

Be Sworn and Give Evidence: The Evolution of the Competent Witness in the Context of the *Canada Evidence Act*

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DURING THE SPRING AND early summer of 1892, the bill that was to become the *Criminal Code* was debated in the House of Commons in Ottawa. One of the first items to be settled was the date the legislation would come into force. Sir John Thompson, the minister of justice and the bill's sponsor, said: "I propose to let the Act go into operation on the 1st January next."¹ But he changed his mind. A few days before prorogation, he moved and carried an amendment to enforce the legislation on July 1, 1893. This was a one-sentence motion: there was no explanation then or later for the change, and Sir John immediately moved on to his next topic.²

What was the reason for this change? Parliament was to be prorogued July 9, so there would have been five months at least to print and distribute the statute. Nor was the bill a new initiative: a similar bill had been introduced in 1891, and 2,000 copies had been distributed that year to persons and institutions that administered criminal law, and to many members of the interested public. Furthermore, the Justice Department had made plans to implement the legislation on January 1. So why did Thompson move the amendment so late in the debate? It is my contention that he made the change so that the bill which was to become the *Canada Evidence Act*, and which he had been obliged to leave on the order paper in 1892, could be enacted in the session of 1893. He had evidently realized that the *Act* was a vital complement to the *Criminal Code*, and that both would have to be brought into force concurrently in order that the criminal justice system would operate as intended.

Just as the Code would be unique in the self-governing dominions, so the Act would be unique because, according to Senator August-Réal

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¹ *House of Commons Debates* (17 May 1892), col. 2702.

² *Ibid.* (28 June 1892), col. 4344.

Angers, then government leader in the Senate and a former attorney general of Quebec, it would constitute a codification of the law of evidence used in both civil and criminal causes, and it would make a momentous change in that law.³ It would give accused persons and their spouses the right to give evidence on oath at their trials. They could not be compelled to give evidence, but would be able to do so if they desired. In short, the Act would give an accused and his or her spouse the right to be what is known as a "competent witness." Furthermore, in contrast to other British jurisdictions that had previously enacted legislation to make accused and spouse competent witnesses, if they did not choose to go into the witness box in Canada, the bench would be forbidden to comment on their silence. Even more significant was the fact that Thompson, who was the Act's sponsor and would become prime minister in November 1892, was opposed to the inclusion of this provision.

Accused persons had not been competent witnesses since the early days of the English legal system, prior to the reign of Henry III. Before that time, when trials by ordeal were essentially appeals to the almighty to point the finger at the guilty party, a procedure existed whereby litigants in civil or criminal causes could give evidence on oath. This was trial by "wager of law" or "compurgation," in which the defendant had the right to swear on oath that he was innocent of the charge, provided that he could produce witnesses to swear to the truth of his oath.⁴ However, even at a time when oath-taking was hedged about with strong theological sanctions, there was a widespread conviction that this procedure conduced to perjury. It is evident that Henry II shared this view, and in the Assize of Clarendon (1166) he laid down that a person of "bad reputation" who cleared himself by wager of law was, nevertheless, to abjure the realm and "thenceforth not return to England, except at the mercy of the lord king."⁵ The Church, which gave religious sanction to the wager of law and trials by ordeal, and whose clergy had large and essential roles in these procedures, came more slowly to a similar conclusion. At the Lateran Council of 1215, Pope Innocent III forbade the clergy to perform

³ *Debates of the Senate* (20 March, 1893) at 364.

⁴ For a short discussion of wager of law, see T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth, 1956) at 112; for an authoritative account, see H.C. Lea, *Superstition and Force* (1870; rpt. New York: Haskell House, 1971) at 14-79.

⁵ Section 14; C. Stephenson and F. Marcham, *Sources of English Constitutional History*, vol. 1 (New York: Harper & Row, 1972) at 78.

religious ceremonies at such trials.⁶ This edict eventually caused wager of law to be supplanted by jury trial in England, and with it the incompetency of a litigant and his or her spouse and their witnesses to give evidence on oath — a prohibition for the accused that endured until the 19th century.⁷ In medieval times, the primary rationale for this prohibition was that trial by jury and trial by wager of law were two distinct procedures, and that to allow the defendant to give evidence on oath in a jury trial would be to entangle one mode of trial with another.⁸ As legal memory dimmed, authoritative writers of the 17th and 18th centuries such as Chief Justice Sir Edward Coke and Chief Baron of the Irish Exchequer Sir Geoffrey Gilbert reverted to the thinking of Henry II and laid down that the disqualification of parties to give evidence on oath in any action, civil or criminal, was incurred because it was probable that interested persons were liable to commit perjury.⁹ This liability, however, was mitigated to some extent for two classes of individuals.

As trial by jury became the norm, the parties to a civil suit who had the right to brief legal counsel could have an expert, a barrister, plead their cases for them. The same right applied also in cases of misdemeanour, because this category of crime grew from the common root which also produced the tort, or civil wrong, and the procedure to try both classes of offence began and remained identical.¹⁰ Those accused of treason or felony had no such right; they were on their own. They were required to conduct their own defence in what amounted to a

⁶ *Ibid.* at 120; W. Holdsworth, *A History of English Law* (London: Methuen, 1972) vol. I at 323–27.

⁷ *Ibid.*, vol. IX at 194.

⁸ J.H. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, Canadian Ed., (Toronto: Canadian Law Book Company, 1905) vol. I at 695; Holdsworth, *ibid.* at 195.

⁹ Their statements are quoted in Wigmore, *ibid.* at 699; and Holdsworth, *ibid.* at 196.

¹⁰ Wigmore, *ibid.* at 695. As developed by the common law in England, a misdemeanour was any indictable offence that was not treason or a felony, but a lesser offence. For a brief account of the development of misdemeanour see D.H. Brown, *The Canadian Criminal Code 1892: A Comparative Study in Codification* (Edmonton: Ph.D. dissertation, University of Alberta, 1986) at 73; for detailed accounts see F. Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I* (1898; rpt. Cambridge: Cambridge University Press, 1978) vol. II at 511–22, 623; C.S. Kenny, *Outlines of Criminal Law*, 3rd ed. (Cambridge: Cambridge University Press, 1907) at 93–4.

dialogue between the accused, on the one hand, and the prosecuting counsel and the judge on the other.¹¹

The first crack in this edifice of exclusion came in the 17th century. Under the influence of progressive efforts to reform the law during the Commonwealth, a defendant was allowed to call witnesses who could testify but not be sworn.¹² At the turn of the century, this disability was removed when statutes were enacted which gave the defendant's witnesses the right to testify on oath.¹³ Early in the 19th century (1827), Jeremy Bentham took issue with Coke, Gilbert and other legal traditionalists when he exposed the fallacy of the exclusion rule in his *Rationale of Judicial Evidence*.¹⁴ In William Holdsworth's succinct paraphrase, Bentham argued that "interest in the litigation is a valid objection to the weight given to the evidence, not to the competence of the witness."¹⁵ This view was publicized by reformers such as Lord Brougham, and in 1851 he translated Bentham's precept into law when he sponsored the Act of the Imperial Parliament which made parties to civil litigation competent witnesses. In 1853, he introduced the legislation that gave the spouse of a party this right; collectively, these statutes became known as "Lord Brougham's Acts."¹⁶

Efforts to give an accused person and his or her spouse the right to testify on oath took longer and were attained piecemeal. The process began in 1872 with the first of a series of 28 statutes which created or amended indictable offences.¹⁷ Each of these bills included a section to the effect that persons accused of that specific offence and their spouses were competent but not compellable witnesses. The principle

¹¹ See for example *R. v. Throckmorton* (1554) 1 *Howell's State Trials* 869 at 871; *R. v. Udall* (1590) 1271 at 1283; for commentary see G. Williams, *The Proof of Guilt*, 3rd ed. (London: Stevens & Sons, 1963) at 42; and J.F. Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883) vol. I at 325-29.

¹² *R. v. Macquire* (1645) 4 *Howell's State Trials* 665 at 666; *R. v. Faulconer* (1653) 2 *Howell's State Trials* 323 at 354.

¹³ 7 & 8 Will. III, 1695, c. 3; 1 Anne, 1701, st. 2, c. 9, s. 3 (Imp.); for commentary see Wigmore, *supra* note 8 at 697.

¹⁴ J. Bowring, ed., *The Works of Jeremy Bentham* (1843; reprinted New York: Russell and Russell, 1962) vol. VII at 385-406.

¹⁵ Holdsworth, vol. IX, *supra* note 6 at 196.

¹⁶ *Act to amend the law of evidence*, 1851, 14 & 15 Vic., c. 99, s. 2; *Act to amend the 14th and 15th Victoria*, c. 99, 1853, 16 & 17 Vic., c. 83, s. 1 (Imp.).

¹⁷ *Metalliferous mines regulation Act*, 1872, 35 & 36 Vic., c.77 (Imp.); for a complete list of these statutes see W.M. Best in S. Phipson, *The Principles of the Law of Evidence*, 12th ed., (London: Sweet & Maxwell, 1922) at 536-37.

that all accused persons and their spouses were to have the right to testify on oath was framed in a short piece of legislation introduced in 1876 by Evelyn Ashley, a lawyer and legal reformer, but the bill was withdrawn in the face of fierce opposition from legal Members of the House.¹⁸ The principle was also included in the criminal code bill that was drafted by a royal commission in 1879.¹⁹ But the bill failed to pass the Commons at that time because the opposition took exception to the tactics of its sponsor, Attorney General Sir John Holker.²⁰

Subsequently, a series of eminent legal practitioners and judges took up the cause in Parliament. All of these reformers had had long experience in the courts, and their observations had convinced them that an innocent person accused of an offence would be better served if the principle were enshrined in law that all accused persons were competent witnesses, thus enabling them to tell their stories to the jury. Conversely, the Crown would benefit because the prosecutor would be able to cross-examine those who went into the witness box in order to detect perjured testimony. In his *Proof of Guilt*, Glanville Williams relates the following incident that puts this point of view in perspective. Sir Richard Webster, later attorney general,²¹

was greatly impressed by a civil action in which he had appeared for a defendant. His client had been successfully prosecuted for fraud, before Lord Coleridge sitting with a jury, and in the civil action, unlike the prosecution, the defendant was able to go into the witness-box to defend himself. The result was that he satisfied the court of his

¹⁸ E. Ashley, *Dictionary of National Biography*, 2nd. supp. (London: Oxford University Press, 1885–1900) at 66; United Kingdom, Parliament, *Hansard* (1876), cols. 1925–1939 at 1936.

¹⁹ United Kingdom, Parliament, *Parliamentary Papers*, Report of the Royal Commission on the Law Relating to Indictable Offences, 1878–9, [c. 2345], draft code, s. 523.

²⁰ D.H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989) at 33–5. Sir James Fitzjames Stephen's draft code of 1878, on which the Commissioners' Code was based, included a section that would have allowed an accused person to make a statement on which he or she might be cross-examined, but it would not be made on oath. Its inspirations were the similar provisions in the Indian *Evidence Act*, which Stephen had drafted in 1872 while he was the legal member of the viceroy's council [L. Stephen, *The Life of Sir James Fitzjames Stephen* (London: Smith, Elder, 1895) at 271], and the abortive evidence act he drafted for the Imperial Government in 1873 (*Hansard*, August 5, 1873, col. 1559).

²¹ After his tenure as attorney general, Webster became Lord Chief Justice and was created Viscount Alverstone. As Lord Alverstone, he became infamous in Canada when he joined with three United States arbitrators, against two Canadians, in the majority decision in the Alaska Boundary question.

innocence of any fraudulent intent... Lord Coleridge often referred to the case, expressing the view that if the defendant's evidence could have been given at the criminal trial, he could not possibly have been convicted.²²

The tactics of these reformers differed from those of Holker, and those who brought in the bills which gave the accused the right to be a competent witness in respect of a specific indictable offence. They introduced legislation — single-item bills — that concentrated only on the principle that every person charged with an offence and his or her spouse should be able to give evidence on oath.

In 1884, Lord Bramwell, a former Justice of Appeal, was the first since Evelyn Ashley to introduce such a measure as a private member's bill. Although it passed the Lords with little opposition and survived second reading in the Commons, there was concerted opposition to the measure, in the face of which the legislation perished in the limbo of a committee.²³ This was the fate also of the similar measures brought in by Bramwell annually in the three succeeding years. In 1885, Attorney General Webster began to work toward the same end in the House of Commons with the introduction of the first of a long line of government bills similar to those that Lord Bramwell had introduced. Glanville Williams tells us that, at first, the measure "met with the usual apathy and the usual efforts to find wisdom in the established rule," and a reading of any of the debates bears him out.²⁴ However, apathy was not the only reason for the defeat of the succeeding bills: equally important was the very effective and unrelenting opposition by the Irish Home Rule lobby, who made this cause their own. For example, Patrick Chance, the Member for Kilkenny, stigmatized the legislation as a second Irish "Coercion Bill,"²⁵ and Timothy Healy, the Irish Q.C. from South Derry, told the Members: "For some years past I have been successful in preventing the passing of this legislation, and if I remain in this House for 50 years, I shall continue to offer such a measure as this the strongest opposition."²⁶ He then proceeded to divert the debate to procedural wrangling, which led to the bill's withdrawal. Although he repeated

²² Williams, *supra* note 11 at 46–7.

²³ United Kingdom, *Hansard* (19 May 1884), cols. 1876–1884.

²⁴ Williams, *supra* note 11 at 47.

²⁵ *Hansard* (11 July 1887), col. 4701. See also the remarks of Senator James Gowan in the debate on an evidence bill in the Canadian Senate; *Debates* (23 March 1893) at 408.

²⁶ *Hansard* (11 July 1887), col. 458.

this process during several debates in later years, the measure gradually gained more support in the Commons. Lord Chancellor Herschell, followed by Lord Chancellor Halsbury, then changed the tactics and reverted to Bramwell's practice by beginning the procedure in the Lords, leaving Webster to press the issue in the Commons. After the bill was amended to exclude Ireland from its operation, it became law in 1898 as the *Criminal Evidence Act*.²⁷ Its form was largely unchanged from Bramwell's first bill: a single-page, seven section act that deals exclusively with the accused and his or her spouse as competent witnesses. However, while the prosecution was forbidden to comment if the accused did not choose to give evidence, there was (and is) no similar prohibition for the bench. The Act is still on the statute book, as are those of 1851 and 1853, together with 29 other statutes concerning evidence, beginning with an Act of 1801.²⁸

The question of the accused as a competent witness had also been a much debated issue in the legislatures of the British Empire during the latter decades of the 19th century. In fact, jurisdictions in the antipodes enacted enabling legislation long before the Imperial Parliament. When considering such legislation, it is well to keep in mind that New Zealand and Australia did not follow the same constitutional path as Canada. Canada pioneered the constitutional arrangement whereby the central government has jurisdiction in the criminal law, whereas the provinces are supreme in the law of property and civil rights.²⁹ New Zealand, like the United Kingdom,

²⁷ 61 & 62 Vic., c. 36 (Imp.). Ireland is specifically excluded from the operation of the statute by section 7. For a sketch of the sometimes stormy progress of the bill through the parliamentary process since Lord Bramwell introduced the first edition in 1884, see the speeches of Halsbury and Webster in *Hansard*, March 10, 1898, cols. 1170-1182; April 25, 1898, cols. 977-985.

²⁸ *Crown debts Act*, 41 Geo. 3, c. 90 (Imp.); *Statutes in Force*, topic 47, Evidence (London: Queen's Printer, 1989). For contemporary and informed views on the efficacy of the evidentiary legislation of the 19th century, see the remarks of Sir H. Poland and W.B. Odgers in *A Century of Law Reform* (London: Macmillan, 1901) at 53-4 and 216-17. For the use and efficacy of the *Act* in the courts, see the biography of Edward Marshall Hall, one of the first eminent defence barristers to put his clients in the witness box; E. Marjoribanks, *For the Defence* (New York: Macmillan, 1929) at 105-06, 222, 236, 263 and 299-300.

²⁹ The only other western state of that time with a similar split jurisdiction, the North German Confederation, was also created in 1867, but their federal penal code was not enforced in all its states until 1870. This jurisdiction was enlarged in 1871 to become the German Empire, and the code was extended to the new states. But it was not until 1877 that the code of criminal procedure was enacted and enforced in the jurisdiction. Brown, *supra* note 10 at 49.

was and is a unitary state whose Parliament legislates exclusively for the whole country. And whereas Australia was in the same condition in which Canada had been in the 19th century prior to Confederation, namely, a collection of independent colonies each of whose legislatures was supreme in its jurisdiction, it is today a federal state whose constitution gives each state exclusive jurisdiction in criminal law.³⁰

In 1882, South Australia was the first to enact enabling legislation. It took the form of a short five-section *Act to enable persons accused of offences to give evidence on oath*.³¹ Since this was the first of such statutes in the British Empire and since those that came after were variations on the theme, it is desirable to see what the substantive matter said:

1. [A]ny person accused of any felony, misdemeanor, or other indictable offence shall, if such person desires, be competent and entitled to be sworn and give evidence as a witness on the trial of the felony, misdemeanor, or offence with which he is charged...
3. The word "person" whenever used in this Act, shall mean as well the person charged as the husband or wife of such person.

Although the New Zealand *justices of the peace Act* of 1882 enabled a person charged with a summary conviction offence and the spouse to give evidence on oath, it was not until 1889 that the *criminal evidence Act* extended the provision to cover those charged with felonies and misdemeanours.³² As in South Australia, this legislation took the form of a short, single-item statute. Two years later, in 1891, New South Wales took a different tack. Earlier, in 1883, the legislature had enacted an extensive criminal law statute,³³ the purpose of which was to "enumerate offences, prescribe maximum punishments and regulate procedure."³⁴ The Act of 1891 amended several disparate sections of the earlier statute and added several new provisions. Among the latter was a section which laid down that all persons charged with an indictable offence and their spouses were competent, but not compellable, to give evidence.³⁵ In the same year, 1891, and

³⁰ B. Fisse, ed., *Howard's Criminal Law*, 5th ed. (Sydney: The Law Book Company, 1990) at 1.

³¹ 45 & 56 Vic., No. 245 (S. Aust.).

³² 1882, 45 & 46 Vic., No. 15, s. 80 (N.Z.); 1889, 53 Vic., No. 16 (N.Z.).

³³ 46 Vic. No. 17 (N.S.W.).

³⁴ *Supra* note 30 at 7.

³⁵ 55 Vic., No. 5, s. 6 (N.S.W.).

following the example set by New South Wales in 1883, the legislators of Victoria enacted the comprehensive *crimes Act*, with a similar provision.³⁶ Queensland was the last Australian state to enact such legislation in the 19th century.³⁷ This was the *criminal law amendment Act* of 1892, a short, nine-section statute which remained on the statute books unchanged until 1961.³⁸ In their original form, none of these statutes included a provision that would exclude comment from the bench or by prosecuting counsel.³⁹

In Canada, the movement to give an accused the right to be a competent witness was a long and often frustrating campaign. However, unlike the English practice and that of the jurisdictions in the southern hemisphere, the instrument in which the right was enacted was a familiar device in Canadian law and had a long history. It was a comprehensive chapter or act that was exhaustive of the statute law on a given subject and that formed an integral part of the codified statute law of several colonies.⁴⁰ In Nova Scotia, for example, the first act with evidentiary content was given royal assent in 1758.⁴¹ During the next 90, years over 20 statutes, or sections thereof, laid down, *inter alia*, rules concerning documentary evidence,

³⁶ 1891, 55 Vic., No. 1231, ss. 34–35 (Victoria).

³⁷ I would like to record my debt to the Hon. D. Fouras, Speaker of the Legislative Assembly of Queensland, and Ms. Karen Sampford, his Research Officer. They provided information and documents concerning the whole Australian experience; I am most grateful for their assistance.

³⁸ 56 Vic., No. 3, s. 3 (Qld.); for commentary, see J.R.S. Forbes, *Evidence in Queensland* (Sydney: The Law Book Company, 1992) at 13.

³⁹ In some Australian legislation, in South Australia for example, there was a provision that “no presumption of guilt” was to be made if an accused did not give evidence (1882, 54 & 46 Vic., s. 1). However, unless it was stipulated in later legislation that an Australian judge was not allowed to comment on the silence of an accused, it was unlikely that the bench remained silent in view of the decision in *R. v. Kops* (1893) 14 N.S.W. Law Rep 150, upheld on appeal (*Kops v. R.* (1894) A.C. 650), that comment from the bench “may be both legitimate and necessary” (1894, A.C., 653).

⁴⁰ For details of statute law codification in the colonies of British North America prior to Confederation, see Brown, *supra* note 20 at 70–92.

⁴¹ *Act relating to treasons and felonies*, 32 Geo. 3, c. 13, c. 35 (N.S.); the section specified the procedure by which witnesses for the accused could give evidence. The irritating practice of embedding items of procedure in a statute that laid down substantive law was a characteristic of the English legislative process and, as is evident, it was taken over by the first colonial legislators. However, they soon eliminated the practice, and concentrated the procedural matter in specific chapters or statutes. See, for example, chapters 133–137 and 168, R.S.N.B. 1851.

the administration of oaths, written evidence and payment for witnesses, culminating in a comprehensive measure in 1849 which specified rules that governed the taking of depositions, the conduct of witnesses, who should be competent witnesses (not parties to a suit nor those charged with a criminal offence), the production and authentication of documents and much else.⁴² The statute law of Nova Scotia was codified in 1851 and with it these acts were consolidated as Chapter 135, "Of Evidence," in the *Revised Statutes of Nova Scotia*.⁴³ When the code came into force, the original statutes were repealed.⁴⁴ In the 1851 *Evidence Amendment Act*, Nova Scotia became the second common law jurisdiction in British North America to enact legislation that gave parties to civil litigation the right to give testimony on oath.⁴⁵ The provisions of this statute, together with other measures, were consolidated with Chapter 135 of 1851 as that chapter in the second series (1859) of the *Revised Statutes*, and the previous legislation was repealed. Similar processes of accretion and consolidation occurred in Prince Edward Island, Ontario and in New Brunswick, where parties to civil suits became competent witnesses in 1853,⁴⁶ 1869,⁴⁷ and 1877⁴⁸ respectively.

Quebec was a special case. When the civilian law of New France for use in litigation concerning property and civil rights was re-adopted in 1774, the former rules of procedure were also revived.⁴⁹ There was no trial by jury; rather, trial was by judge, deposition by witnesses, and by proofs and, in particular, parties to suits were competent to give evidence.⁵⁰ The rules concerning the few persons who were legally incompetent to testify in a suit had been formulated from the writings of the learned civilian, Pothier. These rules are conveniently cited in the *Civil Code of Lower Canada*, 1867, which went on to explain the civilian policy in this respect: "a witness is not rendered

⁴² *Act for improving the law of evidence*, 1849, 42 Vic., c. 21 (N.S.).

⁴³ R.S.N.S., 1851, c. 135.

⁴⁴ *Ibid.*, c. 170.

⁴⁵ 18 Vic. c. 9, ss. 2, 3 (N.S.).

⁴⁶ *Act to amend the law of evidence*, 16 Vic., c. 12 (P.E.I.).

⁴⁷ *Act to amend the law of evidence*, 33 Vic., c. 13 (Ont.).

⁴⁸ *Consolidated Statutes of New Brunswick*, 1877, c. 46, s. 2.

⁴⁹ *Quebec Act*, 1774, 14 Geo. 3, c. 83 (Imp.).

⁵⁰ *Ordinance to regulate the proceedings in the courts of civil judicature*, 1785, 25 Geo. 3, c. 2, s. 11 (Que.).

incompetent by reason of relationship or of being interested in the suit; but his credibility may be affected thereby.⁵¹

A search of the statutes of British Columbia reveals that it did not enact a comprehensive evidence act prior to Confederation. However, B.C. received the English law of 1858 and, with it, its many evidence Acts including those of 1851 and 1853 concerning competent witnesses in civil suits. Thus, despite the fact that these measures were randomly scattered through the English statute book, British Columbia was reasonably well served in this respect. Then, in an apparent recognition of the fact that the *Canada Evidence Act* of 1893 tied up these many loose ends, Victoria enacted an evidence Act in 1894 that was obviously patterned on the Dominion legislation.⁵²

Manitoba and the Northwest Territories were equally well served in this respect by English law. Although the Charter of the Hudson's Bay Company provided that the English law of 1670 was to be enforced in its colony of Rupert's Land, this law was superseded when the Legislative Council of Assiniboia introduced later English law: first, that of 1837, and then that of 1864.⁵³ Thus, in the newly erected province of Manitoba whose territorial area was approximately the same as that of Assiniboia, there existed now some confusion about what law was in force. The Legislature in Winnipeg cleared up the doubt in 1875 by enacting that the English law of 1870 was to be the law of Manitoba.⁵⁴ Later complementary legislation in Ottawa specified that the same law was to apply also to matters under federal jurisdiction.⁵⁵ Of course, as in British Columbia, these statutes ensured that the many English laws concerning evidence and competent witness were in force in Manitoba. The legal history of the

⁵¹ Arts. 1231 & 1332 C.C.Q.

⁵² *Act respecting witnesses and evidence*, 1894, 57 Vic., c. 13 (B.C.). There is some uncertainty about whether all of B.C. received the English law of 1858 or whether part received that of 1862; see J.E. Cote, "The Reception of English Law," (1977) 15 Alta. L. Rev. 91 for discussion. However, whichever is the correct year, it does not affect the argument of this paper.

⁵³ For detail, see D.H. Brown, "Unpredictable and Uncertain: Criminal Law in the Canadian North-West before 1886," (1979) 17 Alta. L. Rev. at 497-99; Cote, *supra* note 52 at 89.

⁵⁴ 1875, 38 Vic., c. 12 (Man.). This was the law pertaining to property and civil rights; Canadian statute law, including the extensive criminal legislation enacted in 1868-69, had been extended to Manitoba in 1873 by 36 Vic., c. 34 (Can.). See Brown, *supra* note 20 at 92-4 for details of this legislation.

⁵⁵ 1888, 51 Vic., c. 33, s. 1 (Can.).

Northwest Territories was essentially the same as that of Assiniboia and Manitoba, except that the legislation to enforce the English law of 1870 was enacted by the federal government in 1886.⁵⁶

In summary: by 1886 all Canadian provinces and the Northwest Territories had legislation that made parties to a civil suit competent witnesses, by virtue of specific legislation or English law that was the basic law of the jurisdiction.

Meanwhile, there had been considerable accretions of procedural and evidentiary law in federal statutes. In the first years of Confederation, Ottawa, which had jurisdiction in the criminal law, enacted virtual copies of the English criminal consolidation Acts of 1861 as Canadian criminal law.⁵⁷ These English acts, as Canadian statutes, brought back the confusing mixture of substantive law and procedural matter in each individual enactment that the colonies had corrected to a greater or lesser degree in the codifications of the 1850s. The forgery act, for example, had 58 sections and ran to 20 pages. Of these, about three pages totalling eight sections were devoted to procedure, including section 54 concerning who could be admitted as a witness, and what corroborative evidence was required in forgery cases.⁵⁸ Then there were statutes whose inspiration was strictly Canadian, taken in large part from former colonial acts. For example, the *Act respecting procedure in criminal cases* contained a long title on witnesses and evidence.⁵⁹ Later, as the need arose, legislation was enacted to deal with specific problems. Such were the 1876 act respecting the attendance of witnesses at criminal trials,⁶⁰ the statutes of 1880 and 1881 that amended the law of evidence and the taking of documentary evidence,⁶¹ the 1886 consolidations of the

⁵⁶ 1886, 49 Vic., c. 25, s. 3 (Can.); Brown, *supra* note 53 at 512. In 1901 the Northwest Territories adopted without change the provisions of the *Canada Evidence Act* [1 Edw. 7, c.1, s. 1 (N.W.T.)]. Saskatchewan drafted and enacted a comprehensive witnesses and evidence Act in 1907 [7 Edw. 7, c. 12 (Sask.)] and Alberta followed with a similar measure in 1910 [1 Geo. 5, c. 10 (Alta.)].

⁵⁷ These were 32 & 33 Vic. (Can.), c. 18, offences relating to the coin; c. 19, forgery; c. 20, offences against the person; c. 21, larceny; c. 22, damage to property.

⁵⁸ 1868, 32 & 33 Vic., c. 19 (Can.). This evidentiary material was later removed to the "Witnesses and Evidence" title of the *Act respecting procedure in criminal cases*; R.S.C. 1886, c. 174, ss. 214, 218; for discussion see Brown, *supra* note 20 at 97.

⁵⁹ 32 & 33 Vic., c. 29, ss. 58–69 (Can.).

⁶⁰ 39 Vic., c. 36 (Can.).

⁶¹ 43 Vic., c. 37; 44 Vic., c. 28 (Can.).

evidence amendment Act, and the Act respecting extra-judicial oaths.⁶² These five statutes are by no means exhaustive of the type; there were at least 12 other Acts that were wholly or partially concerned with witnesses and evidence.

It is suggested that a prime reason for the later proliferation of this type of legislation was that it was needed to supplement provincial evidentiary law in civil cases where a federal tribunal adjudicated. In 1875 the Supreme and Exchequer courts were erected. The latter tribunal was given legal authority of three kinds: "original jurisdiction in suits relating to dominion revenues and in those which involved contravention of dominion statutes where the public interest was concerned, concurrent original jurisdiction with provincial tribunals in suits where the crown in right of the dominion was a litigant, and appellate jurisdiction in contested governmental arbitrations."⁶³ Initially, the justices of the Supreme Court formed a rota to hear Exchequer cases and went on circuit in the provinces to do so. There was not a great deal of federal evidentiary law on the civil side at that time, so that the Act erecting the Court provided that "[i]ssues of fact, in cases before the Exchequer Court, shall be tried according to the law of the Province in which the cause originated, including the laws of evidence."⁶⁴ However, while there was no difference in principle in the law of evidence in the several provinces, Quebec excepted, there were differences in scope and detail that presented one more problem for the peripatetic justices of Exchequer. This problem, then, created the desirability, if not the necessity, for a uniform law of evidence in federal courts, the proliferation of federal evidentiary statutes to provide this, and for the change in the provision respecting the use of provincial law in the 1886 *Evidence Act*: "In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the Province in which the proceedings are taken shall, subject to this and other Acts of the Parliament of Canada, apply to such proceedings."⁶⁵ However, the original problem was compounded, and thus the need for a more comprehensive and permanent solution when, in 1887, the Exchequer was separated from

⁶² R.S.C. 1886, cc. 139, 141.

⁶³ D.H. Brown, "George Wheelock Burbidge" in *Dictionary of Canadian Biography*, Vol. 13 (Toronto: University of Toronto Press, 1993) at 135-37 [hereinafter *DCB*]. Burbidge was the first permanent judge of the Exchequer.

⁶⁴ 38 Vic., c. 11, s. 63 (Can.).

⁶⁵ R.S.C. 1886, c. 139, s. 10.

the Supreme Court, and the legislation effecting this change “very materially enlarged” Exchequer’s jurisdiction, which now “comprehended almost every department of the law except crimes.”⁶⁶

The campaign to make an accused and his or her spouse competent witnesses was begun by Alfred Dymond (1827–1903). Dymond was an English journalist, author and legal reformer who was prominent in the movement to abolish the death penalty in England. He emigrated to Canada in 1869 to become an editor and political writer for the *Toronto Globe*, and in his new surroundings he resumed his activity in legal reform. A Liberal, he was elected to Parliament for North York in 1875, and was an energetic and effective legislator who played a prominent part in putting through the *Canada Temperance Act*.⁶⁷ Although Dymond had a great deal of experience as a lay legal reformer, he was a freshman M.P., and evidently learning his trade when he made his first attempt to change the law respecting the competent witness. It was in 1876, during debate on a criminal procedure bill sponsored by John Hillyard Cameron, a Conservative and a former solicitor-general of Upper Canada. Dymond introduced an amendment that would have allowed an accused person to testify on oath; the spouse of the accused was not included in this proposal.⁶⁸ Edward Blake, the attorney general in Alexander Mackenzie’s Liberal administration, was not unduly harsh with the new backbencher when he explained that such a motion should be made the subject of a “bill introduced for that purpose, giving all parties opportunity for discussion and consideration; and he considered that its introduction at this stage would be an unfortunate precedent.”⁶⁹

Dymond took Blake’s advice. Early in the session of 1877 he introduced a criminal procedure bill that would give an accused person (but not the spouse) the right to testify on oath.⁷⁰ He began second reading with an optimistic and partial account of Evelyn Ashley’s abortive attempt the previous year to bring this about in the Imperial Parliament, and sketched the history of the successful effort to make competent witnesses of the parties to civil actions in both England and Canada. He went on to explain why he thought the right should be

⁶⁶ Brown, *supra* note 63.

⁶⁷ H.J. Morgan, *The Canadian Men and Women of the Time* (Toronto: William Briggs, 1898) at 298.

⁶⁸ *House of Commons Debates* (8 March 1876) at 524.

⁶⁹ *Ibid.* at 530.

⁷⁰ *Ibid.* (15 February 1877) at 43.

extended to the accused in criminal causes in Canada. Since the application of the principle had worked well to discover the truth in the former case, he contended that it would work equally well in the latter. In fact, Dymond said, the accused was not only the best source of information, he was frequently the only source, other than his accuser. He went on to enumerate and then discount predictable arguments against his bill. Prime among them were that many persons accused of crime were lower class illiterates who would be confused by court routine and, although innocent of crime, would make confusing statements in the witness box, leaving them at a disadvantage when cross-examined by able prosecuting counsel. Conversely, the skilled criminal would be encouraged to commit perjury, and his efforts would be successful because of his experience.⁷¹ Dymond was a gifted speaker and, though a layman, his speech was full of legal lore and precedent and nearly every succeeding speaker commented on his grasp of the subject. For the most part, however, they were unconvinced.

Of the ten members who spoke in the debate, eight were lawyers and the majority were opposed to the measure. Hector Cameron, a lawyer, businessman and Conservative member from Cobourg, Ontario, led the opposition. He too began with Evelyn Ashley's bill, but he told a different story. Apart from one former judge, he said, all the English parliamentarians, including the attorney general, had spoken against the measure in the strongest terms; as such events were evaluated, he said, Ashley's initiative was a disaster. Predictably, Cameron expatiated about the accused who would be tempted to commit the "heinous crime of perjury," and those who would be confused and intimidated by court procedure and cross-examination, but he had other concerns too. If Dymond's bill were successful, it would shift the burden of guilt to the accused; he would have to prove himself innocent, rather than cause the prosecution to demonstrate his guilt. If he did not go into the witness box, the jury would take this as an admission of guilt; and the change would bring on inquisition by the bench in the manner of trials conducted in France.⁷² In conclusion, Cameron offered some advice: although he did not think that public opinion supported the bill, if it did gather support, it should be amended to include the spouse of the accused as a competent witness.

⁷¹ *Ibid.* (8 March 1877) at 574-79.

⁷² *Ibid.* at 579-60.

Most of the following speeches were variations and amplifications on the themes introduced by Dymond and Cameron, but other concerns were voiced too. William Kerr, a Liberal from Cobourg, Ontario, spoke for many in this and following debates when he said that he “shrank from the very thought of too frequently interfering with our laws, more especially with the criminal laws of the country,” and that Ottawa should wait for a decision in Westminster, and “as it should be finally decided there, so might this House decide in like manner.”⁷³ Sir John A. Macdonald did not express any opinion for or against the proposed bill, but he said that he would be interested in the views of the minister of justice. Blake sat on the fence.⁷⁴ In a long speech in which he reviewed the arguments for and against the proposition, he said that, although it was an important question, the measure was not yet ready to be placed on the statute book, and he therefore could not recommend second reading. However, “there was one class of case on which the accused might be allowed to give evidence, namely, that of assaults between parties to which there were no witnesses.”⁷⁵ In the face of all of this opposition, Dymond withdrew the bill. But if Ottawa parliamentarians were not prepared to support his campaign, others were.

In his speech from the throne in 1878, the Lieutenant Governor of New Brunswick told the Members of the Legislature that he hoped the dominion Parliament would ensure that all persons charged with crime should “whatever the magnitude of the crime, have the right to give evidence in their own behalf.”⁷⁶ To reinforce this message, the Legislature enacted a bill that made any person a competent witness who was charged under provincial law with an offence that was punished by fine, penalty or imprisonment.⁷⁷

Dymond, in turn, made good use of the Lieutenant Governor’s words when he introduced the latest version of his bill early in the

⁷³ *Ibid.* at 582.

⁷⁴ In the following year, and with respect to Blake’s speech, Dymond said, “After reading [Blake’s] speech — as usual a very able one — over and over again, [he] had not been able to ascertain whether his hon. friend was really favourable or opposed to its principle.” It reminded Dymond of the “remark made regarding a celebrated preacher of the olden time: ‘He prevailed the more because he was not understood.’” Commons, *Debates*, Feb. 28, 1878 at 600.

⁷⁵ *Ibid.* (8 March 1877) 582–84 at 584.

⁷⁶ Quoted in *ibid.* (28 February 1878) at 599.

⁷⁷ 1878, 41 Vic., c. 27, s. 1 (N.B.).

1878 session. He had taken the advice of both Edward Blake and Hector Cameron in drafting the legislation; it was now confined to persons accused of common assault, and the spouse of the accused was to be a competent witness. Dymond characterized the bill as an experiment in that it was confined to a single minor offence. In fact, he said, it was a quasi-civil matter that could be pursued in both civil and criminal courts, but with this difference: in a civil court, the defendant was a competent witness; in a criminal court, he was not. If the experiment were successful, he said, other similar offences could be treated in the same way.⁷⁸

While the debate was much longer than in the previous session, the opposition was predictable. The well-worn arguments of 1877 were dusted off and elaborated, and a new assertion was made. Aemilus Irving (later Sir Aemilus), the Liberal Member for Hamilton, contended that, if the bill was passed without amendment, the judge would usurp the function of the jury and become not only a judge of law, but also a judge of fact.⁷⁹ In rebuttal, Donald Guthrie, another Liberal lawyer and a prominent businessman from Guelph, wanted to know what was new and different in this assertion: since well over 90 per cent of assault cases were conducted by a judge sitting alone, he said, how could the bench not be judge of both fact and law?⁸⁰

Procedural ploys were made to sidetrack the bill, too. Hector Cameron protested that it was improper that a "private member should endeavour to deal or tinker with the general criminal law of the country."⁸¹ He suggested that the minister of justice take over the bill on behalf of the government. Rodolphe Laflamme, Blake's successor as minister of justice, reminded Cameron that several members, including Cameron's namesake, John Hillyard Cameron, had made it a practice to introduce legislation to amend the criminal law. Moreover, unlike Blake in previous debates, Laflamme made it clear that the bill had his unequivocal support. He also elaborated Dymond's suggestion that, if the experiment were successful, it should be extended to every case which was more of a civil than a criminal nature. He was prophetic when he said that it then could be applied "on a more extensive scale."⁸² D'Alton McCarthy, the Conservative

⁷⁸ *House of Commons Debates* (28 February 1878) at 600.

⁷⁹ *Ibid.* at 603.

⁸⁰ *Ibid.* at 606.

⁸¹ *Ibid.* at 602.

⁸² *Ibid.* at 614-15.

member for Simcoe, began by praising the proposal and said that it seemed evident from the debate that the opinion of the House was favourable to the principle of the bill. He thought, however, that if Dymond would allow it to stand over for another year, to be reworked and to be brought in by the government, a better result would ensue.⁸³ McCarthy's efforts and those of the members who opposed the bill were unavailing.⁸⁴ Dymond's support was much stronger and more articulate than it had been in previous years, and the legislation had the unqualified approval of the minister of justice. Apart from an amendment proposed and carried by Henri-Louis Taschereau, the Liberal member from Montmagny and later Chief Justice of the Court of King's Bench, that the accused would be not only a competent witness but also a compellable witness,⁸⁵ the bill passed all its stages in its original form and was given royal assent May 10, 1878. For the first time in Canada, a person accused of a specific criminal offence was a competent witness.

Dymond was prophetic when he said that other offences would be amenable to this treatment, because for several years this piecemeal approach was the only procedure that yielded results. Unfortunately, he could no longer be associated with any future developments because he lost his seat in Parliament in Sir John A. Macdonald's electoral sweep in the fall of 1878 and did not again stand for election. There was a two-year lull in the campaign, until Dymond's act was repealed in 1880 and replaced with legislation that amended the offences against the person Act.⁸⁶ It included the substantive matter in Dymond's act, and extended the right to testify to those accused of assault and battery. Subsequently, there was another lull until 1885, and then legislation came with increasing frequency. In that year, short sections in two statutes made the accused and spouse competent but not compellable witnesses, if charged with the offences laid down in those statutes.⁸⁷ In 1886, two more statutes were added with this

⁸³ *Ibid.* at 613.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* at 1311.

⁸⁶ *Act to amend an Act respecting offences against the person*, 43 Vic., c. 37 (Can.).

⁸⁷ *Act respecting explosive substances*, 48 & 48 Vic., c. 7, s. 5(2) (Can.); *Act to amend an Act for the better preservation of the peace in the vicinity of public works*, 48 & 49 Vic., c. 80, s. 5 (Can.).

provision and in one of these, five specific offences were enumerated.⁸⁸ There were two more in 1888⁸⁹ and in 1889 another two. By 1890, nine statutes included the competent witness provision and it applied to any one of 14 offences. Thus, for example, the anomalous situation existed whereby a person charged with sending an unseaworthy ship to sea, with the possibility of multiple deaths if it sank, was a competent witness, but a person charged with murder was not; similarly, the person accused of seducing a girl under 16 could give evidence in his own behalf, but if he was charged with kidnapping her, he could not.

Meanwhile, the campaign to entrench in the criminal law the principle that any accused person was a competent witness had been carried on by Malcolm Cameron (1832-1898), the Liberal member from Goderich, on Lake Huron, who later became Lieutenant Governor of the Northwest Territories. Cameron, a lawyer, was a legal reformer throughout his long career, and an exceptionally able politician. In 1866, he had applied for a county judgeship and was turned down by John A. Macdonald, then attorney general of Upper Canada. From this inauspicious start, an animosity developed between the two men such that Cameron was characterized by a contemporary as a "thorn in the flesh" of Macdonald from the first days of Confederation.⁹⁰ On the one hand, Cameron's biographer tells us that "[l]argely because of [Cameron's] effort, the federal government spent more than \$600,000 on Goderich harbour. That the work began in 1872 under Sir John A. Macdonald's Conservative government is testimony to Cameron's effectiveness."⁹¹ On the other hand, the bad feeling between the two men is said to have been the reason why Cameron's constituency of South Huron was gerrymandered out of shape when Macdonald "hived the Grits" in 1882.⁹² Elected to the first Parliament of Canada in

⁸⁸ *Act to amend an Act respecting offences against the person*, 49 Vic., c. 51, s. 1(2) (Can.); *Act to punish seduction, and like offences*, 49 Vic., c. 52, s. 6; the offences are listed in s. 1, subs. (1) and (2), and ss. 2, 3, 4 (Can.).

⁸⁹ *Act to amend the law relating to fraudulent marks on merchandise*, 51 Vic., c. 41, s. 13 (Can.); *Act respecting gaming in stocks and merchandise*, 51 Vic., c. 42, s. 4 (Can.).

⁹⁰ D. McGillicuddy, "M.C. Cameron, As I Knew Him" (November, 1898-April, 1899) 12 *Canadian Magazine* at 57-8.

⁹¹ P.A. Russell, "Malcolm Colin Cambell" in *DCB*, vol. 12 at 148.

⁹² McGillicuddy, *supra* note 90 at 58. McGillicuddy quotes from a speech made in the Commons by John Rymal, the member for South Wentworth. Rymal held up a large diagram of the new constituency for Macdonald to see, and told him that he "could bow down and worship this creature of your own creation without committing idolatry, for

1867, Cameron was re-elected in 1872 and 1874. The last victory was voided on appeal in 1875, and thus Cameron was not on hand to support Dymond's initiatives during the remaining years of the Mackenzie administration. But in 1878, Cameron was re-elected and he began to work toward the end that Attorney General Laflamme had predicted.

Cameron's first initiative was in 1882, when he brought in a bill that would make any person charged with a misdemeanour a competent and compellable witness, as well as his or her spouse.⁹³ To give his proposal the greatest authority, Cameron told the House during second reading that its provisions were based on those in the Imperial Commissioners' draft criminal code bill of 1879. He went on to argue that assault as well as assault and battery were misdemeanours, and Ottawa had seen fit to make persons accused of these offences competent to give evidence on their own behalf and compellable to testify for the crown. If such persons and their spouses could testify on oath, then why could not any person accused of misdemeanour so testify? Cameron alluded to a bill introduced earlier in the session by D'Alton McCarthy, which had not been and would not be debated. It would have extended the principle to all accused persons, and would not have made them compellable.⁹⁴ He defended his decision not to go this far, and thus to soften the impact of his legislation on the criminal law, because he preferred "to go slowly, rather than to make changes rapidly, and without, perhaps, sufficient care and consideration." He went on to reiterate and expand the arguments made in previous years by Dymond and his supporters, and to buttress his argument with examples that demonstrated the efficacy of Dymond's Act and its successor.

D'Alton McCarthy told the House that he agreed with almost everything that Cameron had said, with one important exception. This was the provision that would make the accused a compellable witness. His objection is very much to the point, and it bears repeating in his own words: "It is a principle of English law...that a man ought not to be compelled to disclose his own crime... Therefore, the objection I make to the hon. member's Bill is simply that a witness ought not to

there is nothing in the heavens above, the earth beneath, or the waters under the earth, that resembles South Huron."

⁹³ *House of Commons Debates* (16 February 1882) at 16; for detail on misdemeanour, see note 10 above.

⁹⁴ *Ibid.* (27 February 1882) at 109.

be compelled to give evidence, while at the same time it should be open to him to go into the box to explain the circumstances of the offence and tell the whole story."⁹⁵ With this exception, McCarthy went on to give solid support to the principle of Cameron's bill. But he also suggested that his own bill would provide the most equitable remedy for the problem. In so doing, he revealed that prior to introducing the legislation, he had corresponded with members of the bench, whom he did not name, and had modified his draft in light of their suggestions. One judge, with whom McCarthy did not agree at that time, had suggested that he include a provision that laid down the procedure to be followed if an accused person did not choose to enter the witness box. If such a situation occurred, the judge suggested that the fact should not be alleged against the accused; that is to say, prosecuting counsel and the bench should be forbidden to comment on the fact during the trial.⁹⁶ McCarthy concluded by suggesting that both his bill and Cameron's be referred to a select committee.

Sir John A. Macdonald said that he agreed with the principle of Cameron's bill, and with McCarthy's suggestion. It was a short debate: only the three members spoke, after which both bills were read the second time — approval in principle — and sent to a select committee. However, although the committee reported Cameron's bill favourably, Parliament was dissolved before any further action was taken.

In spite of Prime Minister Macdonald's gerrymandering, Cameron was returned in the general election of 1882 and, in the session of 1883, he re-introduced his bill.⁹⁷

In part, he had taken McCarthy's advice: while the legislation was still limited to those accused of misdemeanour, they were not to be compellable witnesses. On second reading, he gave a very brief description of the measure and suggested that it be joined to other criminal law measures in an omnibus bill and referred to a select committee. Macdonald agreed, second reading was given, and it was

⁹⁵ *Ibid.* at 618.

⁹⁶ *Ibid.* at 619; the provision to exclude comment from the bench was in fact included in the Canadian legislation and, in that respect, it differs from the English statute. See *Canada Evidence Act*, 1893, 56 Vic., c. 31, s. 2(2) and the *Criminal Evidence Act 1898*, 1898, 61 & 62 Vic., c. 36, s. 1(b) (Imp.); for an example of how devastating such comment from an English judge can be see Williams, *supra* note 11 at 57-8; for Marshall Hall's strictures on this aspect of the English legislation, see Marjoribanks, *supra* note 28 at 105.

⁹⁷ *Ibid.* (13 February 1883) at 13.

so ordered. Debate in the Committee of the Whole was long and more partisan than ever before. But the division was not between Conservative and Liberal (it was not a government bill) but rather between those who were prejudiced against change and wished to retain the old order, at least until Westminster moved, and innovators who wanted to join the vanguard of progressive reform in the common law world. No new arguments were adduced. The only items of note were that Wilfrid Laurier, a lawyer and a senior Liberal, recommended that not only misdemeanours but all indictable offences should be included in the legislation. Sir Charles Tupper, the minister of railways, gave a long and partisan account of the abortive attempts in both the English and Canadian Parliaments to enact such legislation, and suggested that it was a waste of the members' time to give the measure any further consideration.⁹⁸ The bill was lost after a procedural motion "that the committee rise" was made and passed.⁹⁹

The year 1884 was a much longer re-run of 1883. Cameron brought in the bill of 1883 unchanged; Tupper moved the six-months' hoist in second reading.¹⁰⁰ The motion was defeated and debate continued.¹⁰¹ In the interval between sittings, several members on both sides of the House had done considerable research. For instance, James Lister, a Liberal from Sarnia and a Crown prosecutor, gave an informative speech on the law of evidence in which he castigated Tupper for his insistence that Ottawa wait to see if the Imperial Parliament would move on the issue and, if it did, what it would do. Many common law jurisdictions had enacted enabling legislation in the past several years, he said, and it had worked well. He went on to say that most American states had for several years enforced similar legislation to that proposed by Cameron.¹⁰² In particular, legislation in 1878 had given the accused the right to be a competent witness in federal courts, whose failure to testify did not create any presumption

⁹⁸ *Ibid.* (29 March 1883) at 318, 319–21.

⁹⁹ For discussion on the motion, see *ibid.* at 322, 331–32, and in J.G. Bourinot's *Parliamentary Procedure and Practice*, 2nd. ed. (Montreal: Dawson, 1892) at 622.

¹⁰⁰ *House of Commons Debates* (18 January 1884) at 97.

¹⁰¹ *Ibid.* (4 February 1884) at 97.

¹⁰² *Ibid.* at 93–94; Lister's speech the following year was more detailed and forceful in this respect; see *ibid.*, Feb. 20, 1885 at 184–85. See also Wigmore, vol. I, *supra* note 8 at 593–629 for an annotated list of the considerable number of states that gave an accused and spouse the right to give evidence on oath at that time.

of guilt against him.¹⁰³ However, there was no specific provision to prevent comment by bench and prosecution if the accused did not exercise his right. While the United States had been alluded to previously, Lister was the first speaker to assert this fact with clarity. He was backed up by Frederick Brecken, a Conservative and a former attorney general of PEI, who described the efficacy of the measure in the State of Maine, where he had observed the law in action in criminal court.¹⁰⁴

Although it is apparent from this debate that Cameron was gathering more support for his bill, and although it was again given approval in principle, it was again defeated in committee.¹⁰⁵

In the session of 1885, Cameron changed his bill and his tactics. The legislation of that year was a verbatim copy of Lord Bramwell's bill of 1884 in the Imperial Parliament which, it will be recalled, passed the House of Lords and was given second reading in the Commons. Thus, if it were enacted in Ottawa, all persons accused of an indictable offence, whether felony or misdemeanour, and their spouses would be competent but not compellable witnesses. There was, however, no provision to prevent adverse comment from bench or prosecution if the accused did not give evidence. Cameron also took a page out of Dymond's book by enumerating in advance and then answering the main arguments which had been made against the measure, as follows: (i) there was no necessity for the legislation; no authority had asked for it; (ii) it was not law in England and, until it was, it should not be law in Canada; (iii) it would conduce to perjury; and (iv) it would introduce the procedure of European civilian law into criminal trials in Canada.¹⁰⁶ Even so, all this linen was washed again and again in another major debate.¹⁰⁷ Only one new and significant principle emerged to enliven the proceedings: D'Alton McCarthy, who was a prime supporter of the legislation, had come round, in part, to the view of his judicial correspondent and now supported the proposal that no comment should be made by the prosecution during the trial if an accused did not go into the witness box. Although McCarthy's proposed amendment to this effect brought

¹⁰³ *An act respecting competent witnesses*, United States, 45th Congress, 2nd session, c. 37 (1878).

¹⁰⁴ *House of Commons Debates* (4 February 1884) at 95.

¹⁰⁵ *Ibid.* at 671.

¹⁰⁶ *House of Commons Debates* (20 February 1885) at 176-79.

¹⁰⁷ *Ibid.* at 180-87.

on an extremely acrimonious debate, in which Cameron characterized a member's tactics as "unfair and cowardly" and was reprimanded by the Speaker, it was carried by a substantial majority.¹⁰⁸ During this exchange, the procedure that had been successful in killing the legislation in the two previous sessions was tried again, but this time without success. The bill finally passed all stages in the House, and was sent to the Senate. There, the debate was short, and hostile, with a majority from both sides of the chamber opposed to the measure.¹⁰⁹ James Gowan, a former judge and John A. Macdonald's life-long friend and legal draftsman, epitomized the sense of the majority. The bill, said he, was "a dangerous measure, and...certainly contrary to the spirit of British law," and he buttressed his argument by citing from the experience gained during 42 years on the bench.¹¹⁰

It will have been noticed that there has been no mention of the minister of justice intervening in the debates on Cameron's bills. The reason for this is that these debates took place in the Commons, and the minister, Sir Alexander Campbell, was a senator. In the fall of 1885, Prime Minister Macdonald persuaded John Sparrow David Thompson to resign his seat on the bench and replace Campbell as minister of justice; after this change, the character of the debate on future evidence bills altered radically. Thompson was an exceptionally able individual who came to his new appointment with a wealth of experience. He had been, successively, a leader at the bar, attorney general of Nova Scotia, premier of the province, and a puisne justice of its Supreme Court, and was known as a successful legal reformer with progressive tendencies.¹¹¹ However, up to the time of his appointment in 1885, Thompson had operated in provincial forums and thus had had no opportunity to cause change in the criminal law. When he acquired this power, he demonstrated that, although he was still a dedicated reformer, he was anything but progressive. Like many Canadians of the time, he was a strict law-and-order man: he believed that the law should be made to facilitate the conviction of criminals,

¹⁰⁸ *Ibid.* (11 March) at 496-98, 503.

¹⁰⁹ *Debates of the Senate* (15 April 1885) at 565-78.

¹¹⁰ *Ibid.* at 572; for a biography of Gowan, see D.H. Brown, "James Robert Gowan," in DCB, vol. 13 at 391-95.

¹¹¹ Typical in this respect was his determination to put through the *county incorporation Act* of 1879; Brown, *supra* note 20 at 61-62; for Thompson's life and career, see P.B. Waite's excellent *The Man From Halifax* (Toronto: Toronto University Press, 1985).

and that they should get the ample punishment they deserved.¹¹² In the case of the competent witness, for example, his policy was that "a witness should not only be competent, but compellable...The only reason we admit [witnesses] is to ascertain the truth, and on that ground they should be compellable."¹¹³ Furthermore, as events proved, Thompson would have allowed prosecution and bench to comment adversely if an accused did not choose to enter the witness box.

First reading of Cameron's bill in 1886 followed parliamentary routine.¹¹⁴ Second reading did not. Thompson took precedence; he spoke briefly and to the point, and his argument put new wine in an old bottle. He was "in favour of the principle of the bill," and concurred, "generally speaking, in the arguments by which it is supported."¹¹⁵ He said, however, that there was then a similar bill before the Imperial Parliament that would probably be enacted. He did not want to press ahead with Cameron's bill at that time because there might be important modifications in the English bill. If there were, they should be incorporated in Ottawa's legislation so that Canadian courts could continue to take advantage of the decisions of English tribunals "which we know are almost implicitly followed in matters of criminal jurisprudence, and are the safest guides we have in administering that jurisprudence."¹¹⁶ Cameron was on his feet after Thompson, and it is evident that he was taken aback by this blunt rejection of his measure, but he soldiered on and proposed second reading. It was rejected, as Cameron was rejected by the voters in the general election that winter.

As we know, the English bill was not enacted in 1886, nor for many years thereafter. And, with Cameron out of Parliament, no one else

¹¹² In the minister's opinion, the criminal law of the time had the opposite tendency. He made his views clear early in his tenure when, during a debate on executive clemency, he said: "I think, Mr Speaker, that there is no country in the world in which the criminal classes are treated with such large consideration as they are in Canada. The criminal procedure in Canada, from the first moment of a man's arrest until the last moment of his detention in prison, is a procedure which devises means for his escape," and he went on to particularize his concerns. *House of Commons Debates* (6 June 1887) at 799-800.

¹¹³ *House of Commons Debates* (3 March 1893) at 1675.

¹¹⁴ *Debates of the Senate* (15 April 1885) at 565-78 and *House of Commons Debates* (11 March 1886) at 66.

¹¹⁵ *Ibid.* (14 April 1886) at 707.

¹¹⁶ *Ibid.*

took up the general cause of the competent witness in Canada, either in Parliament or in the media.¹¹⁷ But other legal reform was afoot.

Some time in the fall of 1880, Prime Minister Macdonald had decided to consolidate Canadian statute law as an end in itself, and as a necessary preliminary to any future codification of that law. The consolidation process took five years and came out as the monumental *Revised Statutes* of 1886.¹¹⁸ In particular, much of the material on witnesses and evidence was consolidated in the *Revised Statutes*.¹¹⁹ New law demands new interpretative texts, and the first in the field was Mr. Justice Henri Elzéar Taschereau's *Criminal Statute Law*, which came out in 1888.¹²⁰ It was published in a cramped, one-volume edition that clearly foreshadowed a more comprehensive treatment. Taschereau evidently gave this proposition considerable thought and, instead of a private venture, he suggested to Thompson that he (Taschereau) would draft a criminal code for the Dominion. Thompson rejected the judge's offer on the ground that such a code was being drafted in the justice department. This was not true when Thompson said it in 1889, but he lost no time in putting the process in train.¹²¹

The model for the legislation was the Imperial Commissioners' draft code of 1879, which was laid out in Titles, Parts, and Sections. In the Canadian draft code of 1891, the first six titles contained substantive matter and the remaining four titles were devoted to procedural detail. Thompson's draftsmen included all the material on witnesses and evidence in Title VII, Procedure, ss. 672 to 708. But they had some difficulty integrating the evidentiary matter from the *Revised Statutes* and from statutes enacted since its publication that gave the accused the right to testify on oath. They solved the problem with a drafting innovation whereby the substantive material was placed

¹¹⁷ Only one article, hostile to the idea of the competent witness, has been found in the legal press: a short editorial in the (1885) 21 Can. L.J. 124. There was also a short summary of Bramwell's first bill in the Imperial Parliament, but no comment and no analysis: (1884) 20 Can. L.J. 393. Nothing was found in a search of the public press for 1885. While the media made much of sensational criminal trials, it was incurious about technical discussions of criminal law. For a discussion of this phenomenon, see Brown, *supra* note 20 at 141–42.

¹¹⁸ For the detail of the process, see Brown, *supra* note 20 at 106–17.

¹¹⁹ R.S.C. 1886, c. 139, evidence; c. 141, extra-judicial oaths; c. 174, procedure in criminal cases.

¹²⁰ *The Criminal Statute Law of Canada*, 2nd ed. (Toronto: Carswell, 1888).

¹²¹ Brown, *supra* note 20 at 120–27.

under an appropriate rubric in one of the first six titles, and the deviation from the normal evidentiary procedure in s. 681 in Title VII.¹²² However, under Thompson's direction, the law laid down in several of the original enactments was changed, for s. 681 made the accused not only a competent witness, but also compellable. Nor was there any prohibition of comment if the accused did not go into the witness box. Schedule Two of the code listed the acts from which these provisions were taken among the 73 redundant statutes that would be repealed when the code came into force.

Meanwhile, Malcolm Cameron regained his seat in the general election of 1891. Seven days after Parliament re-convened, he introduced his evidence bill.¹²³ It was for the most part similar to his bill of 1886: a one-page document of five sections, but it now included the provision that counsel and the bench were forbidden to comment during the trial if the accused did not give evidence.¹²⁴ If it were to become law in that form, it would resemble the similar statutes of New Zealand and South Australia already in force, and the eventual English Act: a statute unrelated to any other legislation, and applied only to criminal law. When Cameron moved second reading, he spoke at length; he detailed the history of the measure, and emphasized the fact that Thompson had supported the principle of the bill in 1886, but

¹²² The text of s. 681 is as follows:

The accused, and the wife or husband of the accused, shall be a competent witness either for the prosecution or defence upon the trial of the following offences under this Act:

- (a) making or possessing explosive substances (Part VI, section 100)
- (b) preservation of peace and sale of liquors near public works (sections 116 & 117)
- (c) seducing girl under sixteen (Part XIII, section 179)
- (d) seduction under promise of marriage (section 180)
- (e) seduction of ward, servant, etc. (section 181)
- (f) promoting prostitution (section 183)
- (g) parent or guardian procuring defilement of girl (section 184)
- (h) householders permitting defilement of girls on their premises (section 185)
- (i) gaming in stocks and merchandize (Part XIV, section 199)
- (j) sending unseaworthy ships to sea (Part XIX, section 250)
- (k) assault causing bodily harm (Part XXI, section 260)
- (l) common assault (section 263)
- (m) polygamy (Part XXIII, section 275)
- (n) fraudulent marks on merchandize (Part XXXIV)
- (o) trade combination (Part XL, section 518)

¹²³ *House of Commons Debates* (5 May 1891), col. 129.

¹²⁴ Bill 11, 1891, cl. 2.

had declined to support second reading because he was waiting on events in the Imperial Parliament. Years had passed, and although no bill had been enacted in Westminster, Cameron cited debates, articles in law journals, and other writings to demonstrate that the most prominent and experienced men in England supported the principle that an accused person should be a competent witness. He then gave instances of the anomalous situation that then existed whereby the accused could give evidence in some cases but not in others.¹²⁵ In light of this situation, Cameron wanted to know if the "Minister of Justice could on any ground justify the exclusion of the evidence of an accused person in cases of [the latter] kind."¹²⁶ He then moved second reading of the bill.

Thompson (now Sir John) answered Cameron. Whatever he had been expecting from the minister, it was not what he got. Thompson again affirmed his support of the bill's policy, and then took the legislation out of Cameron's hands. He reminded the House that he had recently introduced the draft criminal code, but would not press it beyond second reading. Instead, he said, a large edition had been published that was to be distributed to individuals who administered the criminal law in order to obtain their views on the legislation. Cameron's bill would now be added to the distribution list. When the opinions of the profession were in, the code would be re-drafted, and would include the competent witness provision.¹²⁷ If such legislation were to come into force, the code would resemble the *crimes Act* of New South Wales in that the provision would be integrated in a comprehensive measure that subsumed the statute law on the subject. But again, it would apply only to criminal law. Cameron protested, but to no avail. Wilfrid Laurier, now the Liberal leader and long time supporter of the bill, intervened to say that the government had now accepted the principle of the legislation, and that was as much as Cameron could hope for.¹²⁸ With that, the debate was terminated.

As Thompson had promised, the draft bills were mailed out and the replies came in.¹²⁹ But the minister did not proceed as he had said he would. Cameron's initiative may have caused Thompson to look

¹²⁵ For examples, see text to note 86, *et seq* and note 123.

¹²⁶ *House of Commons Debates*, col. 2958.

¹²⁷ *Ibid.* (27 July 1891), col. 2960.

¹²⁸ *Ibid.*, col. 2962.

¹²⁹ National Archives of Canada (NAC), RG 13, A1, Department of Justice, files 240/1892, 341/1894 and 1304/1894.

more closely at what his draftsmen had done in the 1891 draft code. In any event, he did not integrate Cameron's bill into the criminal code. Rather, he included some of its provisions in completely different legislation: a bill that would eventually become the *Canada Evidence Act*. It is suggested that there were several reasons for his change of course. First, his long experience working with the comprehensive and convenient evidence chapter in the codified statute law of Nova Scotia; secondly, he saw the opportunity to make federal courts independent of provincial laws of evidence; thirdly, it would give Ottawa the kind of comprehensive evidence act needed in the unique federal state that Canada had become: legislation that would serve in both civil and criminal courts and provide a core that could be added to as and when necessary.

In any event, in the winter of 1891, his draftsmen excised much of the matter pertaining to witnesses from the draft code, namely, sections 679 to 683. Most of this material, together with an *Act respecting evidence* and the *Act respecting extra-judicial oaths* was integrated in an evidence bill in which Schedule C would repeal the two redundant statutes.¹³⁰ Section 2 of the bill states its purpose:

This Act shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

In s. 4, the disparate and particular provisions contained in s. 681 of the 1891 draft code were replaced by the general provision respecting the competent witness from Cameron's bill. But, in compliance with the minister's policy, the draftsmen deviated from the wording of Cameron's model and retained the provision of s. 681 which made the accused compellable, and they did not include the prohibition on comment from the prosecution and bench if the accused did not testify.

However, in excising the evidentiary matter from the criminal code and including it in a separate piece of legislation, the draftsmen linked the evidence bill inextricably to the criminal code. Both would have to come into force concurrently for the code to operate as intended. If the criminal code were enacted, but not the evidence act, there would be no provision for an accused to be a witness of any kind, competent or compellable. For if the legislation in Schedule Two of the code were repealed when it came into effect, as was the plan, then all the special legislation that had given an accused the right to testify on

¹³⁰ R.S.C. 1886, cc. 139 & 141.

oath would disappear, and there would undoubtedly be appeals against this regression. On the other hand, if the statutes in Schedule Two were left in effect, this problem would be avoided; however, many sections of the code would be duplicated by the original legislation, but in different words, and would thus create fertile ground for confusion and appeals. Finally, if an attempt were made to repeal some, but not all, of the items in Schedule Two, the task of deciding what was to stay and what was to go would have given nightmares even to a nitpicker.

Sir John A. Macdonald died in 1891 and Senator Sir John Abbott became prime minister. Thus, Thompson became a very busy man, for he had to take over Macdonald's duties as government leader in the Commons, as well as discharge his own considerable responsibilities as minister of justice.¹³¹

Nevertheless, events in 1892 went as the minister had planned, at least at first. Parliament opened on February 25, and a few days later he introduced the criminal code, a very long piece of legislation. A month later, after a short debate, it passed second reading and was sent to a special joint committee of the House and Senate, of which he was a member.¹³² Senator William Miller, an influential Nova Scotian power broker who was attempting to insinuate himself onto the honours list, was the chairman and, to put it bluntly, Thompson's stooge.¹³³ After much labour, the first sections of the amended bill began to emerge, and on May 17 debate in the Committee of the Whole began.¹³⁴ This process was unduly protracted and toward the end Thompson was warned that a determined effort would be made to defeat the bill in the Senate.¹³⁵ In the event, debate continued until June 28, eleven days before prorogation. It was on this date, just prior to moving third reading, that Thompson moved and carried the amendment that would bring the Code into force July 1, 1893, instead of January 1 that year.¹³⁶ Why? Simply put, the evidence bill could not be passed that session, and the minister or one of his staff must

¹³¹ Waite, *supra* note 111 at 296–341.

¹³² *House of Commons Debates* (8 March 1892), col. 106; (12 April 1892), cols. 1312–20.

¹³³ Brown, *supra* note 20 at 137.

¹³⁴ *House of Commons Debates* (17 May 1892), col. 2701.

¹³⁵ Brown, *supra* note 20 at 142.

¹³⁶ *House of Commons Debates* (28 June 1892), col. 4344.

have realized the implications if the code came into force, but not the evidence act.

The evidence bill, as drafted by the Justice Department, had gotten off to a good start. Thompson moved first reading on April 21, and after a *pro forma* second reading on May 3, it was referred to the special joint committee that was in charge of the criminal code bill.¹³⁷ Even though the chairman was under his thumb, Thompson could not persuade the committee to his way of thinking about the accused as a compellable witness. There was, in his words, "a strong difference of opinion among the members of the committee," and the majority had insisted on striking out the compellable provision that his draftsmen had included.¹³⁸ While the minister could not have been pleased by this result, he knew when to compromise, as he demonstrated in an exchange of correspondence: Senator Gowan had urged the minister "not to take the ground — All or None" with respect to his policy regarding the evidence bill, because "there are many [M.P.s] who would favour or accept the Criminal Law bill, who would not see their way to compel a prisoner to testify."¹³⁹ Thompson's pragmatism is evident in his answer: "You may be sure I will not say "all or none" as regards the evidence sections. I believe in the proposed changes but I am not dogmatic about it."¹⁴⁰ Moreover, the minister still had another hand to play. Thus the bill, as amended by the committee, was not reported until June 30, a week before prorogation.¹⁴¹ There were other reasons for the late date too. The committee did not even begin to consider the evidence bill until the second week in June.¹⁴² At that time, Thompson already had his hands full in the Commons with the criminal code bill, and he knew that it would run into heavy weather in the Senate.¹⁴³ Moreover, since the evidence bill had been reported so late in the session, he would not have time to get it through the House, in addition to the

¹³⁷ *Ibid.* (21 April 1892), col. 1391; (3 May 1892), col. 2008.

¹³⁸ *Ibid.* (3 March 1893), col. 1675.

¹³⁹ Gowan to Thompson, May 11, 1892. NAC, RG 13 A1, Department of Justice, file 63/94, item 49.

¹⁴⁰ Thompson to Gowan, May 18, 1892, James R. Gowan Papers, NAC, microfilm, reel 1889.

¹⁴¹ *House of Commons Journal* (30 June 1892) at 402.

¹⁴² Thompson to Gowan, June 1, 1892. James R. Gowan Papers, NAC, microfilm, reel 1900.

¹⁴³ Brown, *supra* note 20 at 142–45.

code, at least not in the form he wanted. Even if he had, he knew that the Senate would balk at a second controversial bill so late in the session, and one which had caused such a strong difference of opinion in committee. In effect, Thompson had to choose between the code and the evidence bill. He chose the former and left the latter on the order paper. However, the bill, as amended by the committee, was published and circulated to persons and institutions that administered the criminal law.¹⁴⁴

Thompson, who had succeeded Senator Abbott in November 1892, was now prime minister. He was fast off the mark with the evidence bill in 1893. He moved first reading on February 8, ten days after the session opened, in a short and circumspect speech:

This is the Bill which was under the consideration of a joint committee of both Houses at the last session of Parliament. The report of the committee was in favour of the Bill somewhat modified from the present Bill. I have thought proper to introduce the Bill this session in a larger form in order that the whole subject may be submitted to investigation and consideration of members.¹⁴⁵

In particular, s. 4 had been re-drafted to read:

Every person charged with an offence, and the wife or the husband...shall be a competent *and compellable* witness... Provided, however, that no husband shall be compellable to disclose any communication made to him by his wife during their marriage, and no wife shall be compellable to disclose any communication made to her by her husband during their marriage.¹⁴⁶

Like the *Criminal Code*, the Canada Evidence Act, as it was to be titled, was to come into force July 1, 1893. Predictably, in second reading and in the committee of the whole, the arguments were the same as those advanced in the previous debates and, predictably, the legislation ran into heavy weather. Nevertheless, with the prime minister as pilot, the bill swiftly navigated the rocks of argument and the shoals of abortive amendments and, on March 6, sailed through third reading with only one change. William Mulock, a Liberal and later Chief Justice of Ontario, moved and carried an amendment that persons were not competent, rather than not compellable, to disclose

¹⁴⁴ Minister of Justice to distribution list, October 3, 1892; NAC RG 13 A1, Department of Justice, file 1304/1892.

¹⁴⁵ *House of Commons Debates* (8 February 1893), col. 435.

¹⁴⁶ Emphasis added.

any communication made to them by their spouses during marriage.¹⁴⁷ It was a different story in the Senate.

Sir John Abbott, who had done yeoman service in beating back attacks on the criminal code bill the year before, had resigned both from the office of prime minister and as leader of the Senate. His able lieutenant in that campaign, William Miller, had become disenchanted with Thompson, and had turned from fawning friend to influential enemy.¹⁴⁸ Moreover, several senators who opposed Malcolm Cameron's bill in 1885 had, for expediency, become supporters of the current legislation. One of these was James Gowan, who had been so effective in sinking the earlier bill.¹⁴⁹ Secretly, he was still opposed to the provision that provided for an accused to be a competent witness, but he knew that the bill, as a whole, had to be passed in order to implement the *Criminal Code*.¹⁵⁰ Thus, senators from both sides of the chamber generated some long and able speeches, but nothing new in argument, except that Lawrence Power, a Conservative from Halifax, a lawyer and a former Speaker of the Senate, cited the Australian experience for the first time, in support of the bill.¹⁵¹

Auguste-Réal Angers, a former attorney general of Quebec and current minister of agriculture, had replaced Abbott as Senate leader, and he moved first reading of the evidence bill on March 10. Angers was a skilled advocate, and he was first among the majority of the members who supported the bill. But he was no match for those who wished to return it to the form that had emerged from the special joint committee the year before, and to include the provision from Cameron's bill of 1891 respecting comment by the prosecution. First, Richard Scott, a Liberal and a former secretary of state, moved an amendment to eliminate "and compellable" from s. 4. He was elbowed out of the way by James Lougheed, the Conservative Party leader in

¹⁴⁷ *House of Commons Debates* (3 March 1892), cols. 1694–5. Mulock had also been very effective in forcing Thompson to concede to amendments in the *Criminal Code* the previous year; Brown, *supra* note 20 at 140.

¹⁴⁸ Thompson to Miller, January 12, 1893, William Miller Papers. NAC, MG27 1 E10; W. Miller, "Incidents in the Political Career of the Late Sir John Thompson" (n.p., 1895) at 20. A copy of this pamphlet is included in the Miller Papers.

¹⁴⁹ To learn how such an about-turn in policy can be justified, read Gowan's speech in the debate: *Debates of the Senate* (23 March 1893) at 408–09.

¹⁵⁰ Gowan had made his position clear to Thompson the previous year in the letter in which given the minister good advice about the evidence bill of 1892. Gowan to Thompson, May 11, 1892. NAC, RG 13 A1, Department of Justice, file 63/94, item 49.

¹⁵¹ *Debates of the Senate* (27 March 1893) at 444.

the Northwest Territories, who had been a member of the special joint committee the previous year. He had obviously been one of those who had had a "strong difference of opinion" with Thompson and, strongly supported by Miller, he moved that the Senate adopt s. 4 as passed by the committee. Scott then withdrew his motion since "the language of this amendment is more suitable," and the vote restored the committee's wording.¹⁵² But Scott was not satisfied. He recalled the provision of Cameron's bill of 1891 that forbade comment by the prosecution during trial if an accused did not choose to testify, and he moved and carried an amendment to that effect.¹⁵³ Two more minor changes were made and the bill was returned to the Commons on March 27.¹⁵⁴

Three days later the Commons took up the bill, as amended. It was unfortunate for Thompson that he was then in France acting as an arbitrator on the Bering Sea Tribunal. But even if he had been in the House, there was not much he could have done to negate the main Senate amendments at that late date. Time was of the essence; it was now March 30. Hence, as Richard Weldon, Dean of the Faculty of Law at Dalhousie and the member for Albert, N.B., pointed out: "It would be a perilous thing to reject the Bill, because in a short time the Criminal Code will come into operation, and this law of evidence will be necessary."¹⁵⁵ The Senate amendments were accepted, and a further major change was made: it was moved and carried by Louis Davies, a Liberal and later Chief Justice, Supreme Court of Canada, that not only prosecuting counsel, but also the judge, would be forbidden to comment if the accused did not testify.¹⁵⁶ The same day, the senators endorsed the Commons' amendment, and the bill received royal assent April 1, 1893.¹⁵⁷ Thus, when the *Canada Evidence Act* came into force, an accused person and his or her spouse would be competent witnesses, but would not be competent to disclose any communication made to each other during their marriage; and if one or both did not choose to give evidence, no comment could be made by the bench or the prosecution.

¹⁵² *Ibid.* (23 March 1893) at 420, 424.

¹⁵³ *Ibid.* (24 March) 429.

¹⁵⁴ *Ibid.* (27 March) at 447.

¹⁵⁵ *Ibid.* (30 March) at 3485.

¹⁵⁶ *Ibid.* at 3486.

¹⁵⁷ *Debates of the Senate* (30 March 1893) at 493.

For several centuries, a defendant and his or her potential witnesses could not testify on oath in any cause, civil or criminal, in England or her expanding empire. In England this situation began to change in the aftermath of the Glorious Revolution at the end of the 17th century, when legislation provided that witnesses could then testify on oath. It was not until the middle of the 19th century however, that parties to a civil suit were given this right. The campaign to extend the right to accused persons and their spouses was difficult and protracted, and pursued along two avenues: first, in statutes which gave the right to persons accused of specific offences laid down in the enactments and, secondly, as a general policy whereby any accused person could so testify. This right was finally legislated in 1898 in a short, single item statute that applied only to the criminal law, long after similar legislation was enacted by several British jurisdictions in the antipodes and Canada.

In Canada the campaign began later than in England but it ended sooner. It followed much the same course. Thanks largely to the efforts of Alfred Dymond and Malcolm Cameron, the accused person in a criminal trial became a competent witness as of July 1, 1893. Moreover — and this was unique among other British jurisdictions with similar legislation — if the accused did not choose to exercise his right, both bench and prosecution were forbidden to comment on the fact. Furthermore, these provisions were included in spite of the determined opposition of the legislation's sponsor, Sir John Thompson, the minister of justice. An even more signal achievement was the fact that Cameron had given Thompson the impetus to create the comprehensive *Canada Evidence Act*, in which these provisions were embedded. The *Act* was an essential complement to the *Criminal Code*, and it also gave Canada evidentiary legislation befitting her status as a federal state with unique constitutional requirements.