III

Recent Developments In The Law Of Evidence

I have been asked to speak to you for a few minutes this afternoon on recent developments in the law of evidence. I would ask that you keep in mind that the word "recent" is a relative term; much of our law of evidence has evolved through the common law and the authorities in some instances are centuries old.

I think the law relating to blood tests could be considered a recent development. As to the weight to be given such evidence, the decision of the Supreme Court of Canada in *Welstead v. Brown*,[1] is important. In that case the legitimacy of a child was in question. Evidence of the chemical analysis of blood samples taken from the husband, the wife and the child indicated it would be impossible for the husband to be the father of the child. Mr. Justice Cartwright, referring to this evidence at p. 474, stated:

> "In this case, however, the evidence of two qualified medical practitioners was to the effect that tests carried out with samples of the blood of the appellant, of his wife, and of the child indicated that if the child were born of the wife, as is admitted, then it was not merely improbable but impossible that the appellant was the father."

He concluded at p. 475:

> "I wish to make it plain that what I regard as being decisive is the fact that the evidence was to the effect that the appellant could not be the father of the child."

This case is indicative of the weight and conclusiveness of such evidence.

Now as to the admissibility of a blood test: As might be expected, particularly in criminal trials, there has been a conflict of judicial opinion. Some were of opinion that the rules governing the admissibility of a blood test were analogous to those relating to a confession, so well known to all of you, namely, that before such evidence could be given the jury must be satisfied that the blood test was carried out with the consent of the accused and there was an absence of threats, fear or compulsion. This was the view adopted by the Alberta Court in *Rex v. Ford*[2] by the Quebec Court of Appeal in *Rex v. Frechette*[3] and in the unreported decision of *Rex v. Gagnon* in 1951.

However, courts in other jurisdictions differed from this approach. The Ontario Court of Appeal in *Rex v. McNamara*[4] refused to follow *Rex v. Ford* and held that the evidence of a blood test taken when the accused was in no condition to give consent was admissible: the analogy to a confession was denied. The Ontario Supreme Court in 1950 in the unreported decision of *Rex v. Linquard* was to the same effect.

1. [1952] 1 D.L.R. 465.
2. [1948] 1 D.L.R. 787.
3. (1948) 93 C.C.C. 111, aff'd., (1949) 94 C.C.C. 392.
4. [1951] O.R. 6.

There are provisions in the Criminal Code respecting chemical analysis: these are contained in s. 224 (3) and (4); s. 224 pertaining to chemical analysis refers only to the previous two sections. S. 222 deals with the offence of driving while intoxicated, while s. 223 pertains to driving while the ability to drive is impaired. The effect of s. 224 is that the analysis of blood may be admitted in evidence, notwithstanding that an accused person was not, before he gave the sample, warned that he need not give a sample; and it further provides, in subsection (4), that there is no obligation upon an accused person to give such a sample and that a refusal should not be commented upon at the trial.

This rather unsatisfactory state of affairs pertaining to the admissibility of blood tests was, I think, settled in a very recent decision of the Supreme Court of Canada, *The Attorney General for Quebec v. Begin.*[5] In that case the accused was convicted of what is known as motor-manslaughter. At the trial the Crown proved intoxication by means of evidence of a blood test. The accused had consented to give a sample but he had not been warned that the analysis of the sample might be tendered in evidence against him. The question of the admissibility of such evidence was fully considered by the members of the Court and the conclusion and rule to be followed appears to be well set out in a part of the headnote of this case which reads as follows:

> "Under the general law, as it was before the addition of s-s 4 (d) of s. 285 of the Code," [this refers to the section of the 1927 Code] "evidence of a blood test taken without a warning is admissible. The contrary view is based on a misapprehension of the reason and object of the confession-rule and of the privilege-rule both of which are related to the very substance of the declarations made respectively by an accused or a witness. The taking of a blood test does not give rise to the application of these rules nor does the fact that while the method used to obtain a blood test might be illegal and give rise to civil or criminal recourses, renders, per se, inadmissible the evidence resulting therefrom."

The Chief Justice's views were clearly stated at pp. 595 and 596 as follows:

> **"In the present case the accused consented, but I agree with the judgment in the McNamara case that even if he had not asked and therefore had not consented the evidence would be admissible . . . . .**
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> **"In my view a confusion has arisen between the rules as to the admissibility of statements, or admissions, and those relating to self-incrimination. In taking a blood test the accused does not say anything because he is not asked any question. Nothing in this judgment is to be taken as weakening the effect of the rules as to the admissibility of statements, or admissions, because the two matters are entirely distinct."**

Let me now turn to changes in the statutory law of evidence. As you know, the new Canada Evidence Act is contained in Chapter 307

5. [1955] S.C.R. 593.

of the Revised Statutes of Canada, 1952. There were no changes made in this Act in the Revised Statutes. In the same year we had a revision of New Brunswick statutes and the New Brunswick Evidence Act is now contained in Chapter 74 of the Revised Statutes of New Brunswick, 1952. Three new sections were added to this Act. S. 14 deals with the effect of disbelief in an oath; it provides:

> "Where an oath has been administered and taken, the fact the person to whom it was administered and by whom it was taken did not at the time of taking the oath believe in the binding effect of the oath shall not, for any purpose affect the validity of the oath."

There was also included a provision as to the number of expert witnesses allowable. S. 22 provides that unless leave of the Court is obtained not more than three expert witnesses may be called by either side. Finally there is a provision which will permit evidence to be given of a child who is too young to understand the nature of the oath. I wonder how many of you were aware that until 1952 in a civil action the evidence of a child who was not old enough to take an oath would not be admitted. S. 23 now permits such evidence. Subsection (2) of s. 23 is also important: it provides that no action can be decided upon the evidence of a child of tender years unless such evidence is corroborated.

I want to say a word about the admissibility of photographs as evidence at a trial. There are, even today, some Courts which hold that before a photograph can be admitted, the person who took the photograph as well as the person who developed it must be called as witnesses. I myself have had this experience within the past few months. I suggest to you that this is unrealistic and actually not necessary. After all, when a witness goes in a witness box and gives oral testimony, he, in effect, says — "the following words represent the facts as I saw them." I suggest, therefore, that if this witness can say—"these photographs show the facts as I saw them," this would be sufficient. Indeed, in New Brunswick, we have a strong authority concerning the admissibility of photographs and I believe it is frequently overlooked. I refer to the decision of the New Brunswick Court of Appeal in *Rex v. Arthur Bannister.*[6] Photographs of the victim's body were admitted into evidence. The late Chief Justice Baxter said at p. 398:

> "When these gentlemen recognize the photographs as being accurate portrayals of the condition of the charred remains, it seems immaterial to inquire as to the person who had taken them or when they were taken or as to those engaged in their development."

There are also cases on the admissibility of motion pictures. An example of this type of evidence is contained in the decision of The *Army & Navy Department Store v. Retail Wholesale & Department Store Union.*[7] In that case motion pictures of strikers who were

6. (1936) 10 M. P.R. 391.
7. [1950] 2 D.L.R. 850.

picketing the premises were admitted by Chief Justice Farris of the British Columbia Supreme Court. His Lordship stated that the object or purpose of the admission of these photographs, however, was merely for the clarification of the verbal testimony given and not as proof of the facts. He further suggested that with modern innovations old rules of evidence would not necessarily remain static. As a matter of interest I know of two cases within the past year before our own Supreme Court, both of which are unreported, in which motion pictures were admitted into evidence. In all probability the use of motion pictures as evidence will become a common occurrence rather than a novel one.

Let me conclude my remarks with what I consider to be a somewhat prevalent practice in some of our courts. I refer to the tendency in some courts to permit evidence to be given subject to objection. Perhaps I am out of order in referring to this but to me this is a practice which is to be regretted. The admissibility of evidence in a criminal action is ruled upon immediately. However, the rules of evidence in a civil trial are not enforced with such strictness. It would seem that the rules of evidence are comparatively simple, and if evidence is tendered which is objectionable it should be ruled inadmissible forthwith, and if such evidence is admissible it should be admitted as such and not subject to objection. We frequently find that evidence which is admitted subject to objection gets into the record, the case is argued on appeal and nothing further is done about it. We do not know in many cases whether the court bases its decision on such evidence or not. In fact we do not know whether or not such evidence has been rejected or actually admitted, the result being, frequently, that there is no ruling on the matter whatsoever. It is likely that in some cases this is the proper course to follow, that is to admit such evidence subject to objection, but I suggest this is too frequently done. In this regard I would like to refer to a portion of a recent article which appeared in Chitty's Law Journal wherein the author refers to an old decision of *Walker v. Frobisher*,[8] which was decided 150 years ago. In referring to this the author said:

> "A judge must not take it upon himself to say whether evidence improperly admitted had or had not any effect upon his mind. In many cases it would appear very difficult for a judge to disabuse his mind of the effect that inadmissible evidence has had upon him. It may well be that he can disabuse his mind of the facts stated in that evidence but even a person of the greatest mental discipline would sometimes, if not often, find it extremely difficult to disabuse his mind of the atmosphere created by the hearing of that inadmissible evidence. If evidence is admissible, even if there be no jury, a judge ought to rule that it is inadmissible and refuse to hear it, because of the danger, not of his acting upon the facts known by that evidence, but of the danger that the atmosphere that the hearing of the evidence may create upon his mind."

Donald M. Gillis,
Saint John, N.B.

8. (1801) 6 Ves. Jun. 70; 31 E.R. 943.