CODIFICATION OF THE LAW OF EVIDENCE: THE AMERICAN PRECEDENT

1. *The Law of Evidence: A State of Opacity*

The law of evidence is not of ancient origin. There was no place for it in the primitive law, nor in early England. When the Normans conquered England one of William's first tasks was to record a census of the people, obtaining his information from the people of the neighbourhood. This constituted the famous *Doomsday* Book. People of the neighbourhood were again the source of facts when in 1166 Henry II established the Assize of Novel Disseisin to solve disputes as to the possession of land. Gradually the inquisitorial system of fact finding evolved, replacing the Anglo-Saxon trial by ordeal and the Anglo-Norman trial by battle, and trial by compurgation. From the twelfth through the sixteenth centuries the inquisitorial system was the most common method of trial and was the forerunner of the trial by jury as we know it today.

During the formative period there arose no need for a law of evidence *per se*. The inquisitors adjudicated disputes on the basis of their own knowledge of the facts. Witnesses could not be compelled to testify before the jury, indeed, the independent witness was frowned upon as an intermeddler. As late as 1670 in *Bushells case,* Vaughan, C. J., allowed the jury to rely upon its own knowledge to nullify the evidence of independent witnesses. By the close of the eighteenth century the practice of independent juries deciding on facts provided by independent witnesses was firmly established. The transition from the inquisitorial to the adversary system had been gradual. With the advent of this latter system, the law of evidence as we think of it today began to emerge.

Evidence is a curious subject; only the common law system has such a thing as a branch of the law called evidence. Other systems of law and judicial bodies in our own system which are not classified as courts, seem to function quite well without it.[1] While evidence enters into every legal subject that we use, the common law system has treated it as though it were a separate branch of the law. It is difficult to disagree with Professor Murray when he says it is not possible to classify evidence, as we do the other branches of the common law. "When it comes to classi-

1. Murray, Evidence: A Fresh Approach, p. 577.

fication," he states, "the law of evidence is an *avis rarissima* — a very rare bird."[2]

Because of the curious nature of this branch of the law, the result of its evolution midst neat categories of property, torts, and contract, the rules of evidence have in the main resisted change over the centuries. Jerome Frank in his book *Courts on Trial* has commented on this when noting that contemporary legal education deals with the application of rules of law to a given set of facts, an education which in the main relates not to the fact finding function of the trial court but to the function of an appellate court:

> "Yet trial court fact finding is the toughest part of a judicial function. It is there that court-house government is least satisfactory. It is there that most of the very considerable amount of judicial injustice occurs. It is there that reform is most needed".[3]

Why have these rules of evidence resisted change? Perhaps it is because we have been taught to approach our rules of evidence with a feeling akin to reverence. Consider the following opinion:

> "During the nineteenth century . . . [rules of evidence] were looked upon with almost religious sanctity without consideration being given to whether their source was historical accident, a social policy of the time of their origin, an outgrowth of a formalism then found in pleading and procedure generally, or was based upon a sound principle of logic and psychology. Discrimination was not made between principles fundamentally sound and those fantastic in their origin. Generally speaking, it was enough that the rule had been stated and being a rule of evidence its sins were white-washed and its virtue exhorted. In a large measure evidence rules were *learned rather than thought through*, and efforts were directed toward their classification rather than their criticism."[4]

Thus the nineteenth century championed the adversary system; the rules of evidence were accepted with little question. Despite the numerous statutory changes and judicial re-examinations the existing restrictive approach was sustained. This was at the expense of a great loss of material and relevant evidence. It was an age of rules-ism and not realism.

What are the results of this resistance to reform? Cecil A. Wright in his review of the eighth edition of *Phipson*, conjectured:

> "The profession will no doubt continue to find the present volume as helpful as past volumes in providing simple authority to prove that almost anything is inadmissible, at the same time it will provide as little comfort intellectually as we have become accustomed to the subject as currently treated."[5]

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2. Ibid. p. 578.
3. Frank, Courts on Trial, p. 4.
4. Ladd, A Modern Code of Evidence, p. 338, Model Code of Evidence.
5. Wright, The Law of Evidence: Present and Future, p. 714.

Despite the high place which the book holds among practitioners says Wright, it is both depressing and discouraging. It is depressing because there seems to be an endless pitting of authority upon authority, of isolated case upon isolated case, of countless distinctions of cases from other cases; of distinctions which the reader at any rate could not understand. It is discouraging because, while the subject of evidence might appear to have as its object the due ascertainment of truth, the bulk of the volume thereof would suggest that the concern is with preventing the ascertainment of truth via the application of technical rules. These rules are justified by "cloudy generalizations unsupported by experience". If these conclusions be valid, then the harsh things which have been said by laymen about the administration of justice could well be soundly based.

One result of this conglomeration of outdated and confusing rules has been that they frequently are ignored by trial judges. Mr. Justice Charles E. Clark of the United States Court of Appeals for the second circuit has noted that while scholars and appeal courts have been struggling with the weight of the myriad authorities, trial courts have in the main been sensibly ignoring them.[6] Appeal Courts today are not too disturbed when evidence is wrongly admitted. The admission of incompetent evidence will not provide reason for the reversal of a judgment at first instance, unless all of the competent evidence is insufficient to support the judgment; or unless the finding was clearly induced by the incompetent evidence. This modern attitude is based upon good common sense.

If this sensible behaviour by our judges prevails, then why the need to change the rules of evidence which only purport to restrict admissibility to an absurd extent? Such rhetoric raises two other questions. First, of what value are these intricate and conflicting rules if our judiciary often ignores them? Second, would our law of evidence not be made more cogent and meaningful to us if it consisted of a series of broadly stated rules which we all could agree are truly fundamental to the conduct of a fair trial? As it stands our rules of evidence have become so complicated that only persons with very gifted minds have the ability to understand and apply them correctly.

> "Certainly no one save a lawyer can understand the law of evidence; and, in the opinion of this writer no lawyer even though he may admit to understanding that law, could explain it."[7]

6. Clark "Forward to a symposium of the Uniform Rules of Evidence" . . . contained in Murray, op. cit., p. 579.
7. Wright, op. cit., p. 719.

There are grave dangers in refusing to respond to so obvious a challenge. Simplification of the law of evidence is essential if the courts are to function efficiently; it is essential if the courts of law are not to lose further ground to administrative bodies of various kinds; it is essential so that the administration of justice will not merit the harsh comments made by laymen. However, before we can render our rules of evidence clear and understandable to everyone, we shall first have to rationalize them in the light of their purpose.[8]

II. *The Mechanics of Reform: The American Choice*

A good starting point is the definition of evidence itself. Phipson defines evidence as: "the testimony . . . which may be legally received in order to prove or disprove some fact in dispute."[9] Nokes defines evidence as "that which makes evident a fact to a judicial tribunal".[10] Professor Murray feels these definitions beg the question which the student wishes answered. Presumably one must read through some 7000 precedents collected by Phipson to find out just what evidence can "make evident a fact" or can be "legally received".[11]

James Bradley Thayer said in 1898 that: "unless excluded by some rule or principle of law all that is logically probative is admissible".[12] It is submitted that this latter definition is most cogent. This approach to the law of evidence has been recognized by the English courts. In 1946 Lord Goddard C. J. stated:[13]

> "We start with the general principles that evidence is admissible if it is logically probative . . . This is the proper and sensible approach."

Such an approach has also gained favour in Canada. The purpose of the law of evidence said Cecil Wright, in his article supporting a code of evidence, is,

> "the introduction of all logically relevant evidence without sacrificing any fundamental policy of the law which may be of more importance than the ascertainment of truth".[14]

If this be the rationale behind the rules of the law of evidence, (and indeed it would seem that this is a sensible approach) then the next step would be to simplify these rules so they will refer articulately and definitely to this objective. How can this be accomplished? By what mechanics?

8. Murray, op. cit., p. 581.
9. Phipson, Manual of the Law of Evidence, 9th ed. p. 2.
10. Nokes, An Introduction to Evidence, 2nd ed., p. 3.
11. Murray, op. cit. p. 587.
12. Ibid. p. 585.
13. R. v. Sims (1946) K.B., 531, at 557.
14. Wright, op. cit., 715.

Much thought has been given to the character of the change needed. The basic issue has been whether it is better to proceed piece-meal and correct a few of the outstanding obstructions, or attempt to eliminate at one time all of the existing evils. Complete revision it seems, is preferable, as there is much merit in having a unified series of improvements integrated with a common purpose. One of the greatest advantages in undertaking the task as a whole would be the utility and convenience of the finished product.[15] Such a fixed and reliable source of the rules would make the work of lawyers easier and the results fairer.

Cecil Wright has posed the question: Should we not reconsider and enunciate just what the underlying objections to the reception of evidence are? Could we not then leave the court a wide discretion in its application of these principles?[16] What Wright had in mind was a code. More specifically, he was endorsing the *Model Code of Evidence* of 1942, sponsored by the American Law Institute. This code was to supplant the provisions of the Common Law and all statutes inconsistent with it. The project was begun in 1940 under the directorship of Professor E. M. Morgan of Harvard Law School, and Professor Wigmore of Northwestern. The staff of advisors included two outstanding judges, Augustus N. Hand and Learned Hand; the list of general consultants included many other judges and leading practitioners from various jurisdictions. Perhaps the most important single topic the Code dealt with was hearsay.

This code was not a success. It was viewed as wildly heretical in some quarters; its failure to take into account the feelings of the profession against opening the door too widely to hearsay evidence proved fatal.

The drive behind the formulation of a code of evidence did not wane. A Committee of the National Conference of Commissioners on Uniform State Laws in 1949 took up the challenge. The Committee began its work under the chairmanship of Judge Spencer D. Gard; its members included three practising lawyers and three law professors. The Committee received considerable assistance from the committee responsible for the earlier attempt at codification. In 1953 the resulting product, the Uniform Rules of Evidence consisting of seventy-one rules, was approved by the American Bar Association.

These rules appear to be a carefully thought-through compromise designed to overcome the objections of the American

15. Ladd, op. cit., 338.
16. Wright, op. cit., 717.

legal profession to the more dramatic attempt at reform found in the Model Code, and at the same time designed to meet the criticisms of those demanding reform of this traditionally strict and complex branch of the law.[17] Without suggesting that nothing further remains to be done, Professor Murray feels these rules, available in convenient form, are ready to be used.

Would this work be of value to Canadian lawyers? What have the uniform rules to do with us?

> "If a Canadian lawyer thinks for one moment that these particular rules are simply some sort of makeshift designed to overcome the mistakes of less able lawyers and judges than this country or England has produced, he will have missed completely the significance of the achievement of the Uniform Rules. The Uniform Rules are not just another set of rules designed merely to alleviate confusion in the practice of evidence law. They are instead an extraordinarily competent and coherent code of sensible rules, the product of scholarship and practical wisdom of a great number of highly trained individuals . . . Here for the first time in the Anglo-American world are rules of practice which make good sense from beginning to end. They make good sense because they are grounded in good sense."[18]

III. *Illustrations of Codification*

A good illustration of the value of the Uniform Rules is to be found in its treatment of the problem of relevancy. In handling the vast multitude of cases in which the courts and writers have attempted impossible distinctions between logically relevant and legally relevant evidence, the Rules return to first principles. Rule I defines relevant evidence as "evidence having any tendency in reason to prove any material fact". Rule 7 then makes all relevant evidence admissable, except as otherwise specifically provided. This simple stressing of logic is in harmony with the views of modern writers and also with the practice of the majority of the common law courts. In *Hollington v. Hewthorn,* Lord Goddard stated:

> ". . . it is relevance and not competence that is the main consideration, and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded".[19]

If relevance and not competence is to be the "main consideration" then how are the present rules relating to competency treated by the Uniform Rules? First let us look at the rules by which we are presently purported to be governed. While admitting that a mere digest of the rules of evidence does not provide the best

17. Murray, op. cit., p. 595.
18. Ibid. p. 584.
19. (1943) 1 K.B. 587.

media[20] by which we may comprehend them, Professor Murray has referred to the Canadian Encyclopedic Digest.[21]

> "As regards husbands and wives of defendants in criminal cases, the wife or husband of the person charged may now be examined as a witness on behalf of the person charged; but *probably* not without such wife or husband's own consent, unless expressly so provided by some particular statute. For the prosecution, on the other hand, the wife or husband cannot be called as a witness, at least in cases governed by the Canada Evidence Act; except (1) in those cases where she or he could have been so examined at common law . . . though in such cases the spouse can probably not be examined without his or her own consent; and except (2) in the case of certain offences particularly enumerated in the Act in which cases the Act says that the wife or husband of the person charged shall be a competent and compellable witness for the prosecution without the consent of the person charged. Quaere whether, because of the use of the word compellable in the Canada Evidence Act, the wife or husband is in such cases deprived of the former marital privilege to refuse to testify against the other spouse".

This mass of common-law and statutory rules relating to competency and compellability and privilege of witnesses in criminal cases would lead one to believe that the law of evidence was designed to impede proof of particular issues. Let us see what the draftsmen of the Uniform Rules have devised as a solution to the problem. Rule 7 has been described as the keystone of the Code:

> "General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules:
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> Except as otherwise provided in these rules (a) every person is qualified to be a witness and (b) no person has a privilege to refuse to be a witness and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing and (e) no person has a privilege that another shall not be a witness or shall not disclose any object or writing, and (f) all relevant evidence is admissible."

By this one rule the many conflicting rules relating to witnesses have been obliterated. The standards of relevancy and materiality have been retained. The draftsmen then write back in the remaining rules of the code only those exclusionary rules which they deem to be fundamental facets of public policy. Indeed the wisdom of even including these exclusionary rules as part of our law of evidence has been questioned. The more liberal view would vest in the trial judge a wide discretion to restrict matters which, although by logic are material and relevant, nonetheless derogate from the fairness of a trial; *prima facie* however, such matters would be admissible.

In regard to the admissibility of convictions, the Uniform Rules appear to offer a good solution to a nagging problem. The problem

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20. But does the most used textbook on the subject, Phipson on Evidence, help us with its 7000 precedents?

21. 7 C.E.D. Ont. 2nd. 307-9.

is similar to that posed by s. 12 of the Canada Evidence Act.[22] Thereby, a witness (including an accused) may be queried as to whether he has been convicted of an offence. If he denies the fact the opposite party may prove the conviction. If he admits the fact, no further evidence to adduce such will be admitted. In the United States a similar situation existed. Rule 21 of the Uniform Rules states:

> "Limitations on Evidence of Conviction of Crime as Affecting Credibility: Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."

Thus the type of crime, evidence of the conviction of which is admissible to impair the credibility of any witness, is that which involves dishonesty or false statement. And evidence even as to such crime is inadmissible to impair the credibility of an accused in a criminal trial, unless the accused first offers evidence supporting his credibility.

> "The policy of this rule is to encourage defendants in criminal actions to take the stand. The rule . . . would correct the abuse of smearing rather than discrediting a defendant who takes the stand."[23]

What about the admissibility of a record of conviction in a criminal case, into a later civil case, wherein that fact may be material? In our courts, such a record is not even *prima facie* evidence of the conviction notwithstanding its materiality.[24] Certainly this is so where the accused has pleaded not guilty. Would there be a difference if the convicting court was not a magistrate's court but rather a high court? Surely this is a factor relevant to weight rather than admissibility. If the trial judge in the civil action feels the evidence placed before him suggests the earlier criminal conviction to be a wrong one, he is not bound to give it weight. We should not balk at using a conviction of rape as evidence of adultery. Yet by applying the leading English case of *Hollington v. Hewthorn*[25] (wherein it was held that a magistrate court conviction for careless driving was inadmissible in a later civil action) the rape conviction would not be admissible. We prefer to take refuge in precedent.

The Uniform Rules have preferred to treat such a matter as one of the exceptions to the hearsay rule:

22. R.S.C. 1952. c. 307.
23. Murray, op. cit., 591.
24. Ibid, p. 591.
25. (1943) 1 K.B. 587.

> "Evidence of a final judgment — adjudging a person of a felony [is admissible] to prove any fact essential to sustain a judgment".

Note the careful wording of the exception. Because convictions in traffic courts and in misdemeanor cases are often less trustworthy than convictions in felony cases, a conviction for say, careless driving, could not be admitted to prove negligence in a later civil action.

It has been said that the complications arising from the admission of hearsay constitute nearly one third of the law of evidence.[26] The hearsay rule has been said to be the child of the jury system. It would be closer to the truth if it were said that the hearsay rule is the child of the adversary system, and that the jury is the foster parent "foisted upon it by the judges and the text-writers of the nineteenth century".[27] As noted earlier, the Norman inquest marked a break from the Anglo-Saxon trial by ordeal and the Anglo Norman trial by battle and trial by compurgation, all of which were essentially adversary in their nature. The inquest removed the proceedings from the control of the litigants. The decision depended upon what would be said by the witnesses selected by a public officer. This body of witnesses was to evolve to the jury as we know it today. At first the jury based its decision upon what its component members themselves knew. Often their information was acquired through 'hearsay'. At the beginning of the 17th Century however, objections to the receipt of such information were to be registered, and by the third decade of the eighteenth century, it was generally rejected.[28]

The earliest reason for the rejection was lack of oath of the person who was author of the statement. The jury was to be protected from unsworn testimony. However in retrospect, this cannot be accepted as an accurate reason. First, the condition of oath had by then lost most of its effectiveness. Second, the presence or absence of a jury should not affect the necessity for an oath. In fact sworn hearsay was excluded as early as 1668 because the other party could not cross examine. This opportunity for cross examination is a required facet of the adversary system. The adversary, not the jury, is to be protected. The rule rejecting hearsay and the rule requiring the opportunity for cross

26. Murray, op. cit., 592.
27. Morgan, Comments on the Proposed Code of Evidence of the American Law Institute, p. 282, Model Code of Evidence.
28. Ibid, 283.

examination as a prerequisite to admissibility developed together with the adversary system. This was no historical accident.[29]

During the early part of the nineteenth century, judges began to give reasons for rules which they had theretofore been applying in reliance on precedent alone. The strict construction of these precedents had resulted in some artificial limitations upon the exceptions. In rationalizing the results of the decisions the judges relied upon the general notion that a party was obliged to produce the best evidence available, but no more. Had this been applied generally hearsay would have been received wherever better evidence could not be obtained. They therefore found (or inserted) some circumstance which was thought to make the admissible-hearsay more reliable than hearsay in general.[30] By mid-nineteenth century it became the fashion to attribute the exclusion of hearsay to the incapacity of the jury to evaluate it. Yet we have seen that this argument is not historically sound. Hearsay was originally and logically excluded because of the requirement that the opponent be allowed to cross examine. Yet when one looks at the classes of utterances which are now recognized as exceptions to the hearsay rule by some respectable authority, he will find that they really disregard the adversary theory, that is, the right to the opportunity to cross examine. In most instances there is apparent a situation in which an ordinary man making such a statement would positively desire to tell the truth; often the most that can be obtained is an absence of a motive to falsify.[31]

The rule against hearsay then, developed alongside and in close conjunction with the adversary system; the adversary system once established, would not allow the admission of hearsay evidence because the opponent would not be allowed opportunity to cross examine. Because the courts have often, though inarticulately, been of the opinion that 'all available evidence is necessary, and that hearsay is better than nothing', the harshness of the rule was subject to their attempts at modification. In order to expand upon some exceptions and create limitations upon others, the courts were forced to rationalize the legal precedents, which purported to bind them, in the light of the cases at which they presided. These rationalizations were often based on a historical insight into the development of the hearsay rule, which was not at all clear in their minds. The result is that the law governing

29. Ibid, 284. It was earlier noted that only the common law with its adversary system, boasts a branch of the law called evidence. (supra footnote 2). It is equally interesting to note that the term "cross examination" is conspicuously absent from all other languages, and, that the Civil Law does not reject hearsay.
30. American Law Institute (1942) Model Code of Evidence, 221.
31. Ibid, 222.

hearsay today is a conglomeration of inconsistencies developed as a result of the application of conflicting theories. Refinements and qualifications have only added to the rule's irrationality.[32]

It seems not overly optimistic to say that the creation and enumeration of some fundamental doctrine would make the courts rational bodies rather than "mechanistic word jugglers". Hearsay as an objection must have some basis in reality. Its prejudicial nature should clearly outweigh its probative value.[33]

Lord Maughams Act[34] of 1938 did make strides in permitting the admission of certain affidavits and other written statements by parties other than the witnesses. But this is a piecemeal approach to a branch of the law which can be made coherent only by a restatement of the objectives and underlying policies thereof, in a way which will not hinder its expansion in response to constantly arising situations.

The Model Code did violence to the common law rules. For instance, evidence of hearsay by a declarant was made admissible if the judge finds that declarant is unavailable, or if the declarant is present at the trial and subject to cross examination. It rejects hearsay only where the declarant is unavailable and not present for cross-examination.[35] Doubtless the sweeping changes in hearsay law proposed in the *Model Code of Evidence* were largely responsible for the unfavourable reception of the Code by the American legal profession. This was unfortunate, for the draftsmen of the Uniform Rules, being sensitive to this unfavourable reception, attempted only a modest reform. Many of the reforms merely express the law as it already exists; others make only minor changes in the hearsay rule; only a few make significant changes in the prevailing law.[36]

To a Canadian lawyer, it might look as though the draftsmen of the Uniform Rules have introduced many new exceptions to the hearsay rule. There are indeed thirty-one clearly defined exceptions to the rule. The draftsmen however have merely liberalized and extended the major exceptions.

This has done little to lessen the criticism of legal scholars. This set of rules to them is not reformative enough. It is difficult to disagree with such criticism, for a key of thirty-one distinct exceptions would seem, at first appearance, to derogate from simplicity rather than add to it.

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32. Ibid, 223.
33. Wright, op. cit., 718.
34. English Evidence Act 1 & 2 Geo. VI. c. 28.
35. Morgan, op. cit., 593.
36. McCormick, Hearsay: a Symposium on the Uniform Rules of Evidence, Murray op. cit., 593.

Yet the Uniform Rules on hearsay probably represent the longest step forward now feasible by legislative action. They represent perhaps the best re-judgment and restatement of the rule and the use thereof. The hearsay rule has been considered by the draftsmen to be basically sound. These Rules have organized the exceptions into a unit which allows for ready reference. The Rules are valuable in that by their very clarity they represent considerable progress. It is hoped that their impact on the law will be substantial.

What do the Uniform Rules say about *res gestae*? This so called rule or doctrine of evidence is beloved by trial lawyers who usually regard it as an idea of great amplitude and as having tremendous possibilities.[37] The rule is referred to usually in the following manner; a lawyer wishes to introduce some particular evidence; his opponent objects. The Judge then asks the first lawyer on what basis he proposes to introduce the evidence and receives the answer "as part of the *res gestae*". In other words the evidence is to be admissible because it purportedly will prove a fact which is part of a series of facts which are in issue.

The phrase, it seems, first came into use in evidence near the end of the eighteenth century. It would seem that it was called into use mainly because of its 'convenient obscurity'. It was an ambiguous phrase to begin with, and as its ambiguity multiplied so did its capacity; it served as a 'catch-all'. Thayer considered the employment of this method of finding relief a dangerous one; judges, text-writers and students have found themselves sadly embarrassed by "the intolerable vagueness of the expression."[38] Indeed, there has been a great deal of criticism of the doctrine. Judge Learned Hand has stated:

> ". . . and as for *res gestae* it is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."[39]

Dean Wright states that while in fact a substantial discretion is vested in the trial judge, the law of evidence has been treated in theory as a series of rigid categories, and if common sense rebelled against this kind of medieval logic, "there was always the normal method of making a new category in which one could classify anew what he could not force into another mold". Hence

37. Murray, op. cit., 589.
38. Thayer, Legal Essays, (1908), 267, in Morgan, Maguire, and Weinstein, Cases and Materials on Evidence, 650.
39. Morgan, Maguire, and Weinstein, op. cit., 649.

we have the sprawling category of *res gestae*. The annoying and "confusing mass of fact situations" in which this *res gestae* doctrine has been held to permit the introduction of evidence indicates that the rule can mean all things to all men.[40] It is highly likely that this "confusing mass of fact situations" is the product of the courts' attempts to exercise a discretion in admitting what seemed normally relevant to a fact in issue.

A most refreshing approach to the doctrine of *res gestae* has been adopted by the Uniform Rules; they do not even mention the doctrine. And, if we accept the validity of the unflattering things which have been said about this so called doctrine by distinguished judges and scholars, then surely this approach is right: there is no place in the law of evidence for *res gestae*.

Modern writers on evidence have attached extraordinary importance to the field of judicial notice. Yet its possibilities as a time and money saver in the judicial process remain by and large untapped. Because when this service is used, it is said, proof of facts is not needed, Canadian lawyers have been trained to think of it as existing outside the field of evidence. American scholars have come to view this service as a system of proof which utilizes the produce of the scientific technique of our age. The proper use of this device would in many instances circumvent the costly and time consuming battle of experts which so often mars the reception of that kind of evidence today. Rule 9 of the Uniform Rules contains the following:

> "(2) Judicial notice *may* be taken without request by a party of (a) private acts and resolutions (of the Congress and of other American legislative bodies) and (b) the laws of foreign countries.
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> (3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule, *if* a party requests it *and* (a) furnishes the judge sufficient information to enable him properly to comply with the request, *and* (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request".

Note that in paragraph (2) the word "may" is used. The onerous responsibility of discovering what is the law of the foreign countries, is not vested in the judge. This responsibility is vested in the party requesting that judicial notice be taken. Also, the judge, under this rule, is not required to take judicial notice of law of a foreign country unless that party first furnishes the judge with the necessary information and second, has given sufficient notice of his intention to the adverse party.

40. Wright, op. cit., 716.

In Canada judicial notice of the laws of foreign states is not generally a means of proof of those laws. The method of proof is generally via expert witnesses. In 1952, however, the Manitoba legislature enacted the following amendment:

> "Every court shall take judicial notice of the laws of any part of the British Commonwealth or of the United States, or any state, territory, possession, or protectorate thereof . . ."[41]

This amendment is similar to the above cited portion of Rule 9 of the Uniform Rules in that it attempts to eliminate the time and money consuming practice of calling expert witnesses of foreign states. It is submitted however, that this enactment is, in a sense, too bold. For instance, how is the Manitoba Court supposed to inform itself of the laws of any particular state? There is no reference to the responsibilities of the litigants such as that found in the Uniform Rules. The responsibility of discovering what is the law of a foreign state rests, it appears, with the Manitoba judge: the word "shall" rather than "may" is used; the judge is unconditionally bound. The careful approach of the Uniform Rules as contrasted to what would seem an incomplete amendment by the Manitoba legislators suggests that we have something to learn from Americans in the manner, as well as matter, of legal reform. This comparison also demonstrates, I think, the advantage of attacking reform of the law of evidence on a broad scale rather than a piecemeal approach.

IV. *Astigmatic Resistance*

The view that a complete restatement and revision of the law of evidence was the preferable method by which a reform could be effected was stated above. The favourable reaction of the American Bar to the Uniform Rules, the comprehensive product of years of research by eminent scholars, judges, and practitioners, serves to support this view. Yet there is opposition to such a measure; there has always been opposition to the establishing of codes in common law jurisdictions. Judge Jerome Frank has been referred to as one not in favour of any sort of codification. He has stated:[42]

> "No code can anticipate every possible set of facts. Moreover when social conditions change and social conditions alter, many portions of the code act as an intolerable straight jacket".

No doubt codes or portions thereof, have acted in such a manner, a manner derogating from flexibility. It is submitted however,

41. R.S.M. 1954, c. 75, S. 28(1).
42. Frank, op. cit., 290.

that a code need not act in such a manner. Frank himself has observed that codification has suffered from a failure to distinguish two incompatible aims: (1) the procuring of simplicity, and (2) the procuring of precision. These aims are irreconcilable he says because "simplicity implicates flexibility while precision leads in the direction of rigidity and completeness". The code system has tended *unduly,* as Frank admits, to foster the second aid. "But a code deliberately devised with reference to the desirability of growth and stated in terms of general and flexible principles may some day prove to be the way out of some of the difficulties of legal administration."[43]

The difficulties attempted to be circumvented by a code, in this instance, are those presented by the confusing morass of precedents which constitute the law of evidence, rules such as the hearsay rule, the best evidence rule, the rule against opinions, which in their present form are of little or no value. If these difficulties were to be remedied by a code any legislative reform leading to a code of evidence must necessarily restrict itself to broad principles — thereby vesting in the judiciary ample discretion in the application of those principles.

Professor J. D. Morton in a recent article,[44] has seen fit to attack the proposal of a code, not on the traditional grounds that it would tend to restrict development of the law of evidence, but rather on the grounds that a code would be of no real help. Murray has said that "most of us in Canada, the United States and England have been taught to study evidence as if its principle were designed to impede freedom of proof."[45] Morton infers his support of such a status quo by stating the following:

> "Admissibility is determined first by relevancy — an affair of logic and experience, and not at all of law; second, but only indirectly, by the law of evidence which declares whether any given matter which is logically probative is excluded."[46]

Therefore says Morton, the cornerstone on which the code was based, — "that unless excluded by some rule or principle of law, all that is logically probative is admissible",[47] cannot support a code of evidence; it is not possible to create a positive code of "logic and experience and not at all of law".[48] A code of evidence he continues must be substantially negative in form in that it will declare what relevant matter is to be excluded and on the question

43. Frank, Law and the Modern Mind, 336-7.
44. Morton, "Do We Need a Code of Evidence" (1960) Can. Bar Rev. 35.
45. Murray, op. cit., 585.
46. Morton p. 35, quoting Thayer, A Preliminary Treatise on Evidence at the Common Law (1898).
47. Murray, op. cit., 585.
48. Supra, footnote 46.

of relevancy we must inevitably depend on the reasoning capacity of the Bench and Bar.[49]

Morton concludes that we need not a code but rather sound reasoning and clear thinking.[50]

It is submitted that the view that a code of evidence is not desirable because it offers no help cannot be supported by the substance of Morton's article. He attempts to impute into the minds of the proponents of such a code an intention to create a positive code of logic and experience.[51] But no one is attempting to do this! No one would disagree with the proposition that a code of evidence must be substantially negative and exclusary in form, nor that, as to the question of relevancy, we must depend upon the sound reasoning of jurists. Indeed, Morton states that Professor Murray is overly pessimistic about the current state of evidence and overly optimistic about the therapeutic effect of a code,[52] implying that Mr. Murray saw a code as a panacea for all procedural ills existing in our system of administration of justice. But the latter writer clearly avoided such a conclusion. He cautioned:[53]

> ". . . The Uniform Rules have little if anything to add to the solution of conflicts which arise from differences in reasoning in the areas of relevancy, materiality and weight of evidence. The only solution to problems of that sort . . . is to demand a higher degree of quality in the reasoning process. That is simply a problem of education . . . the Uniform Rules are confined to solving the problem of admissibility of evidence, which we lawyers have created with our exclusionary rules".

V. *Conclusion*:

It is submitted the better opinion is that our law of evidence is today hopelessly intricate and confusing. The gifted persons who can thoroughly comprehend it seldom can explain it with any degree of clarity. In theory at least the judicial system is not given the opportunity of discovering the truth; it is hampered by a body of rules inconsistent with each other and riddled by exceptions. Even in practice, there is the danger that the problem to admit or not to admit will become the sole or major question for the court. Moreover it is doubtful that the skill displayed by modern judges and lawyers in handling (and evading) evidence problems is proof that our law of evidence is clear or practical.

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49. Morton, op. cit., 36.
50. Ibid, 46.
51. Supra, footnote 62.
52. Morton, op. cit., 46.
53. Murray, op. cit., 595.

It has been submitted that an overall assault on the rules of evidence is preferable to the nibbling approach which has dominated for centuries. This subject can only be made into a coherent and sensible whole by a reconsideration and enunciation of the underlying objections to the reception of relevant, probative, material. Such an approach has been employed in the United States, the result of the labours of judges, practitioners and professors of law, who have devoted their lives to the study of the subject, has been the Uniform Rules of Evidence. This set of seventy-one clear and concise rules are really evidence of how excellent is the rationalizing of American scholars. With the work of Thayer and Wigmore as a background, "works which have never been equalled or even remotely approached by any other writer on this subject,"[54] it is not surprising that the Americans have lead the way toward what the law of evidence should be. If the profession in our country is to make the law of evidence what it should be then we would do well to take a close look at the American precedent. Surely we too can draft a similar code for our use.

If such an end is indeed desirable why is there so much opposition to the establishment of simplified set of rules? It is submitted that such a plan is bound to run into opposition from a profession nurtured on a diet of highly seasoned phrases. The conservative element of the legal profession has more than once in legal history confidently prophesied disaster when changes were made in the law.

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54. Wright, op cit., 715.

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