduct), and certain documents. There are, however, peculiarities about the Canadian law which require consideration.

1. Self-incriminating Out-of-Court Statements

The point of departure for a discussion of the limits of the Privilege must be section 5 of the Canada Evidence Act:

> 5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> (2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

Section 5 only relates to "witnesses". That term has been defined as "one who, in the course of juridical processes, attests to matters of fact".[37] This includes those who give evidence at trials, examinations for discovery,[38] preliminary inquiries,[39] before Royal Commissions and other public inquiries,[40]

or in response to interrogatories.[41] It does not, however, include persons who give statements outside the juridical process, or as the result of illegal coercion. Frequently, of course, incriminatory statements made out of court fall within the ambit of the hearsay rule or the confessions rule and may be excluded on that basis. There is also some possibility that such evidence in certain circumstances may be excluded by the Canadian Bill of Rights.[42]

2. Objective Fact Evidence, including Non-Testimonial Actions or Conduct

The Canadian courts have followed the English rule that relevant objective fact evidence is admissible if it is available.[43] Even if it had been obtained by improper means, objective fact evidence is admissible if its reliability has not been undermined by the means used to obtain it. All attempts to introduce the American doctrine of "the fruits of the poisonous tree" have been rejected by the Canadian courts, on the basis that the interpretation of the privilege against self-incrimination in the United States has been affected by its entrenchment in the American Constitution.

Recently the Supreme Court of Canada re-affirmed the position taken by the Canadian courts, but disagreed

with English and Privy Council decisions which suggest that the trial judge has a discretionary power to exclude relevant evidence on the basis of "fairness". In R. v. Wray[44] the question was whether the Crown could adduce evidence relating to the involvement of the accused in locating the murder weapon. The information about the location of the murder weapon had been gained by the police as the result of a confession which was inadmissible. The trial judge refused to allow the Crown to adduce evidence as to the part taken by the accused in the finding of the weapon, and in the absence of sufficient other evidence to inculpate the accused, directed a verdict of acquittal. The Ontario Court of Appeal, in a unanimous judgment delivered orally, said

> In our view, a trial Judge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute, the exercise of such discretion, of course, to depend upon the particular facts before him.[45]

The majority of the Supreme Court of Canada disagreed with the Ontario Court of Appeal and held that the judge's "discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused" (to use the words of Lord Goddard in Kuruma v. R.[46]) must be interpreted as meaning a power to exclude "evidence gravely

prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling...".[47] The majority pointed out that while it might be "unfortunate" from the standpoint of a guilty man to be convicted on evidence obtained by improper means, it could not be said that his conviction was unfair. English cases, and cases in the Privy Council, which contained *dicta* suggesting a broader judicial discretion with respect to the exclusion of relevant evidence, were either distinguished on the facts or were held to be unsupported by precedent.

The dissenting judges in R. v. Wray accepted the existence of judicial discretion as stated by the Ontario Court of Appeal, and two of them, including the Chief Justice, said that it would be contrary to the maxim *nemo tenetur seipsum accusare* to allow the use of evidence which had been obtained from the accused contrary to his will.[48] They did not, however, go into the history of the maxim, and cited no authority for applying it in this manner.

The Supreme Court also had dealt recently with the question of whether it is contrary to the Privilege to require an accused person to give non-testimonial evidence against himself. In Re: the Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.),[49] the Court had held that it was within the constitutional authority of the provincial legislatures to

require a person in charge of a motor vehicle to give a sample of his breath for analysis. The judgment contained *dicta* that the privilege against self-incrimination did not apply to non-testimonial evidence. The case was decided before the passage of the Canadian Bill of Rights,[50] however, and that Bill set out the Privilege as one of the protected values in the administration of justice in Canada. A year after the decision in the Wray case, it was argued in Curr v. R.[51] that the provisions of sections 223 and 224A(3) of the Criminal Code[52] were an infringement of the Bill of Rights. Briefly, the sections in question make it an offence to refuse without reasonable excuse to provide a breath sample for analysis when a sample is demanded by a peace officer, and they permit the court to draw an adverse inference from any such refusal in a prosecution for driving, or having the care or control of, a motor vehicle while one's ability to drive is impaired by alcohol or a drug. The accused argued that these sections were contrary to a number of provisions of the Bill of Rights, and particularly sections 1 (*a*) and 2 (*d*), which read as follows:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law....

> 2. Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> *(d)* authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self-crimination or other constitutional safeguards.

The Supreme Court of Canada was unanimous in holding that the Code sections were not contrary to the Bill of Rights. Ritchie J., with whom Fauteux C.J. concurred, held that the words of the Bill must be given the meaning they bore at the time the Bill was enacted, and, in the light of the decisions in A.-G for Quebec v. Begin [53] and the reference Re: the Validity of Section 92(4) of The Vehicles Act, 1957 (Sask.),[54] the term "protection against self-crimination" in section 2(*d*) must be taken to mean "protection against 'self-incriminating statements' and not as embracing 'incriminating conditions of the body' such as alcohol content of the breath or blood."[55] Laskin J., who delivered the judgment of himself, Abbott, Hall, Spence and Pigeon JJ., and in whose judgment Martland J. concurred, held that whatever the legislative history and social policy was, the actual words of section 2 (*d*) were not broad enough to provide protection under the Bill for evidence given under compulsion to a police officer:

But whatever be the logic as to the scope of the privilege against self-crimination, either in the United States or elsewhere, the governing text in this case is s. 2(*d*) . The formulation of the privilege in s. 2(*d*) is a qualified one; and apart from the question whether it would, if applicable here, cover the compulsory taking of breath samples as well as compelled utterances and communications, I cannot read s. 2(*d*) as going any farther than to render inoperative any statutory or non-statutory rule of federal law that would compel a person to criminate himself before a court or like tribunal through the giving of evidence, without concurrently protecting him against its use against him. I leave for future consideration the scope of the term "evidence" since this is not a matter that arises in the present case.[56]

To the argument that section 1(*a*) might embody a residual privilege against self-incrimination beyond that found in section 2(*d*), Laskin J. said that he did not construe the Canadian Bill of Rights as taking a piecemeal approach to the privilege, and the words of neither section 1(*a*) nor 2(*d*) provided any suggestion that such was the case.[57]

On the basis of the Wray and Curr cases, it would appear that the privilege against self-incrimination does not apply to non-testimonial out-of-court evidence. However, it must be remembered that in the Curr case, Laskin J. expressly left for future consideration the scope of the word "evidence" in section 2(*d*) of the Bill of Rights. Hence, it may be that the Bill of Rights provides protection against self-crimination in the courtroom which is broader than the previously existing testimonial privilege. This might, for example, relieve the accused from any obligation to speak, write, stand, assume a stance, put on a garment, etc. in court for purposes of identification.[58] Only time will tell whether

section 2(*d*) of the Bill will be given such an interpretation.

3. Documents

The common law privilege in relation to the production of incriminating documents of course formed a part of the law in Canada prior to the introduction of the immunity provisions of the Canada Evidence Act and the provincial Evidence Acts. Some of the provincial immunity provisions specifically provide protection with respect to incriminating documents,[59] but the majority of the provincial enactments follow the wording of section 5 of the Canada Evidence Act, which states only that "No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him...".

There are three possible interpretations of the effect of section 5 on the common law privilege for incriminating documents. The first is that Parliament intended to abrogate the documentary privilege and protect only the testimonial privilege. There is no evidence to support this proposition apart from the silence of the section itself. It seems more likely that the omission was merely a legislative oversight, for it would be natural for Members of Parliament primarily concerned with devising an appropriate rule in criminal cases to concentrate on testimonial evidence. Moreover, it is highly likely that the draftman was following the words of some existing immunity provision and most of these only dealt with testimonial evidence.[60]

The second interpretation is that section 5 is broad enough to include the documentary privilege. On this construction, a demand for an affidavit of documents or for production of documents would constitute a "question" within the meaning of the section, and the reply would constitute an "answer". In Attorney General v. Kelly[61] the majority of the Manitoba Court of Appeal stated in *dicta* that this was a desirable and proper construction of the law. On the other hand, the British Columbia Court of Appeal in R. v. Simpson & Simmons[62] held that production of documents could not be equated to an answer under section 5 of the Canada Evidence Act, for the words simply do not permit it. According to the British Columbia Court of Appeal once documents fell into the hands of the Crown, by whatsoever means, neither the Canada Evidence Act nor the common law prevented their use in evidence. The Court did not suggest, however, that section 5 empowered the Crown to order production - in the actual case this was done by virtue of a section of the Departmental Inquiries Act.[63]

This leads to the third interpretation - that is the absence of express words or necessary implication to the contrary, section 5 has left the common law privilege with respect to incriminating documents intact.[64] This would mean that a witness could refuse to produce documents on the ground that they would tend to incriminate him, but once they are produced they would lose their privileged nature and could be used in that or subsequent proceedings.[65] This view would

appear to be the one to be preferred from the standpoint of applying the rules of statutory interpretation, although it would result in an inconsistency in the law as between testimonial and documentary evidence in those provinces whose immunity provision is patterned on section 5 of the Canada Evidence Act. In provinces where the immunity provision extends to include documents, section 37 of the Canada Evidence Act would appear to incorporate the immunity into criminal proceedings in that province.

It should be noted that a different rule governs the case where the witness is the accused. In Re Bank of Montreal[66] the Crown served a subpoena *duces tecum* on the superintendent of the Bank's British Columbia division. The Bank obtained a writ of prohibition to prevent the enforcement of the subpoena. Hutcheson J. held that the superintendent had possession of these documents only because of his official capacity in the corporation and that the same "safeguards, privileges and rights" applied to a corporate entity as to a natural person. He said that this was not a case to which section 5 of the Canada Evidence Act applied, but one in relation to the obligation of the Crown to prove its case without the help of the accused:

> This is not a case where the privilege or protection is claimed on the basis that documents would tend to incriminate the accused - a claim which might well need to be made on oath - but the claim is here made on the broader basis that the accused is not required to give evidence or produce documents *incriminating or otherwise.*[67] [Italics added.]

This same rule would, of course, apply to non-testimonial chattels.[68]

Assuming that there is a privilege in relation to the production of incriminating documents, whether it be part of the immunity provision of the Evidence Acts or a residual common law privilege, it is necessary to examine exceptional situations where the privilege does not exist. At least two of the four exceptions mentioned in the previous chapter as applying in the English law would appear to be equally applicable in Canada, namely "where the privilege has been withdrawn by a clear, unambiguous statutory provision" and "where the documents are of a public nature".[69] The fourth exception - "where the document was one that was required to be kept by statute" - does not appear to have been raised in the Canadian courts, and as was suggested in chapter 2, is a questionable exception in any case. The third exception - "where the person holding the document does so in a representative capacity, and production is sought by a member of the group so represented, in relation to litigation concerning the group activities" - requires some comment. The exception is justifiable on grounds of public policy and implied waiver of privilege, and it has been accepted in Canada as an exception to the solicitor-client privilege.[70] However, in Webster & Kirkness v. Solloway, Mills Co. Ltd.,[71] the Appellate Division of the Alberta Supreme Court held that the defendant, a broker, on the basis of the common law privilege against self-incrimination could refuse to produce documents to the plaintiff, who

was his client, at the discovery stage of the action, with respect to dealings between them. The court relied upon Short v. Mercier,[72] but that case is not a satisfactory precedent for the Webster case because its judgment does not consider the effect of the fiduciary relationship on the claim of privilege. Moreover, Short v. Mercier also could be distinguished on the basis that the plaintiff apparently was a party to the alleged illegality. The authority of the Webster case is further undermined by the fact that the Supreme Court of Canada has since ruled that the immunity provisions apply to the discovery stage as well as to trials.[73] All in all, there appears to be sufficient ground for a re-examination of the Webster ruling on documents by Canadian courts.

OPERATION OF THE PRIVILEGE

As in England, the privilege against self-incrimination operates on two levels, the right of a witness to claim protection when asked a question the answer to which would tend to be incriminatory, and the right of the accused (and his or her spouse) to stay out of the witness box.

1. Ordinary Witnesses

Grounds for claiming the privilege against self-incrimination (or for claiming "the protection of the Evidence Act", to use lawyers' jargon) are basically the same in Canada as in England; however, minor differences

exist as the result of the constitutional framework of Canada and the varying dates at which English law was received by individual provinces.

(a) *Crimes*

As indicated earlier, the division of powers in the Constitution creates problems when it comes to defining what is "criminal" for the purposes of the privilege against self-incrimination. Section 91(27) of the B.N.A. Act gives the federal Parliament exclusive jurisdiction to legislate in relation to "Criminal Law" and "Procedure in Criminal Matters". It follows, therefore, that the provincial legislatures are precluded from legislating in relation to these matters. However, the provincial legislatures are permitted by section 92(15) to enforce provincial laws by "the Imposition of Punishment, by Fine, Penalty, or Imprisonment". There seems to be little doubt on the basis of the English authorities that at common law the offences created by the provincial legislatures would be regarded as crimes.[74] The resemblance is further heightened by virtue of the fact that in general the provinces have adopted federal summary conviction procedure in prosecutions under provincial statutes.

The question therefore is quite clear: is liability to punishment for breach of a provincial law a sufficient basis for claiming the privilege against self-incrimination, inasmuch as by constitutional definition such an infraction cannot be a "crime", and the procedure whereby it is enforced cannot be "criminal"?

In prosecutions for provincial offences, the courts have left little doubt that they view the proceedings as being essentially "criminal", whatever the constitutional niceties may be.[75] Accordingly, in the absence of express statutory provisions to the contrary, they have applied the rules of the common law, including the privilege against self-incrimination, with respect to these offences.

In prosecutions for federal offences, there do not appear to have been any reported cases in which an argument has been raised about the right of a witness to set up section 5 of the Canada Evidence Act with respect to answers tending to show that the witness had committed a provincial offence. If the issue were raised, however, the courts should have no difficulty in concluding that "crimination" for the purposes of section 5 includes liability to prosecution for a provincial offence. The word "crime" has one meaning at common law and another under the B.N.A. Act, and it is submitted that the legislators had the common law meaning in mind when passing the Evidence Act. If, on the other hand, proceedings with respect to provincial offences are classed as "civil" proceedings, then section 5 can still provide protection as "liability to a civil proceeding at the instance of the Crown..." is the other basis for granting immunity.

Liability to criminal prosecution in a foreign state also poses some interesting problems in Canada. The question of whether Canada should follow King of the Two Sicilies v. Willcox[76] or U.S.A. v. McRae[77] was left open by the Supreme Court in Power v. Ellis,[78] which was decided before the passage of the Canada Evidence Act. Inasmuch as the immunity provisions of the various Evidence Acts require the witness to answer the question, and the protection of the immunity provision does not have extra-territorial effect, the question becomes largely academic. However, while there may not be any reason to grant immunity with respect to the subsequent use of the answer in Canadian courts because no risk of a Canadian prosecution is involved, it does place the witness who is subject to extradition in an unenviable position.[79]

Section 5 of the Canada Evidence Act and the corresponding sections of the provincial Evidence Acts, follow the common law in making the Privilege available to a witness only in cases where the answer may tend to criminate "him" or may tend to establish "his" liability to a civil proceeding. However, the application of the section to corporations and spouses requires special consideration.

On a number of occasions, Canadian courts have decided that the privilege against self-incrimination, both at common law and under the immunity provisions of the Evidence Act,

applies to corporate entities as well as to natural persons.[80] Until recently, however, there was no clear statement of the circumstances in which the Privilege could be claimed on behalf of a corporation, or as to the persons who could claim it. As mentioned earlier in relation to documents, Hutcheson J. of the British Columbia Supreme Court held in Re Bank of Montreal[81] that a subpoena *duces tecum* directed to the Bank's divisional superintendent could not be enforced against the defendant corporation because an accused is not required to give evidence or produce documents incriminating or otherwise. This decision was followed by the Manitoba Court of Appeal in 1967 in R. v. Ettenhofer Painting and Decorating Ltd.,[82] where it was held that the Crown could not call the president of the accused corporation as a witness to testify to certain facts within his knowledge as president.

No reference was made in the Ettenhofer case, however, to a decision the previous year by Jessup J. of the Ontario High Court in R. v. Beamish Construction Co. Ltd.[83] In that case the question was whether the Crown could call a servant [who is not a director] of the accused corporation as a witness. Jessup J., influenced by *Wigmore on Evidence*,[84] expressed reservations about the extension of the Privilege to corporations, and while accepting earlier decisions as good law, he pointed out that they all related to cases in which documents or interrogatories were being demanded. He held that these were

peculiarly productions of the accused corporation itself, and the cases were therefore not apposite in considering whether an employee might claim privilege on behalf of his corporate employer. He therefore found that there was nothing to prevent the Crown calling the corporation's servant as a witness; however, he admitted that he had doubts on the matter, and expressed the hope that the question would be dealt with by the Court of Appeal.[85]

The Ontario Court of Appeal dealt with the problem in R. v. Judge of the General Sessions of the Peace for the County of York, ex parte Corning Glass Works of Canada Ltd.[86] It held that a distinction must be drawn between proceedings in which the corporation itself (albeit through an agent) is the witness, and cases where it is not. Thus, proceedings at the discovery stage must be distinguished from proceedings at trial, because at the discovery the witness for the corporation is literally "the mouthpiece" for the corporation, whereas at trial a witness subpoenaed to give evidence, even if he happens to be president and controlling shareholder of a corporate accused, "is required to testify as to all relevant facts within his knowledge, whether those facts were acquired by him during his employment or term of office or were acquired in circumstances completely unrelated to the corporation."[87] Similarly, in cases where a corporation is obliged to produce documents which might tend to incriminate it, the production is that of the corporation and not of its officer who swears the affidavit on production. Here too the corporation is

entitled to refuse to give any assistance to the prosecution. The Court of Appeal disagreed with the decision in R. v. Ettenhofer Painting and Decorating Ltd. and with the Bank of Montreal case to the extent that the latter stands for the proposition that the employees of an accused corporation cannot be called to give evidence which would tend to incriminate the accused. An application by the accused to the Supreme Court of Canada for leave to appeal was dismissed by that Court without written reasons.[88]

To summarize, corporations do not appear to create any exception to the rule that a witness may only claim the privilege against self-incrimination when the answer would tend to incriminate him. Employees, directors, or even owners of an accused corporation may be called by the Crown as witnesses, and while they retain the right to claim the protection of the Evidence Act with respect to answers which tend to incriminate them personally, they cannot make such a claim on behalf of the corporation, unless the proceedings are in the form of a discovery, and the witness is there as the designated representative of the corporation. With regard to documents, an accused corporation can refuse to produce, and can resist the production of, documents which are either directly or indirectly in its custody. As stated earlier, however, this latter rule appears to spring from the Crown's obligation to prove its case rather than from the privilege against self-incrimination.

The words of section 5 of the Canada Evidence Act clearly appear to prevent a witness claiming privilege with respect to an answer that might tend to incriminate his or her spouse. In order to find that the privilege extended to protect the spouse of the witness, it would be necessary to conclude that this was a privilege at common law which had not been taken away by the passage of the immunity provision. There is, however, no Canadian authority supporting this proposition, and the common law authority in England is indifferent at best.[89]

The question of the competence and compellability of the spouse also requires some comment in the Canadian context. It will be remembered that the Canada Evidence Act originally provided that both the accused and his or her spouse were "competent" witnesses, and the Supreme Court of Canada in Gosselin v. R.[90] held this meant that they were to be treated like ordinary witnesses who if competent were also compellable. In 1906, the Act was amended to read "competent witness for the defence".[91] It has never been decided whether the spouse of the accused remained a compellable witness for the defence in view of the Supreme Court's interpretation of the word "competent"; however, it is suggested that inasmuch as the 1906 amendment also included a provision making the spouse of the accused "a competent and compellable witness for the prosecution" in certain specified offences under the Criminal Code,[92] the better interpretation is that when the word "competent" is used alone it does not connote "compellable".

Section 4(4) of the Canada Evidence Act also preserves the common law exceptions relating to offences involving the "liberty, health, or person" of the spouse. As in England, there is some dispute as to whether the exception applies only where the injury or threat to the spouse forms an essential part of the charge, or whether it also applies in other cases (such as theft) where the evidence indicates such a threat or injury.[93] There is also a difference of judicial opinion on whether the spouse is both competent and compellable for the prosecution under the common law exception, or merely competent. The English position as stated in R. v. Lapworth,[94] favouring compellability, was rejected by the British Columbia Provincial Court in R. v. Carter,[95] on the basis that where a wife did not wish to give evidence against her husband it was not *pro bono publico* to compel her to do so in the absence of clear statutory direction. On the other hand, the Appellate Division of the Alberta Supreme Court in R. v. Lonsdale[96] followed the Lapworth case, saying that the Supreme Court of Canada in Gosselin v. R. had laid down a general rule that if a wife was competent to give evidence she was also compellable.

It is questionable whether much reliance should be placed on Gosselin v. R. in this connection, for the Supreme Court was not considering the common law exception - which, in fact, did not form a part of the Canada Evidence Act at the time.

Moreover, its assessment of the intention of Parliament with regard to the compellability of spouses was obviously wrong, as indicated by the debates preceding the passage of the Canada Evidence Act and by the subsequent passage of the 1906 amendment. It is strange that Parliament did not specify in setting out the common law exception whether the spouse was to be compellable or merely competent for the prosecution, particularly inasmuch as it used the words in other subsections of section 4. It is possible that Parliament itself did not know what the common law position was at that time, and it wished the Canadian rule to be consistent with that in England; hence it adopted a carbon copy of section 4(2) of the Criminal Evidence Act, 1898,[97] and left it to the wisdom of the courts to determine what the common law considered to be *pro bono publico*.

(b) *Ecclesiastical Offences*

The privilege with respect to questions tending to show the commission of ecclesiastical offences was introduced to Canada as a part of the common law, but with the exception of the jurisprudence on questions relating to adultery, there appear to be no reported Canadian cases involving this privilege.

It is doubtful whether the immunity provisions of the Evidence Acts are broad enough to permit a witness to claim privilege based on liability to ecclesiastical punishment, for they only apply to questions that may tend to "criminate" him, or may tend to "establish his liability to a civil proceeding

at the instance of the Crown or of any person". In Canada, there is no state religion, and all churches are regarded as voluntary associations. Without the element of the state, ecclesiastical offences cannot be crimes; neither are proceedings before ecclesiastical courts civil proceedings. It could be argued that the privilege concerning ecclesiastical offences, not having been abolished by clear and unambiguous words in the Evidence Acts, still exists in its common law form; but even if this were the case, it is likely that the Canadian courts would follow their English counterparts and rule that liability to such punishment is so remote for the laity as to be fanciful,[98] and therefore find the privilege to be obsolete.

The exception in civil proceedings for questions tending to show that the witness has committed adultery is well established in Canada. The scope of the privilege varies - in some provinces it extends to all witnesses in any action, while in others its availability is limited either as to type of witness, or type of proceeding, or both.[99] The Canada Evidence Act contains no provision for the recognition of this privilege; however, it is possible that it is incorporated by virtue of section 37 of the Act. If this is so, it will apply in some provinces and not in others, depending upon the manner in which the provincial law delimits the privilege.

(c) *Penalties and Forfeitures*

There were a number of early cases in Canada which recognized the privilege not to answer a question if the answer

would tend to subject the witness to a penalty or a forfeiture. This privilege appears to have been completely incorporated in the immunity provisions of the Evidence Acts by the reference to answers that "may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person".[99a]

(d) *Scandal*

Doe d. Marr v. Marr,[100] decided by the Upper Canada Court of Common Pleas in 1853 recognized the existence of a judicial discretion to excuse the witness from answering a question imputing, or seeking to elicit an admission of, scandal concerning the witness. However, there does not appear to be any reference to scandal as a basis for claiming privilege after this case. The explanation probably is that about this time the popular judicial opinion in England had shifted against the acceptance of scandal as a basis for claiming privilege, and the Canadian courts, relying upon English cases and text-books simply followed suit.

It is submitted that scandal may indeed be an acceptable basis for claiming the common law form of privilege in those provinces which received the English law as it stood in the early 19th century. Certainly there is nothing in the Canada Evidence Act which clearly and unambiguously would remove such a privilege. The same holds true for the immunity provisions of the provincial Evidence Acts. In fact, of course, the judges do exercise a considerable measure of control over questions of this nature, if it appears that their relevance is tenuous in relation to the degree of social injury they may cause the witness.[101]

In this sense, the privilege respecting scandal still exists where the balance of convenience and fairness permits.

(e) *Civil Liability*

At first sight, section 5 of the Canada Evidence Act appears to provide prospective protection against the use of a compelled answer, even where the threatened liability is only civil rather than criminal. This protection is, however, subject to the condition that apart from the compulsion of the Canada Evidence Act or any provincial Act the witness would have been excused from answering the question.

There is no Canadian case law supporting the proposition that liability to civil proceedings is, or ever was, a basis for privilege; and, as was pointed out in chapter 2, the Imperial Parliament in the statute 46 George III, c. 37 (1806) resolved in the negative any doubt about the existence of such a privilege in England. It is arguable that this statute was of local rather than general applicability, and that it would not apply to the colonies; but, even if this were the case, the better view of the antecedent common law is that the privilege was not established with respect to questions relating to civil liability.

In view of the clear evidence that no privilege existed in the late 19th century in Canada with respect to answers tending to show "liability to a civil proceeding", why were the words used in section 5? It seems improbable that the draftsman was unaware of 46 George III c. 37, or that Parliament intended to create a privilege where none had existed before.

The more likely explanation is that the term was included to cover actions for penalties or forfeitures, and possibly to cover liability to prosecutions for provincial offences which constitutionally could not be classed as criminal prosecutions.[102]

Procedure

A loose practice has grown up whereby counsel, before launching into a line of potentially incriminating questions, makes a single request to the court on behalf of the witness for the protection of both the Canada Evidence Act and the Evidence Act of the province where the proceeding is taking place.[103] As this expedites matters considerably, the practice is rarely challenged; nevertheless, it misconceives the operation of section 5 of the Canada Evidence Act, and the comparable sections of the provincial Evidence Acts, and it constitutes a dangerous shortcut.

Section 5(2) provides:

> Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, *and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer,* the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence. [Italics added.]

The words prior to the italicized portion of section 5(2) clearly state that it is the witness who is to object, and that the objection must relate to the tendency of his answer to

a particular question to incriminate him or establish his liability to a civil proceeding. Thus, a general claim made on his behalf by counsel is no more acceptable under the Evidence Act than it is at common law.[104] Reference to the common law practice is reinforced by the italicized words, which make the protection conditional upon the existence in the circumstances of a privilege not to answer but for the statutory compulsion. Any deviation from the procedure laid down by the statute may result in the witness's answers being usable in subsequent proceedings by persons who were not represented in court at the time the protection of the Evidence Act was claimed.

There is some doubt as to whether the judge plays a judicial or only a ministerial function in relation to the witness's claim for the protection of the Evidence Act. The English courts have concluded that it is for the judge, rather than the witness, to decide whether the privilege against self-incrimination applies to a certain questions; albeit that "if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question." [105]

By way of contrast, McDonald, C.J.B.C.,in the case of R. v. Simpson and Simmons[106] suggests that the judge's sole function under section 5 of the Canada Evidence Act is to make a note on the record of the witness's claim for protection:

> Let us see what this section says. In plain and simple language it is this: No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him. He must answer every question put to him; but if he objects to

answer, upon the ground that his answer may tend to criminate him, what happens? Simply this, Parliament (not Magistrate, Judge or Commissioner) gives to him protection to the extent that his answer so given shall not be used or receivable in evidence against him in any criminal trial. I am aware that a loose practice has grown up whereby the presiding officer often says, "yes, I extend to you the protection given by the Act". As a matter of fact, the presiding officer and the Commissioner here, have no more authority to grant or to withhold the protection than had the chauffeur who drove the witness to the Court House, or the tipstaff at the door. The protection is given by the Act itself, once the privilege is claimed, and nothing said by the Commissioner can add or subtract from the protection which the statute extends.[107]

The Ontario Court of Appeal in the case of R. v. Mottola and Vallee[108] also has asserted that the protection of the Act is conferred by the Act itself and not by the ruling of the judge.

> If the trial judge has nothing to say about the conferment of the protection under the Act, it must mean that the judge at the subsequent proceeding has the right to determine whether the claim had been properly made, for section 5 states specifically that the protection only exists if, apart from the statutory compulsion, the witness would have been excused from answering such question. Thus, at some point the common law test for privilege must be satisfied. Obviously, the judge at the subsequent hearing is in a better position to know whether the answers are incriminating than is his English counterpart who must make his decision without knowing what the answers actually are.

The Limits and Effects of the Protection

One of the problems of the federal system is that in order to have a coherent legislative scheme it is often necessary for the legislation of the federal and provincial governments to dovetail, as each level of government has exclusive jurisdiction over a certain aspect of the scheme. Nowhere is this more apparent than in relation to providing protection against the use of incriminating answers. It frequently happens that the proceeding in which the witness is compelled to answer is governed by provincial law, while the subsequent proceeding in which it is sought to use his answer, is governed by federal law, or vice versa. In that situation the statute that took away the common law privilege against self-incrimination at the first proceeding cannot provide the witness with any protection at the subsequent proceeding: it would be unconstitutional if it attempted to do so.[109] The nature and limits of the protection respecting the use of a compelled answer necessarily are determined by the legislation governing the proceeding in which it is sought to use such answer. One of the most unsatisfactory aspects of the Privilege in Canada is that there are a number of different possible combinations, with a variety of results.

First proceeding, answer compelled by	Subsequent proceeding, protection governed by
1. Canada Evidence Act	Canada Evidence Act
2. A provincial Act	" " "
3. Other federal Act	" " "
4. Provincial Evidence Act (same province)	Provincial Evidence Act
5. Canada Evidence Act	" " "
6. Other federal Act	" " "
7. Other provincial Act (same province)	" " "
8. A provincial Act (different province)	" " "

As stated earlier in this chapter, the protection afforded by the Evidence Act is contingent upon the witness having objected, but being compelled by a statute to give an answer which may tend to incriminate him or establish his liability to a civil proceeding. However, not all forms of statutory compulsion suffice to activate the immunity provisions.

The protection provided by section 5(2) of the Canada Evidence Act is quite broad, covering cases in which the original compulsion was by virtue of the Canada Evidence Act or any provincial Act (not just an Evidence Act). However, the protection is specifically limited to criminal trials or other criminal proceedings, and apparently would not cover those civil proceedings (for example, in the Federal Court) which are governed by the Canada Evidence Act. It should also be noted that section 5(2) provides no protection where the witness was compelled to

incriminate himself (or subject himself to penalties or forfeitures) by virtue of some other federal statute - for example, the Bankruptcy Act.[110] It is, of course, possible that the other federal legislation may also provide prospective protection in proceedings subject to federal jurisdiction with respect to answers which it has required a witness to give.[111]

The protection provided when the subsequent proceedings are governed by a provincial Evidence Act varies somewhat from province to province, but two primary patterns emerge. The larger group comprised of Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Ontario and the two Territories, follows the lead of the Canada Evidence Act and provides protection when the answer was compelled by virtue of either the Evidence Act of that province or any Act of the Parliament of Canada.[112] The smaller group, comprised of New Brunswick, Prince Edward Island, Québec and Saskatchewan, only provides protection when the answer was compelled by virtue of the provincial Evidence Act.[113] There is, however, some variation within the smaller group. For example, the New Brunswick immunity provision only applies to penalties, forfeitures and provincial offences; hence, the common law privilege remains with regard to answers that would incriminate as to federal offences.[114] The Québec situation is also peculiar in that the Code of Civil Procedure[115] provides protection only with regard to answers compelled by that code; whereas, the Summary Conviction Act[116] adopts the rules set out in the Canada

Evidence Act. To complicate matters further, the Québec Coroner's Act simply states that "the ordinary rules of evidence in criminal matters shall apply to coroners' inquests."[117]

It should be noted that none of the provincial Acts provides any protection with respect to answers that were compelled either by virtue of another Act of the same province or by an Act of the legislature of another province. This leaves a fairly substantial gap in the protection available to witnesses; although, it does not seem to have created any problems to date, if the total absence of case law on the point is any criterion.

Insofar as the limits on the use of compelled answers are concerned, the provincial immunity provisions follow three main formulations. The first formulation, employed by five provinces, is: "... the answer so given shall not be used or receivable in evidence against him in any [other] civil proceeding or in any [other] proceeding under any Act of the Legislature".[118] The word "other", in square brackets only appears in the Newfoundland and Saskatchewan provisions, but it has been held that the word is implicit in any event, in order to avoid the absurdity of compelling an answer at the discovery stage, the use of which at all later stages of the same proceeding is forbidden by the statute.[119]

The second most popular formulation is: "... the answer so given shall not be used or receivable in evidence in any legal proceeding thereafter taking place against him".[120] If it is assumed that the provincial legislatures meant to restrict the application of this provision to legal proceedings over which they have constitutional jurisdiction, and that the word "other" is implicit in this provision also, then the second formulation covers the same types of cases as are covered by the first. However, there is one important difference: the second formulation restricts protection to any legal proceeding thereafter taking place <u>against</u> the witness. In other words, if the witness subsequently launches a proceeding himself, or the subsequent proceeding is not of an adversarial nature, it appears his answer could be used against him.

The third formulation restricts the protection to subsequent proceedings that take the form of a "prosecution" under an Act of the provincial legislature. This is the situation under the Alberta Evidence Act and the Québec Code of Civil Procedure.[121] However, where the compelled answer was given in a proceeding other than one governed by the Code of Civil Procedure, the limits of protection in the Province of Québec are not clear.

Two other comments need to be made on the interpretation of the various immunity provisions in the Evidence Acts. The first is that the provisions universally say that the compelled answers "shall not be <u>used</u> or receivable in evidence". It has been held that the prohibition with respect to the "use" of the

answer precludes any direct or indirect reference in the subsequent proceeding to the answer.[122] On the other hand, it does not preclude the Crown or some other party from taking advantage of the answer in the preparation of its case.[123]

The second comment relates to the exception in section 5(2) of the Canada Evidence Act relating to perjury. The exception provides that the answer may be used in "a prosecution for perjury in the giving of such evidence." The result is that if it appears from the compelled answer that the witness in fact committed perjury on some other occasion, the compelled answer cannot be used against him in a prosecution for that perjury: the exception clearly only permits the use of the compelled answer in a prosecution for perjury in the giving of that answer.[124]

2. The Accused

The position of the accused as a witness is dealt with in subsections (1) and (5) of section 4 of the Canada Evidence Act:

> 4.(1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.
>
> *** *** *** ***
>
> (5) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution.

In dealing with the privilege against self-incrimination, the courts have maintained that the common law rights of the accused cannot be taken away except by the clear and unambiguous language of a statute.[125] It is therefore rather strange that the courts have held on a number of occasions that, by giving the accused the right to give sworn testimony from the witness box, section 4 abrogated his former right to make an unsworn statement from the dock.[126] The result may be a desirable one, as the unsworn statement, free from the perils of cross-examination, is inconsistent with a rational fact-finding process; nevertheless, it seems to be contrary to one of the cardinal rules of statutory interpretation.

The wording of section 4(1) is very similar to the introductory clause of section 1 of the Criminal Evidence Act, 1898, making the accused a competent witness in his own behalf, but not making him compellable. His right to remain silent is reinforced by subsection (5) which prohibits comment either by the judge or by counsel for the prosecution on his failure to testify. However, this has been interpreted as applying only to comments in jury cases,[127] and then only to such comments as invite the jury to draw an adverse inference from the failure of the accused to enter the witness box.[128] Ritchie J., speaking for the majority of the Supreme Court of Canada in McConnell and Beer v. R.,[129] interpreted the subsection in the following manner:

I think it is to be assumed that the section in question was enacted for the protection of accused persons against the danger of having their right not to testify presented to the jury in such fashion as to suggest that their silence is being used as a cloak for their guilt.

As has been indicated by Mr. Justice Evans, it would be "most naive" to ignore the fact that when an accused fails to testify after some evidence of guilt has been tendered against him by the Crown, there must be at least some jurors who say to themselves, "If he didn't do it, why didn't he say so."

It is for this reason that it seems to me to be of the greatest importance that a trial Judge should remain unhampered in his right to point out to the jury, when the occasion arises to do so in order to protect the rights of the accused, that there is no onus on the accused to prove his innocence by going into the witness-box. To construe s. 4(5) of the Canada Evidence Act as interfering with that right would, in my opinion, run contrary to the purpose of the section itself.[130]

It is implicit in Ritchie J.'s statement that it would be wrong for the jury to draw any conclusion as to the innocence or guilt of the accused from his failure to enter the witness box. However, the courts have also said that "the law does not forbid jurors to use their intelligence and consider the absence of denial or explanation",[131] and in considering whether there has been a miscarriage of justice, Courts of Appeal do take into account whether the accused testified at his trial.[132]

In chapter 2, it was pointed out that according to a survey conducted in criminal jury courts in England in 1969, almost 99% of those on trial entered the witness box to testify on their own behalf. A similar survey conducted in Canadian

courts of comparable jurisdiction in 1968-69 revealed that only 26.5% of the accused persons in jury trials entered the witness box, while only 34.5% entered the witness box in non-jury cases.[133] The Canadian sample was too small and not sufficiently representative to be deemed statistically reliable, but it bears out the general impressions of practitioners and judges that about a third of the accused persons in Canada exercise their right to enter the witness box. The reason for the great difference between the English and Canadian percentages of accused persons entering the witness box appears to be that in Canada the accused is treated like any other witness,[134] and under section 12 of the Evidence Act may be cross-examined as to his previous convictions:

> 12(1) A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

The purpose of the section is to permit cross-examination as to credibility on a subject which can be easily proved if a false answer is given. Theoretically, therefore, if the witness admits his previous convictions, this should strengthen his credibility; however, it is obvious that the section is not used by the prosecutor for this purpose, but rather to give the jury a full picture of what kind of a person they have before them. It follows, that section 12 holds terrors for any accused person with a serious record, and defence lawyers have for years sought the amendment or abolition of the provision. However, cases suggesting that the trial judge

had the discretionary power to forbid questions under the section on the basis of fairness were stated to be incompatible with the clear meaning of the words of the section.[135]

There are two other factors in Canada that tend to encourage accused persons to stay out of the witness box. The first is that under section 578(3) of the Criminal Code the accused loses the right to address the jury last if he does call evidence. There is a good deal of controversy about the value of the last word, but there is no doubt that many defence counsel regard it as an important tactical advantage which far outweighs any benefits accruing through the accused attempting to give an explanation of his involvement in the criminal transaction. The second factor is a greater fear on the part of the accused persons in Canada of being charged with perjury. This will be dealt with a greater length in the next chapter.

In cases where there is more than one accused, their status as witnesses depends upon how they are charged and tried. In Re Regan it was held that "It is, of course, clear that persons jointly indicted and tried together cannot be compelled to give evidence . . . and equally clear that *ordinarily* persons separately indicted, or jointly indicted but tried separately, are compellable witnesses".[136] A literal interpretation of this statement would lead to the conclusion that the manner of charge rather than the manner of trial was the pre-eminent consideration; but the better rule would appear to be the reverse--namely, making the accused neither com-

petent nor compellable for the Crown if he is being tried together with another person. Even though the evidence on the two separate charges is theoretically treated separately, the practical danger of an incriminating admission with respect to the one charge contaminating the minds of the finders of fact with respect to the other charge is so great, that compelling one accused to testify against his co-accused is inconsistent with the maxim *nemo tenetur seipsum accusare*. Perhaps the court meant to grant some measure of discretion to the trial judge in this regard by the use of the qualifying word "ordinarily".

The non-compellability of the accused also applies to pre-trial proceedings. The accused is under no obligation to give evidence at a preliminary inquiry: indeed, whether the accused has counsel or not, the presiding justice must advise him of his right to make a statement or remain silent as he sees fit.[137] Nor is the accused a compellable witness at a coroner's inquest, after he has been formally charged in connection with the death under investigation.[138] Where, however, no charges have yet been laid, a potential accused may be compelled to testify at an inquest, although, of course, he may claim protection against the use of his answers in a subsequent criminal proceeding.[139] This could lead to abuse by the police, who by deferring the laying of charges have an opportunity to hear their chief suspect under examination at the inquest. This inconsistency needs legislative consideration.

In prosecutions for provincial offences, the provincial Evidence Acts generally follow the Canada Evidence Act so far as compellability of the accused and cross-examination on previous convictions are concerned. There are, however, some provinces in which a person accused of an offence under a provincial statute is a compellable witness;[140] although in practice he is rarely called by the Crown. The Yukon Territory is the only jurisdiction forbidding cross-examination on previous convictions as a means of testing credibility.[141] The evidence ordinance in that Territory is a replica of section 1(*f*) of the Criminal Evidence Act, 1898.

As a witness, the accused has the same right as any other witness to claim the protection of the immunity provision of the relevant Evidence Act. Likewise, if he fails to assert his claim to protection, his answers may be used against him in a subsequent proceeding. Thus in R. v. Brown (No. 2),[142] the Supreme Court of Canada held that the testimony of the accused at his first trial could be used against him at his second trial because he had not seen fit to claim the protection of the Evidence Act in the former case. This meant that the accused in the second trial was in fact not able to exercise his right to remain silent with the same degree of freedom as normally would have been the case, but the court held that this was something the accused had brought on himself. In the Brown case the accused was charged with murder at his first trial and manslaughter at his second trial. The court left open the question of whether section 5 of the Canada Evidence Act would protect the accused at

a new trial for the same offence against the use of statements given by him at his first trial.[143]

CONCLUSIONS

There are a number of weaknesses in the immunity legislation as it presently stands in Canada, ranging from definitional difficiencies, which leave the scope of the immunity and of the antecedent common law privilege unclear, to a lack of uniformity between jurisdictions, which renders the supposed protection illusory in some instances. But despite its shortcomings, section 5 of the Canada Evidence Act has demonstrated over the last eight decades that withdrawing the witness's privilege to refuse to answer incriminating questions can be done without undermining the integrity of the judicial process. Whether the immunity legislation is superior to the common law privilege will be examined in the chapters to follow.

The right of the accused to stay out of the witness box, after being withdrawn on one occasion by the House of Commons and on another by the Supreme Court of Canada, once again is firmly embedded in Canadian criminal procedure. The small percentage of accused persons in Canadian courts who enter the witness box and subject themselves to cross-examination is a matter of concern from a fact-finding point of view. On the basis of the experience in England, it is

submitted that this situation can be rectified to a large extent by changing the Canadian rules with regard to cross-examination on previous convictions, the right to address the jury last, and judicial comment on the failure of the accused to testify. However, the question must still be asked whether Bentham's comments about our protective attitude towards those accused of crime are not just as applicable today as they were 150 years ago.[144]

Chapter Four

HOW NON-LAWYERS SEE THE PRIVILEGE: SURVEY PROCEDURES

In the first three chapters, we have examined the history and present status of the privilege against self-incrimination in England and Canada, and have noted a number of changes that ought to be made in the privilege in both jurisdictions if it is to be applied logically and consistently. But, while a minor tune-up may make the machinery of justice function more smoothly, it is no substitute for a periodic major overhaul. A rule which developed in response to the social conditions of the sixteenth and seventeenth centuries is surely due for a fundamental re-examination. Even the immunity provision of the Canada Evidence Act has been in operation for over 80 years - a period long enough to justify a re-appraisal by the standards of any nation, let alone one which has undergone such fundamental social and political changes as Canada has.

It goes without saying that the views of lawyers, judges and legal scholars are of great significance in the process of evaluation and reform of the law, for they know what the law is, and why it is what it is. But, on the broader question of whether the law is attuned to the needs and the mores of society, the views of the legal fraternity may be as divorced from contemporary reality as the flat earth theory. On a topic with such fundamental implications as the privilege against self-incrimination, the experience and opinions of a broad spectrum of society should be canvassed before recommendations for change

are formulated. That is not to say that the law should be nothing more than a reflection of popular morality, for the latter is by no means an infallible guide to justice and truth; however, any legal system which is regarded as being fundamentally nonsensical by a substantial proportion of reasonable citizens is bound to suffer a loss in credibility and willing compliance, which are two essential ingredients for the maintenance of a free society.

It was decided to attempt some assessment of the views of laymen with regard to the privilege. It was not, of course, possible in a study of this nature to survey anything approaching a representative sample of the populations of England and Canada. The sample therefore had to be drawn from particular segments of the population. Two groups were chosen[1] - jurors and criminal recidivists - because they not only possess a special interest and expertise in the operation of the criminal justice system, but their views in regard thereto are of obvious significance and importance to the system. For example, if jurors regard failure of the accused to enter the witness box as being tantamount to a confession of guilt, or if criminals think that jurors draw this conclusion, the privilege may be regarded by criminals as a sham, and this fact may intensify their festering alienation from society, rendering the possibility of rehabilitation even more remote.

Planning for these two comparative surveys commenced in England in the autumn of 1968. While both surveys were

planned and executed at roughly the same time, the survey of criminal recidivists was given some degree of pre-eminence, because it was intended to compare the jurors' responses with those of the recidivists rather than vice versa.

CRIMINAL RECIDIVISTS - A SURVEY OF PRISONERS

Before attempting to conduct a study of criminal recidivists, certain preliminary problems had to be resolved. First, there was the problem of how to make contact with an appropriate sample of persons falling into that group. People are not likely to list their occupation as "professional criminal", so directories, voters' lists, etc. could not be used to assemble a sample. One approach considered was to use criminal court records, and attempt to interview all persons tried in particular courts during a given period of time. However, that idea was rejected because of the difficulty of locating such persons and establishing a satisfactory interview situation. Many persons who find their way into criminal courts do not have a permanent address, and even if they could be contacted they would likely feel threatened by a request for an interview. There also would be the problem of maintaining some degree of consistency in the conditions under which the interviews were conducted.

It was decided therefore to try to arrange interviews in the prisons, where large numbers of potential subjects were readily available, and where the selection process and interviewing conditions could be standardized. Such a sample would be open to the criticism that the subjects were biased against

the judicial system because they had been convicted by it. On the other hand, given the practicalities of the situation, it is unlikely that any system could be devised which would eliminate bias, so the possible bias of this group simply had to be borne in mind.

The next problem was to establish the characteristics of the sample. Ideally, the sample should be representative of the entire criminal population, but the possibility of getting such a sample was remote. Even in prisons where there is a large cross-section of the criminal population, there is neither a complete nor a representative sample. Certain classes of offenders are not in prisons at all (e.g., juvenile offenders), and others are seldom sentenced to a term of imprisonment (e.g., first offenders). Conversely, the prison population is over-representative of that portion of the criminal population which commits what might be classed as "serious" crimes, such as murder, rape, armed robbery, crimes of violence and major frauds. Another problem associated with attempting to obtain a representative sampling of the entire criminal population was that with a small total sample (approximately 100 prisoners in England and a similar number in Canada) it would be impossible to have more than one or two representatives from each of the most serious types of offences; and such a small number would not be statistically reliable. Women offenders also were excluded from the sample for this latter

reason. One other exclusion was dictated by the desire to match the opinions of prisoners in England with those in Canada: it was necessary to exclude from the English sample prisoners of West or East Indian or African extraction, and similarly to exclude from the Canadian sample prisoners of Indian, Eskimo or Métis origin. The two groups are not comparable, and it seemed best to leave a study of their plight to a special research project concentrating on racial discrimination.

Other categories of prisoners were excluded because of administrative reasons. It was felt that certain types of offenders, who are low in the pecking order might find it difficult to participate in group sessions, and this might not only affect their responses, but also the responses of the rest of the prisoners in the group. For this reason, those with serious records of sexual or drug offences, or crimes of violence, were excluded, all three being regarded with varying degrees of disfavour by the bulk of the prison population in England. Convicted perjurers were excluded because their responses would be too readily open to attack, and prisoners under 21 and over 45 years of age were excluded in order to make sure that the subjects were neither too young to have had a reasonable experience, nor too old to care any longer.

The final exclusicnary criterion related to the subject's contact with the courts. As one of the prime purposes of the survey was to determine the attitude of the prisoners to certain courtroom procedures, it was necessary to limit the

survey to subjects with a certain minimum of experience before the courts. That minimum was set at three actual trials, at least one of which was a jury trial.

As a result of the foregoing considerations, it was decided that the criteria for selection should be as follows:

> white, male prisoners, between the ages of 21 and 45, with experience as a defendant in three or more actual trials (at least one of which was by jury), whose records were basically for acquisitive offences, but excluding prisoners with a record of perjury or any serious record for crimes of violence, drug or sexual offences.

Having chosen the criteria, the next problem was to make arrangements with the appropriate authorities to gain admittance to the prisons in order to carry out the surveys. With the help of Dr. Nigel Walker of Nuffield College, Oxford, contact was made with senior officials of the Home Office, Prison Department. Permission was granted to conduct a pilot study in the Oxford local prison, on the understanding that subsequent studies would be dependent upon how much of a disruption in prison routine occurred as a result of the pilot study in Oxford.

The pilot study was conducted in Oxford prison in December, 1968, to determine whether the selection procedures yielded an adequate sample, what the reaction of the selected prisoners was to the study, and whether they understood the questions and were capable of answering them. A group of eight prisoners were selected for the pilot study by the prison officials, on the basis of the criteria set out above, and arrange-

ments were made for a preliminary group session of 1½ - 2 hours and an individual session of approximately 1 hour with each member of the group.

The group meeting was an informal get-acquainted session. Although I did not use a set piece for fear that it would sound too impersonal, my introductory remarks were designed to convey the following basic information:

-- I was not a criminologist and was not studying the prison system;

-- I was a Canadian law professor, who was doing a study in England and Canada of Evidence and Procedure in criminal cases (i.e., the rules governing what happens before the police and before the courts);

-- I thought that the rules did not always work as fairly as they ought to and that the purpose of my study was to recommend reforms;

-- in determining what changes in the rules were necessary, not only judges and lawyers but ordinary people like themselves, who had had experience before the police and before the courts, ought to be consulted;

-- I would like to talk to them about their experiences and opinions, first as a group and then individually;

-- I was not going to pry into their personal lives;

-- everything they told me would be treated as confidential, and in any publication of the results of my work it would be impossible to identify any individual as having taken part.

With that, the meeting was thrown open for general discussion of what they thought of the police, lawyers and judges, what were the chief problems, and how they thought they could be resolved. The prisoners entered the discussion at once, and without any apparent hesitancy, even though a guard was present in the room part of the time. As in any group, some were more

extroverted than others, but all seemed genuinely interested in the discussion and willing to cooperate.

During the last half hour of the session, I administered a questionnaire designed to determine what they would do in certain situations and to test their attitudes to certain procedures.[2] The questions took the form of little stories, followed by two or more optional responses. An effort was made to have the stories deal with actual situations with which the prisoners might be acquainted, stated in language that they would understand. Each prisoner had his own copy of the questionnaire, and he was asked to fill it in but not sign it. As the sole purpose of the test was to see whether this type of questionnaire was feasible, particularly when administered in a group, there was no secret code by which prisoners could be identified. The procedure was that I read aloud each question and its possible responses, and when it appeared that all the prisoners had had an opportunity to select an answer, I repeated the process with the next question. On one or two occasions, a prisoner would interrupt to ask a question or to make some comment about the factual situation in the story. I attempted to restrict my responses to short clarifications and to avoid introducing interpretations or new facts.

A week later, I met each of the prisoners individually for approximately an hour. Interviews were conducted in private, in a cell converted to an interview room. The standard pattern was that we would talk informally for a few minutes while the

prisoner enjoyed a smoke or some sweets, which I was permitted to offer them. Turning to the questionnaire, I briefly explained its general nature, and asked if they had any questions. None of them had.

The questionnaire[3] opened with a series of personal questions and questions related to the prisoner's record (Q.'s 1-4). This information would be useful not only for analysing the responses, but for checking the subject's credibility by comparison with the information on his record. [The prisoners were not informed that this information could be checked for me by the prison officials.]

The questionnaire had two basic purposes: to determine what the subject regarded as the acceptable limits of police investigative methods, and to determine his attitude towards telling the truth, lying, or remaining silent when asked an incriminating question by the police or in court.

The questionnaire attempted to achieve the first purpose by a number of different types of questions. The subject was asked some simple questions to test his knowledge of his rights before the police (Q.'s 5-8). He was asked to specify the methods used by the police which he regarded as improper, and which of those methods had been used by the police on him (Q.'s 9-10). A series of hypothetical cases then were posed, and the subject was asked to say whether the particular method used by the police in the case was proper or improper, the term "improper" being defined as something which in the subject's view "society does not want the police to do" (Q. 11). Finally, there was

an open-ended question, asking how we could best overcome improper police methods (Q. 12).

To achieve its second purpose, the questionnaire included a number of questions asking how the subject would have acted in a hypothetical situation (Q.'s 13-14), and how he had acted in an actual situation (Q.'s 15-18). Perjury as an option was considered from various points of view, including the subject's own perjury, his estimate of its frequency, and his estimate of the chances of an accused person being caught and convicted of perjury committed by him at his own trial (Q.'s 14, 16, 21-23). Other questions in this group inquired into his experience as a witness, and what factors influenced his decision to enter or stay out of the witness box (Q.'s 17-19); and a final question asked whether he had ever heard of the privilege against self-incrimination, and if so, what did it mean.

The pilot survey with questionnaire No. 2 established that it was feasible to administer this type of a questionnaire to a population of criminal recidivists. There seemed to be no problems with their comprehension, and it was clear that there was time for additional questions in the one hour allotted. On the other hand, my experience with questionnaire No. 1, which was administered in a group setting, was not entirely satisfactory, because even though it appeared that each of the prisoners understood every question, there was no way of testing comprehension with reasonable accuracy. Moreover, administering the test materially reduced the opportunity for me to get to know

the prisoners, and more importantly for them to feel comfortable with me. It was decided therefore to amalgamate the two questionnaires in a new questionnaire No. 3, which would be administered on an individual basis[4].

The new questionnaire was not merely a combination of the earlier models, however. There were a number of significant differences in form and substance. First, while it apparently had made no difference that the personal questions came first, it was felt that from a tactical point of view it was preferable to deal with personal matters after the subject had answered the rest of the questions, and had discovered that he had really nothing to fear. Second, a major question was introduced to test the attitudes of the subjects towards various rules about pre-trial interrogation (Q. 13). Third, the question testing attitudes to various police methods was broadened to include comparable methods being used by civilians. This was done to see whether the subject objected to the method itself or to the fact that the method was used by the police. This question was also modified to get a more precise set of instructions to the subjects, and to permit a third option of "no strong feelings" in addition to the two originally provided (Q. 14). Fourth, the questions which attempted to determine the attitude of the subject to telling the truth, lying, or remaining silent in the face of incriminating questions were made more precise in order to assist in their analysis (Q's. 15-22). Finally, a new question was introduced in which the prisoner was asked to rate the effect of various items of evidence in the minds of the jury (Q. 23).

Permission was received from the Prison Department to try out questionnaire No. 3 in the Oxford prison. This once again would be a pilot study, but it would also provide some check on the reliability of the test, in that several of the prisoners who had taken part in the first survey would also take part in the second. The second study, group session plus individual interviews with 14 prisoners, took place in the Oxford prison in the latter part of February, 1969. The same procedures were followed *mutatis mutandis* as in the first survey. From an administrative point of view, the interviews and questionnaire No. 3 went very smoothly. Moreover, of the prisoners retested, there was a high degree of consistency in their answers to comparable questions. On the basis of my evaluation of whether I was getting useful responses, and an apparently favourable report by the Governor on the degree of inconvenience I was causing, the Home Office approved the continuation of the research in nine additional prisons: Blundeston, Camp Hill, Canterbury, Cardiff, Dorchester, Lincoln, Pentonville, Wandsworth, and Winchester.

In each instance, I made arrangements directly with the Governor of the prison to interview prisoners at a time that was convenient to the administration. The same letter was sent to each of the Governors, setting out the nature of my research, the type of prisoner I wished to interview and the amount of time it would take. Without exception, the Governors or their representatives were extremely cooperative in assisting with this research project. As might be expected, the degree of

security varied from prison to prison, and each prison had its own attitude towards permitting direct access to prison files. In most instances selection of prisoners was done by myself working through the files with the assistance of a prison officer; but as already indicated, in some instances the selection was done for me. In all instances the group interviews and the administration of questionnaire No. 3 took place without the attendance of any guards or prison officers, other than the one who introduced me to the group, explained any changes in routine to accommodate my visit, and then left. It was not possible to arrange the individual interviews in such a way as to preclude all contact between a subject who had been interviewed individually and another who was awaiting his turn. However, by scheduling interviews one after the other, and completing the individual interviews in just under two days normally, an effort was made to reduce the opportunity for contamination to a minimum. In addition, prisoners were asked not to discuss the questionnaire with their fellow inmates, and for what it was worth, they all agreed not to do so.

The interviews in these nine prisons were conducted over the next three months. Everything went very smoothly; although it became necessary to make minor modifications in the light of experience. It was not always possible to find a sufficient number of prisoners who had gone through at least three actual trials; so this number was reduced, although the one jury trial remained as a requirement. In a few instances, it was found that the prisoner's own statement of his age was different from

that stated on his record. In a few cases this would have put the prisoner outside the 21 to 45 bracket by a year or so. As the original range was arbitrary, and there did not appear to be anything unusual about the responses of these prisoners, it was decided to include them in the study, and on the Canadian survey the age limit was extended to 50 years. The wording of one question also had to be changed. 14-J originally stated: "Some drivers drive faster than the speed limit if they think that no traffic police are watching. A very effective way of catching such drivers is by using hidden radar traps." The prisoners were asked whether they "approved, disapproved, or had no strong feelings" about this police method. Towards the end of the English part of the survey, a couple of prisoners remarked that they would approve of such a method if it were reliable. I informed them that I understood it was reliable, and asked them to answer the question on that basis. Thereafter, in administering the test I read the second sentence of 14-J as stating "a very accurate and effective way, etc.," and the Canadian questionnaire was modified accordingly.

In Canada, I received permission from the Commissioner of Penitentiaries to conduct the survey in the Western region. Accordingly, prisoners were interviewed in the federal penitentiaries located at Stony Mountain, Prince Albert, Drumheller, New Westminster, Matsqui and William Head. In all cases I was allowed to make my own selection from the inmate files which were provided under the supervision of a prison officer.

This work began in May, 1970, and it soon became clear that the requirement that the members of the sample have experience in one jury trial was completely unrealistic. Jury trials are only mandatory in cases such a treason, sedition, piracy, murder and rape, and according to the criteria for selection, commission of any of these offences would be a sufficient reason to exclude the prisoner from the sample. While the accused has the option of a jury trial in all indictable offences,[5] very few of the acquisitive offenders in the institutions which I visited ever had opted for a jury trial. The result was that in order to obtain anywhere near 100 prisoners for the Canadian sample, the requirement respecting trial experience had to be reduced from three trials to one, and the requirement for a jury trial had to be dropped altogether. Even with this modification, it was impossible to draw 100 qualified prisoners from the penitentiaries in the Western region. In part this was due to the fact that in the prairie provinces anywhere from 25% to 50% of the prison population is either Indian or Métis (a group which was excluded because of the difficulty of matching them against the English sample), and because many of the acquisitive offenders also had a serious record of crimes of violence, e.g. armed robbery. The end result was that in order to get the requisite number of prisoners for the Canadian sample, interviews had to be held with prisoners in two provincial correctional centres in Saskatchewan and a return visit had to be made to the Prince Albert penitentiary some four months after my original visit. In all instances, I had excellent cooperation from the

prison officials and the prisoners themselves.

Interview procedure was the same as that employed in the English study - that is to say, a group interview followed by individual interviews. There were rare exceptions to this, where a subject for one reason or another was unable to attend the group interview; but in those cases, I always spent a few minutes at the beginning of the individual interview to explain the purpose of the research, to answer any questions he might have, and generally to put him at ease. The questionnaire used was the same as that used in England, with some verbal changes to reflect different Canadian usage. As in England, it was impossible to avoid the possibility of prisoners talking to their mates about the questionnaire, and the same precautions were taken to avoid contamination of the subjects.

In both the English and Canadian institutions included in the survey, 90-95% (in many cases 100%) of the prisoners who satisfied the criteria were interviewed. Cooperation by the prisoners was excellent. In only one or two cases in each country did a prisoner, who satisfied the criteria, refuse to participate in the study, and in only one case did a prisoner who had agreed to be interviewed subsequently withdraw. Nor did there seem to be any reluctance to talk to me about the matters contained in the questionnaire. The prisoners seemed on the whole to be genuinely pleased to be consulted on a subject which had affected them (and in all likelihood would continue to affect them) so directly. This was particularly true of

the English prisoners, a fact which may be accounted for in part by me being a foreigner (and thus unlikely to be a Home Office spy), and in part by my cigarettes and sweets being more of a luxury than they were for the Canadian prisoners. There also may be deeper reasons for this apparent attitudinal difference, which reflect a difference in mentality between prisoners in Canadian penitentiaries and those in English prisons, but that is beyond the scope of this study.

THE JURY SURVEY

Shortly after planning commenced for a jury survey, it was discovered that conducting a survey in England among actual jurors was out of the question. The Lord Chief Justice recently had ruled that such contact with jurors, even after the expiration of the time for appeal, was improper. This meant that jury research would have to be done by means of a simulation model - a costly and time consuming undertaking. Two jury simulation projects were already underway - one at the London School of Economics - and the other at the Penal Research Unit at Oxford University, and it was decided to explore the possibility of participating in one of them.

The London study involved a tape recorded simulation trial, tailored to test certain facets of trial procedure. Various audio tapes were prepared, reflecting modifications of the evidence, directions to the jury, etc. Letters were then written to a large number of persons possessing the necessary qualifications to sit on a jury, inviting them to spend an evening as a part of the simulation jury. One of the tapes

would then be played to the jury, and their deliberations following the playing of the tape were themselves tape recorded. Different juries heard different versions of the trial tape. The researchers would then attempt to discover what changes in the procedure or evidence resulted in significant differences in the reactions of jurors.[6]

The Oxford study was more elaborate, involving what was known as a "shadow jury", a group of twelve persons, with the qualifications of jurors, who were willing to take part in the experiment. The twelve would sit in the public gallery throughout a trial in the Oxford Assize Court or Quarter Sessions, and when the actual jury retired to consider its verdict, the shadow jury would likewise retire to consider its verdict. The deliberations of the shadow jury were tape recorded and analysed by the Penal Research Unit, and subsequently a questionnaire was circulated by the Unit to those who had participated in the experiment.[7]

Either project would have provided a suitable vehicle for surveying the reaction of jurors to specific factual situations. Each had advantages. The London project, by controlling every aspect of the procedure and evidence, would have provided a more precise instrument for testing differences in jury responses; on the other hand, the Oxford project more truly simulated the drama of the courtroom. In the final analysis, however, the decision as to which project would be the better tool for purposes of this study was made easy by the fact that the London project had progressed to such a stage that it would

have been very difficult to integrate new material or questions, whereas the Oxford project was ready, willing and able to do so.

Because of the nature and length of the questionnaire being administered to the subjects by the Penal Research Unit, only one question could be submitted as part of the self-incrimination study to the first group of shadow jurors. This was a direct question as to the kind of inference that the shadow juror would have drawn from the failure of the accused to enter the witness box.[8] The Penal Research Unit agreed to submit an extensive questionnaire on self-incrimination to another series of shadow jurors.[9] This questionnaire to a large extent replicated the questionnaire used in the survey of prisoners. In particular, it was designed to test the attitudes of the shadow jurors to certain types of police methods, certain types of evidence about the accused, and compelling the accused (and the spouse of the accused) to give evidence. The questionnaire was administered after I had left England, and unfortunately the Unit was not able to follow a consistent pattern - some questionnaires were administered personally, some were sent out to early shadow jurors by post, and others were handed to shadow jurors immediately after they had completed their deliberations on a case. 111 questionnaires were completed and returned to me. It is not possible to say how many or which

ones were completed by each method; however, an instruction sheet was attached to the questionnaire in anticipation that it might be completed by the shadow jurors personally, so the effects of the differences in method of administration should be substantially reduced if not entirely eliminated.

In Canada, no ruling had yet been made to prohibit the interviewing of jurors by researchers. I received permission from the Attorney General of Saskatchewan to interview approximately 100 jurors who had taken part in a criminal trial, subject to the following conditions:

> 1. jurors could not be contacted unless the time for appeal of the decision had expired without an appeal having been lodged by either side or the appeal dealt with and the time for any further appeal had elapsed;
>
> 2. participation of jurors was to be on a voluntary basis; and
>
> 3. all information so gathered should be treated as strictly confidential, and any publication of results had to preserve to anonymity of all persons involved in the trials.[10]

It was understood, of course, that the survey should be conducted discreetly and without fanfare or publicity, and the persons interviewed should be advised that they should not discuss the matter with other persons, as this also might result in publicity.

The sample was drawn from the courthouse records of jurors who had sat in criminal cases in the period September, 1970, through June, 1971. A letter was sent to each juror indicating that I was doing research in an attempt to determine

how non-lawyers see the criminal trial, and requesting the opportunity to talk with them for approximately one hour on a confidential basis about the trial on which they had served as a juror. Interviews, using basically the same questionnaire as that administered by the Penal Research Unit to the English shadow jurors, were conducted by myself and a student assistant.[11] Procedures were standardized, and the questionnaires were filled in by the interviewer rather than the juror.

To give some idea of the frequency of criminal jury trials in Canada, during the period in question, in the four largest cities in the province, representing a combined population of approximately 325,000, and serving as the judicial centres for perhaps another 100,000, there were only twelve criminal jury trials. Of that number, one was under appeal; hence, the jurors in that case could not be included in this survey. Theoretically, this left a total of 132 jurors, but as some of the jurors had sat on two or more of the cases, the actual number of jurors available for inclusion in the survey was significantly less. A total of 90 persons were interviewed, representing 107 of the 132 theoretical jurors.[12] Of the remaining 25, the great majority could not be traced, or were not in the city when the interviews were being conducted. In only one case was there a refusal to participate in the survey. In practically all cases, the interviews were conducted in the living room of the juror's home. Generally the interviewer and the juror's family were present in the room, but in such cases there was never any interference by them in the examination.

The questionnaire to the Saskatchewan jurors was broken into two parts.[13] Part A contained general questions about the case which the juror had tried, while Part B was essentially a duplicate of the questionnaire used in England. The questions in Part A attempted to determine how well the juror remembered particular features of the case, and how matters such as the failure of the accused to enter the witness box, summing up by counsel, and the directions of the judge affected the juror in reaching his decision.

The Saskatchewan jury survey was, and is likely to remain, unique in Canadian legal research. In 1972 the following provision was added to the Criminal Code:

> 576.2 Every member of a jury who, except for the purposes of
>
> (a) an investigation of an alleged offence under subsection 127(2) in relation to a juror, or
>
> (b) giving evidence in criminal proceedings in relation to such an offence,
>
> discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.[14]

As with the survey of prisoners, results of the jury surveys in England and Canada will be dealt with in the next chapter.

Chapter Five

PRISONER AND JUROR VIEWS ON SELF-INCRIMINATION

The empirical studies described in the previous chapter sought information on the need for and desirability of some form of privilege against self-incrimination, first before the police, and, second, before the courts. The inquiry was approached without any hypothesis, for even with the greatest precautions, such an approach inevitably, it is submitted, introduces an element of subconscious bias, which may operate in the formulation, administration or interpretation of the project or its results. The sequence adopted, therefore, was to seek the evidence first and then form the hypothesis. The evidence is as follows.

SELF-INCRIMINATION BEFORE THE POLICE

This topic was examined from four different aspects. First, did the prisoners know of their right to remain silent when questioned by the police? Second, what did the prisoners think were improper police methods in the obtaining of evidence from suspects? Third, are certain crime detection methods regarded as acceptable, or at least unobjectionable? Fourth, what means of controlling improper methods might be devised? The first, second and fourth of these questions by their very nature were susceptible of an answer only by the prisoners; but the third question, being a test of attitudes, was also submitted to the jurors.

1. Did the Prisoners know of their Rights to Remain Silent when Questioned by the Police?

The first question on the questionnaire administered to the prisoners was "Do you have to answer questions which the police ask you?. 104 of the 109 (95.4% English prisoners and 92 of the 100 (92%) Canadian prisoners tested , correctly answered "No". The second question was designed to determine whether the prisoner knew what advantage there was in remaining silent: "If you do say anything to the police, can the police use what you have said as evidence against you at your trial? Here, "Yes" was the correct answer, and 84.4% of the English prisoners, and 92.0% of the Canadian prisoners gave this response. An additional 14.7% of the English and 6.0% of the Canadian prisoners gave a second acceptable answer, namely, "Yes, if they cautioned you first."

It is not surprising that all but a few of the prisoners interviewed in both countries knew that they did not have to answer questions put to them by the police, because the sample in each case was of men who had been through the mill a number of times and had doubtless learned either from experience or from their peers. The response referring to the effect of a caution - though not strictly accurate, inasmuch as the Judges' Rules are merely guidelines, not rules of law - also shows a measure of sophistication in the knowledge of the prisoners giving that reply. The fact that more than twice as many English prisoners as Canadian prisoners refer to the caution is probably attributable to the fact that the Judges' Rules have not been formally accepted in all parts of Canada;[1]

thus the Canadian police have a good deal more latitude in questioning suspects than do their counterparts in England. In Canada, the courts do, however, take into consideration the question whether the police had administered a caution in determining the voluntariness of statements given by the prisoner to the police; hence, Canadian police commonly do caution a suspect before questioning him.

2. <u>What Methods used by the Police did the Prisoners think were Improper?</u>

This question was dealt with both in the introductory group sessions and in the questionnaire administered individually to the prisoners. In the group session, my opening remarks, while being careful not to suggest knowledge of any specific wrong-doings by the police, indicated that I thought the procedures before the police were not always what they should be. Discussion on this point was never hard to start, and, indeed, usually occupied a good half of the discussion period. Normally, it was a topic upon which almost everyone in the group had a view based on experience or hearsay. Certain interesting patterns of responses emerged. In England, comments were more critical of detectives than of the uniformed police, and much more critical of detectives in London than elsewhere. Moreover, while violence and "verballing" were the most common allegations against the English police generally, the allegations against London police frequently involved some form of corruption, usually demanding and accepting bribes. Not every prisoner who objected to extortion by the police was motivated by a sense of

moral indignation, however; many regarded bribery as a very useful and necessary device in avoiding or subverting rightful prosecution. The objection was to the amounts demanded [one London prisoner bemoaned the fact that he had to steal twice as much as he normally would because of the constant pay-offs to the police], and the dishonest conduct of some police officers, who, having accepted a bribe, failed to carry out their end of the bargain.

In Canada, the group discussions relating to police activities focussed almost exclusively on violence. Most of the Canadian prisoners had moved around a good deal, and had had contact with the police in several cities and provinces. There was a discernible pattern to the complaints. Police forces in Toronto, Winnipeg, Regina and Vancouver came in for frequent and often vitriolic criticism for the way in which they treated prisoners. At the other end of the scale, the R.C.M.P. almost universally were conceded to treat their prisoners fairly. One prisoner described the difference between the city police forces and the R.C.M.P. as "the difference between night and day"; another described it in terms of the R.C.M.P. getting their evidence first and then picking you up, whereas the city police forces would pick you up on suspicion and try to make you give yourself away. There was one major exception to this general approval of the R.C.M.P., however, and that was in the area of narcotics.

Because of the nature of the work, narcotics investigations involve surprise raids on dwelling houses, and rather rough treatment of suspects found therein if the police think that any attempt will be made to destroy the evidence, for example by swallowing it. The normal search warrant would be ineffectual for such a raid; hence the far reaching authority of the writ of assistance is employed. Only the R.C.M.P. can use the writ of assistance, and as a result, even where a narcotics raid is being conducted by a city police force, an R.C.M.P. officer possessing the writ must be present. There can be no doubt that suddenly being throttled by the police, who gained admittance to your home by kicking in the door without warning is a frightening experience, and it is not surprising that it was the subject of some complaint by Canadian prisoners in the group discussions.

The question of improper police methods was also dealt with in the individual interviews. Questions 10-12 of the questionnaire sought direct answers on improper police methods, and question 14 was designed to test the attitude of the subject to a variety of different investigative techniques.

Question 10 asked: "There has been a great deal of talk about 'improper police methods'. What methods used by the police do you think are improper?"

The prisoners in both countries tended to be much less outspoken in their criticisms of the police in the individual interviews than in the group interviews, and most had difficulty

identifying more than a few methods used by the police that they regarded as improper. Although the total number of improper police methods identified by the English prisoners was 46, and by the Canadian prisoners 38, no English prisoner listed more than 7 such methods and no Canadian prisoner listed more than 6. Indeed, the average number of improper police methods listed by prisoners in England was 3.62, while the average for Canadian prisoners was 2.48. The numbers were even smaller when the prisoners were asked, "Have any of these improper methods been used by the police on you?". Here the responses ranged from 0-7 in England to 0-6 in Canada, with averages of 3.18 in England and 2.14 in Canada. 10% of the Canadian sample and 3.7% of the English sample indicated that no improper police methods had been used against them.

Some interesting comparisons and contrasts emerged in relation to the types of improper police methods listed by the two groups of prisoners. The following summary table lists the improper police methods named by at least 10 prisoners in either survey, and shows the percentage of prisoners who alleged that the method had been used against them. It also indicates those differences between English and Canadian results that are statistically significant as calculated by the chi-square test: one asterisk indicates the difference is significant at the 5% level, and two asterisks at the 1% level. This same code for significance will be used throughout this chapter.

TABLE 1

Comparison of English and Canadian Prisoner Responses Identifying Principal Improper Police Methods

Method Complained of	% Mentioning		% Alleging use v. self	
	Eng.	Can.	Eng.	Can.
1. Violence	54.1	71.0*	44.0	57.0*
2. Verballing	39.4	2.0**	37.6	2.0**
3. Planting evidence	24.8	4.0**	16.5	4.0**
4. Putting pressure on suspect's family	22.9	8.0**	20.2	8.0**
5. Using bail as lever	22.0	12.0	20.2	11.0
6. Not allowing outside contact until a statement is given	21.0	14.0	21.0	14.0
7. Perjury on subornation of perjury	14.7	15.0	14.7	13.0
8. Harassing a person who has a record	13.8	16.0	13.8	13.0
9. Using trickery to to obtain a statement	12.8*	3.0	10.1*	2.0
10. Demanding and accepting bribes	12.8**	0.0	11.9**	0.0
11. Making improper or harassing searches	5.5	13.0	4.6	13.0
12. Asking prisoner to admit other offences and have them T.I.C.	11.0*	2.0	11.0*	1.0
13. Rigging I.D. parade	10.1	6.0	9.2	5.0
14. Lying to, or giving bad advice to prisoners	9.2	4.0	8.3	3.0

Sample size - English 109, Canadian 100

* Difference sig. at 5% level

** Difference sig. at 1% level

The figures make it clear that violence or threats of violence is the No. 1 improper method used by the police in the opinion of prisoners in both countries. In Canada,

this is particularly true, with 71.0% of the prisoners listing it. No other improper method is listed by more than 16.0% of Canadian prisoners. By way of contrast, while violence topped the poll in the English survey, five other methods were mentioned by more than 20% of the English prisoners.

The two methods where the results of the English and Canadian surveys are closest are perjury and harassing a person who has a record. The results for other methods in the list often differ significantly: at the 1% level we find verballing (the giving in evidence by the police of an inaccurate account of a verbal statement given by the prisoner), planting evidence, putting pressure on the suspect's family, and and demanding and accepting bribes; at the 5% level, we find violence, using trickery to obtain a statement, and asking a prisoner to have a list of other offences T.I.C. (taken into consideration). It should be noted that the only case in which the Canadian frequency of complaint was significantly higher than the English was violence.

How can these differences be explained? Perhaps these methods are used by the Canadian police, but are not regarded as being improper by Canadian prisoners but merely as part of the game. Certain prisoners on both sides of the Atlantic expressed the view that if anyone was stupid

enough to make a statement to the police, or to fall for one of their tricks, he deserved to be convicted. Another possible explanation is that in each country there is a certain lore about police methods which develops in the criminal sub-culture. The components of this lore are based partly upon experience and partly upon hearsay. This is evidenced by the significant difference between the number of persons objecting to a particular method used by the police and the number who said that they had had that method used by the police against them. It may be that the Canadian prison lore is not quite as sophisticated in its characterization of police methods as that in England. Third, there is the fact that criminal procedure varies somewhat from England to Canada; thus, the practice of asking to have other offences taken into consideration at the time of sentence is not nearly so widespread in Canada as in England. Finally, it is possible that the Canadian police do not in fact resort to some of the methods used by their English counterparts - or at least to the same extent. This does not mean that they are lily white in their conduct, as the results regarding violence and the making of improper or harassing searches would indicate.

The fourteen improper methods mentioned in Table 1 can be broken down into misfeasances (actions which are crimes themselves) and malfeasances (actions which constitute maladministration or at most civil wrongs). There may be some argument about which category some of the methods should be in, but taking the general tendency of each of the items, it is suggested that violence, verballing, planting evidence, perjury,

demanding and accepting bribes, and rigging identification parades clearly are misfeasances. The remainder of the list are malfeasances. Misfeasances accounted for 53.5% of the complaints by English prisoners and 57.6% of the complaints by Canadian prisoners. However, if violence is removed from the list because of its overwhelming impact on the average, quite a different picture emerges - only 42.1% of the English complaints in Table 1, and only 27.3% of the Canadian complaints concerned misfeasances by the police.

It would have been interesting to see whether certain personal characteristics such as age, education, social class or age at first conviction have any significant association with either the number of complaints or type of complaints made by the prisoners against the police. Unfortunately, with the exception of age, these data were too soft to be considered reliable.

While the numbers are too small to produce a statistically significant result, there did appear to be some difference between the responses of English and Canadian prisoners in the same age group, which may indicate a trend.

TABLE 2

Average number of Complaints about Police Methods by Age Group

	<25	25-29	30-34	35-39	40-44	>44
English	3.37	3.92	3.26	3.77	4.33	2.83
Canadian	2.32	2.57	2.72	2.36	2.00	2.00

Number in each group (Canadian figures in parentheses): <25, 19 (19); 25-29, 35 (30); 30-34, 27 (28); 35-39, 13 (11); 40-33, 9 (7); >44, 6 (5).

We see that whereas in the Canadian sample the number of complaints rises to a peak of 2.72 for prisoners in the age group 30-34, and then drops to a low of 2.00 for prisoners in the age group 40-44 and >44, the curve for the English prisoners has two peaks - one for the age group 25-29 and the other for age group 40-44. Curiously, the high point of the Canadian curve (the age group 30-34) is the low point of the English sample and conversely the high point of the English sample (the age group 40-44) is the low point of the Canadian sample. These divergences do not appear to be due to a skewed sample in either case; although in the 40-44 age group the size of the sample is so small that one or two responses can have a major impact on the group average.

The relatively low rate of complaint by the youngest and the oldest prisoners in both samples leads one to speculate that as prisoners have more experience with the police they become more antagonistic towards them; but at some point the prisoners mellow towards the police or become reconciled to their tricks. It is also possible there is a corresponding pattern in conduct by the police, starting with a certain degree of solicitousness toward young offenders, which is not evident with recidivists. However, when the criminal has reached an age when he has lost his aggressiveness, and becomes a familiar, pathetic figure, the police may once again show more compassion.

Going through the improper methods listed in Table 1, and comparing the response rate of each age group, no consistent

pattern emerged either in the English or the Canadian sample, and, as between the two samples, there was little commonality. In any case, the numbers involved in relation to particular methods were so small as to be statistically unreliable. Some grouping obviously was necessary. The improper methods were therefore divided into misfeasances and malfeasances, and the samples were divided into two almost equal halves, taking 30 years of age as the breaking point.

TABLE 3

Comparison of English and Canadian Prisoners - complaints of Misfeasances and Malfeasances by age

	Under 30		30 and Over	
Misfeasances	Eng.	Can.	Eng.	Can.
1. Violence	32	35	27	37
2. Verballing	17	1	26	1
3. Planting evidence	13	2	14	2
7. Perjury	9	8	7	8
10. Demanding & accepting bribes	7	0	7	0
13. Rigging the I.D. parade	3	4	8	2
Total Misfeasances	81	50	89	50
Malfeasances				
4. Putting pressure on the suspect's family	10	4	15	5
5. Using bail as a lever	14	6	10	6
6. Not allowing outside contact until a statement is given	15	8	8	6
8. Harassing a person who has a record	9	10	7	7
9. Using trickery to obtain a statement	7	3	7	0
11. Making improper or harassing searches	3	3	3	10
12. Asking prisoner to admit other offences and have them T.I.C.	10	0	2	2
14. Lying to, or giving bad advice to prisoners	6	2	4	1
Total Malfeasances *	73	36	56	37

* Difference between older and younger group of English prisoners significant at 5% level.

The two samples were similar for misfeasances, but a difference appeared between them for malfeasances. In the Canadian sample the numbers under and over 30 were almost equal both for misfeasance and malfeasance. In the English sample, the older group had a significantly (5% level) lower number of complaints falling in the malfeasance category than the younger group. This could be interpreted as indicating that there has been some change in the methods employed by the police dealing with prisoners, but it could also indicate that the prisoners learn some of the tricks used by the police, such as not allowing contact with the outside until a statement has been given or asking a prisoner to have other offences taken into consideration, and they are not bother by them; on the other hand, the misfeasances, by and large, are beyond the control of the prisoner no matter how wise he is in the ways of the police.

3. Approved and Disapproved Crime Detection Methods

It could not be assumed that a prisoner's failure to mention a particular crime detection method in response to question 10 implied approval by him of its use. The questionnaire therefore also included question 14, in which the subject was given a series of hypothetical examples of crime detection methods and was asked whether he approved, disapproved or had no strong feelings about their use. Unlike question 10, this question could also be used to test juror attitudes, as it did not require a personal knowledge of police methods. The sequence of examples in the question was designed to discourage subjects from concluding

that there was a pattern of desired and undesired answers. In order to see whether the subject was responding to the method or merely expressing an anti-police bias, some examples involved civilians using the same sort of methods as were used by the police in another given hypothetical situation.

As an introduction to the question, the subject was told that the survey was "trying to determine the attitude of fair-minded persons to certain methods of crime-detection". To avoid any suggestion that "fair-minded" persons were prosecution-oriented, and opening example was given that even the most hard-hearted proprietor would have trouble approving - setting a potentially lethal shotgun to discharge at youthful apple thieves if they touched the trip wire foot of the apple tree. To this illustration 102 English prisoners expressed disapproval, 5 had no strong feelings and 2 approved. The jurors displayed a similar revulsion to the method with 108 English jurors disapproving, 2 having no strong feelings and only 1 approving, while 88 Canadian jurors disapproved and 2 approved.

Certain of the examples involved police methods with which the prisoners almost certainly would be familiar, either from personal experience or from hearsay. They appeared as examples A, G and N:

> A. The police suspected a 13-year old of murder. They picked him up at school one afternoon, and took him to the police station. They kept the boy there alone and questioned him continuously for eight hours until he told them he had done it.

G. In order to get evidence to convict a gang of thieves, the police offered to drop charges against one member of the gang if he would evidence against the others.

N. Bill and Edward were charged with theft. Neither would say anything to the police. They were put in separate cells. A day later, Constable Harris told Bill, "The game is up. Edward has grassed.[2] It looks bad for you." Bill then gave a full statement, telling how he and Edward had done it. In fact, Edward had not said anything to Constable Harris.

In each case, the prisoners overwhelmingly disapproved of the method used by the police. The jurors' response to example A almost matched that of the prisoners, but for examples G and N the jurors were more inclined to approve of the method:

TABLE 4

Comparison of English and Canadian Prisoner and Juror Responses to Hypothetical Crime Detection Methods A, G and N (in percent)

	Prisoners						Jurors					
	Approve		Disapprove		No Strong Feelings		Approve		Disapprove		No Strong Feelings	
	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.
A.	3.7	2.0	91.7	95.0	4.6	3.0	7.2	13.3	87.4	80.0	5.4	6.7
G.	5.5	4.0	93.6	94.0	.9	2.0	30.6	22.2	52.3	72.2	17.1	5.6
N.	23.9	29.0	66.1	62.0	10.1	9.0	58.6	51.1	26.1	42.2	15.3	6.7

Sample size - Prisoners, 109 English and 100 Canadians;
Jurors, 111 English and 90 Canadians

A and N correspond to items 6 and 9 in Table 1 above. The fact that A was disapproved of more vigorously than N shows a degree of consistency between the answers of the prisoners to the two questions. The strong objection by prisoners to "G" came as something of a surprise, as one might have thought that the prisoners would see this as a way of saving their skins. The converse appears to have been the case, however; that is, they saw this method as putting them in jeopardy at the whim of an accomplice, who would try to cast all the blame on them in order to satisfy his police benefactors. The difference between the responses of prisoners and jurors may be based at least in part on the failure of jurors to comprehend the implications of the method to the same extent as the prisoners.

The examples that were paired provide an interesting comparison between attitudes to civil and police crime detection. The groupings were as follows:

B. A shop was broken into three times in one year. Finally, the shopowner installed hidden cameras to take the picture of anyone entering the shop after closing time.

J. Some drivers drive faster than the speed limit if they think that no traffic police are watching. A very accurate and effective way of catching such drivers is by using hidden radar traps.

E. The owners of an electrical shop suspected that some of their employees had been stealing small things like electric razors and toasters from the shop. To find out who were the guilty ones, the owners made each employee take a lie-detector test.

L. After a safe-cracking, the police rounded up all the known safe-crackers in the city and brought them to the police station for questioning. Each suspect was taken by himself into the interview room. There, he was told to hold out his hands, and a dry powder was sprinkled on his palms. The police told the suspect that if he was innocent, nothing would happen; but if he was guilty, his hands would begin to sweat during the questioning, and the powder would make his hands itch. One suspect soon began to fidget, and he told where the stolen money was.

F. The treasurer of a trade union said that he had been robbed by two masked men when he was taking the union's monthly dues to the bank. The union executive were suspicious of the story, so one of the executive members who was not known to the treasurer, phoned the treasurer and said that he knew the treasurer had pinched the money, and he would tell the police unless the treasurer gave him half. The treasurer pleaded with him not to go to the police, and agreed to split the money. The union executive tape-recorded the telephone conversation.

K. Albert was a very clever burglar. The police could never prove anything against him. One day, two men, identifying themselves as well-known criminals, met Albert and told him they wanted to talk to him about a big job they were planning. They asked him how he operated and what jobs he had done lately. Albert told them all about his last three burglaries. The men were detectives.

C. A policeman in plain clothes went into a house in which it was suspected that alcohol was being sold illegally. He gave a password, and was served a drink. As soon as the money was accepted for the drink, the proprietor was arrested.

M. In a certain county it is against the law to sell beer on Sunday. It was rumoured that a hotel dining-room was breaking this law. In order to get proof, two clergymen took off their clerical collars and visited the hotel for Sunday dinner. They asked for beer, and after a little coaxing the waiter brought them beer in a teapot. The clergymen then informed the police.

An additional example (H) also fits in with the last pair. It was inserted to see whether the prisoners drew the line at protecting drug pedlers:

> H. A policeman in plain clothes went to a suspected drug "pusher" and asked him for some "junk".[2] When it was handed over by the pusher, the policeman arrested him.

The results show a surprising degree of similarity not only between the attitudes to civilian and police crime detection methods, but also between the English and Canadian samples:

TABLE 5

Comparison of English and Canadian Prisoner and Juror Responses to Hypothetical Crime Detection Methods B, J, E, L, F, K, C, M, and H, grouped in pairs (in percent)

	Prisoners						Jurors					
	Approve		Disapprove		No Strong Feelings		Approve		Disapprove		No Strong Feelings	
	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.
B.	83.5	93.0	2.8	2.0	13.8	5.0	95.5	97.8	0.0	2.2	4.5	0.0
J.	54.1	86.0	36.7	10.0	9.2	4.0	60.0	92.2	25.5	6.7	14.6	1.1
E.	27.5	22.0	66.1	70.0	6.4	8.0	18.9	36.7	58.6	57.8	22.5	5.6
L.	32.1	22.0	56.0	60.0	11.9	18.0	45.9	41.1	40.5	43.3	13.5	15.6
F.	38.5	40.0	31.2	39.0	30.3	21.0	47.3	54.4	36.4	36.7	16.4	8.9
K.	36.7	46.0	46.8	42.0	16.5	12.0	73.9	75.6	7.2	21.1	18.9	3.3
C.	33.9	37.0	41.3	43.0	24.8	20.0	53.2	75.6	18.9	17.8	27.9	6.7
M.	15.6	22.0	68.8	61.0	15.6	17.0	8.1	35.6	71.2	54.4	20.7	10.0
H.	70.6	64.0	20.2	26.0	9.2	10.0	88.3	85.6	7.2	13.3	4.5	1.1

Sample size - Prisoners, 109 English and 100 Canadians;

Jurors, 111 English (except for J and F where there were 110 responses), and 90 Canadians

Both the bent and the straight seem to regard a man's home as his castle, which he is entitled to protect against intruders by non-lethal means such as hidden cameras. However, the analogy between catching a thief in one's home by using a hidden camera and catching a driver who is a danger to the public by using radar does not appear to have been accepted by the English prisoners and jurors as wholeheartedly as it has in Canada. However, it must be noted that the approval rate for the English prisoners is probably low as a change was made in the wording of the example after interviewing 59 prisoners to make it explicit that radar was very "accurate" as well as effective. After the change, the approval rate increased from 52.5% to 68.0% and the disapproval rate dropped from 33.9% to 28.0%.

The lie-detector had been described in the immediately preceding question as a very accurate machine; however, the prisoners and jurors in both countries disapproved of its use by a civilian employer (a use which is very common in the United States). It seems strange that the police hocus-pocus of sprinkling an unknown powder on the palms of a suspect was disapproved of less by prisoners and jurors in both England and Canada than the use of the lie-detector.

If anything indicates that the prisoners were responding to the method described rather than expressing an anti-police bias, it is the results for example C, H and M. The

prisoners were more willing to see entrapment used by a police-man than a parson; and when it came to capturing drug pushers, such action by the police was strongly approved by prisoners in both countries. This same tendency is reflected in the juror results; indeed, the English jurors were more critical of the sleuthing by the clergy than were the English prisoners.

The two remaining examples cited in question 14 were D and I:

> D. A constable stopped a man who was running down a dark street at 2:00 o'clock in the morning, and asked him what he was doing.
>
> I. Someone was stealing petrol from the tank of James's car every week or so. James felt pretty sure that it was his neighbour, Frank, but he had no proof. James was an amateur hypnotist, and one night, when Frank came over for a drink, James hypnotised him and asked him if he had been stealing the petrol.

D was intended to be a control example, and a high percentage of prisoners in both groups felt that the policeman was acting properly in stopping the nocturnal runner. The example of the hypnotism was inserted out of curiosity, and it was strongly rejected by both prisoner groups and by both juror groups. It is interesting to note that there was no significant difference between Canadian prisoners and jurors in the case of either D or I, whereas the English jurors had a significantly higher disapproval rate than the English prisoners in the case of I and a substantially lower disapproval rate in the case of D.

TABLE 6

Prisoner and Juror Responses to Hypothetical Crime Detection Methods D and I

	Prisoners						Jurors					
	Approve		Disapprove		No Strong Feelings		Approve		Disapprove		No Strong Feelings	
	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.
** D.	67.1	81.0	18.3	10.0	14.7	9.0	84.7	81.1	5.4	14.4	10.0	4.4
* I.	21.1	18.0	51.4	69.0	27.5	13.0	8.2	14.4	64.5	68.9	27.3	16.7

Sample size - Prisoners, 109 English and 100 Canadian;
Jurors, 111 English for "D" and 110 for "I", 90 Canadian

* Difference between English prisoners and jurors signified at 5%
** " " " " " " " " 1%

Adding up all the columns, we find that both the Canadian prisoners and the Canadian jurors were higher in approval rates than their equivalents in England.

TABLE 7

Comparison of English and Canadian Overall Averages for Prisoner and Juror Responses to Hypothetical Crime Detection Methods. (Canadian figures in parentheses).

	Prisoners			Jurors		
	% App.	% Dis.	% No Strong Feelings	% App.	% Dis.	% No Strong Feelings
** Police Methods A,C,D,G,H,J, K,L and N	36.4 (41.2)	52.3 (49.1)	11.3 (9.7)	55.9 (59.8)	30.0 (34.6)	14.1 (5.7)
** Civilian Methods * B,E,F,I and M	37.2 (39.0)	44.0 (48.2)	18.7 (12.8)	36.7 (47.8)	46.1 (44.0)	18.2 (8.2)
Overall Averages	37.7 (40.4)	49.3 (48.8)	14.0 (10.8)	48.6 (55.5)	36.8 (37.9)	15.6 (6.6)

Sample size - Prisoners, 109 English and 100 Canadian
Jurors, 111 English (110 for J, E and I) 90 Canadian

* Difference between English and Canadian prisoners signified at 5% lev.
** " " " " " jurors " " 1% "

The difference between Canadian and English prisoners was not significantly different for police methods, but it was significant at the 5% level for civilian methods. Paradoxically, the Canadian prisoners both approved and disapproved of the civilian crime detection methods at a higher rate than did the English prisoners. This phenomenon was even more apparent in the juror survey, with the Canadian jurors being higher in both categories. Canadian jurors differed at the 1% level from English jurors in their response both to civilian and police methods. This was mainly because of the considerably lower rate at which Canadians selected the option "No Strong Feelings".[3]

4. Possible Means of Controlling Improper Police Methods

As the persons most knowledgeable and the most likely to be affected, the prisoners were asked their views on two methods of controlling police investigations. The first was essentially the American rule (though not identified to the prisoners as such) which attempts to control the police by excluding from the prosecution's case all evidence obtained as the result of the use of improper means.[4] The second was the proposal put forward by the well known British association, "Justice" (likewise not identified as such), whereby the police would take the suspect before a magistrate, where they would conduct their questioning under controlled conditions, and where all answers would be accurately recorded.[5] Under the

"Justice" proposal, the person being questioned could refuse to answer, but if he did so refuse the prosecution could, at his trial, mention that the accused had failed to answer certain questions when before the magistrate. The two methods of discouraging improper conduct by the police were not posed as alternatives; hence, it was quite possible for subjects to favour one, both or neither. The reason for including the question was to determine what measures the prisoners would regard as being both fair and effective in dealing with the problem.

The proposed rule totally excluding evidence gained by improper means was favoured by 50.4 of the English sample, and another 23.8% favoured the rule in part. The most common reasons for favouring the total exclusion of the evidence were:

- that it would help stop the use of improper methods by the police;
- that the police should not be allowed to profit by the use of improper methods;
- that even an innocent person can suffer from improper police methods; and
- that it would be a good rule from the thief's point of view.

Those favouring the rule in part generally suggested that the rule should apply to statements by accused persons, but not the things found as the result of the statement. Those opposed to the proposed rule (24.8%) also gave a number of explanations for their position:

- the proposed rule is impracticable because the judges in England would not believe such allegations against the police;
- criminals cannot complain about improper methods so long as the methods are not too improper;

- a guilty person should not get off on a technicality in a major case;
- it would let a lot of guilty men go free; and
- if the prosecution has good evidence it should be used.

The results in Canada were fairly similar: 61.0% favouring the total exclusion of the evidence, 16.0% favouring the rule in part and 20.0% being opposed to the rule. The reasons given for the various choices also corresponded in type and number to those in England, with one exception, namely, those favouring the rule frequently mentioned that people should not be prejudiced by ignorance of their rights.

When asked whether there should be any exceptions to the proposed rule, 35.8% of the English sample and 41.0% of the Canadian sample replied that there should be none. Of those who believed that some exceptions should exist, the largest number selected murder, sexual offences and crimes of serious violence as exceptional cases. A substantial number of the English prisoners (12.8%) mentioned that assaults on children should be outside the protection of the rule also.

The response to the proposed procedure of questioning suspects before a magistrate was surprisingly favourable, particularly among English prisoners. 76.1% of the English sample favoured the implementation of the system as described. The Canadian total was 55.0% in favour. Another 12.8 of the English sample and 13.0% of the Canadian sample favoured the proposal in part. The usual reason in both countries for

approval in part was that the prosecution should not have the right to mention the accused's failure to answer questions. Only 9.2% of the English sample were not in favour of the proposal, either in whole or in part, and their stated reasons for opposing the proposal involved misgivings about the magistrates; it was suggested that the magistrates, not being legally trained, were generally in league with the police, hence they provided little protection for the accused. Strangely, in Canada, where magistrates are usually legally trained, many of the prisoners who opposed the system also cited magisterial chumminess with the police as a prime reason for the opposition. Another reason cited by 12.0% of the Canadian prisoners for opposing the suggestion was that it would tend to force an accused to incriminate himself, by requiring him to account for himself or run the risk of adverse comment being made.

Certainly the "American" rule is more beneficial to the accused than the "Justice" proposal; therefore, why should not both groups of prisoners have opted for it? Were the English prisoners perhaps more sporting about their criminal activities, or were they simply less sophisticated in their assessment of the impact of the two proposals? It is, of course, impossible to say on the basis of the facts available; however, one can postulate that the difference between the English and Canadian prisoners' choice of methods for controlling police conduct is in part a reflection of the police methods that were

uppermost in their minds. For the Canadian prisoners, police violence was by far the most common complaint, and as the prime motivation for employing violence is to obtain leads rather than confessions, the Justice proposal does not provide the kind of protection required. On the other hand, while violence was also number 1 on the English prisoners' list of complaints, verballing ran a close and perhaps more poignant second; whereas only 81.4% of those mentioning violence alleged that it had been used on them personally, 95.3% of those mentioning verballing alleged that it had been done to them by the police (see Table 1, *supra*). The main effect of the Justice proposal would be to control this abuse by the police, and therefore it undoubtedly looked attractive to the English prisoners.

THE NEED FOR SOME FORM OF PRIVILEGE AGAINST SELF-INCRIMINATION IN THE COURTS

To see how the privilege in the courtroom context was perceived by the prisoners and jurors, questions were asked to determine (1) what the prisoners knew about their right to remain silent, (2) how the risks involved in certain options were assessed, and (3) how the issue of the compellability of the accused was viewed.

1. Prisoners' Knowledge of their Right of Silence

Question 3 asked "When you are being tried for a criminal offence, do you have to go into the witness box and give evidence?" 80.7% of the English prisoners and 92.0% of

the Canadian prisoners answered "No", while 15.6% of the English prisoners and 3.0% of the Canadian prisoners answered "Yes". The remainder of the sample responded that they did not know. For the English prisoners, there was a supplementary question designed to determine how many of them would mention the option of making a statement from the dock. Only 43.1% of the group mentioned this as an alternative.

Question 6 asked "Have you always gone into the witness box and given evidence at your trials?" 56.9% of the English sample but only 27.0% of the Canadian sample replied "Yes", while 38.5% of the English prisoners and 69% of the Canadian prisoners replied "No". When the question was asked why they had not gone into the witness box, the most prominent reasons were: advice of counsel (percentage of sample 14.7% English, 13.0% Canadian); the prisoner thought it would worsen his case (10.1% English, 17.0% Canadian); his record might thereby be revealed (13.0% Canadian); he would have had to either incriminate or perjure himself (7.0% Canadian); the Crown had such a strong case that it seemed pointless to go into the box (5.5% English. 2.0% Canadian). A total of 15 different reasons was given, by either English or Canadian prisoners, but of the 10 remaining reasons none was mentioned more than oce by either group.

It had been anticipated (correctly) that Advice of Counsel would be the primary reason for not enter the witness box. Question 8 therefore asked "What advice does your lawyer

give you about going into the witness box? A surprising number indicated that in their experience counsel gave no advice at all (31.2% English, 21.0% Canadian). 44.0% of the English sample and 39.0% of the Canadian sample said that lawyers had advised them to enter the witness box. In those cases where lawyers had advised against entering the witness box, either they gave no reasons for so advising, or the prisoners could not remember what they were (17.4 English, 41.0% Canadian). Of the reasons that could be remembered, the likelihood of the accused saying something that would improve the Crown's case and damage his own, was the one most frequently mentioned by the English prisoners (7.3%). This reason was also mentioned by 4.0% of the Canadian prisoners, but for them the fear of having their criminal record revealed in cross-examination was a much more compelling reason (11.0%).

The problem was approached in another way. The prisoners were asked "From your experience, if an accused person asked you to tell him in what situations he should not go into the witness box, what would you tell him?"[6] Several of the prisoners in both groups (4.6% English, 16.0% Canadian) took the position that they would not advise the accused one way or the other. A substantial percentage of the English prisoners (21.1%) asserted that they would advise the accused to go into the witness box in all cases. This was not a common attitude

among Canadian prisoners, however, for only 2.0% of them held that view, probably because of the different rule regarding the admissibility of the accused's record in cross-examination.

A total of 16 reasons were mentioned by the prisoners as being the basis for advising the accused not to enter the witness box. Of these, nine were mentioned by more than one prisoner in either the English or the Canadian samples as shown in Table 8.

TABLE 8

Comparison between English and Canadian Prisoners: Reasons for Not Entering the Witness box

Reason	% Mentioning	
	Eng.	Can.
*The record of the accused might be revealed on cross-examination	9.2	22.0
The accused might give evidence that would help the Crown	18.3	29.0
The accused likely would not impress the court as being a credible witness	31.2	23.0
The accused is guilty	16.5	14.0
The accused has made a statement to the police which is inconsistent with the evidence he would give in the witness box	3.7	1.0
The Crown's case is very weak	6.4	3.0
The story of the accused can be given just as well by other witnesses or by his lawyer	10.1	9.0
The Crown's case is very strong	6.4	4.0
Accused would have to implicate co-accused	.9	3.0

Sample size - English 109, Canadian 100

* Difference significant at 5% level.

There is a strong similarity between the responses of the two groups. The only case in which there was a significant difference is the first, and this clearly is based upon the more severe Canadian rule regarding cross-examination on the accused's record.

It will be remembered that in a survey of the English courts, conducted in the same year as this survey, 98.8% of the accused persons who had pleaded "not guilty" gave evidence at their trials, while the comparable Canadian figure was 26.5% for jury trials and 34.5% for non-jury trials.[7]

2. Options and Risks

The final question on the questionnaire (apart from biographical data) was also designed to see how the prisoners viewed the effect on the jury of certain types of evidence or other operative factors at the trial. The prisoners were asked to listen to a story, and afterwards their comprehension and recollection of the facts of the story were checked with a few key questions. Most of the prisoners demonstrated attention by answering all the questions perfectly. For those who did not, their memory was refreshed before proceeding to the actual exercise.

The story was as follows:

23. At 2:00 o'clock one morning, Jones suddenly woke up and saw a man going out through the bedroom window. Jones rushed to the window and saw the man for a few seconds as the man ran down the street. Jones found that his wallet, containing two £5 notes, was gone. He phoned the police and told them that he had been robbed. He also gave a description of the thief, and he added that while he had not had a very good view of him, the man looked very much like Frank, a young man of 22 years of age, who occasionally did odd jobs for Jones.

The police sent a patrol car to the neighbourhood to look for the thief. At 2:15, Frank was found, walking along, about six blocks from the Jones house. He was searched and found to have two £5 notes and three £1 notes. Later, Jones's wallet was found in a dustbin about half-way between the Jones house and where Frank was picked up.

Frank is charged with "burglary", that is, entering and theft. He is being tried by jury. There are a number of things which may occur at the trial, and I would like to know how you think they would affect the jury. I am going to give you three cards. On each card is written something which might happen at Frank's trial. Think about the effect each one would have on Frank's case in the eyes of the jury if it happened all by itself. Then tell me which one you think would have the worst effect on his case, and which one you think would have the least effect on his case. If you think that there would be no difference in effect between two of the possibilities, please tell me.

When I was satisfied that the subject understood not only the facts but the procedure to be followed, I handed him, three at a time, six cards, which for the same of convenience are here identified as A, B, C, D, E and F and read as follows:

A. The jury are told that Frank is a layabout who usually lives on the dole.
B. The jury are told that a year ago Frank was convicted for fighting in a pub.
C. Frank tells the jury the amazing story that he was trailing a Russian spy at the time the police picked him up.
D. The jury are told that Frank has a record of seven previous convictions for entering and theft.

E. Frank does not go into the witness box (where he would have to answer questions put to him by the Crown counsel).
F. The jury are told that Frank three years ago was convicted of rape.

The subject's responses were noted, and the test repeated, varying the combination of the cards until a rank order appeared. Normally this would take four to five combinations.

To achieve an over-all rank order, each response was scored, the six factors being assigned values ranging from 6 (for the factor considered to have the worst effect upon Frank's case) to 1 (for the factor considered to have the least effect), according to how the subject ranked them. The scores for each factor were then totalled and expressed as a percentage of the maximum possible score.

TABLE 9

Ranking by Prisoners of Selected Factors in terms of their Degree of Detrimental Effect upon the Accused's Case in the eyes of the Jury

	ENGLISH		CANADIAN	
	Absolute	% of Maximum	Absolute	% of Maximum
A	363	55.5	282	47.0
B	216	33.0	223	37.2
C	255.5	39.1	304	50.7
D	612.5	93.7	568	94.7
E	360	55.0	305	50.8
F	482	73.7	418	69.7

Sample Size - English 109, Canadian 100

There is a striking similarity between the English and Canadian results. In fact, if the results for A and C were transposed in the Canadian sample, the rank order would be identical to that of the English sample. Moreover, the percentages for the most part are very close. Evidence of previous convictions for the same offence as the one with which the accused is charged is regarded as being clearly the most damaging to the accused in the eyes of the jury, while evidence of a record for a serious (though unassociated)offence is regarded as being the next most damaging. It is also interesting to note that while "failure to enter the witness box" was ranked fourth by the English prisoners and third by the Canadian prisoners, when expressed in terms of a percentage, this factor was deemed more harmful to the accused in the eyes of the jury by the English prisoners than by the Canadian. It is interesting to speculate why A should be regarded with more misgiving by English prisoners than Canadian. One English prisoner expressed the view that the jury was composed of taxpayers, who were particularly antagonistic towards those on the dole. Indeed, the word "dole" has a particularly pejorative ring to it, which the word "welfare" (that was used in the Canadian questionnaire) does not seem to have. It may also be that many of the English prisoners knew from personal experience about the attitude of juries towards layabouts, whereas for most Canadian prisoners, due to the small number who had had a jury trial, it was an entirely hypothetical question.

As the jurors were given the same question, it is possible to compare their responses with those which the prisoners attributed to them:

TABLE 10

Ranking by Jurors of Selected Factors in terms of their Degree of Detrimental Effect upon the Accused's Case in the eyes of the Jury

	ENGLISH		CANADIAN	
	Absolute	% of Maximum	Absolute	% of Maximum
A	398.0	59.8	276.0	51.1
B	257.5	38.7	250.5	46.4
C	367.5	55.2	290.5	53.8
D	633.5	95.1	502.0	93.0
E	395.0	59.3	278.5	51.6
F	279.5	42.0	292.5	54.2

Sample Size - English 111, Canadian 90

The first observation is the almost perfect correlation between prisoner expectation and juror response to revelation of the serious record of previous similar offences. This certainly seems to justify the reluctance of Canadian prisoners to enter the witness box unnecessarily. At the other end of the scale, all agreed that an unrelated conviction for fighting in a pub was the least harmful of the six factors. There was also good correlation between prisoner expectation and juror assessment of factor A - evidence that Frank was a layabout who usually

lives on the dole (welfare) - it being the second most harmful piece of evidence for the English jurors, and the second least harmful in the eyes of the Canadian jurors. However, the juror responses did not correspond to prisoner expectations in relation to factors C and F. The weight given to evidence of a conviction for rape was very much lower than adjudged by the prisoners, particularly insofar as the English jurors were concerned. It is also clear that jurors considered that a prisoner who tells an obvious lie is probably guilty. Failure to enter the witness box was regarded with much more disfavour by English jurors than Canadian jurors, and this is possibly attributable to the fact that it is a rarity for English prisoners to stay out of the witness box. Indeed, in all cases observed by the English shadow jurors, the accused went into the box; whereas, with the exception of one case, the accused did not enter the witness box in the cases heard by the Canadian jurors.

Just how much weight should be attributed to the jury responses in relation to item E is problematical. On another questionnaire administered to a different group of shadow jurors as a pilot study, the jurors were asked to indicate what inference, if any, they would have drawn if the accused in the case they had observed had failed to enter the witness box.[8] Of the three options given to them, 87 (40.8%) said "no inference", 16 (7.5%) said an inference of innocence, and 110 (51.6%) said that they would have drawn an inference of guilt. But this has to be compared with the responses of the Canadian jurors, the great majority of whom had

actually had to decide a case in which the accused had not entered the witness box. When asked what inference, if any, they had drawn from the failure of the accused to enter the witness box. 75.3% replied "no inference", 3.2% said an inference of innocence, and 21.5% said an inference of guilt. For 12 jurors in the Canadian sample, the question was hypothetical, as the accused had gone into the witness box. These jurors were more inclined to draw adverse inferences from the failure of the accused to enter the witness box (41.7% drew inferences of guilt, while 58.3% drew no inference). The Canadian jurors were also asked to express an opinion as to what inference the majority of the jury drew about the failure of the accused in their case to enter the witness box. The figures corresponded to the inferences which the individual jurors said that they had drawn: no inference, 77.8%; inference of innocence, 2.8%; and inference of guilt, 19.4%. When asked whether the failure of the accused to enter the witness box had been discussed by jury members prior to reaching their decision, the Canadian jurors were about equally divided, 49 saying "yes" and 45 saying "no", with 4 indicating that they could not remember[9]. The implication is that jurors who are actually confronted with the necessity of deciding upon the guilt or innocence of the accused are less likely to rely upon his failure to testify than are those for whom the exercise is merely in the abstract. Of course, the responses to factor E may well be a better indicator of their sub-conscious reaction.

An allied question, which may reflect on the true attitude of jurors to the failure of the accused to enter the witness box, is what inference they would draw from the failure of the wife of the accused to answer a pertinent question. The factual situation given to the jurors was as follows:

> Alfred is charged with robbery. At his trial his wife is called as a witness. In cross-examination, the Counsel for the Crown asked her whether her husband (the accused), had said anything to her about the robbery. She answered, "Yes." Counsel for the Crown then asked her what her husband had told her about the robbery, but she refused to answer this question:
>
> A. If you had been on the jury, what conclusions would you have drawn from her refusal to answer?
>
> B. Would you be in favour of the judge ordering her to answer the question? (Answer either "yes" or "no")

Responses of the English and Canadian jurors were almost identical. 28.3% of the English jurors and 26.4% of the Canadian jurors said they would draw no inference from her failure to answer the question. 71.7% of the English jurors and 72.4% of the Canadian jurors said that they would draw an inference that the accused was guilty. 1.1% of the Canadian jurors said that they would draw an inference that the accused was innocent. Admittedly, the two cases are not exactly parallel, but on the other hand each involved a person exercising his or her right to remain silent. It is not clear why a greater number of jurors would draw an inference of guilt from the spouse's refusal to answer than from the accused's own failure to enter the witness box.

Perhaps the reasoning was that since he had called his wife as his witness, her refusal to reply was his refusal; and the only reason why a person would refuse to reply is that he has something to hide.

Strangely, having agreed upon the inference to be drawn from her refusal to answer, the English and Canadian jurors diverged considerably on the issue of whether the judge should order her to answer. 39.6% of the English jurors and 64.8% of the Canadian jurors were in favour of the judge making such an order; while 60.4% of the English jurors and 35.2% of the Canadian jurors opposed such action, a difference that is significant at the 1% level. The divergence between the two groups on this question is particularly odd in view of the fact that they gave practically identical responses to the question of whether the accused himself should be made a compellable witness (see *infra*). It is impossible to tell on the basis of the data why the difference exists, but it does seem to point to a stronger sense of chivalry in England.

In Questions 15 through 18 of the prisoner questionnaire, an attempt was made to determine the utility of the common law privilege against self-incrimination as compared with the Canadian immunity provision. In Question 15 the prisoner was asked to think of himself as a witness in the trial of another person:

> Suppose that you were called as a witness at the trial of a man named Harold. When you are in the witness box, you are asked where and whn you first met Harold. Actually, you first met him one night three years ago, when you helped Harold and two other men break into a warehouse and steal a large quantity of electrical goods. Harold and the two others were caught and convicted, but the

police never suspected you. So, if you answer the question truthfully, the police quite possibly will look into the warehouse job again and charge you. Now, suppose the law said that you could do one of three things:

i. tell the truth; or

ii. refuse to answer the question, if you first tell the court that your answer would tend to show that you have committed a crime; or

iii. tell the truth, but claim the protection of the Evidence Act. (The Evidence Act would not protect you against being prosecuted for your part in the warehouse job; but if you were prosecuted for it, your answer at Harold's trial could not be used against you.)

There is, of course, a fourth possibility, but it is against the law:

iv. you could tell a lie, so that the police would not learn of your connection with the warehouse job.

The prisoners were asked to indicate which of the four choices they would select, and why. The results showed a difference between the two samples that was significant at the 1% level

TABLE 11

How Prisoners would Respond to a Self-Incriminating Question asked at Someone Else's Trial

		% ENGLISH	% CANADIAN
i.	Tell the Truth	11.0	1.0
ii.	Refuse to answer on basis of self-incrimination	30.3	41.0
iii.	Answer, but claim protection of the Evidence Act	23.9	37.0
iv.	Lie	34.9	21.0

Sample size - English 109, Canadian 100.

When asked which they would choose if they had to choose between ii and iii, 56% of the English prisoners chose ii while 44% chose iii. The Canadian results were virtually identical, 55% choosing ii and 44% choosing iii, the remaining one prisoner in the Canadian sample saying that he would choose ii if he were a witness against Harold, but iii if he were a witness for him.

There were some interesting comparisons and contrasts between the reasons offered by English and Canadian prisoners for choosing either ii or iii. In both groups, the primary reason for choosing ii was that it offered better protection against prosecution for the warehouse job than did any of the other three choices. But 21 of the 41 Canadian prisoners who chose ii gave as a reason that if they lied they might be prosecuted for perjury; whereas this reason was mentioned by only 4 of the 33 English prisoners. This fear of a perjury prosecution also manifested itself in the reasons for choosing iii. Of the 37 Canadian prisoners who chose this option, 22 of them cited the fear of a perjury prosecution, as compared with only 5 of 25 English prisoners. On the other hand there was substantial agreement between the two groups on the two other main reasons for choosing iii, namely (a) that refusing to answer might harm Harold's case, and (b) that if the police had anything on you concerning the warehouse job they would have prosecuted you by now, and refusing to answer might "aggravate" them, causing them to take an interest in your past in general.

The same four options were available in question 16 in which the prisoner was asked to suppose that he was testifying in his own defence:

> Suppose that you are accused of stealing £450 on December 16th. You are being tried by jury, and at your trial you go into the witness box to give evidence in your own defence. You are asked a question by counsel for the Crown, which you cannot truthfully answer without tipping off the police that you committed another fairly serious theft on December 10th. You don't think that the police suspect you at all of the December 10th theft. Suppose

that you have the same choices with regard to answering this question as you had as a witness in the previous question.

The results were that there was a pronounced swing to favour lying, particularly among the English prisoners.

TABLE 12

How Prisoners would Respond to a Self-Incriminating Question asked at their own Trial

		% ENGLISH	% CANADIAN
i.	Tell the Truth	8.3	3.0
ii.	Refuse to answer on basis of self-incrimination	26.6	43.0
iii.	Answer, but claim protection of the Evidence Act	15.6	21.0
iv.	Lie	49.5	33.0

Sample size - English 109, Canadian 100

A comparison of this table with the preceding one indicates that the swing to option iv among the English prisoners took place at the expense of all the other options; whereas among the Canadian prisoners it was entirely at the expense of option iii - indeed there was a slight increase in the number opting for either i or ii. The difference between the number of English and Canadian prisoners choosing the fourth option would once again appear to be due to the fear of a perjury prosecution that is prevalent among Canadian prisoners.

However, the Canadian prisoners probably do not practise what they preach. Questions 17 and 18 asked the prisoners whether they had ever been in a situation similar to that described in questions 15 and 16 respectively, and, if so, what they had done. Table 13 indicates the response, and compares it with the responses set out above in Tables 11 and 12

TABLE 13

Self-Incriminating Questions: how English and Canadian Prisoners said they would respond in a Hypothetical Case as Compared with how they said they had responded in Actual Cases (all figures in percent)

	Someone Else's Case				Own Case			
	Hypothetical		Actual		Hypothetical		Actual	
	Eng.	Can.	Eng.	Can.	Eng.	Can.	Eng.	Can.
i. Tell the truth	11.0	1.0	21.4	4.8	8.3	3.0	22.7	6.9
ii. Refuse to answer on basis of self-incrimination	30.3	41.0	0.0	19.0	26.6	43.0	4.5	13.8
iii. Answer but claim protection of Evidence Act	23.9	37.0	7.1	14.3	15.6	21.0	4.5	10.3
iv. Lie	34.9	21.0	71.4	61.9	49.5	33.0	69.2	69.0

Sample Size - For hypothetical cases, English 109, Canadian 100; for actual cases there were 14 English and 21 Canadian prisoners who said that they had encountered this sort of a situation in someone else's case, and 22 English and 29 Canadian prisoners who said it had occurred to them in one of their own cases.

No statistical conclusions can be drawn from the responses in respect of actual cases because of the small numbers involved. The figures are also patently questionable - it seems highly unlikely that Canadian courts would allow a witness, even in his own case, to refuse to answer a question on the basis of the privilege against self-incrimination, and *a fortiori* that English courts would permit a witness to claim a non-existent protection under the Evidence Act. Nevertheless, it is of interest to observe that English and Canadian prisoners admitted to lying in the majority of cases and at almost the same rates.

The prisoners' views on the oath were investigated in questions 20-22, and again a difference existed between the responses of the English and the Canadian prisoners. When asked

whether they thought the oath meant much to the average prisoner, only 4.6% of the English prisoners answered "yes", as compared with 18% of the Canadian prisoners. When asked "From your conversations and other dealings with prisoners, what percentage of them do you think have lied about some important fact when they were giving evidence from the witness box at their trials?", 63 (58.3%) of the English prisoners responded with a percentage ranging from 90% to 100%. In the Canadian sample, only 36 (37.1%) gave such a high estimate of the rate of perjury by prisoners in their own cases.[10]

A substantial difference (significant at the 1% level) appeared when the prisoners were asked to estimate the chances of being caught and convicted of perjury (question 21-A). The following table shows the differing assessment of risk by the two groups of prisoners.

TABLE 14

Assessment of Risk of being caught and Convicted of Perjury**

Risk	% ENGLISH	% CANADIAN
0.0	41.3	6.0
.009 -.001	32.1	24.0
.09 - .01	23.9	31.0
1.0 - .1	2.8	39.0

Sample Size - English 109, Canadian 100.

** Difference between two samples significant at 1% level.

When asked to estimate in a general way whether the chances of being caught and convicted of perjury were "greater, much greater, less or much less" than of being caught and convicted for stealing, the modal answer of the English prisoners was that the risk was "much less" (82.6% gave this response). The modal answer for the Canadian prisoners was that the risk was "less" (50% gave this response). However, the prisoners were not asked to define what they meant by the terms "less", "much less" etc., so no firm conclusions can be drawn on the basis of this particular answer.[11]

Consideration of the likely length of a sentence imposed for perjury apparently does not have any major effect on a decision whether to commit perjury or not. The English prisoners on average estimated the sentence for perjury at 29.2 months, while the Canadian prisoners estimated 25.7 months. On the other hand, 20.0% of the English sample suggested that a fine of conditional discharge might be imposed, whereas only 2.0% of the Canadian prisoners suggested that the accused might be given the option of paying a fine.

Question 22 asked "Have you ever lied about some important fact when you were giving evidence from the witness box at one of your trials?" 70.5% of the English sample and 54.0% of the Canadian sample answered "yes", but when those who had never given evidence from the witness box or who could not remember whether they had lied were subtracted from the sample totals, the gap was narrowed somewhat - 77.0% of the English, and 65.9% of the Canadian admitting to perjuring themselves on important facts. Of

those who said that they had never perjured themselves on important facts, a number in both samples indicated almost apologetically that there were extenuating circumstances: some said that they had appeared only in one case and either were not guilty in that case or had not found it necessary to lie, while another said that he had lied on some minor matters but nothing "important".

It would seem to be a fair conclusion, that when the chips are down, a majority of the prisoners on both sides of the Atlantic will lie to save their own skins. But there is some evidence that the rate of perjury is less in Canada than in England, and this appears to be due to the considerably stronger belief on the part of Canadian prisoners that they may be prosecuted for and convicted of perjury.

3. Should the Accused be a Compellable Witness?

The ultimate question is whether criminals have a different view than non-criminals of the propriety of making the accused a compellable witness for the Crown.

This was approached in both the prisoner and juror surveys through a series of questions relating to the possible use of the lie-detector in court.[12] The subjects were informed that according to experts the lie-detector was accurate in 96% of the cases. They were also told that the lie-detector would not replace the jury, and, indeed, like the opinion of an expert, its results could be rejected by the jury if the jury was satisfied that the results were incorrect. The subjects were then asked whether they would be in favour of requiring the following

types of witnesses to give their evidence while attached to a lie-detector:

(a) prosecution witnesses,

(b) defence witnesses other than the accused,

(c) the accused himself in certain cases if he entered the witness box.

In the juror survey the first category was broken into "prosecution witnesses other than policemen" and "policemen" The results were as follows.

TABLE 15

Percentage of Prisoners and Jurors in Favour of Requiring certain Witnesses to give their Evidence while attached to a Lie-Detector

	% Prisoners		% Jurors	
	Eng.	Can.	Eng.	Can.
Prosecution witnesses (general)	74.3	67.0		
(a) Other than policemen			46.2	55.6
(b) Policemen			41.5	53.3
Defence Witnesses other than the Accused	65.1	60.0	49.1	58.9
The Accused in certain cases if he enters the witness box	56.9	34.0	52.8	63.3

Sample size - Prisoners, English 109, Canadian 100;
Jurors, English 106, Canadian 90.

It can be seen that the popularity of the lie-detector decreased in the eyes of the prisoners as the suggested area of its use increasingly impinged upon the defence, while the opposite was the case with the jurors. Indeed, the results tend to confirm prisoners' suspicions that the court regards the word of the accused with a great deal more suspicion than that of a policeman.

On the other hand, despite the opposing directions of the prisoner and juror curves, it should be noted that both groups of prisoners were more inclined to favour the use of the lie-detector on defence witnesses than were jurors in either country. Indeed, English prisoners were more favourable than English jurors towards the use of the lie-detector on the accused; however, the comparison on this latter point is not entirely valid, as wording of the question on the juror questionnaire could be construed as seeking a response with respect to accused persons in general, whereas that on the prisoner questionnaire provided a clear invitation to consider whether some but not all accused persons should be required to give their evidence while attached to a lie-detector.[13]

Finally, the question was asked whether in the trial of some crimes[14] the accused should be required to go into the witness box, and if so, what crimes. Table 16 shows the results of this inquiry and the categories of response mentioned by five or more prisoners or jurors.

TABLE 16

Percentages of Prisoners and Jurors Favouring making the Accused a Compellable Witness in certain cases

Type of Case	Prisoners		Jurors	
	Eng.	Can.	Eng.	Can.
All Crimes	13.8	6.0	26.1	35.6
Murder	27.5	10.0	22.5	18.9
Sexual Offences	22.9	15.0	17.1	10.0
Crimes of Violence	15.6	9.0	15.3	11.1
Assaults on Children	8.3	2.0	.9	0.0

Sample Size - Prisoners, 109 English, 100 Canadian;
Jurors, 111 English, 90 Canadian.

On the category "all crimes" the difference between the two groups of prisoners was not statistically significant and neither was the difference between the two groups of jurors. However, the difference between English prisoners and English jurors was significant at the 5% level, and that between Canadian prisoners and Canadian jurors at the 1% level. In total, 52.3 of the English prisoners and 24% of the Canadian prisoners were in favour of making the accused a compellable witness at least in some cases (significant at the 1% level), while 67.6% of the English jurors and 67.8% of the Canadian jurors expressed such an opinion. The difference between the English prisoners and English jurors was not statistically significant, but that between Canadian prisoners and jurors was significant at the 1% level. At first sight the results leave the impression that English prisoners are more public-spirited than their Canadian counterparts; however, it must be remembered that general or partial compellability would have a far more serious effect on an accused person in Canada than would be the case in England, due to Canada's evidentiary rule permitting cross-examination of the accused on his previous convictions.

One final observation about Table 16 is that murder, sexual offences and crimes of violence were considered by all four groups to be the specific areas of the criminal law where there was greater justification for making the accused compellable. Curiously, assaults on children appear to be a special and almost unique concern of English prisoners.

CONCLUSION

The conclusion to be drawn from the prisoners' surveys is that neither England nor Canada has a monopoly on virtue or due process. Allegations against the police are, of course, easy to make, and the nature of the survey precluded any verification of them.[15] However, the frequency of certain allegations, in circumstances where there was no opportunity for communication between the prisoners, does tend to lend them some credence. In any event, whether these methods are very common or not, the fact that they have been complained of by a substantial number of prisoners indicates that in the prisoners' view they constitute unfair procedures.

As far as the privilege at trial is concerned, both the prisoners and jurors recognized the dangers involved in accused persons failing to enter the witness box, but similarly both recognized certain factors, in particular the revelation of a record of convictions for similar offences, were considerably more harmful. In the light of the Canadian rule permitting cross-examination on previous convictions, it is not surprising that Canadian prisoners in fact show a greater reluctance than their English counterparts to enter the witness box or to endorse any suggestion that the accused be made a compellable witness. A change of this rule might make a substantial difference in the attitudes of Canadian prisoners, just as a change in the English practice concerning prosecutions for perjury committed by an accused in his own case might make lying a less attractive option for prisoners in that country.

Chapter Six

SYNTHESIS

Whither the privilege against self-incrimination in England and Canada? Has it still some value, or is it one of the many anachronisms of the common law that has been preserved by an unthinking adherence to precedent? A rule that was a necessary counterbalance to the power of the church and state in the turbulent times of the Tudors and Stuarts may not be necessary in the last quarter of the 20th century. Indeed, some contend that the rights of the accused have expanded to such an extent that the capacity of society to deal with those who flout the criminal law is seriously weakened.[1] The criminal justice system must maintain some minimum of effectiveness, or there is a danger that it will lose its credibility as an alternative to private war, and the very foundations of our social order will be undermined. The objective of the criminal law, and particularly of criminal procedure, should be therefore to achieve a balance between the right of the individual to be left alone and the duty of the state to protect its citizens from the activities of deliberate law-breakers.[2]

How does the privilege against self-incrimination fit into this equation? This question must be examined from three perspectives - that of the witness, that of the accused and that of the suspect in the custody of the police.

THE WITNESS

In England in civil cases the privilege only applies to questions the answers to which would either incriminate the witness or subject him to a penalty. In criminal cases the privilege also extends to forfeitures, but the Criminal Law Revision Committee in its report on Evidence has suggested that the same scope be given to the privilege in criminal as in civil cases.[3] The justification for retaining the privilege with respect to penalties when it does not apply to damages (which can be far more substantial) is by no means clear, and it is suggested that there is none and that the privilege with respect to penalties should be abolished.[4]

In Canada the federal and provincial Evidence Acts require that answers be given to incriminating questions, but if protection is claimed these answers cannot be used in subsequent proceedings. It has not been established whether these immunity provisions entirely replace the common law privilege inherited from England, neither has the interaction between the various provisions been well defined. Legislative action should be taken to clarify both of these points.

It may be asked whether there is any further need for a privilege of any sort. Many apparently civilized countries do not provide a witness with any protection against self-incrimination. The Law Reform Committee in its Sixteenth Report (Privilege in Civil Proceedings) recognized that "the privilege could, on occasion, be used in a way which might defeat the ends of justice and that, as a matter of logic, a

strong case can be made in favour of its abolition."[5] But it also observed that there was a strong popular sentiment in favour of the existence of the privilege, and it concluded that the law should continue to give expression to this sentiment, as "the common law must not lose its common touch"[6] The Law Reform Committee did not reveal how it concluded that there was such a widespread sentiment in favour of protecting witnesses from the unpleasantness of having to answer incriminating questions, and it is an open question whether it does exist, and, if it does, whether it supports the existing form of the privilege. In the survey of shadow jurors in England, question No. 2 set out a factual situation in which he could not answer truthfully without tipping off the police that he himself was guilty of a robbery. The jurors were then asked to indicate which of the following rules they would like to see applied in the case:

A. Bill should be excused from answering the question.

B. Bill should be ordered to answer the question.

C. Bill should be ordered to answer the question, but he should be given a guarantee that his answer could not be used in evidence against him if he was later charged with the robbery.

D. Bill should be ordered to answer the question, but he should be given a guarantee that he will not be charged with the robbery.

The results were: A--24, B--42, C--42, D--3 (total--111).

In other words, only 21.6% of the sample favoured the present common law rule, while 37.8% favoured its total abolition.

Adding together the results of options A, C and D, it can be said that a substantial majority of the subjects favoured some form of privilege, the Canadian immunity provision being preferred by 60.9% of this group.

Another test of the efficacy of a privilege must be its rate of utilization. One would have thought that as the common law privilege appears to afford the witness more protection against future prosecution than does the Canadian immunity provision, it would be used more frequently. However, surveys conducted in connection with this research in criminal jury courts in England in 1969 and in superior and district courts of criminal jurisdiction in Alberta and Saskatchewan in 1969-70 reveal that the reverse is true. No count was kept of the total number of witnesses involved in the two surveys, but some indication of the comparative rates can be gained by correlating the number of witnesses who claimed the privilege with the number of accused persons standing trial in the cases included in the survey. In England, in cases involving 2855 defendants, only 9 witnesses claimed the privilege against self-incrimination--a rate of one claim per 317.2 defendants. In Canada, in cases involving 563 defendants, 35 witnesses claimed the protection of the Evidence Act--a rate of one claim per 16.1 defendants. It was not possible to verify the data personally, but they tend to confirm estimates gathered informally in connection with this study from lawyers and judges in the two

countries, and it seems safe to conclude that it is relatively rare for witnesses to claim the privilege in England but quite common for witnesses to claim the protection of the Evidence Act in Canada.[7] It is remarkable that such a small number of witnesses claimed the privilege in England. Assuming that roughly the same proportion of witnesses were asked incriminating questions in England as in Canada, 177 claims should have been made. What did the other 168 witnesses do--did they simply tell the truth and accept the consequences, or did they lie? It will be remembered that as between telling the truth and lying in this sort of situation the English prisoners surveyed favoured lying 3 to 1.[8]

The conclusion is that the Canadian provision is superior to the common law privilege. Not only does it encourage disclosure, which is a positive benefit from the fact-finding point of view, but it also seems to be more acceptable to the general public and the witnesses themselves than does the common law privilege.

Certain changes in the administration of the immunity provision should be considered, however. The requirement that the protection be claimed by the witness with respect to each incriminating question is awkward and time-consuming in practice, and it is unnecessary in any event inasmuch as the trial judge does not rule on the validity of the claim but merely notes that it was made. A single claim made by the witness at the beginning of his evidence not only would expedite the trial, but it might

encourage greater truthfulness, for under the present rule some witnesses may be tempted to lie rather than alert the police to their misconduct by claiming the protection of the Evidence Act for a particular truthful answer. A good case can be made for having all evidence deemed to be given under the protection of an immunity provision, without the necessity of any claim by the witness.[9] This would eliminate the inequality that exists between witnesses who are fully conversant with the protection available and those who are not. It would mean that the witness's responses in one case could not be used against him in another, but there seems to be no good policy reason why they should be used. The purpose of calling the witness is to provide information relevant to the case at bar--not to lay the foundation for a subsequent criminal or civil action against him. It is proposed that the rule also apply to non-incriminatory responses. This would avoid the problems associated with trying to determine whether a particular answer is incriminatory or not. Moreover, it would not create any serious problems for proof in subsequent cases, because most non-incriminatory statements would be inadmissible in subsequent criminal cases by virtue of the hearsay rule, and in civil litigation the individual would be a compellable witness.[10]

THE ACCUSED

In both England and Canada the accused has the absolute right to decide whether to enter the witness box. This obviously constitutes a significant limitation on the power of the court to ascertain the facts, for the evidence of the person most likely to know what transpired is available only if it suits his purposes. Moreover, the rule, by accentuating the importance of pre-trial admissions and confessions, is indirectly responsible for many serious problems that arise during the investigatory stage, as the zeal of police officers to obtain an incriminating statement sometimes outstrips their discretion.

The practical problems created by the privilege are matched by legal and philosophical inconsistencies. The law does not provide protection against self-incrimination per se, but only against testimonial self-incrimination--even with respect to that it is ambivalent, allowing (and in England even encouraging) adverse inferences to be drawn if the privilege is exercised.

Why then retain the privilege? The answer is that quite apart from any philosophical argument about the type of criminal justice system we wish to have, abolishing the right of the accused to refrain from testifying would not be a practical solution to the practical problems the privilege creates. First, such a measure almost certainly would evoke an intense, unfavourable reaction which would make its introduction extremely difficult politically and might serve to undermine respect for

the law and the courts generally. The reaction to the Eleventh Report of the Criminal Law Revision Committee, which contained a somewhat similar recommendation manifestly illustrates this point. Second, whether because of high principle or simple squeamishness the general public in both England and Canada does not seem to be ready to make the accused a compellable witness. As reported in the previous chapter, the jury studies in the two countries revealed that only 26.1% of the English and 35.6% of the Canadian jurors felt that the accused should be a generally compellable witness. Even with respect to the high crime of murder, only about one-half of the jurors (48.6% English and 54.4% Canadian) felt that the accused should be made to enter the witness box. The statement of the Law Reform Committee in its Sixteenth Report (Privilege in Civil Proceedings) quoted earlier in this chapter that "the common law must not lose its common touch" is *à propos* in this context. Third, there was a strong negative reaction from both the English and the Canadian prisoners surveyed to the idea of making the accused a compellable witness: 86.2% of the English prisoners and 94.0% of the Canadian prisoners were opposed to making the accused generally compellable. While the law does not have to be shaped to suit the convenience of those who choose to break it, a conscious effort should be made to make procedure in the criminal courts fair in their eyes in order to reduce their sense of grievance towards and alienation from society.[11] Finally, the question has to be examined from the standpoint of what other options are open, and it appears that there are several measures

short of actual compulsion that will encourage all but a very few defendants in criminal trials to enter the witness box.

The difference between the very low rate of failure to enter the witness box in England (1.2%) and the high rate in Canada (73.5% in jury cases and 65.6% in non-jury cases)[12] shows that the problem can be resolved to a very large extent by adopting appropriate procedural rules at trial. Three changes in particular would increase the likelihood of accused persons in Canada entering the witness box. In most urgent need of change is the Canadian rule permitting cross-examination of the accused on his criminal record if he enters the witness box. Both the prisoners and the jurors listed the revelation of a serious record for similar offences as the most harmful of several possibilities as far as the defence was concerned. Theoretically, the answers of the accused as to his record go only to his credibility and are not evidence going to his innocence or guilt on the present charge; but this is too subtle a distinction to be appreciated by laymen, and it is questionable whether even a judge can accomplish this feat of "Now you see it; now you don't!"[13] The Canadian rule permitting the Crown to sum up last if the defence calls evidence also should be repealed. It is not clear whether having the last word is in fact an advantage, but many lawyers think that it is, and on this basis probably advise their clients in doubtful cases to stay silent. The third change would involve repealing the restriction on judicial comment on the failure of the accused to testify in his own defence.[14] The rule has been construed as

applying only to jury trials, and there is some indication from the Canadian court survey that the accused is more likely to go into the witness box in non-jury trials, which may be attributable to the risk of adverse comment.[15] In this case, unlike the previous two, it is not recommended that the Canadian rule be made exactly equivalent to the present English rule. Comment by the trial judge on the failure of the accused to enter the witness box should be made mandatory rather than discretionary. Leaving it to the discretion of the trial judge results in the application of different standards as to when a comment is called for, and this lack of consistency can be translated readily into a lack of fairness. It should not be difficult to draw up a standard direction, pointing out that the accused has the right of silence but that he also has the right to testify, and suggesting that the stronger the Crown's case is against him the more reason there is to enquire why the accused has not gone into the box to answer it. Such a direction would provide a measure of consistency and also help to control the inferences that jurors might draw in the absence of instruction.[16]

For England the failure of the accused to enter the witness box does not appear to be a major problem. On the other hand, perjury by the accused is a problem. The policy in England of not prosecuting a person for committing perjury in testifying in his own defence may contribute to the problem, for whatever the comparative statistics may be on the numbers of such prosecutions, the English prisoners surveyed thought that there was a significantly lower chance of being caught and

convicted of perjury than did the Canadian prisoners. If they act on the basis of assessment of risk it follows that English prisoners are therefore significantly more likely to perjure themselves than Canadian prisoners.[17]

The policy of condoning the personal perjury of the accused may have the effect of increasing the numbers of accused persons prepared to enter the witness box, but this gain for the fact-finding process is likely more than offset by the effect of the erroneous evidence proffered by mendacious defendants. Additionally, the policy may redound to the disadvantage of the truthful defendant, for if it is known that the accused can lie with impunity there is likely to be a strong tendency among the triers of fact to disbelieve his exculpatory testimony. In other words, the policy of having one standard of testimonial integrity for witnesses in general and another standard for the accused, though conceived as a gesture of charity, in the long run is beneficial neither to the criminal justice system nor to the accused.[18]

To summarize this part, applying a cost-benefit analysis to the question of whether the accused should be made a compellable witness, one must conclude that the net benefits of making him compellable are not as great as those that can be attained by other measures designed to encourage him not only to testify but to testify truthfully. While the introduction of the measures discussed above in all probability would have a major effect upon the percentage of accused persons testifying

in Canada, in England, where all but 1.2% of accused persons enter the witness box already, the effect of proposed changes would be qualitative rather than quantitative.

THE SUSPECT IN POLICE CUSTODY

The question of what to do about custody statements could be avoided by simply saying that the privilege against self-incrimination has always been restricted to cases in which the individual was being asked to answer questions under oath; therefore, police questioning is beyond the terms of reference of this work. However, though this would be historically and legally correct, it would be intellectually dishonest. Both in England and Canada the chief criticism of the criminal justice system voiced by the prisoners surveyed concerned police methods. In particular they were critical of police practices in obtaining and reporting statements from persons in custody.[19] Of the fourteen most frequent complaints against the police, seven (most of which were at the top of the list) related either directly or indirectly to police practices with respect to statements: violence, verballing, putting pressure on the suspect's family, using bail as a lever, not allowing outside contacts until a statement is given, using trickery to obtain a statement, and lying to or giving bad advice to prisoners. Truly, police interrogation has become the modern day equivalent of the Inquisition.

Confessions and admissions of an accused person have a peculiar mystique about them that well may overpower the triers of fact; hence, both from the standpoint of the accused and that of society, it is extremely important that the rules governing their admissibility be scrupulously fair. To this end, the English courts have developed the confessions rule to exclude involuntary statements made to persons in authority, the Judges' Rules to govern police practice in the interrogation of suspects, and the judicial discretion to exclude evidence which would be unfair to the accused. By way of contrast, only the confessions rule applies in Canada, though it is a matter of general police practice to caution the suspect before questioning him.[20]

The responses of the prisoners interviewed in both countries show that neither hortatory guidelines nor mandatory rules of exclusion provide an adequate control for improper police methods. While they may encourage most police officers to strive for excellence, the few who most need to be controlled can circumvent the rules by lying about whether any impropriety occurred. On that issue the policeman's word is likely to be preferred to that of the accused, whether in the context of determining the admissibility of evidence, or in a proceeding to sanction the police officer for his improper conduct.

But the police too have complaints about the present situation. The fact that no one is obliged to answer questions put to them by the police adds countless hours to the process

of crime detection and frequently stultifies it. Moreover, even with the most careful police work, many cases are lost because a statement properly obtained and voluntarily given was ruled inadmissible by the judge on the basis of perjured evidence given by the accused or his witnesses. Such failures have a multiplier effect, for they encourage law-breakers to expand their activities, which puts even greater pressure on the law enforcement agencies and causes their work to be even less effective, which in turn encourages more law-breaking, etc. Therefore, in proposing new ways of dealing with the problem of improper police methods, we must be mindful that society has a right to be protected against the activities of criminals, and the police have been charged with the responsibility of providing that protection. It should not be beyond the ingenuity of man to devise procedures which will respect both of those interests.

The questioning of the accused by the *juge d'instruction* has long been a fundamental part of French criminal procedure, and variations thereof exist in several other European countries. The *juge d'instruction* is no mere umpire, listening to the evidence called by the prosecution and deciding whether there is sufficient case to go to trial. Once the case is put in his hands, he takes over the investigation, examines the witnesses and the accused, controls what questions may be submitted by the prosecution and the defence, and finally decides whether the case is sufficiently substantial to go for trial. The

accused does not have to answer questions put to him by the *juge d'instruction*, but in practice almost invariably he does, because adverse inferences may be drawn from his silence.[21]

The common law has never had a judicial officer whose function was quite equivalent to that of the *juge d'instruction*, and it is difficult for a common law lawyer to accept the notion of the judge being in charge of the investigation and the interrogation, and also deciding upon whether a case has been made out against the accused. However, prior to the development of municipal police forces and the introduction of the modern preliminary examination procedure in 1848, the accused was questioned by a magistrate, and the idea of judicial participation in the examination of the accused by the police, as a means of protecting the accused from improper police methods, is neither new nor radical. The *Indian Evidence Act*, prepared as the result of the work of a Select Committee headed by Sir James Fitzjames Stephen in 1871-72, contains a provision excluding evidence of a confession made by a person in the custody of a police officer unless it is made in the immediate presence of a magistrate.[22] The National Commission on Law Observance and Enforcement (the Wickersham Commission), focussing its attention upon third degree methods used by American police in the early 1930's reported that

> Probably the best remedy for this evil [the third degree] would be the enforcement of the rule that every person arrested charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given the right to have counsel and then interrogated by

the magistrate. His answers should be recorded and should be admissible in evidence against him in all subsequent proceedings. If he chooses not to answer, it should be permissible for counsel for the prosecution and for the defence, as well as for the trial judge, to comment on his refusal. The existing rule in many jurisdisctions which forbids counsel or court to comment on the failure of the accused to testify in his own behalf should be abolished.[23]

A problem with the Wickersham proposal is that unless the magistrate became thoroughly acquainted with the case beforehand, he could not conduct the examination effectively, but if he became too closely identified with the prosecution, his independence in the eyes of the public could well be undermined. The proposals of "Justice" in 1967, and of the Evidence Project of the Law Reform Commission of Canada in 1973, avoid this problem by having the questioning done by the police in the presence of a judicial officer.[24] Under these proposals the only custody statements admissible against the accused at his trial would be those given in the presence of a judicial officer.[25] In order to prevent the police doing indirectly what they were forbidden to do directly, the proposals preclude reference by the police at the examination to any prior statements made to them by the accused while in custody. In return for these protections, the suspect would be under an obligation to answer relevant questions by the police, and these answers, whether inculpatory or exculpatory, would be admissible at his trial. If the suspect failed to answer, on the other hand, this too could be mentioned at the trial and could serve as the basis for an adverse inference. In both proposals, restrictions are placed upon the functions of defence counsel to prevent the proceedings from

into endless arguments over technicalities. Counsel could advise his client on his rights, and could intervene to protect him against questions that were improper or unclear, but it would not be proper to advise the accused not to answer questions in general or particular.

Both the "Justice" proposal and the proposal of the Evidence Project of the Law Reform Commission of Canada appear to have received a cool reception. The Criminal Law Revision Committee in its Eleventh Report regarded schemes for interrogation of suspects before a magistrate to be impracticable. The Committee felt that the magistrates would be opposed to the system and would be very reluctant to undertake the additional work; in any event, the Committee doubted that it would be possible to arrange for magistrates to be available at all times as the police might think necessary. It also expressed doubt that defence counsel at trial would be willing to accept without challenge the statement taken from the accused at the formal interrogation in the presence of the magistrate. The Committee was not, however, opposed to placing an onus upon the accused to give an account of himself to the police. Indeed, the first section of the draft Evidence Bill would impose a duty upon him to mention, upon being questioned by a police officer, any fact subsequently relied upon in his defence. Failure to do so would be the basis for a possible adverse inference by the court or jury.[26] By contrast, the Law Reform Commission of Canada appears to have turned its back on the

proposal of its Evidence Project, saying that compulsory discovery was inconsistent with the fundamental presumption of innocence, and on this basis should be rejected.[27]

Neither the Criminal Law Revision Committee nor the Law Reform Commission based its conclusions on empirical evidence. In fact, the prisoner surveys in England and Canada showed a high degree of acceptance for the notion of examination of the accused by the police in the presence of a magistrate.[28] In comparison to what they are accustomed to at the hands of the police, this procedure would apparently be a great step forward. The objections that did occur were chiefly with respect to the proposed right to draw inferences of guilt at the trial from the accused's failure to answer before the magistrate. Here, with a good deal of justification, the accused could complain that such a procedure would require him to show his hand, knowing only the barest outline of the Crown's case against him. Even in civil proceedings the defendant is not required to respond to questions put to him by his adversary until the latter has spelled out his case in a formal statement of claim. The prisoners' complaint is reminiscent of the original argument against the *ex officio* oath that a person should not be obliged to defend himself under oath until there had been "due presentment" of the charges against him.

Examination of the accused by the police before a judicial officer would be more acceptable if it were less ambitious. The reformers have attempted to expedite matters by telescoping parts of the investigation, discovery and trial, but the three stages do not meld conveniently. It seems oppressive to force the accused to make admissions for the purpose of the trial when neither he nor his counsel have been informed of the Crown's case. Nor is a hearing of this nature the appropriate forum for deciding upon the admissibility of certain evidence: in most cases the two sides would not be properly prepared to argue the point nor the judicial officer to decide it. The distinction between the two pre-trial stages, investigation and discovery, must be observed. Space does not permit an elaborate restatement of the proposal here, but the following modifications would make it more consistent with the traditions and practices of the common law without compromising its essential features.

1. <u>The Investigatory Stage</u>

In determining the circumstances in which a person could be required to attend for examination by the police before a judicial officer a balance of convenience must be struck between the duty of the police to carry out an effective investigation, and the general interest of the citizen not to be bothered unnecessarily. This balance can best be maintained by requiring the police to obtain a court order if they wish someone to attend for questioning. This could be done on an

ex parte basis upon the police showing they have reasonable cause to believe that the person either committed the offence or that he was implicated therein. If satisfied, the judge could order that the person appear before the judicial officer at such time as might be appropriate.

The function of the judicial officer should be to act as an independent official who would advise the suspect [at this stage a charge may not have been laid, hence he is not an "accused"] of his rights and protect him from harassment or unfair questions. He would be responsible also for making sure that all questions and answers were accurately recorded. It would be desirable for him to have some knowledge of the criminal law and criminal procedure, but as he would not be making decisions on the ultimate admissibility of evidence or on the culpability of the suspect, he would not require a full legal training. Perhaps it would be desirable to develop some form of judicial para-professional trained specifically for this task.

The admissibility at a subsequent trial of statements made by the suspect before the judicial officer should be governed by the normal rules of evidence relating to pre-trial statements; however, the fact that he was compelled to attend for questioning should not be a basis for considering his statements to be involuntary. His answers could also be used at trial by the Crown to show a previous inconsistent statement;

likewise, the law should permit the accused to refer at his trial to statements made by him before the judicial officer for the purpose of showing consistency, but this right should be accorded only if he enters the witness box at his trial.[29]

Of prime importance is, of course, the consequence of failure to answer a question. As this is an investigative rather than a discovery proceeding, the suspect should not be required to answer nor should his failure to answer constitute an admission that could be adduced against him at his trial. His silence could, however, be used by the prosecution to challenge his credibility if he were asked the same question at his trial. He could avoid this challenge to his credibility by not entering the witness box at his trial, but in so doing he would be subject to adverse comment by the trial judge, so this is no real escape. His more likely tack would be to try to explain his silence on the basis of "advice of counsel", which may or may not be regarded as a reasonable excuse, depending upon the particular circumstances.

The "Justice" proposal would have prohibited counsel at the hearing from advising his client not to answer questions. From a practical point of view it is doubtful whether such a restriction would be acceptable to the legal profession, and in any event it is likely an unnecessary measure. While some counsel might advise their clients not to answer any question, the effects of such action upon the defence at trial would tend to deter the giving of such advice indiscriminately. The other

function of the lawyer would be to watch that the questions addressed to his client were clear and unambiguous and relevant to the crime under investigation, for the hearing should not be allowed to be used as a general fishing expedition.

2. The Discovery Stage

Assuming that the suspect is in fact charged with the offence, the Crown should be required to make discovery of its full case against the accused. The only exception to that general rule should be where the Crown can satisfy the court that there is a danger that revealing the names of certain witnesses would endanger their system of crime detection, or would likely result in "intimidation, physical harm, threats of harm, bribery, or economic reprisal directed against the potential witness or other persons".[30] Much of the discovery could be done in writing, but provision should be made for the defence to examine and test exhibits and to cross-examine witnesses if it wished. The record of the examination of the accused before the judicial officer would be one of the items in the discovery. At the end of the discovery by the Crown, the accused should be entitled to present a motion that the Crown has produced insufficient evidence to justify a trial, and if the presiding judge ruled in favour of the motion, the accused would be discharged.

The procedure outlined in the preceding paragraph is generally in keeping with the recommendations of the Law Reform Commission of Canada in its working paper on "Discovery".[31] The Commission did not recommend taking the next step and requiring discovery by the accused, saying that compulsory discovery "will erode the principles of our criminal process".[32] However, the Commission expressed itself as being in favour of encouraging the defence to voluntarily admit facts, and it said that it believed that the system contained incentives for the defence to make discovery to the prosecution. These incentives include possible savings in time and money and the adverse inference that would likely be drawn by judges and juries from the failure of the defence to make discovery to the prosecution prior to the trial.[33]

If the Commission believes that it is desirable for the accused to make discovery of his case, and for judges and juries to draw adverse inferences from his failure to do so, it would be more forthright to make such failure the subject of adverse comment by the trial judge. After learning the Crown's full case, the accused cannot complain that he is being asked to show his hand first, and if he does not provide an innocent explanation it is surely a fair inference that he cannot. Moreover, the incentives to voluntary discovery mentioned by the Commission work inequitably and inconsistently.

Mandatory judicial comment on failure to make discovery would help to eliminate the discrimination against the poor in this regard, and also help to control the type of inference that might be drawn by jurors.

This two-step approach to the pre-trial process would have advantages both for the prosecution and the defence. It would not involve any major changes in the present rules of evidence for procedure, and it would be fair to the accused. It should provide an acceptable balance between two competing social goals - protection of society, and personal freedom.

3. Other Mechanisms to Control Police Practices

The pre-trial procedures outlined above would not be a panacea for all the complaints the prisoners voiced against the police. They would not protect the suspect against improper methods unrelated to obtaining a statement, for example, bribery, perjury, planting evidence, rigging identification parades or harassing people with a record. Moreover, they would not prevent the police from threatening the suspect with unpleasant consequences for himself or his family if he did not co-operate. Other techniques must be devised to deal with these hazards. Certain measures such as the establishment of standard rules for the holding of identification parades could be introduced almost immediately, but long range solutions, involving a basic re-thinking of police administration are also required.

The obvious starting point is police training. Because of financial constraints the police training programmes often leave much to be desired. The small number of complaints by Canadian prisoners about the highly trained and disciplined R.C.M.P. as compared with municipal police forces shows that respect for the rights of the individual by the police is not necessarily inconsistent with high quality crime detection.

A second area worth exploring is the custody and control of persons awaiting their first court appearance. So long as the police are responsible both for carrying out the investigation and for custody of the accused, they will have the opportunity to exert direct or subtle pressure on him to make a statement or give them leads. The interposition of another agency would mean that inducements such as violence, interruption of sleep, or withdrawal of amenities to a large extent could be eliminated.

Finally, there is an urgent need for a truly effective grievance procedure. As long as the only options open to the complainant are to prove his complaint against the police in a court of law, or to file a complaint with the Police Commission and have the police investigate themselves, he is unlikely to feel any great confidence in the outcome. What is needed is an independent body, such as an ombudsman, that would have the authority and the means to carry out a full investigation, and whose findings could be easily enforced. It is in measure like this, rather than in simplistic exclusionary rules of evidence,

that the real hope for establishing what Wigmore calls both a "fair state-individual balance" is to be found.

CONCLUSION

The privilege against self-incrimination has played a useful and humanizing role in the development of the common law system. It has been useful in that it forced the Crown to develop an investigative capacity in connection with its function of prosecuting those charged with criminal offences, instead of merely relying on extracting confessions from unwilling victims. It has been humanizing in that it focussed attention on the importance of the liberty of the subject and his right not to be deprived of that liberty without the due process of the law. But the law must be made to respond to changing social needs, and even a concept as fundamental as the privilege against self-incrimination must be re-assessed from time to time. The proposals contained herein are neither radical nor visionary. They are in keeping with the history and traditions of the common law, and would provide, if anything, greater protection for the accused than he receives now either in England or in Canada. At the same time, they would enhance the powers of the police and the prosecution and thus redound to the benefit of society.

F O O T N O T E S

A P P E N D I C E S

Chapter One

FOOTNOTES

There are a number of books and articles to which frequent reference is made in this chapter. In order to simplify the footnotes, these works are listed below in full, and subsequent references will be by author and page number, except where additional information is required.

W.S. Holdsworth, *A History of English Law*, 17 volumes [various editions] (London, Methuen & Co., 1903-67).

L.W. Levy, *Origins of the Fifth Amendment* (New York, Oxford University Press, 1968).

M.H. Maguire, "Attack of the Common Lawyers on the Oath *Ex Officio*", chapter 7 of *Essays in History and Political Theory in honor of Chas Howard McIlwain* (New York, Russell & Russell, 1936).

E.M. Morgan, "The Privilege Against Self-Incrimination" (1949), 34 *Minnesota Law Review* 1.

T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London, Butterworth & Co., 1956).

F. Pollock and F.W. Maitland, *The History of English Law*, 2 volumes (Cambridge, University Press, 1895).

J. Strype, *The Life and Acts of John Whitgift, D.D.*, 3 volumes, (Oxford, Clarendon Press, 1822).

J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, volume 8 (revised by J.T. McNaughton, 1961) of 10 volumes (Boston, Little, Brown & Co., 1940-72).

Chapter One

1. In the time of Henry I, 1100-1135, itinerant justices, representing the king, were holding sittings throughout the kingdom. Henry II, 1154-1189, reorganized the system to ensure that the justices went on circuit and heard cases on a regular basis. This could be regarded as the birth of English criminal justice. See, for example, *Holdsworth*, vol. 1 (7th ed.), Introductory Essay by S.B. Chrimes, at 42-3*; *Plucknett*, at 80; and *Potter's Historical Introduction to English Law*, 4th ed. (London, Sweet & Maxwell Ltd., 1962), at 111.

2. *Pollock and Maitland*, vol. 2, at 595-601.

3. J.F. Stephen, *A History of the Criminal Law of England* (London, Macmillan & Co., 1883), vol. 1, at 256-7; *Plucknett*, at 107-13.

4. *Levy*, at 22-3.

5. For discussion of presentment in the King's courts see *Pollock and Maitland*, vol. 2, at 639-49. For a succinct description of the procedure in the ecclesiastical courts see *Levy*, at 22-3, and *Strype*, vol. 3, at 232-5.

6. *Strype*, vol. 3, at 234-5.

7. A. Esmein, *Le Serment des Inculpés en Droit Canonique* (Paris, Ernest Leroux, éditeur, 1896), at 4-5; *Maguire*, at 201. The first recorded use of procedure *per inquisitionem* on the Continent was in 1198.

8. The text of the constitution as reported in *Wigmore*, at 270 is as follows: "*Jusjurandum calumniae in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quo ut veritas facilius aperiatur, et causae celerius terminentur, statuimus praestari de caetero in regno Angliae secundum canonicas et legitimas sanctiones, obtenta consuetudine in contrarium non obstante*". The translation accepted by *Wigmore* (loc. cit.) is: "We do decree that the oath of calumny, by which the truth is more easily discovered, and causes finished with greater celerity, shall in future be administered throughout the kingdom of England in causes of an ecclesiastical and civil nature; according to the canons in that behalf, notwithstanding any custom to the contrary." *Levy*, at 449, suggests that the constitution actually conferred the power to employ not just the oath of calumny but the oath *de veritate dicenda*. *Maguire*, at 200, says the constitution authorized the use of a special form of the oath of calumny which was practically equivalent to the oath *de veritate dicenda*. J.E. Sayers, in *Papal Judges Delegate in the Province of Canterbury, 1198-1254* (Oxford University Press, 1971), at 85-6, states that Otho introduced

the oath of calumny, but Pope Gregory IX in 1238 wrote to the prior and the convent of Christ Church, Canterbury, allowing them to force their adversaries to take either this oath or the oath *de veritate dicenda*, if they undertook to take the same oath themselves. The difference between the two oaths was that by the oath of calumny the party only swore that he was bringing or defending the action in good faith; whereas by the oath *de veritate dicenda* he undertook to answer all questions truthfully.

9. See *Levy*, at 19-26; *Wigmore*, at 273-6; *Maguire*, at 201; and *Strype*, vol. 1, at 321-2, where the reasons for not requiring presentment are discussed.

10. *Maguire*, at 205-6, and *Morgan*, at 1-3.

11. See N. Adams, "The Writ of Prohibition to Court Christian" (1935-6), 20 *Minnesota Law Review* 272, at 288, for reasons why litigants chose to sue in the ecclesiastical court.

12. 1 Statutes of the Realm 209. The date of the statute is uncertain, but it was probably passed in the last years of the reign of Edward II, 1307-1327: see *Maguire*, at 206. The original text reads: *"Et quod non permittant quod aliqui laici in balliva sua in aliquibus locis conveniant ad aliquos recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis."*

13. *Wigmore*, at 277.

14. *Maguire*, at 204-8.

15. See, for example, G.B. Flahiff, "The Writ of Prohibition to Court Christian in the Thirteenth Century" (1944), 6 *Mediaeval Studies* (Toronto, Pontifical Institute of Mediaeval Studies), 261, at 293. Even as late as 1414 we see the King asserting that the true jurisdiction of the ecclesiastical courts was matrimonial and testamentary matters: "Item, Foreasmuch as divers of the King's liege People be daily cited to appear in the Spiritual Court before Spiritual Judges, there to answer to divers Persons, as well as of Things which touch Freehold, Debt, Trespasses, Covenants, and other Things whereof the cognisance pertaineth to the Court of our Lord the King, as of Matrimony and Testament...." 2 Henry V, c. 3.

16. *Pollock and Maitland*, vol. 1, at 104-11.

17. *Maguire*, at 207-8; *Morgan*, at 4-5

18. 2 Henry IV, c. 15. For a discussion of the operation of this statute see *Levy*, at 57-60; *Maguire*, at 208-9; and *Morgan*, at 5-6.

19. This requirement was introduced by 2 Henry V, c. 3 (1414). It does not appear that the requirement was complied with in all cases. It was obviously a matter of contention in the time of James I: see Coke's note on the responses of Popham C.J. and himself to the Privy Council with regard to the use of the *ex officio* oath by the ecclesiastical courts (1606), as reported in 12 *Co. Rep.* 26, and the dispute over the delivery of a copy of the Libel in Burrowes, Cox, Dyton et al., 3 *Bulst.* 49 at 51-2.

20. *Peine forte et dure* was to continue as a possible punishment for persons refusing to plead until 1772 when by the statute 12 George 3, c. 20, the law was changed to interpret a failure or refusal to plead as equivalent to a guilty plea. It was only in 1827 that the law was changed to equate it with a not-guilty plea: 7 & 8 George 4, c. 28, s.2. Officially, *peine forte et dure* was not regarded as torture - see *Levy*, at 326 - but the distinction must have seemed a trifle subtle to those who had to endure *peine*. The best discussion of the use of torture in England is D. Jardine's work, *A Reading on the Use of Torture in the Criminal Law of England* (London, Baldwin and Cradock, 1837). *Holdsworth* also discusses its use in England, vol. 5 (2nd ed.), at 184-7. The pre-trial examination of prisoners by justices is considered to have developed as part of the common law long before it became statutory by virtue of 1 & 2 Philip & Mary, c. 13 (1554), and 2 & 3 Philip & Mary, c. 10. The wording of sec. 4 of the former statute clearly implies that this was the case - "And the said Justices, or one of them being of the Quorum, when any such Prisoner is brought before them for any Manslaughter or Felony, before any Bailment or Mainprise, *shall take the Examination of the said Prisoner*, and Information of them that bring him, of the Fact and Circumstances thereof as shall be material to prove the Felony, shall put in Writing, before they make the same Bailment; which said Examination, together with the said Bailment, the said Justices shall certify at the next General Gaol-delivery to be holden within the Limits of their Commission." [Italics added] The italicized words are more appropriate to describing the continuance of an existing practice than the creation of a new one. While not using this argument, Sir James Fitzjames Stephen also asserts that common law justices of the peace questioned those charged with felonies: see J.F. Stephen, *A History of the Criminal Law of England* (London, Macmillan & Co., 1883), vol. 1, at 219-20, and "The Practice of Interrogating Persons Accused of Crime" (1855-58), 1 *Juridical Society Papers* 456.

21. 25 Henry VIII, c. 14 (1534). For a discussion of Henry's religious attitudes, see *Levy*, at 68

22. 1 & 2 Philip & Mary, c. 13 (1554), and 2 & 3 Philip & Mary, c. 10 (1555).

23. J. Foxe, *The Acts and Monuments of John Foxe* (reprinted by Ams Press Inc., New York, 1965), vol. 5, at 184 and 221. In the latter location, Lambert is also quoted as referring to the common proverb, "Thoughts be free, and need pay no toll" - a phrase to be used later by Chief Justice Coke.

24. *Ibid.*, at 221.

25. The ecclesiastical law on due presentment is set out above, at page 5. The case against Lambert was discontinued when the Archbishop died, but his outspoken views brought him into conflict with Henry VIII and he was burned as a heretic in 1538.

26. Leigh's case and Hynde's case are referred to in 2 *Brown & Gold*, 271; 12 *Co. Rep.* 26, at 27; and 3 *Bulst.* 48, at 50. The Latin phrase is found only in 3 *Bulst.*

27. For example, in the Burrowes case, 3 *Bulst.* 48, at 51, Coke cites the Scrogs case for the proposition that no one is bound to answer under oath a question that would "draw them within the danger of a penal law". In fact the case (Skrogges v. Coleshil (1558), 2 *Dyer* 1756), which is well reported, makes no such point. The facts were that Coleshil had been appointed Exigenter of London by Queen Mary during a period when the office of Chief Justice was vacant. Subsequently she appointed Anthony Browne to the post of Chief Justice, and he refused to recognize Coleshil and appointed Skrogges, asserting that he had the exclusive right to appoint to this office. A royal commission was established with full power to determine the issue and to imprison Skrogges if he refused to answer. Skrogges demurred to the claim of Coleshill and to the jurisdiction of the commission, whereupon he was imprisoned for contempt. The Court of Common Bench released him, however, "because he was a person in the court and a necessary member of it." It is also of interest that Skrogges was the nephew of the Chief Justice. Coke may also have given a faulty account of Hynde's case. There is a decision of the Court of Common Pleas in Hinde's Case (Mich. 19 Eliz.) 4 *Leo.* 21, that suggests that *habeas corpus* was granted because the warden of the Fleet had failed to certify the cause for which Hindes had been committed by the ecclesiastical commissioners. It is possible, of course, that Coke was referring to a different case, or the same case on a different point.

28. (1590), 4 *Leo 194; sub. nom.* Collier v. Collier, *Moo.* 906; *sub. nom.* Cullier v. Cullier, *Cro. Eliz.* 201. The argument apparently had been considered by the Star Chamber in 1580. An anonymous account of the trial of Lord Vaux *et al.* states that Chief Justice Dyer and some other common law judges sitting in the Star Chamber on the case, acknowledged that *nemo tenetur seipsum prodere* where to do so might endanger his life or limb, but concluded that the rule did not apply to the Star Chamber because it did not have the power to punish by execution or dismemberment: John Bruce (editor), "Narrative of Proceedings in the Star Chamber against lord Vaux, sir Thomas Tresham, sir William Catesby, and others, for a contempt in refusing to swear that they had not harboured Campion the Jesuit", in 30 *Archaeologia: or, Miscellaneous Tracts Relating to Antiquity* (London, Society of Antiquaries, 1844), 80. An extensive summary of this article is found in *Levy*, at 100-6. As an anonymous account, its reliability is lessened.

29. *Moo.* and *Cro. Eliz.* say that prohibition was granted.

30. (1591) *Cro. Eliz.* 263.

31. *Levy*, chapters 5 and 6, contains a good summary of the history of this period. *Strype* also contains excerpts of arguments against the *ex officio* oath, vol. 2, at 30-2. Although the arguments were accepted ultimately by Coke, they tended to be long on rhetoric and short on authority. The fact that defendants were not examined under oath in the common law courts did not mean that the same rule had to apply in the ecclesiastical courts. Presumably the Church was the final authority on the law of God, and it said the *ex officio* procedure was necessary: in this regard see Archbishop Whitgift's justifications for the procedure in *Strype*, vol. 1, at 317-22. As for Magna Carta, it was never intended that chapter 29 thereof [quoted *infra* at page 21] should apply to other than "Freemen" in "royal courts". Even if the Court of High Commission was deemed to be a royal court by virtue of the monarch being the temporal head of the Church, the powers given to the commissioners to maintain the purity of the faith could be and were vast, 1 Elizabeth, c. 1, s. 18 (1559), and the exercise of those powers therefore was in accordance with the "Law of the Land".

32. 12 *Co. Rep.* at 26.

33. *Loc. cit.* The text cited by Coke makes it clear that he was referring to the statute *de articuli cleri* (see *supra*, footnote 25) and his reference to an ordinance of Edward I is in error.

If this is the case, it is questionable whether the exception made for matrimonial and testamentary causes was based upon the need to uncover secrets, as Coke suggests, or upon a recognition by the Crown of the exclusive jurisdiction of the ecclesiastical courts in these two areas. Many serious crimes are committed in circumstances in which there are no witnesses other than the culprit himself, and Coke's suggestion that matrimonial causes do not involve the same degree of shame and infamy as other offences would not hold true in many cases. The ecclesiastical courts, indeed, used the secrecy argument to justify the use of *ex officio* procedure in all crimes that are classified as *malum prohibitum*: see *Strype*, vol. 3, at 233.

34. 13 *Co. Rep.* 9, at 10.

35. 2 *Brown. & Gold.* 14.

36. 3 *Bulst.* 48.

37. *Ibid.*, at 49.

38. See, for example, Sir Walter Raleigh's trial, 2 *How. St. Tr.* 1, esp. at 25-6. On Coke's approval of the use of torture, see *Holdsworth*, vol. 5 (2nd ed.), at 185.

39. 16 Charles I, c. 10. For a discussion of the reliance upon Magna Carta as an authority, see *supra*, footnote 31.

40. 16 Charles I, c. 11, s. 2.

41. *Ibid.*, s. 4.

42. 4 *How. St. Tr.* 63.

43. *Ibid.*, at 76.

44. 4 *How. St. Tr.* 989, at 1101.

45. 4 *How. St. Tr.* 1315.

46. 4 *How. St. Tr.* 1269 and 5 *How. St. Tr.* 407. *Levy* devotes chapter 9, pp. 260-300, to Lilburne's trials.

47. An exception was 2 Henry V, c. 4.

48. *Evidence Act, 1851*, 14 & 15 Vict., c. 99, s. 2. Spouses of parties became competent and compellable in civil cases by the *Evidence Act, 1853*, 16 & 17 Vict., c. 83, s. 1.

49. *Criminal Evidence Act, 1898*, 61 & 62 Vict., c. 36, s. 1. There were some early statutory exceptions which will be noted later. At common law, the spouse of the accused was competent and compellable for the prosecution in cases involving a charge of personal violence by the accused against his or her spouse, R. v. Lapworth, [1931] 1 K.B. 117. It is also possible that the spouse is compellable at common law in cases involving the liberty of the wife, R. v. Wakefield, 2 *Lewin C.C.* 279, at 287 per Hullock B., and in treason cases, Mary Griggs' Case, *T. Raym.* 1.

50. The statutes 1 & 2 Philip & Mary, c. 13, and 2 & 3 Philip & Mary, c. 10, were repealed and re-enacted by 7 George IV, c. 64, ss. 2 and 3 (1826), which extended the power of pre-trial examination by justices to include misdemeanours as well as felonies. This Act in turn was repealed by 11 & 12 Vict. c. 42 (1848), which introduced a preliminary examination procedure which was compulsory for witnesses called by the prosecution but non-compulsory for the accused.

51. The wording of 1 & 2 Philip & Mary, c. 13, s. 4, quoted *supra*, footnote 20, makes it clear that the justices were to make a written record "... of the Examination of the said Prisoner, and Information of them that bring him, of the Fact and Circumstances thereof as shall be material to prove the Felony". Logically, the prisoner's silence in the face of a strong *prima facie* case against him is a "circumstance... material to prove the felony". The concept of the confession to a person in authority having to be voluntary in order to be receivable in evidence appears to have come from the Roman law via the ecclesiastical courts to the common law. Voluntariness was a prerequisite for the use of a *confessio in jure* in the ecclesiastical courts (see J.E. Sayers, *Papal Judges Delegate in the Province of Canterbury, 1198-1254* (Oxford University Press, 1971), and the notion appears to have made its way into the common law at an early date, A.-G v. Mico, *Hardres* 137, *arguendo* at 139.

52. *Tothill* 18

53. *Hardres* 2. Hardres apparently took an active interest in the subject, for he reports extensively one of his own arguments in favour of the privilege against self-incrimination in A.-G v. Mico, *supra*, footnote 51. It is possible that the blending of the two principles was done by Hardres rather than by the defence counsel.

54. In *Strype*, vol. 1, at 317-22, Archbishop Whitgift's justifications for the use of proceedings *ex officio mero* are given, one of which (at 322) was that experience had shown that if the chief gentleman of the parish were affected no action would be started if it were left to private presentment.

55. See *Levy*, chapter 2.

56. See *supra*, footnote 23.

57. While an argument against the *ex officio* procedure apparently was put forward by the Catholic defendants in the Vaux case in 1580, see *supra*, footnote 28, most of the philosophical arguments appear to have been made by Puritans, such as Cartwright, Beale, Barrow, Udall and Morice (see *Levy*, chapters 4-6). For a summary of points made in one of Morice's tracts, see *Strype*, vol. 2, at 30-2.

Chapter Two

FOOTNOTES

In order to simplify the footnotes, the following frequently cited works will be referred to in an abbreviated form.

J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Boston, Little, Brown & Co., 1940-72), will be cited as *Wigmore* (plus the appropriate volume and revision).

Great Britain, Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings), (London, Her Majesty's Stationery Office, 1967), will be cited as Cmnd. 3472.

Great Britain, Criminal Law Revision Committee, Eleventh Report, Evidence (General), (London, Her Majesty's Stationery Office, 1972), will be cited as Cmnd. 4991.

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1. J.B. Thayer, *A Preliminary Treatise on Evidence at Common Law* (Boston, Little, Brown & Co., 1898), at 498-501, traces the history of the hearsay rule to the 14th century. Even at this date the function of a witness was to state what he had seen and heard, not what somebody else had seen and heard: *quod vidi et audivi*; *de visu suo et auditu*. A different view is stated in *Wigmore*, vol. 5, at 9: "... the Hearsay rule as a distinct and living idea, begins only in the 1500's and it does not gain a complete development and final precision until the early 1700's." There is no doubt that from time to time prior to the 18th century the courts received hearsay as evidence [many courts do so today without realizing it], but it is also clear that the weakness of hearsay was understood in the 16th century. For example, the court in Lord Lumley's Case (*circa* 1580), held that the accusers in a treason trial must both be lawful witnesses, and one could not be an accuser by hearsay: see *Coke's Institutes of the Laws of England* (first published 1648, reprinted, London, E.R. Brooke, 1797), part 3, at 25; and Sir Matthew Hale, *History of the Pleas of the Crown* (first published 1682, reprinted, London, 1800), vol. 1, at 305. Both Coke and Hale quote from Dyer's unpublished manuscript. The hearsay rule was stated as an established part of the common law in Lutterell v. Reynell (1670), *Mod.* 282.

2. The definitions of hearsay are legion. The quotation is taken from *Phipson on Evidence*, 11th ed. (London, Sweet & Maxwell, 1970), at 269: "Oral or written statements made by persons who are not parties and who are not called as witnesses are inadmissible to prove the truth of the matters stated."

3. King v. R., [1967] 1 *A.C.* 304 (P.C.). Though the case is one concerning evidence obtained by improper means, the Judicial Committee stated the rule in terms of a general discretionary in criminal cases to disallow evidence "if the strict rules of admissibility would operate unfairly against the accused" (at 316).

4. [1967] 1 *A.C.* 760.

5. 1 *Leach* 263, at 263-4.

6. *Wigmore*, vol. 3 (Chadbourne revision, 1970), at 297. Wigmore recognizes that the term was used frequently before this time, but says (at 291-7) that until the middle of the 18th century confessions were not used as evidence but as guilty pleas, i.e. as a substitute for evidence. [A good example of this is Dr. Parry's Case (1584), 1 *How. St. Tr.* 1095.] He says that involuntary confessions frequently were used and cites D. Jardine, *Use of Torture in the Criminal Law of England* (London, Baldwin & Cradock, 1837) for the proposition that

torture was used in England until at least 1640. However, Jardine, after discussing the cases in which torture had been used, concludes (at 59) that the use of torture was not lawful at common law but was lawful as an act of prerogative. The cases where torture was used usually related to treason or sedition - crimes against the monarch - rather than lesser crimes, where the victim was a private individual. Wigmore's view depends upon voluntary confessions being treated as conclusive (like a guilty plea), as distinct from very persuasive. No doubt the law was in a transitional stage in the 16th and 17th centuries, but if the confession was conclusive, why should the prosecution bother to adduce other evidence when it had a confession to rely on? There are early cases in which the court seems to have regarded the confession as just part of the evidence. In the trial of Edward Abington *et al.* (1586), 1 *How. St.Tr.* 1141, confessions were led, followed by other evidence, all of which was considered by the jury. In the trial of Sir Christopher Blunt *et al.* (1600), 1 *How. St.Tr.* 1409, the Attorney General (Sir Edward Coke) said (at 1420) that the question for the jury was not whether Blunt was guilty of Treason, "for he confesses himself guilty of matter which is rebellion and insurrection, and that of itself is flat Treason", but he went on to offer several proofs, starting with Blunt's confession (see esp. 1422 et seq.).

7. *Hardres* 137, at 139.

8. The report of the trial of Henry, Earl of Surrey, and Proceedings against Thomas, Duke of Norfolk (1546), 1 *How. St.Tr.* 451, contains an account of the latter's confession which concluded with the words "Without compulsion, without force, without advice or counsel, I have and do subscribe the premisses..." (at 458). In the proceedings against Edward, Duke of Somerset (1550), 1 *How. St.Tr.* 509, the Duke's confession was not acted upon by Parliament, as "some of the lords said, they did not know whether that confession was not drawn from him by force: and that it might be an ill precedent to pass Acts upon such papers, without examining the party, whether he had subscribed them freely and uncompelled..." (at 513).

9. 1 & 2 Philip & Mary, c. 13, s. 4, and 2 & 3 Philip & Mary, c. 10, s. 2. See also *supra*, footnote 51 of chapter 1.

10. See J.E. Sayers, *Papal Judges Delegate in the Province of Canterbury 1198-1254* (Oxford University Press, 1971), at 89-91.

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11. In Deokinanan v. R., [1969] 1 *A.C.* 20 (P.C.), the Judicial Committee states at 33 the rationale for the rule and also the weakness of it. The Criminal Law Revision Committee in its report on Evidence (General), Cmnd. 4991, at 39. recommended the abolition of the distinction between persons in authority and others in determining the admissibility of confessions.

12. See King v. R. (supra, footnote 3) and cases cited therein.

13. R. v. Wray, [1971] *S.C.R.* 272.

14. For a discussion of the use of illegally obtained evidence in the United States, see *Wigmore*, vol. 3 (Chadbourne revision), at 555-61, and vol. 8 (McNaughton revision), at 5-61.

15. Illustrations taken from *Wigmore*, vol. 8 (McNaughton revision), at 387-400.

16. *Ibid.*, at 379-80.

17. The English authorities cited by Wigmore, *loc. cit.*, do not support the proposition that documents and chattels should be treated in the same way. The only authority which could be so construed is a dictum by Lord Mansfield in Roe dem. Haldane v. Harvey (1749), 4 *Burr* 2484, at 2489, where he said "But in a criminal or penal cause, the defendant is never forced to produce any evidence, though he should hold it in his hands in Court." The object in issue was, however, a document of title; hence Lord Mansfield's dictum bears little weight respecting chattels generally. It should be remembered that the Crown's right of search is a very effective substitute for an order for production.

18. *Civil Evidence Act 1968*, c. 64, s. 14(1).

19. Cmnd. 3472, draft clause 1.

20. See *supra*, footnote 18.

21. Orme v. Crockford (1824), 13 *Pri.* 376.

22. Bruce v. Nicolopulo (1855), 11 *Exch.*129; Mortimer v. M'Callan (1840), 6 *M. & W.* 58; R. v. Fursey (1833), 6 *C. & P.* 84; Bartholomew v. Stephens (1839), 8 *C. & P.* 728.

23. The King of the Two Sicilies v. Willcox *et al.* (1850-51), 7 *St.Tr. (N.S.)* 1049; R. v. Justices of the County of Birmingham (1828), 8 *B. & C.* 375.

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24. Talbot v. Marshfield (1865), 2 *D. & S.* 549; In re Mason; Mason v. Cattley (1833), 22 *Ch.D.* 609.

25. *Wigmore*, vol. 8 (McNaughton revision), at 367.

26. (1836), 7 *C. & P.* 612.

27. Monnins v. Monnins (1672-73), 2 *Ch.R.* 68; Bird v. Hardwicke (1682), 1 *Vern.* 109. On the use of the Chancery remedy of discovery in aid of common law actions generally, see W.S. Holdsworth, *A History of English Law*, 2nd ed., vol. 5 (London, Methuen & Co. Ltd., 1937), at 281-2.

28. (1880), 5 *Q.B.D.* 467.

29. *Ibid.*, at 469.

30. 7 *St.Tr. (N.S.)* 1049. By way of contrast, the Court of Exchequer in East India Co. v. Campbel (1749), 1 *Ves. Sen.* 246, held that the fact the crime was committed out of England made no difference, because the government might choose to send the witness to the foreign state for trial in order to avoid reprisals.

31. *Ibid.*, at 1069.

32. (1867), *L.R. 4 Eq.* 327.

33. Cmnd. 3472, at 7.

34. Cmnd. 4991, at 104 and draft clauses 15(1)(a) and 45(8).

35. The dicta favouring extending the Privilege to cover questions which might incriminate the witness's spouse are found in R. v. Inhabitants of Cliviger (1788), 2 *Term. Rep.* 263, at 268 and 9; R. v. Inhabitants of All Saints, Worcester (1817), 6 *M. & S.* 193, at 200; and Lamb v. Munster (1882), *L.R. 10 Q.B.D.* 110, at 112-3. On the other hand, Lord Ellenborough C.J. in R. v. Inhabitants of All Saints, Worcester (*supra*), had doubts on the question, and in R. v. Inhabitants of Bathwick (1831), 2 *B. & Ad.* 639, it was held that a woman's testimony was receivable where there was no direct charge or proceedings against her husband, but her testimony would not be receivable against him if he were charged.

36. Cmnd. 3472, at 6, and draft clause 1(1)(*b*); *Civil Evidence Act 1968*, c.64, s. 14(1)(*b*); Cmnd. 4991, at 104, and draft clause 15(1)(*b*).

37. [1912] *A.C.* 305.

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38. [1931] 1 *K.B.* 117. An early decision, Mary Grigg's Case (1660), *Raym. Sir T.* 1, stated that treason was the only case in which one spouse was competent to testify against the other. However, a broader exception, based on necessity, was stated by Lord Mansfield in Bentley v. Cooke (1784), 3 *Doug.* 422, at 423-4: "There never has been an instance either in a civil or criminal case where the husband or wife has been permitted to be a witness for or against the other, except in case of necessity, and that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury." While the example of personal injury cases was only illustrative, there has been little inclination to press for a broad interpretation of the necessity exception, as most cases have involved personal injuries or threats to injure the spouse. In D.P.P. v. Blady, [1912] 2 *K.B.* 89, Pickford and Lush JJ. stated the exception as being confined to cases in which the offence itself concerned the "liberty, health, or person of the wife". The King's Bench Division in the Lapworth case (*supra*) made it clear that the exception also applied so as to permit a husband to testify if the wife had been the aggressor. For a discussion of the early cases, see P. Taylor, *Law of Evidence*, 11th ed. (London, Sweet & Maxwell, 1920), vol. 2, at 924-6.

39. Cmnd. 4991, at 105, and draft clause 15(3).

40. The Committee divided questions respecting other offences into two categories: questions tending to show that the accused committed the offence charged, and questions relevant only to credibility. The Committee recommended that privilege be accorded for one but not the other: "To allow the privilege in the former case, even in theory, might make the law seem artificial, but it would seem reasonable to allow it in the latter case." No explanation is given as to why granting the Privilege would be artificial in the one case and reasonable in the other. See Cmnd. 4991, at 105.

41. [1939] 2 *K.B.* 395.

42. *Ibid.*, at 409-10.

43. Klein v. Bell, [1955] *S.C.R.* 309.

44. *Wigmore*, vol. 8 (McNaughton revision), at 353.

45. 16 Charles I, c.11, s.4.

46. 13 Charles II, c.12, s.1.

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47. *Ibid.*, s. 4.

48. (1822), 1 *Addams* 105.

49. 14 & 15 Vict., c. 99, s. 2.

50. (1868), *L.R. 2 A. & E.* 281.

51. *Ibid.*, at 285.

52. See *supra*, chapter 1, esp. at 14-9.

53. Brownsword v. Edwards (1750-1), 2 *Ves. Sen.* 243; A.-G. v. Duplessis (1752), *Park.* 144; Finch v. Finch (1752), 2 *Ves. Sen.* 491. Theoretically, the Privilege continued for another century and a half, but there appear to be no cases in which liability to ecclesiastical punishment was used as a basis for claiming privilege in other courts until Redfern v. Redfern (*infra*), in which it was declared obsolete.

54. [1891] *P.* 139.

55. *Ibid* ., at 145.

56. *Ibid.*, at 147.

57. 20 & 21 Vict., c. 85.
58. 32 & 33 Vict. c. 68.
59. [1942] 2 *K.B.* 253. Gorrell Barnes J. came to the same conclusion about the effect of Redfern in Evans v. Evans & Blyth, [1904] *P.* 378.

60. Cmnd. 3472, at 19.

61. Jones v. Green (1829), 3 *Y. & J.* 298.

62. Derby v. Derbyshire C.C., [1897] *A.C.* 550.

63. Lucas v. Evans (1745), 3 *Atk.* 260; Hambrook v. Smith (1852), 17 *Sim.* 209; Hurst v. Hurst (1874), 30 *L.T.* 698.

64. Pye v. Butterfield (1864), 5 *B. & S.* 829.

65. *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict., c. 41, s.14. Now see the *Law of Property Act, 1925*, 15 & 16 George V, c. 20, s.146. On the tenant's right to relief against forfeiture see E.H. Burn, *Cheshire's Modern Law of Real Property*, 11th ed. (London, Butterworths, 1972), at 430-4.

66. Cmnd. 3472, at 7.

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67. *Loc. cit.*

68. S. 14

69. Cmnd. 4991, at 103, and draft clause 15.

70. Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. (1915), 83 *L.J.K.B.* 1574.

71. Some of the leading cases that hold such a privilege exists are The Trial of Nathanael Reading (1679), 7 *How. St.Tr.* 259, at 296; Anonymous (1690), 1 *Salk.* 153; Finch v. Finch (1752), 2 *Ves. Sen.* 491; Franco v. Bolton (1797), 3 *Ves. Jr.* 368; R. v. Lewis (1801), 4 *Esp.* 225; Macbride v. Macbride (1801), 4 *Esp.* 242. The subject was of considerable interest in the middle of the 19th century: see S.M. Phillipps, *Law of Evidence*, 10th ed. (London, Wm. Benning, 1852), vol. 2, at 493-503, and W.M. Best, *Principles of Evidence*, 2nd. ed. (London, S. Sweet, 1855), at 163-7. Both authors suggested that the witness was bound to answer questions tending to disgrace his character if they were relevant to the transaction in issue, but they said that the cases were inconclusive as to whether answers had to be given if the questions were relevant only on a collateral issue such as the witness's credibility.

72. Anonymous (1755), 2 *Ves. Sen.* 631; Coffin v. Cooper (1801), 6 *Ves. Jr.* 514.

73. Ex. p. Simpson (1809), 15 *Ves. Jr.* 476, at 477.

74. E.g., Fisher v. Owen (1878), 8 *Ch. D.* 645.

75. E.g., R. v. Lewis (1801), 4 *Esp.*225, at 226; Macbride v. Macbride (1801), 4 *Esp.* 242.

76. There are a number of cases in which the two are treated together: The Trial of Nathanael Reading (1679), *How. St. Tr.* 259, at 296; Anonymous (1690), 1 *Salk.* 153; The Trial of Sir John Freind (1696), 13 *How. St. Tr.* 1, at 16; The Trial of James O'Coigly (1798), 26 *How. St. Tr.* 1191, at 1353; R. v. Lewis (1801), 4 *Esp.* 225, at 226; R. v. Hodgson (1812), *Russ. & Ry.* 211; Swift v. Swift (1832) 4 *Hag. Ec.* 139, at 154-5.

77. See *infra*, footnotes 86 and 87. In particular, see Parkhurst v. Lowten (1819), 2 *Swan.* 194, at 216.

78. The *Criminal Procedure Act, 1865*, 28 & 29 Vict., c. 18, s. 6, permits questioning of a witness regarding convictions, and proof thereof if the witness denies or fails to admit same [this applies to civil as well as criminal cases]; the *Evidence Further Amendment Act, 1869*, 32 & 33 Vict. c. 68, s. 3, forbade, in proceedings instituted in consequence of adultery, the asking of questions tending to show that the witness had committed adultery. With regard to pleadings and affidavits, the Supreme Court has the power under Orders 18/19 and 41/6 to strike out

scandalous matter.

79. (1603?), *Noy* 151.

80. *Loc. Cit.* Italics added.

81. (1658), *Hardres* 137.

82. *Ibid.*, at 139, italics added.

83. 46 George III, c. 37. The debate on Lord Melville's impeachment is found in *Cobbett's Parliamentary Debates* (1806), vol. 6. The opinions of the judges are found at 234-9 and 244-9.

84. Thomas v. Newton (1826), *M. & M.* 48n; R. v. Adey (1831), 1 *M. & Rob.* 94; R. v. Garbett (1847), 2 *Car. & Kir.* 474; Boyle v. Wiseman (1855), 1 *Jur. N.S.* 115; Osborne v. London Dock Co. (1855), 10 *Ex.* 698.

85. Parkhurst v. Lowten (1819), 2 *Swan.* 194.

86. The Trial of Nathanael Reading (1679), 7 *How. St. Tr.* 259, at 296; The Trial of Richard Langhorn (1679), 7 *How. St. Tr.* 417, at 435; The Trial of the Earl of Castlemaine (1680), 7 *How. St. Tr.* 1067, at 1096; The Trial of Sir John Freind (1696), 13 *How. St. Tr.* 1, at 16; The Trial of James O'Coigly (1798), 26 *How. St. Tr.* 1191, at 1353; R. v. Lewis (1801), 4 *Esp.* 225, at 226; R. v. Pegler (1833), 5 *C. & P.* 521.

87. Perhaps the leading authority upon which subsequent practice was based is Paxton v. Douglas (1809), 16 *Ves. Jr.* 239: this particular point being discussed at 242. See also Wakley v. Cooke (1849), 4 *Ex.* 511; Bickford v. Darcy & Beachey (1866), *L.R. 1 Ex.* 354; McFadzen v. Liverpool (1868), *L.R. 3 Ex.* 279; Fisher v. Owen (1878) 8 *Ch.D.* 645; Allhusen v. Labouchere (1878), 3 *Q.B.D.* 654. The *Evidence Further Amendment Act, 1869*, s. 3, forbidding questions tending to show that the witness had committed adultery, was an exception to this practice until repealed by the *Civil Evidence Act 1968*, s. 16(5). With regard to discovery of documents the House of Lords held in National Association of Operative Plasterers v. Smithies, [1906] *A.C.* 434 that the privilege against self-incrimination could not be used as a basis for refusing to provide an affidavit of documents, but only to resist a demand for production of specific documents.

88. See Sloman v. Kelly (1839), 3 *Y & C. Ex.* 673, at 674n, citing the practice of Garrow B. at nisi prius.

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89. There are a number of cases that indicate that the former practice was for the judge to advise the witness that he need not answer: Bembridge's Trial (1783), 22 *How. St. Tr.* 1, at 143 (*arguendo*); The Trial of Robert Watts (1794), 23 *How. St. Tr.* 1167, at 1264-6 (*arguendo*); Lloyd v. Passingham (1809), 16 *Ves. Jr.* 59, at 64; Paxton v. Douglas (1809), 16 *Ves. Jr.* 239, at 242; Wakley v. Cooke (1849), 4 *Ex.* 511, at 518; and Fisher v. Ronald (1852), 12 *C.B.* 762, at 763-4.

90. (1873), *L.R. 4 P.C.* 599.

91. *Ibid.*, at 607-8. The case does not prevent a judge from advising a witness of the Privilege, but only says that it is not mandatory. It is still common practice for judges to advise witnesses that they need not answer obviously incriminating questions.

92. Claridge v. Hoare (1807), 14 *Ves. Jr.* 59; Dandridge v. Corden (1827), 3 *C. & P.* 11; Fisher v. Ronald (1852), 12 *C.B.* 762; Adams v. Lloyd (1858), 3 *H. & N.* 351; Scott v. Miller (1859), 5 *Jur. N.S.* 858.

93. (1852), 12 *C.B.* 762.

94. Adams v. Lloyd (1858), 3 *H. & N.* 351.

95. Not only did the judges require the witness to swear that the answer would incriminate them (see Osborne v. London Dock Co.) (1855), 10 *Ex.* 698; The Mary (1868), *L.R. 2 A. & E.* 319; and Webb v. East (1880), 41 *L.T. (N.S.)*715, but in Short v. Mercier (1851), 3 *Mac. & G.* 205, Truro L.C. said at 217: "... it will satisfy the rule if he states circumstances, consistent on the face of them with the existence of the peril alleged, and which also render it *extremely probable*" [italics added].

96. R. v. Boyes (1861), 1 *B. & S.* 311, at 329-30.

97. Ex. p. Reynolds (1882),20 *Ch.D.* 294.

98. The courts have used a veriety of terms to describe the degree of implication that suffices to entitle a witness to claim the Privilege: "tends to incriminate", R. v. Slaney (1832), 5 *C. & P.* 213; "may be links in a chain", Cates v. Hardacre (1811), 3 *Taun.* 424; "may furnish a step in the prosecution", Claridge v. Hoare (1807), 14 *Ves. Jr.* 59; "if the defendant is not obliged to answer the facts, he need not answer the circumstances", East India Co. v. Campbel (1749), 1 *Ves. Sen.* 246.

99. Sharp v. Carter & Evans (1735) 3 *Peere Wms.* 375; Harrison v. Southcote (1751), 1 *Atk.* 528.

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100. *Wigmore*, vol. 3A (Chadbourne revision), at 860, states that the courts granted the privilege if the facts directly involved disgrace and not merely tended to disgrace the witness. He cites Lord Alvanley in Macbride v. Macbride (1801), 4 *Esp.* 242, at 243: "I will not say that a witness shall not be asked to what may tend to disparage him: that would prevent an investigation into the character of the witness, which it may be often of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness." However, in R. v. Hodgson (1812), *Russ. & Ry.* 211, the Court of Crown Cases Reserved held that the complainant in a rape case need not answer questions whether she had had connections with persons other than the accused "as they *tended* to criminate and disgrace her" [italics added]. Moreover, both Phillipps and Best, writing at a time when the privilege was still recognized by the courts, describe it in terms of questions "tending to disgrace": see S.M. Phillipps. *Law of Evidence*, 10th ed. (London, Wm. Benning, 1852), vol. 2, at 493, and W.M. Best, *Principles of Evidence*, 2nd ed. (London, S. Sweet, 1855), at 163.

101. Thomas v. Newton (1826), *M. & M.* 48n.; R. v. Adey (1831), 1 *M. & Rob.* 94.

102. If counsel can question whether a warning should be given about the Privilege [see J.F. Josling, "Self-Incrimination in Evidence", [1954] *Criminal Law Review* 916], it would seem to follow that they should be able to question whether the Privilege ought to be granted. Perhaps, however, counsel should not be allowed to cross-examine the witness in a *voir dire* on the issue.

103. R. v. Garbett (1847), 2 *Car. & Kir.* 474; R. v. Kinglake (1870), 11 *Cox C.C.* 499.

104. R. v. Kinglake (*supra*).

105. See Triplex Safety Glass Co. v. Lancegaye Safety Glass (1934) Ltd., [1939] 2 *K.B.* 395. The degree of danger the witness must be in was discussed in R. v. Boyes (1861), 1 *B. & S.* 311 (*supra*, footnote 96). Cockburn C.J., speaking for the Court, said (at 330): "...we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things - not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." In that case the court rejected a claim of privilege based on the danger of impeachment for an electoral offence. The danger of ecclesiastical punishment was held to be too remote in Redfern v. Redfern, [1891] *P.* 139, and Blunt v. Park Lane Hotel, [1942] 2 *K.B.* 253. Where penalties have

expired, no privilege will be granted: Roberts v. Allatt (1828), 1 *M. & M.* 192; Trinity House v. Burge (1828), 2 *Sim.* 411; and Ewing v. Osbaldiston (1834), 6 *Sim.* 608.

106. The first *Bankruptcy Act*, 34 & 35 Henry VIII, c.4 (1542), empowered certain Lords to examine under oath all persons who might be holding property of the bankrupt or who might be indebted to him. If such persons did not disclose "the plain and whole Truth" to the satisfaction of the said Lords, they would lose and forfeit double the value of all goods, chattels, debts etc. by then concealed. The bankrupt himself became subject to compulsory examination and was specifically deprived of any right to refuse to answer by 5 George II c. 30, s. 16 (1732). See now the *Bankruptcy Act*, 1914, 4 & 5 George V, c.59, s. 15(B). Another area in which the public interest at an early date was held to be supreme was gaming: see 9 Anne, c. 14 ss. 3-4 (1710).

107. J.D. Heydon, "Statutory Restrictions on the Privilege Against Self-Incrimination" (1971), 87 *Law Quarterly Review* 214 examines the different types of immunity provisions found in English statutes. Bankruptcy is an exceptional case, for the disclosures of the bankrupt on compulsory examination can be used against him in other proceedings: R. v. Scott (1856), *Dears, & B.C.C.* 47; R. v. Cherry (1871), 12 *Cox C.C.* 32; R. v. Robinson (1872), *L.R.* 1 *C.C.R.* 80; In re Solicitor (1890), 25 *Q.B.D.* 17; R. v. Erdheim, [1896] 2 *Q.B.* 260.

108. African Co. v. Parish (1691), 2 *Vern.* 244; East India Co. v. Atkins (1720), 1 *Str.* 168; Jackson v. Benson (1826), 1 *Y. & J.* 32; Green v. Weaver (1827), 1 *Sim.* 404. In Lee v. Read (1842), 5 *Beav.* 381, at 385 the Master of the Rolls questioned whether a person could deprive himself of the privilege against self-incrimination by agreement.

109. Belsham v. Harrison (1846), 15 *L.J. Ch.* 438; R. v. Garbett (1847), 2 *Car. & Kir.* 474.

110. The chief authority for this proposition is East v. Chapman (1827), 2 *C. & P.* 570 where Abbott C.J. said, at 573, "I think, having given evidence, you must answer the question. You might have objected to give evidence at first; but having gone through a long history of what passed, and was not taken down, you must still go on, otherwise the Jury will only know half of the matter." See also Sloman v. Kelly (1839), 3 *Y. & C.* 673.

111. 340 U.S. 367, at 374 (1951).

112. (1852), 20 L.T. 272. The following cases, though not involving the Privilege, are examples of cases in which the Chancery required disclosure to prevent a fraud: Dixon v. Olmius (1787), 1 *Cox Eq. Cas.* 414; Bulkeley v. Dunbar (1792), 1 *Anst.* 37; and Stickland v. Aldridge (1804), 9 *Ves. Jr.* 516.

113. *Ibid.*, at 273.

114. While arguments based on silence are always dangerous, it is significant that the greatest authority on Evidence, Wigmore, does not mention the exception.

115. 61 & 62 Vict., c. 36.

116. Boyle v. Wiseman (1855), 1 *Jur. N.S.* 115, per Alderson B. (*arguendo*), at 116. On the other hand Park B. said *loc. cit.*: "If silence under such circumstances is to be taken as an admission of guilt the protection given by the statute will be useless. It is impossible however to prevent the jury hearing the refusal to answer."

117. Harries v. Thomas (1917), 25 *Cox C.C.* 753, per Lord Lindley C.J. at 757. For an admirable discussion of the accused's right not to be questioned see Glanville William, *The Proof of Guilt*, 3rd ed. (London, Stevens & Sons, 1963), chapter 3.

118. R. v. Mudge (1908), 1 *C. App. R.* 62; R. v. Kirkham (1909), 2 *C. App. R.* 253; Tumahole Bereng v. R., [1949] *A.C.* 253, at 270 (P.C.); R. v. Sharmpal Singh, [1962] 2 *W.L.R.* 238, at 245 (P.C.).

119. Boyle v. Wiseman, *supra*, footnote 116. Presumably the whole purpose of allowing judicial comment on the failure of the accused to testify is to draw the attention of the jury to the fact and tacitly invite them to draw logical inferences therefrom.

120. See R. v. Mudge and R. v. Kirkham, *supra*, footnote 118.

121. See Glanville Williams, *The Proof of Guilt* (*supra*, footnote 117), at 67-8.

122. The survey was done as part of the research for this work. The ten busiest criminal jury courts in England, chosen by reference to the *Home Office Supplementary Statistics Relating to Crime and Criminal Proceedings* for the years 1965-7, were contacted and asked to co-operate in gathering data in 1969 on (a) the number of witnesses who claimed the privilege not to answer specific incriminating questions, and (b) the percentage of defendants in contested cases who failed to enter the witness box. Information was obtained from eight of the courts, either through the Clerks of the Peace (or Assize) or the Prosecuting Solicitors for varying periods of 1969.

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Court	Survey Period	Witnesses claiming Privilege	Defendants	Defendants not entering W. Box
Inner London Q. Sessions	Jan - Jun	0	894	3
Middlesex Q. Sessions	Jan - Dec	2	617	2
N.E. London Q. Sessions	Aug - Dec	4	172	4
Old Bailey	Jan - Dec	0	667	14
Leeds Assize Ct.	Jan - Dec	0	182	6
Manchester Crown Ct.	Jan - Jun	2	215	0
West Riding Q. Sessions	Jan - Dec	1	108	4
		9	2,855 *	33

(* This number includes only defendants in contested cases, excluding guilty pleas and sentencing cases. Figures from the eighth court, the Crown Court of Liverpool, did not give a breakdown to show the number of defendants in contested cases, but revealed that in 1,163 cases handled by the Prosecuting Solicitor, 10 defendants did not enter the witness box and no witness claimed the privilege against self-incrimination. Incomplete returns on the types of charges involved in the cases where the accused did not enter the witness box reveal no discernible pattern.)

123. Cmnd. 4991, draft clause 5(1) and 5(2).

124. *Ibid.*, draft clause 5(4)

125. *Ibid.*, draft clause 5(3)

126. *Ibid.*, draft clause 5(5)

127. R. v. Minihane (1921), 16 *C. App. R.* 38. *Wigmore*, vol. 8 McNaughton revision), at 456-75 deals with the effect of waiver by voluntarily entering the witness box.

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128. Evidence of other offences may be admissible in the following exceptional ways: (1) under the similar facts rule; (2) under the *res gestae* doctrine; (3) where proof of the other offence is a necessary element of proof of the offence charged; (4) in certain cases on the issue of credibility; and (5) where the other offence has already been brought out in examination-in-chief. The lattermost exception was established by the House of Lords in Jones v. D.P.P., [1962] *A.C.* 635, which is the leading case on the interaction of paragraphs (*e*) and (*f*) of section 1. On the facts of the case the majority of the House found that cross-examination with respect to the other offence did not offend the prohibition in 1 (*f*) because the jury was already aware of it from the evidence-in-chief. The House was divided (3-2) on whether questions that did offend 1 (*f*) could still be admissible under 1 (*e*) as being relevant to proof of the offence charged: the majority asserting that they could not.

It should be pointed out also that the accused may open himself to attack by setting up his own good character, or by casting imputations on the character of the prosecutor or the witnesses for the prosecution (s. 1(*f*)(*i*)) or by giving evidence against a co-accused (s. 1(*f*)(*ii*))

129. Orme v. Crockford (1824), 13 *Pri.* 376. The dicta of the majority in Jones v. D.P.P., *supra*, would support the view that s. 1(e) should be given a restrictive interpretation. However, it should be noted that *Wigmore*, vol. 8 (McNaughton revision), at 459-62 favours the view that when the accused voluntarily testifies he waives his privilege against self-incrimination with respect to all relevant questions (except those which merely impeach his credit and are therefore not directly related to the charge). He cites no English authority for this view.

130. Cmnd. 4991, draft clause 15(2)(*b*)(i).

131. *Ibid.*, draft clause 15(2)(*b*)(ii).

132. *Ibid.*, at 104-5.

133. 384 *U.S.* 436 (1966).

134. Cmnd. 4991, at 19, and draft clause 1.

135. *Loc. Cit.*

136. Cmnd. 4991, at 23, and draft clause 1(1).

137. *Ibid.*, at 24-6.

138. *Ibid.*, draft clause 2(2).

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139. *Ibid.*, at 43-4. The Committee expressed the view that the law was too favourable to the accused and that in the light of changed social and legal conditions the law ought to be amended to place greater emphasis upon getting the facts: see pages 9-16.

140. *Ibid.*, draft clause 2(2)

141. R. v. Sartori, Gavin & Phillips, [1961] Crim. L.R. 397; R. v. McLintock, [1962] *Crim. L.R.* 549; R. v. Cave, [1963] *Crim. L.R.* 371.

142. Wendo v. R. (1963), 109 *C.L.R.* 559; R. v. Saunders, [1965] *Q.D. R.* 409. The Canadian cases in the common law provinces generally follow the law as stated in R. v. Thompson [1893] 2 *Q.B.* 12, at 16: "... it must be proved affirmatively *to the satisfaction of the trial Judge* that it was made freely and voluntarily, and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly from language by a person in authority in connection with the prosecution of the person by whom the confession was made." [Italics added.] This test was followed in Re Lewis (1904), 9 *Can. C.C.* 233; R. v. Ryan (1905), 9 *Can. C.C.* 347; R. v. Graf (1909), 15 *Can. C.C.* 193; R. v. Hughes (1920), 35 *Can. C.C.* 103; R. v. Myles (1922), 40 *Can. C.C.* 34; Sankey v. R. [1927] *S.C.R.* 436. An apparent exception to this approach is R. v. Lee, [1953] *O.R.* 34 in which the Ontario Court of Appeal said that the trial Judge could not be satisfied that the statement was voluntary if he had any doubt about it. However, the Court ruled that even though the trial Judge had said in his ruling on the *voir dire* that the onus on the Crown was on the preponderance of evidence, his finding that the statement was admissible was not in error because he did not "suggest that he was in any doubt about the admission of this statement." The Quebec courts also have followed the stricter test: see R. v. Viau (1898), 7 *Que. Q.B.* 362 and Trepanier v. R. (1911), 19 *Can. C.C.* 290.

143. For a survey of criminal cases in which the Privilege was employed, see *supra*, footnote 122. There would be even fewer instances in civil cases. One Chancery judge told me that he could only recall two cases where the Privilege was claimed in his years on the bench.

144. [1939] 2 *K.B.* 395, discussed *supra*, at 51-2.

145. [1962] *A.C.* 635, discussed *supra*, at footnote 128.

146. See *supra*, footnote 35.

147. The best critique of the Privilege is found in Jeremy Bentham's *Rationale of Judicial Evidence* (Bowring ed., 1843), vol. 7, at 451 *et seq.* The utility of the Privilege today will be assessed in a later chapter.

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FOOTNOTES

1. 30 & 31 Vict., c. 3.

2. 17 & 18 Vict., c. 125.

3. 36 & 37 Vict., c. 66, and 38 & 39 Vict., c. 77.

4. Sir Henry Maine said in his *Lectures on the Early History of Institutions*, 4th ed. (London, John Murray, 1885), at 397, "I do not know a single law reform effected since Bentham's day which cannot be traced to his influence." For two of Bentham's principal works on Evidence, see *Rationale of Judicial Evidence* (Bowring ed.) vol. 7, esp. at 451 *et seq.*; and *A Treatise on Judicial Evidence*, extracted from the manuscripts of Jeremy Bentham by M. Dumont. Translated into English (London, from the *Law Journal* published by J.W. Paget, 1825), at 240-5.

5. In *A Short History of the Criminal Evidence Act, 1898*, which is found as a preface to W.B. Allen's *The Criminal Evidence Act, 1898* (London, Butterworth & Co., 1898), Sir Harry Bodkin Poland Q.C. lists twenty-six statutes passed between 1872 and 1897 that rendered the accused and his or her spouse competent witnesses for the defence. A brief account of the attempts to enact a criminal code is found in the *Report of the Royal Commission appointed to consider the Law relating to Indictable Offences* (London, H.M.S.O., 1879 [c. 2345]). The Commission was appointed to inquire into and consider the provisions of the *Criminal Code Indictable Offences Bill*, 1878. The Report recommended the enactment of a criminal code and appended a suggested draft. Pursuant to the Report, the *Criminal Code Bill*, and subsequently the *Criminal Code (No. 2) Bill*, were introduced in 1880. Neither was successful.

6. *Controverted Elections Act* (1873), 36 Vict., c. 28, s. 39 (Can.); *Elections Act* (1874), 37 Vict., c. 9, ss. 99 and 111 (Can.); *An Act for Suppressing Gaming Houses* (1875), 38 Vict., c. 41, s. 7 (Can.); *Canada Temperance Act* (1878), 41 Vict., c. 16, s. 89 (Can.); *An Act Respecting Prize Fighting* (1881), 44 Vict., c. 30, s. 8 (Can.); *An Act Respecting Explosive Substances* (1885), 48-49 Vict., c. 7, s. 8 (Can.); *An Act for the better Preservation of Peace in the Vicinity of Public Works* (1885), 48-49 Vict., c. 80, s. 5 (Can.).

7. *An Act to provide that Persons charged with Common Assault shall be Competent Witnesses* (1878), 41 Vict. c. 18, s. 1 (Can.). The Act was amended to make the accused a compellable witness for the prosecution in cases of battery also by (1880), 43 Vict. c. 37, s. 2 (Can.). The Bill was introduced by Mr. Dymond.

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8. See *Debates of the House of Commons of the Dominion of Canada*, 5th Session - 3rd Parliament, 1878, vol. 4, at 599-616 (debate on second reading).

9. *Ibid.*, at 1305.

10. (1878), 41 Vict. c. 16, s. 123 (Can.)

11. See *Debates of the House of Commons of the Dominion of Canada*, 5th Session - 3rd Parliament, 1878, vol. 5, at 2397-8, where Prime Minister Alexander Mackenzie is reported as saying that matter was one of the greatest importance to this country to find some way to check "the torrent of intoxication which for many years had been increasing and pouring in an unlimited stream over the land", and that the Government had introduced the Bill to repress a traffic "which had produced so much disaster of every kind and which threatened, if left uncontrolled, to exercise a still more disastrous and permanent evil influence on the destinies of this country."

12. (1888), 51 Vict., c. 34, s. 13 (Can.).

13. See *Debates of the House of Commons of the Dominion of Canada*, 3rd Session - 5th Parliament, 1885, vol. 17,, at 504 (vote on second reading) and 616 (third reading given); and *Debates of the Senate of the Dominion of Canada*, 3rd Session - 5th Parliament, 1885, vol. 1, at 578 (motion defeated on second reading).

14. See *Debates of the House of Commons of the Dominion of Canada*, 4th Session - 5th Parliament, 1886, vol. 21, at 707.

15. *Ibid.*, 1st Session - 7th Parliament, 1891, vol. 32, at 2958-60.

16. This Bill was entitled *An Act further to amend the Law of Evidence in Criminal Cases*, and was Bill No. 11, 1891.

17. The responses are to be found in the Public Archives of Canada, Department of Justice Records (R.G. 13, Box 1891-1892, File 240).

18. The Bill was entitled *An Act respecting Witnesses and Evidence*, and was Bill 69, 1892.

19. The responses are to be found in the Public Archives of Canada, Department of Justice Records (R.G. 13, Box 1892-1893, File 480).

20. 3rd Session - 7th Parliament, 1893, Bill 23, s. 4.

21. See *Debates of the House of Commons of the Dominion of Canada*, 3rd Session - 7th Parliament, 1893, at 1674-1704 (debate on second reading); and see comment of Mr. McCarthy on the extent of the opposition to the Bill at 3482. For the Senate deliberations see *Debates of the Senate of the Dominion of Canada*, 3rd Session - 7th Parliament, 1893, at 363-65 (debate on second

reading); 407-24, 426-30 (debate in Committee of the Whole); and 442-47 (debate on third reading).

22. *Debates of the House of Commons of the Dominion of Canada*, 3rd Session - 7th Parliament, 1893, at 3481-86. For a summary of the Parliamentary history of the *Canada Evidence Act* see R.D. Noble, "The Struggle to make the Accused Competent in England and in Canada" (1970), 8 *Osgoode Hall L.J.* 249.

23. The *Canada Evidence Act* (1893), 56 Vict., c. 31 (Can.).

24. (1894), 14 *U.C.R.* 588.

25. (1898), 1 *Can. C.C.* The cases in the intervening period were R. v. Hendershott (1895), 26 *O.R.* 678, and R. v. Williams (1898), 28 *O.R.* 583.

26. (1898), 61 Vict., c. 53 (Can.). R. v. Clark (1901), 5 *Can. C.C.* 235, held that the amendment removed any doubts about whether the Privilege had to be claimed.

27. R. v. Chisholm (1896), 32 *C.L.J.* 591.

28. (1901), 1 Edward VII, c. 36 (Can.).

29. (1903), 33 *S.C.R.* 255.

30. *Ibid.*, at 263-8, Sir Elzear Taschereau C.J.C., said that while he personally would not be unwilling, in cases of ambiguity in statutes, to concede that reference to the debates in Parliament might be useful, he did not feel justified in departing from a rule applied both in England and the United States.

31. (1906), 6 Edward VII, c. 10 (Can.).

32. Section 92(14) of the *British North America Act, 1867*, gives the provincial legislatures exclusive jurisdiction over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." By virtue of Section 91(27), the federal government has the exclusive legislative authority with respect to "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.". Federal authority over civil proceedings in courts other than provincial courts comes from Section 101, which empowers it to establish its own courts, and from the general residuary power under the "Peace, Order and good Government" clause of Section 91.

33. The leading case on this point is C.P. Wines v. Tuley, [1921] 2 *A.C.* 417 (P.C.). On the other hand, in Valin v. Langlois (1897), 3 *S.C.R.* 1 the Supreme Court of Canada suggested that

the federal Parliament has the power to direct what procedure should be adopted in matters within federal jurisdiction. This could cover civil procedure over such matters as divorce.

34. Section 37 provides: "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." R.S.C. 1970, c. E-10.

35. None of the Evidence Acts takes the form of a code, so the common law automatically applies to fill the interstices. The *Criminal Code*, R.S.C. 1970, c. C-34, s. 7(2) and (3) provides:

> "7(2) The criminal law of England that was in force in a province immediately before the 1st day of April, 1955 continues in force in the province except as altered, varied, modified or affected by the Act or any other Act of the Parliament of Canada.
>
> (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada."

36. For Manitoba, Alberta, Saskatchewan, the Northwest Territories and the Yukon, the laws of England relating to civil and criminal matters as they applied to the Territories on July 15, 1870, are in force, insofar as they have not been "repealed, altered, varied, modified or affected" by any Act of the appropriate legislative body in Canada, or by any Act of the United Kingdom Parliament applicable to the said territories. The comparable date for British Columbia is November 19, 1858. In Ontario the date for reception of criminal law is September 17, 1792, but the rules relating to testimony and proof do not have a cut-off date. Quebec did not receive the English law in civil matters, but in criminal matters the date is 1774. The Maritime Provinces - Nova Scotia, New Brunswick and Prince Edward Island - have no cut-off date for the reception of the common law, but have different rules for reception of English statutes. New Brunswick has the date of the Restoration (1660) for general statutes and the date of the establishment of a separate colony (1784) for statutes and rules relating to practice and procedure (Re Belisle & Moreau (1968), 5 *C.R.N.S.* 68); Prince Edward Island's date is 1773, when it became a colony

(Delima v. Paton (1971), 1 *Nfld. & P.E.I. R.* 317); while Nova Scotia courts have held that only those English statutes as are "obviously applicable and necessary" form part of Nova Scotia law (Uniacke v. Dickson (1848), 2 *N.S.L.R.* 287). Newfoundland appears to apply all English laws and statutes "according to the Rules and Course of the Law of England as far as the situation and circumstances" permit (*The Judicature Act*, R.S. Nfld. 1952, c. 114, s. 4, which refers to *An Act for the Better Administration of Justice in Newfoundland* (1824), 5 George IV, c. 67). Whether a particular English statute or rule of law is applicable in a given province has to be determined on an individual basis. For a good discussion of the question see W.H.P. Clement, *The Law of the Canadian Constitution*, 3rd edition (London, Sweet & Maxwell Ltd., 1916), at 271-97 and A.H.F. Lefroy, *A Short Treatise on Canadian Constitutional Law* (London, Sweet & Maxwell Ltd., 1918), at 50-9.

37. Klein et al. v. Bell et al., [1955] *S.C.R.* 309, per Rand J. at 317.

38. Chambers v. Jaffray (1906), 12 *O.L.R.* 377; Klein et al. v. Bell et al. (1954), 12 *W.W.R. (N.S.)* 272 (B.C.C.A.), and [1955] *S.C.R.* 309. This was a subject of considerable debate prior to the latter decision.

39. Tass v. R., [1947] *S.C.R.* 103; Ruest v. R. (1952), 104 *Can. C.C.* 1.

40. R. v. Lunan, [1947] 3 *D.L.R.* 710; Boyer v. R. (1948), 7 *C.R.* 165. It also applies before other bodies whose inquiries are subject to the *Canada Evidence Act*, for example, inquiries conducted by excise officers, R. v. Demark, [1939] 3 *D.L.R.* 386.

41. A.-G. v. Kelly (1916), 10 *W.W.R.* 131. Interrogatories are not used regularly in those provinces where the alternative procedure by way of examination for discovery is available.

42. The most obvious example of a case in which an out-of-court statement might be excluded by the *Canadian Bill of Rights* is where the accused was denied access to counsel during interrogation by the police, contrary to section 2(*c*)(ii): see R. v. Ballegeer, [1969] 3 *Can. C.C.* 353 and Brownridge v. R. [1972] *S.C.R.* 926.

43. R. v. St. Lawrence (1949), 93 *Can. C.C.* 376, where the authorities are reviewed. See also A.-G. for Quebec v. Begin, [1955] *S.C.R.* 593 and R. v. Wray, [1971] *S.C.R.* 272.

44. [1971] *S.C.R.* 272.

45. [1970] 2 *O.R.* 3, at 4.

46. [1955] *A.C.* 197, at 204.

47. [1971] *S.C.R.* 272, at 293.

48. *Ibid.*, at 280.

49. [1958] *S.C.R.* 608.

50. 1960, c. 44 (Can.). See now R.S.C. 1970, Appendix III.

51. [1972] *S.C.R.* 889.

52. 1953-54, c. 51 (Can.) as amended by 1968-69, c. 38, s. 16 (Can.). Now see R.S.C. 1970, c. C-34, ss. 235, 237.

53. [1955] *S.C.R.* 593.

54. [1958] *S.C.R.* 608.

55. [1972] S.C.R. 889, at 916-7.

56. *Ibid.*, at 912.

57. *Ibid.*, at 913.

58. For a list of different types of non-testimonial evidence excluded from the operation of the Privilege see *supra*, chapter two, at 40-1. In R. v. Grinder (1905), 11 *B.C.R.* 370, it was held that a sample of the prisoner's handwriting, which he had been compelled to provide, could not be used in evidence against him on the ground of the privilege against self-incrimination. No authorities were cited, however, and the decision is inconsistent with R. v. Simpson and Simmons (1943) 79 *Can. C.C.* 344, a decision of the Appellate Division of the same court.

59. R.S.M. 1970, c. E-150, s. 7, R.O.N.W.T. 1956, c. 31, s. 8; R.O. Yuk. 1971, c. E-6, s.8.

60. A search of the Department of Justice records and the papers of the then Minister of Justice, Sir John Thompson, in the Public Archives of Canada failed to reveal the source of the draftsman's inspiration. It is possible that the working papers in connection with the drafting of the *Canada Evidence Act* never were kept on file, or, if they were, they may have been destroyed in the fire of 1916 that gutted the Parliament building. Certainly there were a number of models in Canada, the United Kingdom and the United States to which reference should have been made. In R. v. Hammond (1898), 1 *Can. C.C.* 373, a case decided just five years after the introduction of the Evidence Act, it is suggested that the English *Corrupt Practices Act* (1852), 15-16 Vict., c. 57, s. 9, may have served as the basis for the immunity provision of section 5.

61. (1916), 10 *W.W.R.* 131.

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62. (1943), 79 *Can. C.C.* 344.

63. R.S.B.C. 1936, c. 130.

64. "Few principles of statutory interpretation are applied as frequently as the presumption against alterations in the common law. It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question". *Maxwell on The Interpretation of Statutes*, 12th ed., P. St. J. Langan editor (London, Sweet & Maxwell, 1969), at 116. This rule was applied with regard to the privilege against self-incrimination by the House of Lords in Leach v. R., [1912] *A.C.* 305.

65. This conclusion can be justified either on the basis of waiver of the privilege or the rule regarding the use of objective fact evidence. For the former, see R. v. Brown (No. 2) (1963), 42 *W.W.R.* 448, and for the latter see R. v. Simpson & Simmons (1943), 79 *Can. C.C.* 344.

66. (1962), 39 *C.R.*61.

67. *Ibid.*, at 66.

68. See *supra*, chapter two, at 41-2.

69. There do not appear to be any Canadian cases where a witness has refused to produce a public document on the ground of the Privilege; however, the Crown should be able to demand production of its own documents in court: *Wigmore on Evidence* (McNaughton Revision), vol. 8, at 361-2.

70. Hicks v. Rothermel & Burrows, [1949] 2 *W.W.R.* 705.

71. [1931] 1 *D.L.R.* 831.

72. (1851), 3 *Mac. & G.* 205.

73. Klein et al. v. Bell et al., [1955] S.C.R. 309.

74. See Mellor v. Denham (1880), 5 *Q.B.D.* 467.

75. See, for example, In re McNutt (1912), 47 *S.C.R.* 259; Mitchell v. Tracey (1919), 58 *S.C.R.* 640; Nadan v. R., [1926] *A.C.* 483 (P.C.); Saumur v. Recorder's Court (Québec), [1947] S.C.R. 492; Staples v. Isaacs, [1940] 3 *D.L.R.* 473; R. v. Vanleishout (1943), 80 *Can. C.C.* 361; R. v. McIlree, [1950] 1 *W.W.R.* 894.

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76. 7 *St. Tr. (N.S.)* 1049.

77. (1867), *L.R. 4 Eq.* 327.

78. (1881), 6 *S.C.R.* 1.

79. While nothing can be done to protect the witness against the subsequent use of his answer in a foreign court, it would be fair and reasonable to allow him to claim the protection of the Evidence Act with respect to subsequent proceedings (including proceedings under the *Extradition Act*, R.S.C. 1970, c. E-21) in Canadian courts.

80. As to the Privilege not to answer questions having a tendency to incriminate, see D'Ivry v. World Newspaper Co. (1897), 17 *Ont. P.R.* 387; Webster v. Solloway, Mills & Co., [1931] 1 *D.L.R.* 831; and Klein et al. v. Bell et al., [1955] S.C.R. 309. For cases under the Evidence Acts, see *infra*.

81. (1962), 39 *C.R.* 61.

82. [1967] 1 *Can. C.C.* 386.

83. [1966] 2 *O.R.* 867.

84. *Ibid.*, at 902-3, Jessup J. quoted the passage from *Wigmore on Evidence* (McNaughton Revision) vol. 8, at 353, that is set out *supra*, chapter two, at 52-3.

85. *Ibid.*, at 903.

86. (1971), 16 *D.L.R. (3d)* 609.

87. *Ibid.*, at 613.

88. [1971] S.C.R. viii.

89. See *supra*, chapter two, at 48.

90. (1903), 33 *S.C.R.* 255.

91. (1906), 6 Edward *VII*, c. 10 (Can.), which introduced a new section 4 for the *Canada Evidence Act*.

92. *Ibid.*, The new subsection 3 of section 4 provided:

> "Subject to the provisions of subsection 1 of this section, the wife or husband of a person charged with an offence against any of the sections of *The Criminal Code, 1892*, mentioned in schedule C to this Act, shall be a competent and also a compellable witness for the prosecution without the consent of the person charged".

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93. Cross on Evidence, 3rd ed. (London, Butterworths, 1967), at 150, in discussing the apparently conflicting decisions in R. v. Yeo, [1951] 1 *all E.R.* 864, and R. v. Verolla, [1963] 1 *Q.B.* 285, concludes that "...there is much to be said for the view that the applicability of the exception depends on the nature of the charge rather than the supporting evidence. If, by definition, the crime involves injury the to spouse's person, or an infringement of his or her liberty, it should come within the exception." The Canadian picture is by no means clear. In R. v. Taylor (reported only in an annotation on the subject by E.G. Ewaschuk in (1967), 50 *C.R.* 361-73), it was held by Brooke J. of the Ontario High Court on the basis of the Yeo decision that the complainant wife was not competent to testify against her husband in a proceeding under section 717 of the Criminal Code seeking an order that her husband enter into a recognizance to keep the peace. Brooke J. accepted the submission of defence counsel that a proceeding under section 717 did not allege an "offence" which is the term used in the *Canada Evidence Act* section 4(4). He did not examine the possibility that the proceeding was covered by section 7(1) of the *Criminal Code*, which preserves common law rules other than offences. In R. ex rel. Bowles v. Bowles (1967), 50 *C.R.* 353, a decision of the Alberta Magistrate's Court, the accused was charged with forcible entry of a dwelling house in the actual and peaceable possession of his wife. It was held that the proper procedure was to hold a *voir dire* to determine whether the conduct of the accused husband gave the wife reasonable fear that her person, liberty or health were in danger. This approach was disapproved in R. v. Comiskey (1973), 12 *Can. C.C.*410 (Ont. Prov. Ct.), Sharpe, Prov. Ct. J., preferring to look solely to the offence charged, as suggested by Cross. If the offence necessarily involved danger to the persons health or liberty of the spouse, then she would be competent for the Crown. Finally, in R. v. Lonsdale , [1974] 2 W.W.R. 157, the Appellate Division of the Alberta Supreme Court as a preliminary finding held that a charge of attempted murder of the spouse clearly involved violence, thus permitting the spouse to testify. The appropriate solution would appear to be to sweep away all the exceptions and make the spouse of the accused competent but not compellable in all cases, or both competent and compellable but with a privilege not to answer questions incriminating the accused-exercise of such privilege being the basis for an adverse influence,however.

94. [1931] 1 *K.B.* 121.

95. (1970), 73 *W.W.R.* 491.

96. [1974] 2 *W.W.R.* 157.

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97. 61 & 62 Vict., c. 36.

98. Blunt v. Park Lane Hotel Limited, [1942] 2 *K.B.* 253.

99. The variations of the privilege with respect to questions tending to show that the witness has committed adultery are fully set out in W.K. Power, *The Law & Practice Relating to Divorce*, 2nd ed. by J.D . Payne (Calgary, Burroughs & Co. Ltd., and Toronto, The Carswell Co. Ltd. 1964), at 457-66.

99a. For the common law position in Canada, see: Peters v. Irish (1859), 4 *Allen N.B.R.* 326; Burton v. Young (1967), 17 *L.C.R.* 379; Malcolm v. Race (1894), *Ont. P.R.* 330; Pickerel River Improvement Co. v. Moore (1896), 17 *Ont. P.R.* 287; A.-G. for Ontario v. Toronto Junction Recreation Club Ltd. (1904), 7 *O.L.R.* 248. It was held in R. v. Fox (1889), 18 *Ont. P.R.* 343 that section 5 of the *Canada Evidence Act* replaced the old law insofar as penalties under federal statutes were concerned.

100. (1853), 3 *U.C.C.P.* 36, at 50-1.

101. For the dates at which English law was received by the provinces and territories see *supra*, footnote 36. The judge's power to exclude questions of tenuous relevance and high prejudice was recognized by the Supreme Court of Canada in Koufis v. R., [1941] *S.C.R.* 481 and was re-affirmed in R. v. Wray, [1971] S.C.R. 272, at 293. The power of the court in civil cases to expunge scandalous matter is asserted in the Rules of Court: see, for example, Holmested and Gale, *The Judicature Act of Ontario and Rules of Practice*, Cumulative Supplement to vol. 2 (Toronto, The Carswell Co. Ltd., 1973) Rules 138-9, at pages 1113-27.

102. The decision of the Law Lords in Lord Melville's Impeachment was referred to with approval by Maclennan J.A. in Hannum v. M 'Rae (1898), 18 *Ont. P.R.* 185, at 191. On penalties and forfeitures, see R. v. Fox (1899), 18 *Ont. P.R.* 343.

103. See, for example, R. v. Simpson & Simmons (1943), 79 *Can. C.C.* 344, at 346; and R. v. Mottola, [1959] *O.R.* 520, at 524 and 526.

104. For a statement of the appropriate procedure at common law, see Power v. Ellis (1881), 6 *S.C.R.* 1; Klein et al. v. Bell et al., [1955] *S.C.R.* 309, *per* Rand J. at 322; and the cases cited in footnote 84 of chapter two of this work.

105. R. v. Boyes (1861), 1 *B. & S.* 311, at 329-30.

106. (1943), 79 *Can. C.C.* 344.

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107. *Ibid.*, at 347.

108. [1959] *O.R.* 520.

109. Klein et al. v. Bell et al. [1955] *S.C.R.* 309.

110. R.S.C. 1970, c. B-3, s.137 follows the English exception and requires that all questions be answered without any privilege in examinations before the official receiver. This section seems to be in conflict with section 2(*d*) of the *Canadian Bill of Rights*, R.S.C. 1970, Appendix III.

111. For example, the *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 6(4) and (5); the *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 20(2); the *Dominion Controverted Elections Act*, R.S.C. 1970, c. C-28, s. 44; the *Corrupt Practices Inquiries Act*, R.S.C. 1970, c. C-33, ss.25 and 26; the *Canada Elections Act*, R.S.C. 1970, c. 14 (1st Supp.), s. 85; the *National Transportation Act*, R.S.C. 1970, c. N-17, s. 77; the *Railway Act*, R.S.C. 1970, c. R-2, s. 166(4); the *Canada Temperance Act*, R.S.C. 1970, c. T-5, s. 107.

112. R.S.A. 1970, c. 127, s. 7(2); R.S.B.C. 1960, c. 134, s.5(2); R.S.M. 1970, c. E-150, s. 7(2); R.S. Nfld. 1952, c. 120 (as amended 1971, c. 48, s.4), s. 3A(2); R.S.N.S. 1967, c. 94, s. 56(2); R.S.O. 1970, c. 151, s. 9(2); R.O.N.W.T. 1956, c. 31, s. 8(3); R.O. Yuk. 1971, c. E-6, s. 8(3).

113. R.S.N.B. 1952, c. 74, s.7; R.S.P.E.I. 1951, c. 52 (as amended 1955, c. 12, s.1), s. 6; (1965), 13-14 Eliz. II, c. 80, s. 309 (Que.); R.S.S. 1965, c. 80, s. 35(2).

114. Sweezey v. Crystal Chemicals Ltd. (1963), 38 *D.L.R. (2d)* 505.

115. (1965), 13-14 Eliz. II, c. 80, s. 309 (Que.).

116. R.S.Q. 1964, c. 35, s. 41.

117. R.S.Q. 1964, c. 29, s. 33.

118. British Columbia, Newfoundland, Nova Scotia, Ontario, Saskatchewan.

119. Napier v. Napier (1964), 45 *D.L.R. (2d)* 632.

120. Manitoba, New Brunswick, Prince Edward Island, Northwest Territories, Yukon.

121. R.S.A. 1970, c. 127, s. 7(2); (1965), 13-14 Eliz. II, c. 80, s. 309 (Que.).

122. Moorehouse v. Connell (1920), 17 *O.W.N.* 351, per Lennox J. at 352.

123. Kelly v. Mathers (1915), 31 *W.L.R.* 931, at 935, approved on appeal without reference to this point (1916), 8 *W.W.R.* 1208.

124. R. v. Kruschkovski, [1925] 1 *W.W.R.* 426.

125. For example, Leach v. R., [1912] *A.C.* 305, at 311; Batary v. A.-G. for Saskatchewan, [1965] *S.C.R.* 465, at 476; Laberge v. Carbonneau (1930), 30 *Que. K.B.* 385, at 388; Silberberg v. Caron, [1951] *Que. S.C.* 131, at 135.

126. R. v. Krafchenko (1914), 22 *Can. C.C.* 277; R. v. Kelly (1916), 27 *Can. C.C.* 140; R. v. Campbell (1919), 33 *Can. C.C.* 364; R. v. Frederick (1931), 57 *Can. C.C.* 340; R. v. McNab (1945), 83 *Can. C.C.* 176; R. v. Bluske (1948), 90 *Can. C.C.* 203; Jones v. R. (1958), 121 *Can. C.C.* 199.

127. R. v. Binder, [1948] *O.R.* 607; R. v. McDonald [1948] 1 *W.W.R.* 657; R. v. Bouchard, [1970] 5 *Can. C.C.* 95.

128. R. v. Portigal (1923), 40 *Can. C.C.* 63, at 68; McConnell & Beer v. R., *infra* footnote 130; Avon v. R., [1971] *S.C.R.* 650, at 654-5. There have been many more cases, but the last two cases mentioned both being decisions of the Supreme Court of Canada, seem to settle the matter.

129. [1968] *S.C.R.* 802.

130. *Ibid.*, at 809.

131. R. v. Steinberg, [1931] *O.R.* 222, per Middleton J.A. at 236. For other cases to the same effect see R. v. Clark (1901), 3 *O.L.R.* 176, at 181; R. v. Welch (1931), 57 *Can. C.C.* 202, at 205-6; R. v. Duffy (1931), 4 *M.P.R.* 81, at 84. This approach should be compared with the views expressed by Lord Lindley C.J. in Harries v. Thomas (1917), 25 *Cox C.C.* 753, at 757, and echoed by Doull J. in R. v. Jacquard (1950), 98 *Can. C.C.* 72, at 76-7, and Robson J.A. in R. v. Nahirniak (1931), 56 *Can. C.C.* 225, at 242. It may also be argued that Hall J., with whom Cartwright C.J.C. and Spence J. concurred, in Kolnberger v. R., [1969] *S.C.R.* 213, was denying the right of the trial judge to take into account the silence of the accused: (at 219) "Appellant's failure to deny the charge could not be corroboration under s. 134, and in

imposing an onus on the appellant to offer an explanation or contradiction he [the trial judge] was placing a burden on him which the law says does not exist."

132. There are a large number of cases on this point, but as it was expressly stated by the majority of the Supreme Court of Canada in Avon v. R., [1971] *S.C.R.* 650, at 657 that "the fact that the accused did not testify in the face of inculpatory facts was a matter which the Court of Appeal could place on the scale in applying s. 1014(2)", there is no need to refer to lesser authorities.

133. The survey was done as part of this research. Originally it was hoped to have figures for all major criminal jury and non-jury courts in Canada, to make the survey as comparable as possible to that done in England (see footnote 122 *supra* chapter two). Only seven judicial centres were able to co-operate - all in the prairie region. The survey period was one year in each case, either beginning or ending in 1969. Winnipeg provided statistics for two years as indicated.

	No. of Defendants		No. of Defendants not entering the witness box		% of Defendants not entering the witness box	
	Jury	Non-Jury	Jury	Non-Jury	Jury	Non-Jury
CALGARY	25	216	24	190	96.0	88.0
EDMONTON	8	6	6	3	75.0	50.0
MOOSE JAW	5	38	4	22	80.0	58.0
PRINCE ALBERT	19	140	14	80	73.7	57.1
REGINA	17	81	13	56	76.5	69.1
SASKATOON	16	74	6	31	37.5	41.9
WINNIPEG (1968)	19	62	14	22	73.7	35.5
WINNIPEG (1969)	23		16		69.6	
TOTALS	132	617	97	404		
OVERALL AVERAGES					73.5	65.6

134. R. v. Connors (1893), 5 *Can. C.C.* 70; R. v. D'Aoust (1902), 5 *Can C.C.* 407; R. v. Ramsay & Curtin, [1948] 2 *W.W.R.* 1117.

135. R. v. Titchener, [1961] *O.R.* 606 and R. v. Leforte (1961), 29 *D.L.R. (2d)* 459 found that the judge had a discretionary power to exclude questions asked under section 12;however on appeal to the Supreme Court of Canada in the Leforte case, (1962), 31 *D.L.R. (2d)* 1, it was stated that the decisions relied upon in this connection in the court below were based on a different provision. It has since been held that the judge has no discretionary power as the words of section 12 are clear: Clarke v. Holdsworth (1968) 62 *W.W.R.* 1.

136. (1939), 71 *Can. C.C.* 221, at 224. The rule in Regan was approved by the Supreme Court of Canada in Batary v. A.-G. for Saskatchewan, [1965] *S.C.R.* 465, at 473, as far as those tried separately are concerned.

137. *Criminal Code*, R.S.C. 1970, c. C-35, s. 469(1). The statement contemplated by the provision is unsworn and not subject to cross-examination.

138. Batary v. A.-G. for Saskatchewan, [1965] *S.C.R.* 465. In Re Nelson & Jacobson (1967), 1 *C.R.N.S.* 235, McIntyre J., of the British Columbia Supreme Court (Trial Division) held that a person who was accused of a provincial offence (driving without due care and attention) arising out of a fatal accident could not be compelled to testify at a coroner's inquest. This should be compared with R. v. Quebec Municipal Commission et al., Ex parte Longpré, (1970), 11 *D.L.R. (3d)* 491, in which the Quebec Court of Appeal held that someone who had been accused of a crime could be compelled to testify at any trial, inquiry or proceeding other than one whose outcome may involve his conviction. The Court was of the opinion that the witness's position was no different than that of one co-accused, who if tried separately, is compellable against the other co-accused under Re Regan *(supra)*. It is hard to see how the Longpré decision can be correct in the light of Batary, for while one case involved compellability before an administrative tribunal and the other before a coroner's inquest, neither was a proceeding whose outcome could involve the conviction of the witness. Perhaps the Batary case has to be restricted to the finding that the section of the Saskatchewan *Coroners Act* was *ultra vires*: see McFarlane J.A. in R. v. McDonald, Ex parte Whitelaw (1969), 2 *D.L.R. (3d)* 298, at 311.

139. R. v. McDonald, Ex parte Whitelaw (1969), 2 *D.L.R. (3d)* 298; Wyshynski v. Schwartz et al. (1965), 53 *W.W.R.* 422.

140. The Evidence Acts in the following jurisdictions permit a person accused of a provincial offence to be called: Manitoba, R.S.M. 1970, c. E-150, s. 5; Ontario, R.S.O. 1970, c. 151, s. 8(1); Prince Edward Island, R.S.P.E.I. 1951, c. 52, s. 10; Northwest Territories, R.O.N.W.T. 1956, c. 31, s. 4. In Saskatchewan, persons charged under a provincial statute are generally not compellable, with the exception of certain proceedings under *The Deserted Wives' and Children's Maintenance Act* and *The Child Welfare Act;* R.S.S. 1965, c. 80, s. 33(2).

141. R.O. Yuk. 1971, c. E-6, s. 4(2)(*c*).

142. (1963), 42 *W.W.R.* 448. The Supreme Court of Canada adopted the dissenting judgement of Johnson J.A. of the Northwest Territories Court of Appeal in the case below, found in (1963), 41 *W.W.R.* 129.

143. (1963), 41 *W.W.R.* 129, at 141.

144. Bentham described the privilege as the "most remarkable singularity of the law of England", and that even though the privilege was not always scrupulously observed it still excited the regret of every man "who has reflected on criminal jurisprudence, and sees in this indulgence, only a frequent source of impunity and encouragement to crime." See *A Treatise on Judicial Evidence*, extracted from the manuscripts of Jeremy Bentham by M. Dumont. Translated into English. (London, from the *Law Journal* published by J.W. Paget, 1825), at 240.

Chapter Four

FOOTNOTES

1. As part of this research, talks were held with police officers and judges to determine their views, particularly with regard to the rights of the accused. However, as the talks were confidential, and with a limited number of persons, it would not be proper to identify an opinion expressed as "a policeman's view" or a "judicial opinion". As a result of discussions with the General Council of the Bar and with the Law Society, I entered into correspondence with a selected group of barristers and solicitors who do a great deal of criminal work. A total of 10 barristers and 12 solicitors answered a series of questions, in some instances expressing not only a personal but a chambers view. The sample was too small to provide anything other than an impression of professional opinion on the subject, hence it is not reported in detail. It would have been difficult, if not impossible, to obtain a comparable Canadian sample. There are major differences between the practice of law in England and Canada. On the one hand Canada has a unified profession with no division into barristers and solicitors; on the other hand, the profession is organized and administered on a provincial rather than a federal basis. The administrative problems in selecting an appropriate sample of lawyers from across Canada were so awesome that the idea was dropped.

2. See appendix, Prisoner Questionnaire No. 1.

3. See appendix, Prisoner Questionnaire No. 2.

4. See appendix, Prisoner Questionnaire No. 3.

5. The *Criminal Code*, R.S.C. 1970, c. C-34, s. 429.

6. For a short summary of the London study, see W.R. Cornish and A.P. Sealy, "Juries and the Rules of Evidence - L.S.E. Jury Project", [1973] *Crim. L.R.* 208.

7. For a report on the Oxford study, see *The Jury at Work*, by S. McCabe and R. Purves (Oxford University Penal Research Unit, Occasional Paper No. 4, Basil Blackwell, 1972).

8. The question sent to the jurors read as follows:

> The next question has been inserted because a Canadian lawyer is studying different methods of conducting criminal trials. It is hoped that you may be able to answer in a way that may help him. The following is what he has asked us to put to you.

Chapter Four

"By law, the Crown cannot compel the accused to give evidence. The accused has the right to refrain from entering the witness box if he prefers to remain silent.

(a) Suppose that in the case which you heard, the accused had <u>not</u> gone into the witness box. What inference (if any) would you have drawn from this.

i No inference at all.
ii An inference of innocence.
iii An inference of guilt.

(NOTE - There are strong arguments both in favour of and against all of the above choices. Do not feel that there is only one right answer.)

(b) Please state your reasons for your answer in (a) above. (You may continue overleaf, below the ruled line, if you wish.)"

9. See appendix, English Jury Questionnaire.

10. Letter from Roy S. Meldrum, Deputy Attorney General for Saskatchewan, to myself, dated June 9, 1971.

11. I am indebted to Mr. A. Goudie, for his conscientious and careful work as my student assistant in the summer of 1971. Mr. Goudie observed my interviewing technique, and I monitored his until I was satisfied that our procedures were standardized.

12. Seventeen of the persons interviewed had sat on more than one of the trials in question. This accounts for the difference between 107 and 90.

13. See appendix, Canadian Jury Questionnaire.

14. 1972, c. 13, s. 49 (Can.). It is not clear whether the section makes it illegal for a juror to discuss his own views of the case, what inferences he drew from certain facts, how he reacted to the judge's direction, etc. Nor is it clear whether it applies to jurors in civil cases.

Chapter Five

FOOTNOTES

1. For the effect of the Judges' Rules in England, see R. v. Ovenell, [1969] 1 *Q.B.* 17, at 26 (C.A.). For the Canadian position, see R. v. Fitton, [1956] *S.C.R.* 958, per Fauteux J. at 985; R. v. Bohun, [1933] 3 *W.W.R.* 609 (Sask. K.B.); and R. v. Logue, [1969] 2 *Can. C.C.* 346 (Ont. C.A.)

2. Certain terms had to be changed from one questionnaire to another to match the vocabulary of those who were being asked to answer the questions. In the section on attitudes toward hypothetical crime detection methods, the term "has grassed" (question 14-N in the English Prisoner Questionnaire No. 3) was changed to read "has given a statement" on the other questionnaires. The term "junk" (question 14-H) was replaced by "marijuana" in the English jury questionnaire because those administering the questionnaire felt the word "junk" would not be understood by the subjects. For the sake of consistency the Canadian jury questionnaire followed the English jury questionnaire. As "junk" normally is used to refer to hard drugs, the jury response probably should be regarded as a lower bound when compared with prisoner responses to this question.

3. Table 7 should not be used for the purpose of making a comparison between the results for police methods and civilian methods, as not all examples had equivalents in the other list. The Table simply provides an overall comparison of prisoner and juror responses in the two countries.

4. See appendix, Prisoner Questionnaire No. 3, question 13-A.

5. See appendix, Prisoner Questionnaire No. 3, question 13-B, and "The Interrogation of Suspects" (JUSTICE, 12 Crane Court, Fleet Street, London, 1967 (mimeo.)).

6. See appendix, Prisoner Questionnaire No. 3, question 9.

7. See *supra*, chapter 2, footnote 122; and chapter 3, footnote 133.

8. For the complete text of this question, see *supra*, chapter 4, footnote 8.

9. The explanation for the numbers adding up to more than 90 (the total number of jurors involved in the Canadian sample) is that some of the jurors had sat on more than one case.

Chapter Five

10. The figures are based upon responses by 108 English and 97 Canadian prisoners. The distribution in absolute terms was (Canadian figures in parentheses): 90-100%, 63 (36); 80-89%, 14 (13); 70-79%, 15 (18); 60-69%, 8 (8); 50-59%, 5 (15); 25-49%, 2 (3); 0-24%, 1 (4).

11. See appendix, Prisoner Questionnaire No. 3, question 13-C; English Jury Questionnaire, questions 3, 5 and 6; and Canadian Jury Questionnaire (Part B), questions 2, 4 and 5. Statistics on the number of persons prosecuted for perjury committed by them as a witness in their own case are not available. It is evident, however, that the numbers are very small. In the year preceding and the year of the prisoner surveys (1968 and 1969 in England, and 1969 and 1970 in Canada), the rates of prosecutions for and convictions of perjury (which category in the statistics also includes the offence of "making false statements") were as follows: England, 215 and 217 persons proceeded against respectively and 126 and 102 convicted; Canada, 40 and 62 persons proceeded against and 29 and 45 convicted. Unfortunately, the Canadian figures are incomplete as they do not include statistics from Alberta and Québec. These two provinces represented approximately 35% of the total Canadian population in that two-year period, and on that basis one might assume that Canadian figures in the order of 62 and 96 persons proceeded against and 45 and 70 convicted. Comparing Canada's population in 1969 with that of England and Wales (approximately 21,000,000 and 47,000,000 respectively), the rate of prosecutions for perjury was no higher in Canada than in England and Wales, but the success rate was higher. [See *1968 Criminal Statistics England and Wales*, Cmnd. 4098, at pages 30, 130 and 194, and *1969 Criminal Statistics England and Wales*, Cmnd. 4398, at pages 22, 122 and 186. The Canadian figures were obtained directly from the Judicial Division of Statistics Canada.]

12. See appendix, Prisoner Questionnaire No. 3, questions 13-C-i to vi; English Jury Questionnaire questions 3 A to D; and Canadian Jury Questionnaire, Part B, questions 2 A to D.

13. The question had to be recast for the jury questionnaire as it had formed part of a larger question (question 13) of the prisoner questionnaire, the rest of which was not relevant to the jury survey.

14. See appendix, Prisoner Questionnaire No. 3, questions 13-C-vii and viii; English Jury Questionnaire, questions 5 and 6; and Canadian Jury Questionnaire (Part B), questions 4 and 5.

15. One may perhaps take some comfort from the fact that the number of instances in which an innocent man is convicted because of improper police methods is very small. In reply to question 12 of the questionnaire, the English prisoners cited a total of 56 such instances and the Canadian prisoners 32. These numbers are, of course, highly suspect, but they may perhaps be regarded as an upper bound. Assuming that they are correct, they represent 3.0% of the convictions against the prisoners in the English sample and .9% of the convictions against the Canadian sample. [In a few cases the record was not available, and in those cases the prisoner's own statement of his record was used in arriving at total number of convictions for

Chapter Six

FOOTNOTES

1. See the view of the Honourable Edson Haines of the Ontario Supreme Court in *Studies in Canadian Criminal Evidence*, R.E. Salhany and R.J. Carter, editors, (Butterworths, Toronto, 1972) at 321-34.

2. For a good statement of the role of the law see Lawrie v. Muir, 1950 S.C. (J.) 19, at 26-7, per the Lord Justice General.

3. Cmnd. 4991, at 103.

4. The Law Reform Committee in its Sixteenth Report (Privilege in Civil Proceedings), Cmnd. 3472, at para. 13, said simply: "Actions for penalties are now obsolete except in revenue cases. The privilege which dates from a time when actions by common informers were usual is today of little practical importance. But so long as penalties are recoverable in some civil proceedings, we think that the existing privilege should continue to apply and should be extended to answers and documents which would render the witness's or party's spouse liable to a penalty."

5. Cmnd. 3472, at para. 9.

6. *Loc. cit.*

7. For details respecting the two court surveys, see *supra* chapter two, at footnote 122, and chapter three, at footnote 133.

8. See *supra* chapter five, table 13.

9. For an example of a provision like this, see *The Coroners Act, 1972*, Statutes of Ontario 1972, c. 98, s. 34(1).

10. To deter a person from making one statement under the protection of the Evidence Act at the first trial and a different statement at the second, the immunity provision of the Evidence Act should be amended to allow the use of the protected statement not only in a prosecution for perjury in the giving of that statement but also in a prosecution for perjury in the giving of testimony that clearly was in conflict with the protected statement. For discussion of this problem see *supra* chapter three at page 132.

11. For a summary of the attitude of prisoners and jurors surveyed to the question whether the accused should be compellable, see *supra* chapter five, table 16.

12. For details, see *supra* chapter two, at footnote 133.

13. Prisoner and juror ratings of the detrimental effect of disclosure of a serious record of similar offences are set out in tables 9 and 10 of chapter five. Other studies tend to confirm that revelation of a record for similar offences results in a significant increase in the conviction rate by jurors: see the L.S.E. Jury Project, "Juries and Rules of Evidence", [1973] *Crim. L.R.* 208; and A.N. Doob and H.M. Kirshenbaum, "Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon the Accused" (1972-73), 15 *Crim. L.Q.* 88. Insofar as

judges are concerned, Hall J. (dissenting), in DeClercq v. R. [1968] S.C.R. 902, at 922-3, stresses that it is virtually impossible for a judge to erase from his mind highly prejudicial evidence that hehas heard on a *voir dire*. The issue in DeClercq was whether the accused could be asked during a *voir dire* on the admissibility of a confessionwhether the confession was true. The majority of the Supreme Court of Canada, following R. v. La Plante, [1958] *O.W.N.* 80 and R. v. Hammond (1941), 28 *Crim. App. Rep.* 84, held that while the question to be determined was whether the statement was voluntary (not whether it was true), the question of the truth or falsity of the statement could be a relevant consideration in determining its voluntariness. Hall J. held that the decision of the majority effectively removed the accused's privilege against self-incrimination when the trial was before a judge sitting alone, because the judge would not be able to forget the accused's admission of guilt.

14. The *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 4(5) prohibits comment by either the judge or counsel for the prosecution on the failure of the person charged, or the wife or husband of such person, to testify.

15. The case authority for the rule applying only in jury cases is R. v. Binder (1948), 92 *Can. C.C.* 20. The study referred to *supra*, footnote 12, showed that accused persons were more likely to enter the witness box in a trial before a judge alone (where there might be adverse comment) than in a trial before judge and jury. The difference was not, however, statistically significant.

16. The effect of such a comment is not known, but the L.S.E. Jury Project (see *supra*, footnote 13) came to the conclusion that a judicial instruction to disregard evidence of similar previous convictions did in fact have some significant effect. The Doob-Kirshenbaum study (also *supra*, footnote 13) came to the opposite conclusion, but their method did not involve a true simulation jury study, and as only twelve persons heard this particular set of facts, the results must be regarded with some reservations. The Criminal Law Revision Committee was of the opinion that the prosecution should also be allowed to comment on the failure of the accused to enter the witness box. It suggested that any excesses by the Crown could be put in perspective by the final speech for the defence and the summing-up of the judge (Cmnd. 4991, para. 110). However, if comment by the judge were made mandatory as proposed here, there would appear to be no need for comment by the prosecution.

17. For a comparative assessment of risk of prosecution for and conviction of perjury, and the actual statistics on the subject for England and Canada, see *supra*, chapter five, especially at footnote 11.

Chapter Six

18. If accused persons can lie with impunity when they testify, some thought should be given to having them give their evidence unsworn, as in France. This would not, however, overcome the problem of judges and jurors giving their evidence less weight.

19. See *supra*, chapter five, table 1.

20. Many if not most Canadian police carry a card with the standard caution printed thereon. For cases on the Canadian position with respect to the Judges' Rules, see *supra*, chapter five, footnote 1.

21. For a good description of the function of the *juge d'instruction* see G. Stefani and G. Levasseur, *Droit Pénal Général et Procédure Pénale*, 3rd edition, volume 2 "Procédure Pénale" (Dalloz, Paris, 1968), 348 *et seq*. A summary of French criminal procedure in English appears in *The Accused, a Comparative Study*, J.A. Coutts, editor, (Stevens, London, 1966), 209-22 by R. Vouin. It should be noted that the *juge d'instruction* only becomes involved in a very limited number of cases (usually the more serious cases) although theoretically he can be called upon to intervene in any criminal case: see Gerhard O.W. Mueller and Fré Le Poole-Griffiths, *Comparative Criminal Procedure* (New York University Press, New York, and University of London Press, London, 1969), 36-39.

22. For reference to the examination by the magistrate in early English law see *supra*, chapter 1, at footnote 50. Section 26 of the *Indian Evidence Act, 1872*, reads: "No confession made by any person whilst he is in the custody of a police-officer, unless it is made in the immediate presence of a Magistrate shall be proved against such a person." The *Ceylon Evidence Ordinance*, Revised Statutes of Ceylon 1956, c. 14, ss. 25 and 26 contain a similar provision.

23. National Commission on Law Observance and Enforcement (the Wickersham Commission) "Report on Lawlessness in Law Enforcement", No. 11, June 25, 1931, at 5-6. For a similar proposal, see Paul G. Kauper, "Judicial Examination of the Accused - A Remedy for the Third Degree" 30 *Mich. L. Rev.* 1224 (1931-32). The Wickersham Commission proposal is of historic interest only since the decision of the Supreme Court of the United States in Miranda v. Arizona, 384 *U.S.* 436 (1966), that the protection of the 5th Amendment extended to suspects being interrogated by the police.

24. *"The Interrogation of Suspects"* (JUSTICE, 12 Crane Court, Fleet Street, London, 1967 (mimeo.)), and *Compellability of the Accused and the Admissibility of his Statements* (Study Paper No. 5 prepared by the Evidence Project of the Law Reform Commission of Canada, January, 1973).

Chapter Six

25. The "Justice" proposal made an exception where the custody statement had been tape recorded by the police.

26. Cmnd. 4991, at 172.

27. *Criminal Procedure - Discovery* (Working Paper No. 4 of the Law Reform Commission of Canada, June, 1974), at pp. 29 and 31.

28. See *supra*, chapter five, at 186-7.

29. The "Justice" proposal would have allowed even self-serving statements made by the accused before the judicial officer to be adduced regardless of whether he entered the witness box at his trial. This change would favour the cunning criminal who prepares his explanation as he plans his crime. He could thus get his story before the jury without having to face cross-examination. The Study Paper of the Evidence Project of the Law Reform Commission of Canada therefore only allowed previous consistent statements to be adduced if the accused entered the witness box, and this seems to be the better rule.

30. *Supra*, footnote 27, at p. 37

31. *Ibid.*

32. *Ibid.*, at p. 31

33. *Ibid.*, at pp. 30-31.

Prisoner Questionnaire No. 1

I. The police are talking to your friend, George. They tell him that a house on Snob Hill was broken into on Saturday night, and jewels worth £8000 were stolen. They ask him who he was with on Saturday night. In fact, George was with Bill, but he doesn't know whether he should tell the police this. He asks you for practical advice. Four possibilities are:

1. George should refuse to answer the question.
2. George should tell a lie.
3. George should say he was with Bill.
4. George should say that he will answer the question if the police promise not to prosecute him for any crime which his answer may show he committed.

For each of the following situations, indicate which of the four possibilities you would recommend.

____(A) Neither George nor Bill has a record. They did nothing wrong on Saturday night.

____(B) Neither George nor Bill has a record. They did not steal the jewels, but Bill stole a transistor radio from a shop on Saturday night.

____(C) Neither George nor Bill has a record, but they did steal the jewels on Saturday night.

____(D) George has no record, but Bill has a record for entering and theft. They did nothing wrong on Saturday night.

____(E) George has no record, but Bill has a record for entering and theft. They did not steal the jewels, but they broke into a house and stole a tape-recorder on Saturday night.

____(F) George has a record for entering and theft, but Bill has no record. They did nothing wrong on Saturday night.

____(G) George has a record for entering and theft, but Bill has no record. They did not steal the jewels, but George stole money from a vending machine.

____(H) George and Bill both have records for assaulting a police officer. They did nothing wrong on Saturday night.

____(I) George has no record, but Bill has a long record for crimes of violence. They did not steal the jewels on Saturday night, but they broke into a department store. When they were found by the night watchman, Bill killed him.

____(J) George and Bill both have been convicted twice for entering and theft. They did not steal the jewels on Saturday night, but they met with a group of professional bank robbers to plan a £1,000,000 job for two weeks from now.

II. It is for the prosecution to satisfy the jury beyond all reasonable doubt that the accused is guilty. The law does not require the accused to take the witness stand and swear that he is innocent (although if he doesn't the jury may wonder why). If he does take the witness stand to tell his story, he may be cross-examined by the prosecutor. What he says on the witness stand may therefore either help or hurt his case in the eyes of the jury.

In each of the following cases you are asked to help the accused by giving him practical advice. He wants to know whether you think he would be better off to take the stand and tell his story, or not to take the stand at all.

****

(A) George is charged with theft of a car. The prosecution evidence is that George was picked up at 2:00 o'clock in the morning on a country road, driving a 1968 Rover car. The car had been stolen in the city about midnight.

George's story is that he had spent the evening in the pub. On the way home he had seen this car parked on the street, with the keys still in the ignition. He thought that he would give the owner a good lesson by driving the car out into the country, and then phone the owner to tell him not to be so stupid.

Would you advise George to

____ take the stand and tell his story to the jury?

____ stay off the stand and say nothing?

(B) Bill is charged with breaking into a house and stealing seven five-pound notes. The prosecution evidence is that the house at 36 Wellington Street had been entered about 3:00 o'clock on Sunday morning and the notes taken from the house owner's wallet. The next-door neighbour says that she was wakened about that time by a strange noise. She looked outside into the darkness and saw a man climb out of a downstairs window at No. 36. As he ran away he passed within a few feet of the bedroom window that she was looking

out of. Her description of the man generally fitted Bill. The police say that they received a call shortly after 3:00 o'clock, and they sent a squad-car to investigate. Bill was picked up, hiding behind some dustbins, about a quarter of a mile away. At the time he was picked up, Bill had in his pant pocket a few silver coins and seven five-pound notes.

Bill (who lives on the other side of town) told the police, and tells you, that he had bought a dog the day before from a stranger who had come to his door. He had taken the dog out for a walk just before bedtime, and the dog had run away. He had been following the dog for the last three hours.

Would you advise Bill to

____ take the stand and tell his tory to the jury?

____ stay off the stand and say nothing?

(C) Frank is charged with theft of a car. The prosecution evidence is that Frank and another man stole the car from a commercial parking lot in the city, drove it to a farm owned by Frank's uncle, and hid it there in a barn. The parking lot attendant said at the trial that he saw Frank and another man get into the car and drive it off. On cross-examination by Frank's counsel, the attendant stuck to his story, but admitted that he had a criminal record for fraud and perjury.

Frank's story is that he was at home at the time of the theft. His landlady is willing to tell the court that she saw him come into the house about an hour before the theft took place, and she did not see him go out again until the next morning. She admits, however, that he could have gone out. Unfortunately, Frank has a record of two previous convictions for car theft, and several other convictions as well. If Frank takes the stand, the prosecution will be able to tell the jury Frank's record.

Would you advise Frank to

____ take the witness stand and tell his story to the jury?

____ stay off the stand and say nothing?

(D) Henry is charged with stealing £4800 from his employer. The prosecution evidence is that the thief took money that was paid by customers and put it in his pocket instead of in the till. The employer says that Henry had the opportunity to take the money, and Henry left his job as clerk without giving any notice. A police witness says that Henry has been spending a lot of money on high living. The suggestion is that Henry could not afford to live that well on his clerk's salary.

On cross-examination by Henry's counsel, the employer admitted that there were at least two other employees who had the same opportunity as Henry to steal the money. He also admitted that he himself had been keeping a mistress and spending a lot of money.

Henry tells you that he didn't take the money, that he quit the job because he didn't like it, and that he had made a lot of money at the races.

If Henry takes the stand to tell this story, the prosecution will be able to tell the jury about Henry's criminal record. He has been convicted for rape and also for using a knife in a fight.

Would you advise Henry to

____ take the stand and tell his story to the jury?

____ stay off the stand and say nothing?

(E) Herman is charged with fraud. The prosecution evidence is that he was selling shares in a company. Three people who purchased the shares say that Henry told them the company was doing very well. Within a week, the company was declared bankrupt.

On cross-examination by Herman's counsel, the three purchasers admitted that they had bought the shares without making any inquiries about the company. They admitted that Herman was a complete stranger to them at the time he sold them the shares.

Herman tells you that he honestly believed that the company was doing well. He says that he was as surprised as anyone when it went bankrupt. However, when you talk to him he does not look you in the eye, and he often contradicts himself.

Herman's counsel says that the prosecution evidence is weak. Would you advise Herman to

____ take the stand and tell his story to the jury?

____ stay off the stand and say nothing?

(F) Clarence is charged with stealing £25,000 from the safe of a large department store on Saturday night. The prosecution evidence is that sometime in the period 10:00 o'clock Saturday night and 2:00 o'clock Sunday morning, thieves broke into the store and blew the safe. After looking at the job, the police decided to call on Clarence. They arrived at his house at 5:00 o'clock in the morning and found that he was still up. They searched his house and found £15,000 hidden under a loose floor board.

Clarence told the police that he had just got back from a trip in the country. He said that he kept his savings under the floor-board because he thought it was safer there than in the bank.

Clarence tells you, however, that the £15,000 had come from another job. He tells you that he did not do the department store job. He explains that he couldn't have done it because he and a friend were off in a city 150 miles away, blowing the safe in a building society office. That job had netted them £30,000, of which his share was £15,000.

Would you advise him to

____ take the stand?

____ stay off the stand and say nothing?

If he decides to take the stand, what story should he tell:

____ should he tell the story he told the police?

____ should he tell the story he told you?

____ should he deny that he did the department store job, but refuse to answer questions about where he was that night?

____ should he make up a more convincing story about how he got all that money?

III. A head-on collision has occurred between two cars on an open road. Three people were killed. The only survivor is the driver of one of the cars. The police constable investigating the case asks him for a sample of his breath to test for alcohol. The driver refuses. In an ideal system of law, do you think that the driver should be compelled to give a sample of his breath?

____ yes

____ no

IV. A mechanical lie-detector has been developed which is supposed to give accurate results in 96% of the cases. Assuming the lie-detector will say whether a person is lying, and it is only wrong in a very few cases, would you make lie-detector tests compulsory for any or all of the following witnesses? (Tick those who should be compelled.)

____ police witnesses

____ informers

____ women who claim they have been raped

____ all prosecution witnesses

Would you make an accused person take a lie-detector test? Tick the crimes for which you think an accused should be compelled to take the test.

____ spying for the enemy

____ rape

____ indecently assaulting a child

____ crimes of violence

____ murder

____ homosexual offences

____ fraud and false pretences

____ theft and house-breaking

Prisoner Questionnaire No. 2

1. Age

2. Education, including training in trade

3. Has been tried before: Lay Magistrates, Stipendiary Magistrate, Quarter Sessions, Assizes, Old Bailey (circle)

4. Approximate number of convictions

5. When the police ask you a question during their investigation of a crime, do you have to answer them?

6. If you do say anything to the police, are the police able to use your answer later at your trial?

7. Judges' Rules: "You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence."
"I wish to put some questions to you about the offence with which you have been charged. You are not obliged to answer any of these questions, but if you do, the questions and answers will be taken down in writing and may be given in evidence."
-- Are you acquainted with this form of warning? (or a similar form)

8. When the police have questioned you about crimes you have been charged with, have they always given you this or a similar form of warning?

9. There has been a great deal of talk about "improper police methods". What police methods do you think are improper?

10. Have any of these improper methods been used by the police on you?

11. Would you say any of the following police actions were improper?

A. A large, well-built man was being arrested for drunk and disorderly conduct. He swore at the constable and swung at him but missed. The constable hit him in the jaw with his fist and took him away.

B. A policeman in plain clothes went into a house in which alcoholic beverages were being sold illegally. He gave a password and asked to be served a drink. As soon as the money for the drink was accepted, the policeman arrested the proprietor.

C. In an attempt to find out where a large sum of stolen money was hidden, the police hypnotized one of the suspects and asked him questions while he was under the influence of hypnosis.

D. A constable catches some local juveniles drinking gin in a playground. He does not charge them with an offence, but gives them a stern warning and sends them home.

E. A police officer promises not to press charges against one member of a gang of thieves if he will give evidence against his mates.

F. A student, who was taking part in a demonstration against the Vietnam war, called a policeman, who was trying to maintain order, a "f g pig" and hit him on the head with his placard. The policeman hit the student a stiff blow on the shoulder with his nightstick.

G. The traffic police used an unmarked sports car to catch people who were exceeding the speed limit.

H. Frank and Edward are charged with theft. Neither will say anything to the police. They are put in separate cells. A day later, Constable Harris goes to Frank and says, "The game is up; Edward has grassed on. It looks bad for you." Frank then gives a statement. In fact, Edward had not said anything.

I. A policeman in plain clothes went to a suspected narcotics "pusher" and asked for some "junk". When it was handed over by the pusher, the policeman seized him and arrested him.

J. The police raided a brothel. The only clients there at the time were two well-known businessmen. They were told to go home, and were not charged as found-ins.

K. The police capture one member of a gang of armed robbers. The gang has pulled several large jobs and has killed at least three men. As the prisoner will not identify his mates, or tell anything about the operations of the gang, the police doctor administered a dose of a drug which is popularly known as "truth serum". The prisoner was then questioned while under the influence of this drug.

L. A constable stopped a man who was running down a dark street at 2:00 o'clock in the morning and asked what he was doing.

12. What do you think would be the best way to overcome improper police methods?

13. Suppose you were called as a witness either for the prosecution or for the defence. You are asked a question: "Why did you go to Ralph's house?" If you tell the truth, you will have to say that Ralph was operating a fence and you were trying to sell some stolen goods to him. You have not been charged with stealing these goods, and you are afraid that your answer will tip off the police to your guilt. What would you say in reply to the question?

14. Same as 13, but you are the accused, charged with another offence, and you have taken the stand to testify in your own defence.

15. Has a situation similar to Q. 13 ever happened to you? What did you do?

16. Has a situation similar to Q. 14 ever happened to you? What did you do?

17. Have you always taken the witness stand when you were on trial?

18. If you stayed off the witness stand, why did you?

19. What advice does your counsel give you about taking the witness stand?

20. From your dealings with convicted persons who have taken the witness stand in their own trials, what percentage of them do you think lied about some important fact?

21. Have you ever lied about some important fact when you took the witness stand in one of your trials?

22. What do you think are the chances of being caught and convicted of perjury?

PRISONER QUESTIONNAIRE No. 3

1. Do you have to answer questions which the police ask you? (If the subject says "yes", ask him to explain.)

2. If you do say anything to the police, can the police use what you have said as evidence against you at your trial? (If subject says "no", ask for an explanation).

3. When you are being tried for a criminal offence, do you have to go into the witness box and give evidence? (Check to make sure the subject understands the meaning of "criminal offence", "witness box" and "giving evidence".)

4. When the Judge (Recorder or Magistrate) asks you whether you wish to give evidence, what are the possible things that you can do?

5. In cases in which you have pleaded "not guilty", have you always had a lawyer to defend you at your trial? (Check whether subject understands the term "not guilty".)

6. Have you always gone into the witness box and given evidence at your trials?

7. If you did not go into the witness box, why did you not?

8. What advice does your lawyer give you about going into the witness box.

9. From your experience, if an accused person asked you to tell him in what situations he should <u>not</u> go into the witness box, what would you tell him?

10. There has been a great deal of talk about "improper police methods". What methods used by the police do you think are improper?

11. Have any of these improper methods been used by the police on you?

12. As a result of improper police methods, have you ever been convicted of a crime which you did not commit?

13. As you know, I am studying ways to reform the rules which govern the investigation of crimes by the police and the prosecution of crimes in court. A number of people have suggested changes, and I would like to know what you think about some of the suggestions. There are strong arguments both in favour of and against all of the following suggestions, so I don't want you to feel that there is only one right answer. Say what you really think, and you are sure to have some experts who will agree with you.

A. In one country, there is a rule that no evidence which has been obtained as the result of improper police methods can be used against the accused. This is so even if the evidence so obtained proves that the accused actually committed the crime. For example, suppose that the police failed to tell the accused that he did not have to answer any questions; then neither the accused's answers, nor any evidence found by the police as a result of his answers (such as the stolen money or the murder weapon), could be used in evidence against the accused.

i. What would you think of this as a rule for English courts to apply?
ii. Why?
iii. Would you apply the rule in every case, or would you let the prosecution use the evidence in some cases? (If so, which cases?)

B. In another country, there is a rule that if the police wish to question a person about a crime which they think he committed, they must take him before a Magistrate. The Magistrate makes sure that no improper methods are used by the police, and he also makes sure that all questions and answers are accurately recorded. The person being questioned can refuse to answer; but if he does refuse to answer, the prosecution may, at his trial, say that the accused would not answer certain questions.

i. What would you think of this as a rule for English courts to apply?
ii. Why?

C. Another suggestion is that a mechanical lie-detector (which experts say is accurate in 96% of the cases) should be used by the courts as a means of finding out whether a witness is answering truthfully. The lie-detector would not replace the jury, nor would the jury have to accept the lie-detector's results. The results of the lie-detector test would be like the opinion of an expert, which the jury may reject if satisfied that the opinion is incorrect.

i. Would you be in favour of requiring witnesses for the prosecution to give their evidence while attached to a lie-detector?
ii. Why?
iii. Would you be in favour of requiring defence witnesses <u>other than the accused</u> to give their evidence while attached to a lie-detector?
iv. Why?
v. Would you be in favour of requiring at least certain accused persons to give their evidence while attached to a lie-detector? (They would still have the right to refuse to go into the witness box at all.)

vi. (If the answer to v. is "yes") What accused persons?
vii. Would you say that in the trial of some crimes, the accused should be required to go into the witness box?
viii. (If the answer to vii is "yes") What crimes? Why?

14. I am trying to determine the attitude of fair-minded persona to certain methods of crime detection. The examples I use are based on North American rather than British experience, but I would like you to tell me whether you would "approve", "disapprove", or "have no strong feelings" about the use of these methods in England. For example, if I told you that some young boys had been pinching apples from Smith's garden, and Smith one night hid a wire at the foot of his apple tree, which would fire a shotgun in the direction of the apple tree if anybody touched the wire, would you say you "approve", "disapprove", or "have no strong feelings" about Smith's method of crime detection?

A. The police suspected a 13-year-old boy of murder. They picked him up at school one afternoon, and took him to the police station. They kept the boy there alone and questioned him continuously for eight hours until he told them he had done it.

B. A shop was broken into three times in one year. Finally the shopowner installed hidden cameras to take the picture of anyone entering the shop after closing time.

C. A policeman in plain clothes went into a house in which it was suspected that alcohol was being sold illegally. He gave a password, and was served a drink. As soon as the money was accepted for the drink, the proprietor was arrested.

D. A constable stopped a man who was running down a dark street at 2:00 o'clock in the morning, and asked him what he was doing.

E. The owners of an electrical shop suspected that some of their employees had been stealing small things like electric razors and toasters from the shop. To find out who were the guilty ones, the owners made each employee take a lie-detector test.

F. The treasurer of a trade union said that he had been robbed by two masked men when he was taking the union's monthly dues to the bank. The union executive were suspicious of the story, so one of the executive members who was not known to the treasurer, phoned the treasurer and said that he knew the treasurer had pinched the money, and that he would tell the police unless the treasurer gave him half. The treasurer pleaded with him not to go to the police, and agreed to split the money. The union executive tape-recorded the telephone conversation.

G. In order to get evidence to convict a gang of thieves, the police offered to drop charges against one member of the gang if he would give evidence against the others.

H. A policeman in plain clothes went to a suspected drug "pusher" and asked him for some "junk". When it was handed over by the pusher, the policeman arrested him.

I. Someone was stealing petrol from the tank of James's car every week or so. James felt pretty sure that it was his neighbour, Frank, but he had no proof. James was an amateur hypnotist, and one night, when Frank came over for a drink, James hypnotized him and asked him if he had been stealing the petrol.

J. Some drivers drive faster than the speed limit if they think that no traffic police are watching. A very effective way of catching such drivers is by using hidden radar traps.

K. Albert was a very clever burglar. The police could never prove anything against him. One day, two men, identifying themselves as well-known criminals, met Albert and told him they wanted to talk to him about a big job there were planning. They asked him how he operated and what jobs he had done lately. Albert told them all about his last three burglaries. The men were detectives.

L. After a safe-cracking, the police rounded up all the known safe-crackers in the city and brought them to the police station for questioning. Each suspect was taken by himself into the interview room. There, he was told to hold out his hands, and a dry powder was sprinkled on his palms. The police told the suspect that if he was innocent, nothing would happen; but if he was guilty, his hands would begin to sweat during the questioning, and the powder would make his hands itch. One suspect soon began to fidget, and he told where the stolen money was.

M. In a certain county it is against the law to sell beer on Sunday. It was rumoured that a hotel dining-room was breaking this law. In order to get proof, two clergymen took off their clerical collars and visited the hotel for Sunday dinner. They asked for beer, and after a little coaxing the waiter brought them beer in a teapot. The clergymen then informed the police.

N. Bill and Edward were charged with theft. Neither would say anything to the police. They were put in separate cells. A day later, Constable Harris told Bill, "The game is up. Edward has grassed. It looks bad for you." Bill then gave a full statement, telling how he and Edward had done it. In fact, Edward had not said anything to Constable Harris.

15. Suppose that you were called as a witness at the trial of a man named Harold. When you are in the witness box you are asked where and when you first met Harold. Actually, you first met him one night three years ago, when you helped Harold and two other men break into a warehouse and steal a large quantity of electrical goods. Harold and the two others were caught and convicted, but the police never suspected you. So, if you answer the question truthfully, the police quite possibly will look into the warehouse job again and charge you. Now, suppose the law said that you could do one of three things:

    i. Tell the truth; or
    ii. Refuse to answer the question, if you first tell the court that your answer would tend to show that you have committed a crime; or
    iii. Tell the truth, but claim the protection of the Evidence Act. (The Evidence Act would not protect you against being prosecuted for your part in the warehouse job; but if you were prosecuted for it, your answer at Harold's trial could not be used against you.)

There is, of course, a fourth possibility, but it is against the law:

    iv. You could tell a lie, so that the police would not learn of your connection with the warehouse job.

A. What would you do?
B. Why?
C. If you had to choose between the possibilities ii. and iii., which one would you choose?
D. Why?

16. Suppose that you are accused of stealing £450 on December 16th. You are being tried by jury, and at your trial you go into the witness box to give evidence in your own defence. You are asked a question by counsel for the Crown, which you cannot truthfully answer without tipping off the police that you committed another fairly serious theft on December 10th. You don't think that the police suspect you at all of the December 10th theft. Suppose that you have the same choices with regard to answering this question as you had as a witness in previous question. (Repeat the four available choices to the subject.)

A. What would you do?
B. Why?

17. A. Has a situation like that in Q. 15 ever happened to you?
B. What did you do?

18. A. Has a situation like that in Q. 16 ever happened to you?
B. What did you do?

19. A. When you have had a lawyer to defend you, have you always told him the whole truth about your case?
    B. Do you sometimes tell your lawyer the story which you think would help him to prepare a defence for you, rather than what really happened?

20. A. Do you think that the oath means much to the average prisoner
    B. From your conversations and other dealings with prisoners, what percentage of them do you think have lied about some important fact when they were giving evidence from the witness box at their trials?

21. A. What do you think are the chances of being caught and convicted of perjury, (giving false evidence under oath, with the intention of deceiving the court)? (1/10, 1/100, 1/1000 etc.)
    B. Would you say that the chances of being caught and convicted of perjury are greater, much greater, less or much less than are the chances of being caught and convicted for stealing?
    C. If you were caught and convicted of perjury, what do you think the penalty would be?

22. Have you ever lied about some important fact when you were giving evidence from the witness box at one of your trials?

23. At 2:00 o'clock one morning, Jones suddenly woke up and saw a man going out through the bedroom window. Jones rushed to the window and saw the man for a few seconds as the man ran down the street. Jones found that his wallet, containing two £5 notes was gone. He phoned the police and told them that he had been robbed. He also gave a description of the thief, and he added that while he had not had a very good view of him, the man looked very much like Frank, a young man of 22 years of age, who occasionly did odd jobs for Jones.

The police sent a patrol car to the neighbourhood to look for the thief. At 2:15, Frank was found, walking along, about six blocks from the Jones house. He was searched and found to have two £5 notes and three £1 notes. Later, Jones's wallet was found in a dustbin about half-way between the Jones house and where Frank was picked up.

Frank is charged with "burglary", that is, entering and theft. He is being tried by jury. There are a number of things which may occur at the trial, and I would like to know how you think they would affect the jury. I am going to give you three cards. On each card is written something which might happen at Frank's trial. Think about the effect each one would have on Frank's case in the eyes of the jury if it happened all by itself.

Then tell me which one you think would have the worst effect on his case, and which one you think would have the least effect on his case. If you think that there would be no difference in effect between two of the possibilities, please tell me.

(Note for the supervisor. There are six cards to be shown to the subject in groups of three. The six cards read as follows:

--The jury are told that Frank is a layabout who usually lives on the dole.
--The jury are told that a year ago Frank was convicted for fighting in a pub.
--Frank tells the jury the amazing story that he trailing a Russian spy at the time the police picked him up.
--The jury are told that Frank has a record of seven previous convictions for entering and theft.
--Frank does not go into the witness box (where he would have to answer questions put to him by the Crown counsel).
--The jury are told that Frank three years ago was convicted of rape.

The supervisor must check from time to time to be sure that the subject is thinking of these possibilities as separate happenings and not things which happen in combination. The subject's responses must be noted, and the test repeated, varying the combinations of cards, until a reliable rank order appears. This would likely require a minimum of five combinations.

24. Personal data

A. Age B. Age when first convicted C. Marital status
D. Number of children
E. Subject's education
F. Trade or occupation
G. Has been tried by: Lay Magistrates, Stipendiary Magistrate, Quarter Sessions, Assizes (circle appropriate courts).
H. Number of convictions I. Type of convictions
J. Background (working class, middle class, upper class)
K. Environment at various ages (large city, small city, town, village, rural etc.)

_____ . . . _____

(NOTE: The Questionnaire to Canadian Prisoners was identical to the above, except where word changes were necessary in order comply with Canadian usage.)

QUESTIONNAIRE TO ENGLISH SHADOW JURORS

I M P O R T A N T

Please read the following instructions before answering the questions asked.

In order that all persons completing the questionnaire will do so under approximately similar conditions, you are asked to observe the following rules:

1. Do not read the questionnaire until you are ready to answer it.

2. Do not discuss the questionnaire with anyone before answering it, and do not try to guess what others would be likely to give as answers - your own honest opinion is the right answer to each and every question.

3. The questionnaire should be completed in one sitting of 45 minutes or less.

4. Answer all questions in the order in which they appear.

Thank you.

1. At 2:00 o'clock one morning, Smith suddenly woke up and saw a man going out through the bedroom window. Smith rushed to the window and saw the man for a few seconds as he ran down the street. Smith found that his wallet, containing two £5 notes, had gone. He phoned the police at once, and gave a description of the intruder. He concluded by saying, "I did not get a very good look at the man, but from what I saw of him he looked quite a bit like Frank - a young man who does odd jobs for me from time to time."

The police sent a patrol car to the neighbourhood to look for the thief. At 2:15, that is, 15 minutes later, Frank was found, walking along, about six blocks from Smith's house. He was searched and found to have two £5 notes and three £1 notes in his pocket. Later, Smith's empty wallet was found in a dustbin about half-way between Smith's house and where Frank was picked up.

Frank is charged with breaking and entering Smith's house, and with theft of Smith's wallet and its contents. He is being tried by jury. You are a member of the jury. Certain things may happen, and certain evidence may be given during the trial which might affect your decision as to Frank's innocence or guilt. Six such possibilities are set out below:

A. Evidence is given that Frank is a layabout who usually lives on the dole.

B. Evidence is given that a year ago Frank was convicted for fighting in a pub.

C. Frank enters the witness box and tells the amazing story that he was trailing a Russian spy at the time the police picked him up.

D. Evidence is given that Frank has a record of seven previous convictions for entering and theft.

E. Frank does not go into the witness box [where he would have to answer questions put to him by the Crown counsel].

F. Evidence is given that three years ago Frank was convicted of rape.

Consider each of these possibilities in the context of the case. If only one of the six were to happen in the trial, in your eyes as a juror, which one would do Frank's case the most harm? Enter it in the first position of the rank order chart below.

In the same manner, select from the remaining five possibilities the one most harmful to Frank's case and enter it in the second position of the chart. Repeat this process until you have filled all six positions in the chart.

Rank Order Chart

Most harmful to Frank's case 1___; 2____; 3____; 4____; 5____; 6____ Least harmful to Frank's case

2. Bill is called as a witness in Harry's trial. During cross-examination, Bill is asked a question which he cannot answer truthfully without tipping off the police that he himself is guilty of a robbery. Which of the following rules would you like to see applied in this case?

   A. Bill should be excused from answering the question.

   B. Bill should be ordered to answer the question.

   C. Bill should be ordered to answer the question, but he should be given a guarantee that his answer could not be used in evidence against him if he was later charged with the robbery.

   D. Bill should be ordered to answer the question, but he should be given a guarantee that he will not be charged with the robbery.

* * *

3. It has been suggested that a mechanical lie-detector (which experts say is accurate in 96% of the cases) should be used by the courts as a means of finding out whether witnesses are answering truthfully. The lie-detector would not replace the jury, nor would the jury have to accept the results of the lie-detector test. The results of the test would be like the opinion of an expert, which the jury may reject if satisfied that the opinion is incorrect. Under these circumstances, would you as a juror be in favour of making it compulsory for any of the following witnesses to give their evidence while attached to a lie-detector? (Indicate your opinion by writing "yes" or "no" beside each of the categories.)

   A. Prosecution witnesses other than policemen.

   B. Policemen.

   C. Defence witnesses <u>other than the accused</u>.

   D. The accused, if he enters the witness box.

   (If you feel that some, but not all, accused persons should be required to give their evidence while attached to a lie-detector, please specify in space below which accused persons should be so required.)

4. We are trying to determine the attitude of fair-minded persons to certain methods of crime detection. The examples cited below are based on North American rather than British experience. Would you approve(A), disapprove(D), or have no strong feelings (NSF) if these methods were used in England? (Indicate your opinion by writing the appropriate letters, A, D, or NSF, in the margin beside each example.)

A. Some young boys were stealing apples from Smith's garden. One night, Smith set a wire around the foot of his favourite apple tree, and attached the wire to the trigger of a loaded shotgun aimed at the tree. Anyone tripping the wire would be likely to be peppered with buckshot.

B. The police suspected a 13-year old boy of murder. They picked him up at school one afternoon, and took him to the police station. They kept the boy there alone and questioned him continuously for eight hours until he told them he had done it.

C. A shop was broken into three times in one year. Finally, the shopowner installed hidden cameras to take the picture of anyone entering the shop after closing time.

D. A policeman in plain clothes went into a house in which it was suspected that alcohol was being sold illegally. He gave a password, and was served a drink. As soon as the money was accepted for the drink, the proprietor was arrested.

E. A constable stopped a man who was running down a dark street at 2:00 o'clock in the morning, and asked him what he was doing.

F. The owners of an electrical shop suspected that some of their employees had been stealing small things like electric razors and toasters from the shop. To find out who were the guilty ones, the owners made each employee take a lie-detector test.

G. The treasurer of a trade union said that he had been robbed by two masked men when he was taking the union's monthly dues to the bank. The union executives were suspicious of the story, so one of the executive members who was not known to the treasurer, phoned the treasurer and said: "I know that you pinched the money, and unless you give me half of it, I am going to the police!" The treasurer pleaded with him not to go to the police and agreed to split the money. The union executive tape-recorded the telephone conversation.

H. In order to get evidence to convict a gang of thieves, the police offered to drop charges against one member of the gang if he would give evidence against the others.

I. A policeman in plain clothes went to a suspected drug "pusher" and asked him for some marijuana. When it was handed over by the pusher, the policeman arrested him.

J. Someone was stealing petrol from the tank of James' car every week or so. James felt pretty sure that it was his neighbour, Frank, but he had no proof. James was an amateur hypnotist, and one night, when Frank came over for a drink, James hypnotized him and asked him if he had been stealing the petrol.

K. Some drivers drive faster than the speed limit if they think that no traffic police are watching. A very accurate and effective way of catching such drivers is by using hidden radar traps.

L. Albert was a very clever burglar. The police could never prove anything against him. One day, two men, identifying themselves as well-known criminals, met Albert and told him they wanted to talk to him about a big job they were planning. They asked him how he operated, and what jobs he had done lately. Albert told him all about his last three burglaries. The men were detectives.

M. After a safe-breaking, the police rounded up all the known safe-breakers in the city and brought them to the police station for questioning. Each suspect was taken by himself into the interview room. There, he was told to hold out his hands, and a dry powder was sprinkled on his palms. The police told the suspect that if he was innocent, nothing would happen; but if he was guilty, the powder would make his hands itch. One suspect soon began to fidget, and he told where the stolen money was.

N. In a certain county it is against the law to sell beer on Sunday. It was rumoured that a hotel dining-Room was breaking the law. In order to get proof, two clergymen took off their clerical collars and visited the hotel for Sunday dinner. They asked for beer, and after a little coaxing the waiter brought them beer in a teapot. The clergymen then informed the police.

O. Bill and Edward were charged with theft. Neither would say anything to the police. They were put in separate cells. A day later, Constable Harris told Bill, "The game is up. Edward has given us a statement, and it looks bad for you." Bill then gave a full statement, telling how he and Edward had done it. In fact, Edward had not said anything to Constable Harris.

* * *

5. At the present time, the accused himself does not have to go into the witness box unless he wishes to do so. Do you think that in the trial of some crimes the accused should be <u>required</u> to go into the witness box? (Answer either "yes" or "no".)

* * *

6. If your answer to Question 5 is "yes", in the trial of what crimes would you require the accused to go into the witness box?

* * *

7. Alfred is charged with robbery. At his trial his wife is called as a defence witness. In cross-examination, the Counsel for the Crown asked her whether her husband (the accused) had said anything to her about the robbery. She answered, "Yes". Counsel for the Crown then asked her what her husband had told her about the robbery, but she refused to answer this question.

A. If you had been on the jury, what conclusions would you have drawn from her refusal to answer?

B. Would you be in favour of the judge ordering her to answer the question? (Answer either "yes" or "no".)

QUESTIONNAIRE TO SASKATCHEWAN JURORS

Part A General Questions about the Case

1. What crime was the accused charged with?
2. How many days did you actually sit on the case (including considering your verdict)?
3. How long did it take the jury to reach its verdict when it was sent out?
4. What was the verdict?
5. The defence, of course, cross-examined Crown witnesses, but did the defence call any witnesses of its own?
6. Did the accused enter the witness box and testify in his own defence?
7. What do you think influenced your decision the most in the case? (If the juror says "the evidence", ask him to be specific.)
8. Which lawyer (Crown or defence) was the most effective in your opinion?
9. Why do you say he was more effective?
10. If you were marking them out of 100%, what mark would you give (a) Crown counsel (b)defence counsel for effectiveness?
11. How long was the summing up by Crown counsel? by defence counsel? (Check that the juror understands the meaning of the term "summing up".)
12. How long was the judge's direction to the jury?
13. Did you find the direction was clear, or were you left confused by parts of it?
14. Were there any comments in the jury room which indicated that other members of the jury found the judge's direction to be unclear? (If yes, how many jurors felt this way?)
15. To what extent do you think you were influenced in reaching your decision by

	a great deal	moderately	hardly at all
the judge			
Crown counsel			
defence counsel			

16. Do you think any of the witnesses in this case lied, i.e. told a deliberate falsehood, in court? (Answer yes or no. If the answer is yes, indicate whether the witnesses were (a) policemen (b) prosecution witnesses other than police (c) defence witnesses.)

17. By law the Crown cannot compel the accused to give evidence. The accused has the right to remain silent if he wishes. In this case the accused did not take the witness stand.

    (a) Was this fact discussed at all by the jury in considering the case?

    (b) What inference (if any) do you think the majority of the jury drew from the accused not taking the stand? (i) no inference at all (ii) an inference innocence (iii) an inference of guilt

    (c) what inference did you draw?

18. Much of our procedure in trial by jury has come down to us through the centuries. Have you any criticisms of criminal jury trials from the standpoint of a juror? (Did you find, for example, some things about it confusing, aggravating or frustrating?)

Part B Problems

Question

1. Same as question 1 of the English Shadow Jury Questionnaire, except:
   - for the terms "£5 and £1 notes", read $20 and $1 bills;
   - for the term "dustbin", read garbage can;
   - for the term "dole", read welfare; and
   - for the term "pub", read beer parlour.

2. Same as question 3 of the English Shadow Jury Questionnaire except the first parenthetical instruction relating to writing the response was omitted, and the second parenthetical instruction omitted the words "in the space below".

3. Same as question 4 of the English Shadow Jury Questionnaire except:

   - the introduction read as follows:
   "I am trying to determine the attitude of fair-minded persons to certain methods of crime detection. I would like to know whether you would "approve", "disapprove", or "have no strong feelings" about the use of these methods in Canada. For example, if I told you that some young boys had been stealing apples from Smith's garden, and Smith one night hid a wire at the foot of his apple tree, which would fire a shotgun in the direction of the apple tree if anybody touched the wire, would you approve, disapprove or have no strong feelings about Smith's method of crime detection?";

- as the first example about the boys stealing apples was included in the introduction, the remaining examples were designated A through N as on the Prisoner Questionnaire No. 3;
- for the term "petrol", read gasoline
- in the second last example the words "In a certain county" were omitted.

4. and 5. Same as questions 5 and 6 of the English Shadow Jury Questionnaire.

6. Same as question 7 of the English Shadow Jury Questionnaire, except the words "(if any)" were inserted in part A after the word "conclusions".

Part C Personal Data

(a) Trade or occupation.

(b) Education.

(c) Age.

(d) Marital Status.

(e) Number of Children.

(f) Is this the first time that you have sat through a jury trial

(i) as a juror?

(ii) in any other capacity (specify) ?

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