

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON THE RULE IN HOLLINGTON V. HEWTHORN

LRC 30

1977

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE GARDE B. GARDOM, Q.C.		
ATTORNEYGENERAL FOR BRITISH COLUMBIA		

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON THE RULE IN
HOLLINGTON V. HEWTHORN

Early in 1975 the Commission sought the agreement of your predecessor to the inclusion of an examination of the rule in *Hollington v. Hewthorn* as part of the Commission's approved programme. That agreement was obtained.

The Commission then prepared, according to its usual practice, a working paper embodying tentative proposals for a modification of the rule. The working paper was circulated widely among the judiciary, members of the bar and other interested parties, and comment on, and criticism of, the proposals was specifically invited.

In the face of an initially disappointing lack of response to the working paper, the Commission made further efforts to elicit comment and criticism by issuing further invitations to specific groups to give us the benefit of their views. In addition, a summary of the Commission's proposals was published in "The Advocate" in June/July 1976.

Despite these extra efforts on the part of the Commission to determine whether the tentative proposals were acceptable, only two replies were received. Having given interested parties ample opportunity to express views on the proposals, the Commission decided to proceed with the preparation of this Report.

The recommendations in the Report do not depart from the tentative proposals embodied in the working paper, and the Commission is in favour of a substantial modification, although not complete repeal, of the rule in *Hollington v. Hewthorn*.

CHAPTER I

THE PRESENT LAW

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A. I n t r o -

A simplified statement of what has come to be known as "the rule in *Hollington v. Hewthorn*" is that in civil proceedings, evidence that a party has previously been convicted of an offence arising out of the same facts as are at issue in the civil proceedings is not admissible. The *ratio decidendi* of *Hollington v. F. Hewthorn & Co.* is, however, somewhat more complex than this simple formulation implies, and it is worthwhile to examine the facts of the case and the judgment of the English Court of Appeal.

The essential facts are set out in the report of the case.

The plaintiff, Robert Henry Hollington, the owner of a motorcar, sued as the administrator of the estate of his son, Basil Thomas Edmund Hollington, who had died after action brought, and on his own behalf, claiming damages in respect of a collision ... between the plaintiff's car, driven by B.T.E. Hollington, and a car owned by the first defendants, F. Hewthorn & Co. Ltd., and driven by the second defendant, Ernest Arthur Poll. The defendants denied negligence on the part of the second defendant and pleaded contributory negligence. Owing to the death of B.T.E. Hollington, the plaintiff was unable to adduce any direct evidence of the accident, and he tendered in evidence, in addition to evidence as to the position and condition of the two vehicles after the collision, ... a conviction of the defendant, Poll, for careless driving at the time and place of the collision ... Hilbery J. ruled that [the conviction was not] admissible as being *res inter alios acta*.

The trial judge nonetheless held that the plaintiff had proved negligence, and awarded damages against the defendants, who then appealed.

We are concerned here only with that part of the judgment of the Court of Appeal (delivered by Goddard L.J.) which relates to the inadmissibility in evidence of the conviction.

First, Goddard L.J. dealt with what he saw as the marginal value of admitting the conviction. He said that even if it were admitted, it would still be necessary to link up or identify the careless driving with the accident by calling substantially the same evidence as was before the criminal court. Moreover, he said, since it was not contended that the conviction was in any sense conclusive, once the defendant challenged the propriety of the conviction, retrial would once again be necessary. The opinion of the criminal court was entitled to no more weight than that of a private bystander.

Secondly, he called in aid the maxim *res inter alios acta alteri non debet* that it is unfair in an action between A and C to make binding on A a finding in an action between A and B.

Thirdly, he reviewed the older authorities and concluded that none supported the proposition that a previous conviction for an offence to which a party had pleaded not guilty could be introduced in evidence in subsequent civil proceedings involving that party particular he relied on *Castrique v. Imrie*

4. *Ibid.* 434.
5. N. *supra*, 599.
6. [1911] P. 108.
7. *Ibid.* 115. in which Blackburn J. said that:
9. (1926) 42 T.L.R. 245.

... a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive but is not even admissible evidence of the forgery in an action on the bill.

It is worth noting, however, that Goddard L.J. perceived quite differently the consequences of a plea of guilty. He said:

It may frequently happen that where bigamy or any other crime has to be proved in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof of the confession by a witness present at the trial is admissible because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial.

Fourthly, some of the more recent authorities, supporting the admission of convictions, were reviewed and overruled. It is important to summarize this part of the judgment, as these authorities have been cited in some of the Canadian cases in which the rule has not been applied. In 1911 the case of the *In the Estate of Crippen* came before the Probate Division in England. Crippen's personal representative, although Crippen had been convicted of and executed for the murder of his wife, applied for the administration of the wife's estate. It was held that the personal representative of a man convicted of murder was an unsuitable candidate for the administration, and Evans P. admitted the conviction, "not merely as proof of the conviction, but also as presumptive proof of the commission, but also of the crime." In *Partington v. Partington and Atkinson* a husband, who had previously been found to have been a corespondent, petitioned for divorce. The previous divorce was introduced in evidence, although it was not considered to be an estoppel. Then in *O'Toole v. O'Toole* Hill J. admitted proof of a conviction of the respondent of perjury in swearing that he had not had connection with a certain woman as evidence that he had committed adultery with her. Of these three cases it was simply said that:

11. *Ibid.*
12. [1943] S.C.R. 165. See also *English v. Richmond*, [1956] S.C.R. 383, where the matter of the admissibility of a plea of guilty was considered.
13. N. 3 *supra*.
14. [1907] 1 K.B. 670 (C.A.).

In our opinion, ... [they] go beyond and are contrary to the authorities and ought not to be followed in future."

One further observation in the judgment ought to be noted. It was the view of the court that if previous convictions were to be admitted and given weight, then the same rule ought to apply to previous acquittals. This extension of the argument presented for the admissibility of previous convictions was found to be even more unappealing, and Goddard L.J. said that: If a conviction can be admitted, not as an estoppel, but as *prima facie* evidence, so ought an acquittal, and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case."

The appeal was allowed on the basis that Hilbery J. was wrong in holding that the evidence supported a finding of negligence on the part of the defendants.

B. The Law in British Columbia

Although the rule in *Hollington v. Hewthorn* has had a somewhat chequered career in other provinces in Canada, its principles appear to have been applied consistently in British Columbia in cases involving previous convictions on both pleas of guilty and not guilty, previous acquittals, and previous decrees of divorce on the ground of adultery.

1. Convictions on Pleas of Not Guilty

It would seem that the most recent case in the Supreme Court of Canada concerning this matter directly is *La Foncibre Compagnie d' Assurance de Franco v. Perras and Daoust*, arising out of a decision of the Court of King's Bench, Appeal Side, in Quebec. The facts were that the plaintiffs, having been insured by the defendants, were being driven by their servant, Daoust, and were involved in an accident. Daoust was subsequently convicted of negligent driving. The plaintiffs sought to recover from the defendants, who in turn denied liability because of the criminality of Daoust's conduct. The case involved the law of Quebec, but in this instance the civil law and the common law were to all intents and purposes the same, and the Supreme Court cited *Castrigue v. Imrie* and *Caine v. Palace Steamship Co.* In the majority judgment, delivered by Rinfret J., it was held that:

16. Translation by Law Reform Commission of British Columbia: Moreover, it is our opinion that, quite apart from the question of its regularity, even the presentation of this document was irrelevant to the question at issue.
 17. (1895), 24 S.C.R. 650.
 18. [1943] 4 D.L.R. 704 (B.C.). The Court did not have the benefit of the report of *Hollington v. Hewthorn*.
 19. N. 6 *supra*.
 20. (1966), 56 W.W.R. 57 (B.C.)
21. *Ibid.* 60.

D'ailleurs, nous sommes d'avis que, independamment de sa regularite, la reception meme de ce document [the certificate of Daoust's conviction] etait inadmissible en l'espece.

The Court dismissed the insurance company's appeal on the basis that it had failed to prove the criminality of Daoust's conduct. In arriving at this decision the Supreme Court apparently overlooked its earlier decision in *Lundy v. Lundy* on appeal from the Court of Appeal for Ontario. In that case a man had killed his wife, and had then conveyed part of the estate which had come to him under her will, to his brother. It was held that no devisee could take under the will of a testator whose death had been caused by the criminal act of the devisee himself, and it would seem that the conviction of the husband for manslaughter was introduced without question in the proceedings to set aside the conveyance.

Nonetheless, it was *Perras* which was followed by Wilson C.C.J. in *Secretary of State for Canada v. Quon Hon.* The case involved an application to dispossess a tenant of rented premises on the ground that, in having used it for a criminal purpose, he was in breach of the *Landlord and Tenant Act*. The applicant sought to introduce a certificate of conviction of the tenant on a charge of having kept a disorderly house. The tenant objected to the introduction of the certificate, and the application failed for want of evidence, the decision in *Re Crippen* being specifically disapproved.

In *Canadian Indemnity Co. v. Campbell*, a case involving facts similar to those in *Perras*, the plaintiff insurance company sought to recover an indemnity from the defendant insured. It came out in evidence that the defendant had been charged with careless driving, and had pleaded not guilty, but of this Kirke Smith C.C.J. said:

The outcome of these proceedings was not, of course, tendered in evidence, since the occasions upon which a criminal judgment has been received as evidence in civil proceedings are to be regarded as exceptional; whatever the historical vicissitudes through which it has passed, the general rule today is undoubtedly that which excludes a criminal judgment as evidence of the truth of the facts decided by it.

The plaintiffs were therefore put to their proof, on the balance of probabilities, that the insured, by virtue of his alleged drunkenness, was in breach of a condition of his policy, and for lack of evidence failed in their action.

The latest reported British Columbia case we have been able to find on this point is *Clarke v. Holdsworth*, in which the plaintiff sued the defendants for damages arising out of negligent driving. During the proceedings, but in the absence of the jury, counsel for the plaintiff asked one of the defendants if he had previously been convicted of careless driving at a certain time and in a certain place. The defendant said that he had. Counsel for the defendants objected to this evidence going to the jury. Counsel for the plaintiff, however, cited section 18 (1) of the *Evidence Act* as authority for the propriety of the question. This subsection provides that:

- (1) A witness may be questioned as to whether he has been convicted of any offence, indictable or not, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove the conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the offence, ... is, upon proof of the identity of the witness as such convict, sufficient evidence of his conviction ...

Aikins J. was perfectly clear that the provision represented no abrogation of the rule in *Hollington v. Hewthorn*, but held that he had no discretion to refuse to allow the question and answer to be put before the jury for the purpose of attacking the defendant's credibility. He said, however:

As to the use which can be made of the proof of a previous conviction, I propose to instruct the jury as to the very limited use that may be made of the fact of a previous conviction and I propose, ... to offer some comment to the jury that a conviction of driving without due care and attention may have very little probative value indeed, and perhaps virtually none, in regard to credibility, because it is so wholly alien to the line of offences, such as perjury, fraud, theft, misrepresentation and so forth ... which can give rise to a reasonable inference that a witness is not an honest person ...

2. Convictions on Pleas of Guilty

In *Hollington v. Hewthorn* itself it was held that a different rule applies where a party to civil proceedings has previously pleaded guilty to an offence. That this is also the case in British Columbia appears from an unreported decision of Fulton J. in *McMaster v. Riggs*. The plaintiff sought damages sustained by him when his vehicle was involved in a collision with a vehicle owned and driven by the defendant. In the discovery evidence it came out that the defendant had not contested " a ticket or notice charging him with failure to yield the rightofway," but the matter was not raised by either counsel at the trial. Fulton J. was not, therefore, able to determine whether the failure to contest amounted to a plea of guilty, but said: "... the plea of guilty, while it has weight, is not conclusive of the matter in a civil trial ..." [emphasis added]. His authority for this proposition was *Re Charlton*, a decision of the Ontario Court of Appeal to which we refer in more detail later.

3. Acquittals

The decision of the Supreme Court of Canada in *McLean v. Pettigrew* seems to establish that evidence of previous acquittals in criminal proceedings of parties to subsequent civil proceedings are equally inadmissible. The case involved an action by the plaintiff against the defendant for injuries arising out of the negligent operation of the defendant's car, in which the plaintiff was a gratuitous passenger. Part of the plaintiff's case turned on whether the defendant's actions were "wrongful" according to the law of Ontario, and in attempting to rebut this claim the defendant sought to introduce the fact that he had been charged with careless driving in Ontario, but had been acquitted. All members of the Supreme Court referred to Perras and held that a previous acquittal did not prevent a civil court from arriving at the conclusion that the defendant had been negligent according to a civil standard. The findings of the Quebec courts below that the defendant had in fact been negligent were upheld, and the defendant's appeal was dismissed.

4. Matrimonial Causes

We have been able to discover no reported case in British Columbia in which the question of the admissibility of, or the weight to be accorded to, a previous criminal conviction has arisen in a subsequent matrimonial cause, although the point has arisen elsewhere. The question whether a previous finding of adultery against a corespondent is admissible in the corespondent's own subsequent divorce proceedings has, however, been considered in a number of British Columbia cases. Although two sets of civil proceedings are involved, the situation has traditionally been considered in the context of *Hollington v. Hewthorn*, if for no other reason than the fact that *Partington v. Partington* was specifically overruled in *Hollington*.

In *Lingor v. Lingor*, Wilson J. cited *Hollington*, and Perras in refusing to allow a petitioner for divorce to introduce a finding of adultery against her respondent husband as corespondent in previous divorce proceedings. In an essentially similar, albeit more complicated, divorce action in 1970, Aikins J. in *Meshwa v. Meshwa* applied *Hollington*, *Perras* and *Lingor* and held a previous finding of adultery against a corespondent to be *res inter alios acta*.

It would therefore seem to be almost certain that a British Columbia court would hold a previous criminal conviction to be inadmissible in a subsequent matrimonial proceeding as evidence of the conviction itself or the facts leading up to it.

5. Statutory Exceptions

We have found one statutory exception in British Columbia to the rule in *Hollington v. Hewthorn*, although our search of the statutes has not been exhaustive, and there may be others.

Section 14 of the *Automobile Insurance Act* provides that:

- (1) In any action, cause, or proceeding in which any of the provisions of this Act or the regulations and any plan are invoked and in which it is material to establish that a person using or operating a vehicle was so using or operating the vehicle under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of

the proper control of the vehicle, there shall be received, as admissible evidence on the issue, proof that that person has been convicted of an offence committed at the material time under section 234, 235, or 236 of the Criminal Code (Canada), whether or not that person is a party to the action, cause, or proceeding and whether or not he is a witness at the trial and whether or not he has first been questioned as to whether he has been convicted of that offence.

- (2) For the purpose of subsection (1), a certificate containing the substance and effect only of the conviction of a person for an offence under section 234, 235, or 236 of the *Criminal Code* (Canada) and purporting to be signed by the officer having custody of the records of the court in which the person was convicted, or by the deputy of that officer, shall, upon proof of the identity of the person so convicted, be sufficient evidence of the conviction without proof of the signature or official character of the person by whom the certificate purports to have been signed.

C. The Law Elsewhere in Canada

As we have already mentioned, the rule in *Hollington v. Hewthorn* has had a chequered career in other provinces in Canada, particularly in Ontario, where its application has been rare.

1. Convictions on Pleas of Not Guilty

In Manitoba the rule has been applied in *Kantyluk v. Graham and Kostick*. The issue was whether the plaintiff purchaser of a car might recover from the defendant vendor damages resulting from the alleged defective condition of the car's brakes. In pursuance of his claim the plaintiff sought to introduce in evidence proof that he had already been convicted, under the *Highway Traffic Act*, of operating a vehicle without adequate brakes. Williams C.J.K.B. declined to receive the evidence, citing *Perras and McLean v. Pettigrew* in support of his position.

In Nova Scotia the principles of the rule were applied before *Hollington* itself in *Shaw v. Glen Falls Insurance Co.* The plaintiff was seeking to recover on a policy of insurance against theft, but the defendant, apparently, denied that there was theft and claimed instead that the alleged thief had the plaintiff's authority to use the car. During the course of the trial evidence of a conviction for theft was admitted, and the defendant moved for a new trial. The court granted a new trial, relying, *inter alia*, on *Castrigue v. Imrie* and holding that the decision in *Re Crippen* must be confined strictly to its facts.

The only reported case on this point in Saskatchewan that we have been able to discover was decided in 1927, and in view of the fact that it was decided before *Hollington*, and in view of a later decision on a related point in which *Hollington* was in essence applied, it may be that *Re Noble* is not entitled to great weight, particularly as it was given in a District Court and was founded on *Re Crippen*. The facts were essentially the same as those in *Re Crippen*, and the question was whether a man who had killed his wife was entitled to the administration of her estate on her intestacy. Despite a consideration of *Castrigue v. Imrie*, Gravel Sur. Ct. J. held that "a certified copy of the conviction would be admissible evidence not merely as prov-

ing the conviction itself, but also as presumptive proof of the commission of the crime."

In Ontario there have been at least two cases of importance on this point. In *Deckert v. Prudential Insurance Co.*, decided only one month after *Hollington* when, presumably, the report was not available to the court, it was held that an insurance company was not bound to meet a policy of insurance effected on the life of a man who had been executed for murder. Evidence of the conviction for murder and the subsequent execution was received without discussion.

In *Potter v. Swain*, however, decided two years after *Deckert*, the Ontario Court of Appeal took a different view. The plaintiff was a tenant of the defendants, and had sued to recover rent which he had paid in excess of that permitted by certain Wartime Leasehold Regulations. One of the defendants had previously been charged in criminal proceedings relating to the taking of excessive rent, and in the reasons for judgment in those proceedings, the proper rent was found as a fact. In the civil action counsel for the plaintiff tendered the reasons for judgment as evidence of the proper rent, but they were rejected out of hand, McRuer J.A. saying: The reasons for judgment of the learned trial judge delivered at the conclusion of the criminal appeal have no evidentiary value whatever in subsequent civil proceedings, and ought not to have been received in evidence ..." Neither *Hollington* nor *Deckert* was discussed.

2. *Convictions on Pleas of Guilty*

Except in one instance, the view expressed in *Hollington* that convictions following pleas of guilty may be admitted in evidence in subsequent civil proceedings,

51. (1956), 4 D.L.R. (2d) 539.

52. [1969] 1 O.R. 706. See also *Mellyer Farms Ltd. v. Biro*, [1971] 2 O.R. 583 (City Ct.).

53. [1969] 1 O.R. 706, 709.

54. (1965), 51 D.L.R. (2d) 646 (P.E.I.S.C.). appears to have been uniformly followed in Canada.

In *Ferris v. Monohan*, decided in the Appeal Division of the Supreme Court of New Brunswick, the plaintiffs had claimed damages for injuries caused them by the alleged negligence of the defendant in driving his truck. The plaintiffs sought, over the objection of the defendant, to introduce evidence that he had pleaded, guilty to criminal charges arising out of the same incident. McNair C.J.N.B., applying *Hollington* and *Perras*, held that the evidence was admissible, but conceded that it was open to the defendant to mitigate the weight to be attached to the evidence by explaining that he had been advised that it would be cheaper to plead guilty to the criminal charges than to contest them.

The leading case in Ontario on this point is *Re Charlton*, a decision of the Court of Appeal. Charlton had pleaded guilty to the manslaughter of his wife, who had died intestate. The administrator of her estate then applied for directions as to whether Charlton was entitled to share on her intestacy, and at the trial, counsel for Charlton sought to explain the plea of guilty and advance evidence that he was not criminally responsible for the death of

his wife, and therefore entitled to share on the intestacy. The trial judge, however, afforded conclusive weight to the plea of guilty, and held that no one might profit from his own wrongful act. On the appeal Jessup J.A., delivering the judgment of the court and ordering a new trial, said:

If the result of a criminal trial is not conclusive in a subsequent civil proceeding arising from the same facts I can see no basis in principle and I find no authority that an admission or confession in the criminal trial is nevertheless conclusive in subsequent civil proceedings. It is undoubtedly evidence of very great weight but a plea of guilty like any admission, and notwithstanding its solemnity, is capable of explanation ... The circumstances under which it is alleged the present plea was made may be capable of diminishing its otherwise overwhelming force.

The isolated case in which evidence of a plea of guilty was held to be inadmissible is *MacFarlane Produce Co. v. Canadian General Insurance Co.* The case turned on whether one of the plaintiff's employees, for the purpose of a claim on a policy of insurance against theft, had been guilty of theft when he drove the plaintiff's truck, and damaged it, or whether his actions, although unauthorized, were not criminal. At the trial, without a jury, evidence was introduced that the employee had previously pleaded guilty to taking the truck without the owner's consent, and it appears that the plaintiff based its claim largely on this fact. The claim was dismissed for lack of evidence. Campbell C.J. based his decision to disregard the conviction on *Hollington*, but it appears that this was the result of an incomplete reading of the judgment in *Hollington*, as no reference was made to the distinction made in that case between convictions on pleas of not guilty and pleas of guilty.

It would seem, therefore, that there is no significant dissent in Canada from the view that pleas of guilty in previous criminal proceedings are admissible in subsequent civil proceedings arising out of the same facts, to be afforded some, but not conclusive, weight.

3. Acquittals

The leading case in Canada on the admissibility of, and weight to be accorded to, evidence of previous acquittals would appear to be *McLean v. Pettigrew*, to which we have already referred. Two earlier cases are, however, of interest.

The point arose in 1921 in Ontario in *Re Linn v. Cooper*, where the plaintiff sought to recover goods which he alleged had been stolen from him. The defendant had previously been acquitted on a criminal charge, but Middleton J. in the instant case said:

The finding of not guilty in a criminal matter was not evidence in a civil action, for two reasons: (a) the proceedings were not between the same parties the criminal proceedings are between the Crown and the accused; and (b) the issue was not the same in the criminal proceeding the issue was, Did the accused *feloniously* take the chattels? In the civil, are the goods the property of the plaintiff.

The accused may be acquitted of theft, even when there is no doubt that the goods are the property of the plaintiff.

In a criminal proceeding the evidence must show guilt beyond a reasonable doubt; while in a civil proceeding the Court may act upon a preponderance of probability; so that, even if on the facts the same issue had to be determined by the same tribunal on the same evidence, there might be a finding in favour of the accused in the criminal Court and against him in the civil Court.

The other case, *Re Emele*, decided in Saskatchewan in 1941, must be regarded as an aberration. The question arose on an application for directions by an executor whether a woman who had been acquitted of murdering her husband might take under his will. MacDonald J. regarded the acquittal as conclusive and refused to entertain the contention that he should reach his own conclusion on whether, on the balance of probabilities, the woman had brought about her husband's death. In relying on *Lundy v. Lundy* and *Re Crippen*, the judge admitted that these cases involved previous convictions rather than previous acquittals, but simply noted that "the same principle applies ... [and] the evidence of her acquittal on the criminal charge is admissible in these proceedings and should be acted upon."

4. Matrimonial Causes

The *Divorce Act*, in setting out the grounds for divorce, lists among those grounds a number of acts which may also lead or have led to criminal charges and conviction. It also, of course, provides that adultery is a ground for divorce, and one act of adultery may give rise to more than one set of civil proceedings. The effect of the rule in *Hollington v. Hewthorn* has, therefore, come up for discussion in a number of Canadian cases involving divorce.

The matter of previous criminal convictions and subsequent divorce proceedings has been specifically considered in two Nova Scotia decisions.

In *Manuel v. Manuel* a wife petitioned for divorce on the ground of adultery, offering as evidence the previous conviction of her husband on a charge of rape. Rape, at that time in Nova Scotia, was not *per se* a ground for divorce. MacDonald J. held himself to be bound by *Hollington* and the Canadian cases in which it had been applied, and decided that evidence of the husband's conviction was not admissible to sustain the petition. In the absence of other evidence, therefore, the petition was dismissed.

In *G. v. G.* the previous conviction of the husband for sodomy was presented by the wife in support of her petition, but Cowan C.J.T.D. applied *Manuel* and refused to accept it as evidence of the husband's misconduct. Counsel for the wife, however, also called one of the boys with whom the husband had allegedly been involved, and introduced a written admission by the husband, made to the police before the criminal trial, that he had committed the acts alleged (although he had pleaded not guilty at the criminal trial). In the divorce proceedings the judge held that the boy's evidence, corroborated by the written admission, was sufficient to sustain the petition on the balance of probabilities.

It is worth noting in passing that in *Lauritson v. Lauritson*, 72. (1956), 19 W.W.R. 90 (Sask. Q.B.). See also, of course, *Lingor v. Lingor*, n. 33 *supra*, and *Meshwa v. Meshwa*, n. 34 *supra*. an Ontario decision of

1932, a petition for divorce on the ground of adultery was granted upon proof that the respondent husband had been convicted of having had carnal knowledge of a woman not his wife.

We turn now to the cases in which the presentation of a petition for divorce on the ground of adultery has been supported by a finding in a previous divorce action that one of the parties had participated in an act of adultery.

The general Canadian position, outside of Ontario, would seem to be represented by *Stevenson v. Stevenson*, a 1956 decision in Saskatchewan. The wife's petition was undefended, but she presented certified copies of a previous decree *nisi* and a decree absolute granted in an action founded on adultery, in which her husband had been named as the corespondent. There was no other evidence of adultery, and Thomson J., applying *Hollington* and the British Columbia cases, adjourned the trial to enable the wife to adduce further evidence.

The position in Ontario is different. In *Howe v. Howe* the essential facts were that the petitioner husband had been granted a decree nisi against his wife on the ground of her adultery, but before the pronouncement of the decree absolute it came to light that the husband had been the corespondent in a previous divorce action founded on adultery. Ontario law accorded the courts a discretion to refuse a decree of divorce where the petitioner had also been guilty of adultery. The main issue, raised by the Attorney General for Ontario as an intervener, was whether the decree absolute should be pronounced, and the conclusion of the majority of the Court of Appeal was that it should be. In the judgments of both Riddell and Henderson JJ.A., however, specific reference was made to the point that it was proper for evidence of the previous divorce decree to be introduced for the purpose of establishing the husband's adultery.

In *Thompson v. Thompson*, decided in the Ontario High Court in 1948, Urquhart J. was prepared, in a short judgment, to admit, as evidence of the respondent husband's adultery, a certified copy of the judgment absolute in a previous divorce action involving adultery in which the husband had been named as a corespondent. He found authority for this course in two early English cases,

77. N. 8 *supra*.

78. N. 74 *supra*.

79. (1968), 2 D.L.R. (3d) 273 (Ont. H.C.). but did not refer to *Partington v. Partington* and the overruling of that case by *Hollington*, and he made no reference to *Howe v. Howe*.

The point arose again in Ontario in 1968 in *Love v. Love* and Ferguson J. followed *Howe* and *Thompson*, and purported to distinguish *Hollington* by stating that it involved the admissibility in subsequent civil proceedings for negligence of a previous criminal conviction, and that it was therefore irrelevant to whether a finding of adultery was a finding *in rem*.

CHAPTER II

PROPOSALS FOR CHANGE ELSEWHERE

Introduction

The rule in *Hollington v. Hewthorn* has been criticized by both judges and legal writers,

2. See *infra*.
3. The Times, July 28, 30, 1964. The description of the case appears in Law Reform Committee, Fifteenth Report, The Rule in *Hollington v. Hewthorn* 12 (Cmnd. 3391, 1967).
4. [1967] 1 Q.B. 333.
5. Denning M.R., *ibid.* at 339 (with whom Danckwerts L.J. concurred) and Salmon L.J. at 342.

and has been the subject of study by law reform bodies in numerous Commonwealth jurisdictions, and the subject of statutory change in others.

These jurisdictions include Canada, Alberta, Ontario, the United Kingdom, Fiji, New Zealand, New South Wales, South Australia and Western Australia, and in this chapter we examine the changes and proposals for change.

B. United Kingdom

Apart from South Australia, where change was effected in 1945, the United Kingdom was the first of the jurisdictions mentioned to study the rule in detail and enact legislation to bring about its repeal. This may well have been because of a series of cases decided between 1964 and 1967 in which some of the more bizarre effects of the rule became evident.

In *Hinds v. Sparks* the plaintiff had been convicted of robbery and his conviction had been upheld by the Court of Criminal Appeal. Several years later he brought an action for libel against a defendant who had published a statement that the plaintiff was guilty of the robbery of which he had been convicted. The defendant upon whom, under the existing law, the onus lay of proving that the plaintiff had been guilty failed to discharge it and the plaintiff's action succeeded. In *Goody v. Odhams Press Ltd.*, the facts were similar, although the decision involved appeals from two interlocutory orders of the trial judge. All three judges of the Court of Appeal joined in condemning the rule. In *Barclays Bank Ltd. v. Cole* a man convicted of robbing a bank was sued by the bank for return of part of the money. The defendant denied the robbery and asked for trial by a jury. The request was denied, and the defendant appealed from this decision. The appeal was dismissed, but both Denning M.R. and Diplock L.J. seized the occasion once again to condemn the state of affairs which made it possible for the defendant to assert a right to have his guilt or innocence retried.

In 1967 the Law Reform Committee, under the chairmanship of Lord Pearson, acted upon these judicial suggestions that the rule be reexamined, and presented a report to the Lord Chancellor in July of that year. The Committee's own summary of its recommendations appears in Appendix A to this Report.

As a result, it is supposed, of the Committee's recommendations, sections 1113 of the *Civil Evidence Act, 1968* were enacted, and they provide as follows:

11. (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a courtmartial there or elsewhere shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is

relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a courtmartial there or elsewhere

(a) he shall be taken to have committed that offence unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of section 13 of this Act or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (2) above, a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown.

(5) Nothing in any of the following enactments, that is to say

(a) section 12 of the *Criminal Justice Act 1948* (under which a conviction leading to probation or discharge is to be disregarded except as therein mentioned);

(b) section 9 of the *Criminal Justice (Scotland) Act 1949* (which makes similar provision in respect of convictions on indictment in Scotland); and

(c) section 8 of the *Probation Act (Northern Ireland) 1950* (which corresponds to the said section 12) or any corresponding enactment of the Parliament of Northern Ireland for the time being in force, shall affect the operation of this section; and for the purposes of this section any order made by a court of summary jurisdiction in Scotland under section 1 or section 2 of the said Act of 1949 shall be treated as a conviction.

(6) In this section "court-martial" means a court-martial constituted under the *Army Act 1955*, the *Air Force Act 1955* or the *Naval Discipline Act 1957* or a disciplinary court constituted under section 50 of the said Act of 1957, and in relation to a court-martial "conviction", as regards a court-martial constituted under either of the said Acts of 1955, means a finding of guilty which is, or falls to be treated as,

the finding of the court, and "convicted" shall be construed accordingly.

12. (1) In any civil proceedings

(a) the fact that a person has been found guilty of adultery in any matrimonial proceedings; and

(b) the fact that a person has been adjudged to be the father of a child in affiliation proceedings before any court in the United Kingdom, shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those civil proceedings, that he committed the adultery to which the finding relates or, as the case may be, is (or was) the father of that child, whether or not he offered any defence to the allegation of adultery or paternity and whether or not he is a party to the civil proceedings; but no finding or adjudication other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been found guilty of adultery as mentioned in subsection (1)(a) above or to have been adjudged to be the father of a child as mentioned in subsection (1)(b) above

(a) he shall be taken to have committed the adultery to which the finding relates or, as the case may be, to be (or have been) the father of that child, unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court in the matrimonial or affiliation proceedings in question shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of any enactment whereby a finding of fact in any matrimonial or affiliation proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Subsection (4) of section 11 of this Act shall apply for the purposes of this section as if the reference to subsection (2) were a reference to subsection (2) of this section.

(5) In this section "matrimonial proceedings" means any matrimonial cause in the High Court or a county court in England and Wales or in the High Court in Northern Ireland, any consistorial action in Scotland, or any appeal arising out of any such cause or action; "affiliation proceedings" means, in relation to Scotland, any action of affiliation and aliment; and in this subsection "consistorial action" does not include an action of aliment only between husband and wife raised in the Court of Session or an action of interim aliment raised in the sheriff court.

13. (1) In an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, that person stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly.
- (2) In any such action as aforesaid in which by virtue of this section a person is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or chargesheet on which that person was convicted, shall, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, be admissible in evidence for the purpose of identifying those facts.
- (3) For the purposes of this section a person shall be taken to stand convicted of an offence if but only if there subsists against him a conviction of that offence by or before a court in the United Kingdom or by a courtmartial there or elsewhere.
- (4) Subsections (4) to (6) of section 11 of this Act shall apply for the purposes of this section as they apply for the purposes of that section, but as if in the said subsection (4) the reference to subsection (2) were a reference to subsection (2) of this section.
- (5) The foregoing provisions of this section shall apply for the purposes of any action begun after the passing of this Act, whenever the cause of action arose, but shall not apply for the purposes of any action begun before the passing of this Act or any appeal or other proceedings arising out of any such action.

Since the enactment of this legislation, the English Court of Appeal has considered various aspects of it four times. The two more important decisions are *Wauchope v. Mordecai* and *Stupple v. Royal Insurance Co.*

In *Wauchope* the plaintiff brought an action for negligence against the defendant in respect of a collision between the plaintiff on his bicycle and the open door of the defendant's car parked in the street. Before the action the defendant had been convicted in respect of the collision, of opening the door of a motorvehicle so as to cause injury or danger. By an oversight the trial judge was not referred to the new legislation, and it was held that the plaintiff had not proved his case. on appeal, Denning M.R. (with whom Salmon and Edmund Davies L.J.J. agreed), referring to section 11(2) (a) said:

... in this case, in view of the conviction, it was to be taken that the defendant had opened the door of the car so as to cause injury, unless the contrary was proved. The burden of proof in this civil case was altered. Instead of the burden being on the plaintiff to prove that the defendant was negligent, it was for the defendant to prove that he had not opened the door so as to cause injury. If the judge had been reminded of this new Act, I think that he would have held in favour of the plaintiff.

The matter of the burden of proof was more carefully considered in *Stupple*. *Stupple* had been convicted of robbing a bank of some 87,000, and during the investigation of the crime about 1,000 in cash had been taken from him as evidence. After the conviction *Stupple*, contending his innocence, sued the bank's indemnifiers for the return of the 1,000 but the indemnifiers counterclaimed for the 87,000. In support of his contention, *Stupple* adduced fresh

evidence. At trial, Paull J. was less convinced than the jury in the earlier case of *Stupple's* guilt, but nonetheless said that he thought the conviction ought to be conclusive proof of guilt, and found for the defendants. On appeal, Denning M.R. held that the conviction does not merely shift the evidentiary burden of proof, but shifts the legal burden of proof. In addition, he said, the conviction is a weighty piece of evidence in itself. He gave an example:

Take a runningdown case where a plaintiff claims damages for negligent driving by the defendant. If the defendant has not been convicted, the legal burden is on the plaintiff throughout. But if the defendant has been convicted of careless driving, the legal burden is shifted. It is on the defendant himself. At the end of the day, if the judge is left in doubt the defendant fails because the defendant has not discharged the legal burden which is on him. The burden is, no doubt, the civil burden. He must show, on the balance of probabilities, that he was not negligent: ... But he must show it nevertheless. Otherwise he loses by the very force of the conviction.

Lord Denning went on, however, to say that the weight to be accorded to the conviction would vary according to the circumstances under which it was obtained. A man might, for example, bring evidence to show that he had pleaded guilty to a minor offence to save time, trouble and expense, and thus attempt to prove that the conviction was "erroneous."

Buckley L.J. agreed with Lord Denning that the effect of section 11(2) (a) was to shift the legal burden of proof, and said that it was then up to the convicted man to show, on the balance of probabilities, that "he did not do the act." But he disagreed with Lord Denning that the conviction was evidence in itself, and said that the duty of the trial judge was to decide the matter on the evidence adduced before him. The question of the weight to be attached to the conviction did not therefore arise. Winn L.J. appeared to agree with Buckley L.J. on these points.

Two commentators on the *Stupple* decision have pointed out that it raises important questions on the interpretation of section 11(1) and (2), that there are important practical differences arising from whether the views of Lord Denning or those of Buckley and Winn L.JJ. are followed, and that the confusion following *Stupple* is attributable to ambiguities in the Law Reform Committee's Report. Both Zuckerman and Miller point out that Lord Denning appears to believe that it is open to the convicted man to discharge the burden on him by showing that the conviction is erroneous i.e. improperly obtained. Buckley and Winn L.JJ., however, appear to be of the view that the convicted man must show a good deal more - that he positively did not commit the acts of which he was accused and found guilty. Both commentators agree that the Law Reform Committee probably intended the conviction to be a weighty piece of evidence, but that it was ambiguous on whether the convicted man should have to prove merely the impropriety of the conviction or go further and establish his innocence. Miller, in particular, in reference to the wording of section 11(2) (a) says:

Yet the fact remains that no matter how unjustifiable the conviction is shown to be, it will still be a conviction. As such it will create a statutory presumption of guilt which can, strictly speaking, only be rebutted by evidence tending to establish innocence.

C. South Australia

In 1945 the following amendments were made to the *Evidence Act* of South Australia:

- 34a. Where a person has been convicted of an offence, and the commission of that offence is in issue or relevant to any issue in a civil proceeding, the conviction shall be evidence of the commission of that offence admissible against the person convicted or those who claim through or under him but not otherwise: Provided that a conviction other than upon information in the Supreme Court shall not be admissible unless it appears to the court that the admission is in the interests of justice.
- 34b. Where in any proceedings in the Supreme Court in its matrimonial causes jurisdiction a person has been found guilty of adultery, the decree or order of the court reciting or based upon that finding shall be admissible in any subsequent proceedings in the Supreme Court in its matrimonial causes jurisdiction as

evidence of the adultery as against that person, notwithstanding that the parties to the proceedings in which the finding is tendered are not the same as in the proceedings in which the decree or order was made.

We have, unfortunately, no recent information on the experience in South Australia with these provisions, but Cowen and Carter note that civil cases in that jurisdiction are heard without juries.

D. Fiji

In 1975 the Parliament of Fiji passed the *Evidence (Amendment) Act, 1975*, which followed very closely sections 11 and 13 of the United Kingdom *Civil Evidence Act, 1968*. It is interesting to note, however, that the Fijian Parliament did not enact an analogue of section 12 of the English Act, so that presumably the rule in *Hollington v. Hewthorn* still applies in civil proceedings which are instituted after adultery has been found, or filiation established, in prior proceedings.

The full text of the Fijian amendments appears in Appendix B.

E. New South Wales

The New South Wales Law Reform Commission has not instituted a formal study of the rule in *Hollington v. Hewthorn* in its entirety. It did, however, advert to a particular aspect of the rule in its Report on Defamation published in 1971. Section 56 of the draft statute on defamation which appears in that report provides that:

(1) This section applies to civil proceedings for defamation and to proceedings for an offence under section 51 of this Act.

(2) Subject to subsection (4) of this section, where there is a question of the truth of an imputation concerning any person, and the commission by that person of a criminal offence is relevant to that question, proof of the conviction by a court of that person for that offence is

- (a) if the conviction is by a court of an Australian State, or of the Commonwealth, or of a Territory of the Commonwealth, conclusive evidence that he committed the offence; and
- (b) if the conviction is by a court of any other country, evidence that he committed the offence.

For the purposes of subsection (2) of this section

- (a) an issue whether an imputation was a matter of substantial truth; or
- (b) a question whether an imputation was true or a matter of substantial truth, being a question arising in relation to damages for defamation

is a question of the truth of the imputation, but no other question is a question of the truth of an imputation.

(4) Subsection (2) of this section does not have effect if it is shown that the conviction has been set aside.

(5) For the purposes of this section the contents of a document which is evidence of conviction of an offence, and the contents of an information, complaint, indictment, charge sheet or similar document on which a person is convicted of an offence, are admissible in evidence to identify the facts on which the conviction is based.

- (6) Section (5) of this section does not affect the admissibility of other evidence to identify the facts on which the conviction is based.
- (7) In this section "conviction" includes
 - (a) in the case of a courtmartial within the meaning of the *CourtsMartial Appeals Act 1955*, a conviction which is or is deemed to be a conviction of a courtmartial for the purposes of that Act;
 - (b) in the case of the CourtsMartial Appeals Tribunal constituted under that Act, a finding of guilty under section 25, 26 or 27 of that Act;
 - (c) in the case of a courtmartial constituted under the *Imperial Act* called the *Army Act 1955* or under the *Imperial Act* called the *Air Force Act 1955*, a finding of guilty which is, or falls to be treated as, a finding of the court duly confirmed; and
 - (d) in the case of a courtmartial constituted under the *Imperial Act* called the *Naval Discipline Act 1957*, a finding of guilty which is, or falls to be treated as, the finding of the court - and "convicted" has a corresponding meaning.

In the text accompanying its draft statute, the New South Wales Commission points out why draft section 56(2) differs from section 13 (1) of the English legislation:

... the English enactment goes beyond making a conviction evidence in support of a defence of truth. It applies wherever guilt or innocence of the offence is relevant to an issue. Thus suppose A was murdered and B was convicted of the murder and the facts on which the conviction was based were consistent only with there being but one man guilty of the murder. Then let it be that C publishes a statement that D was guilty of the murder. D sues C for damages for defamation. C pleads a defence alleging the truth of the statement and issue is joined on that statement. It seems to us that the English provision would allow D to use the conviction and the facts on which it was based as conclusive evidence in destruction of the defence based on truth, and to exclude evidence, however compelling, that the statement was true.

Section 56 of the Commission's draft statute was enacted in New South Wales in 1974 as section 55 of *The Defamation Act, 1974*.

F. Western Australia

In September 1971 the Law Reform Committee of Western Australia issued a working paper on the rule in *Hollington v. Hewthorn*. It contained a broad description of the existing law in that state and elsewhere, and a description of the advantages and disadvantages of change. It concluded with a series of questions which, in effect, invited respondents to the paper to state whether they were in favour of change, and if so, whether change should be radical or limited.

In April 1972, the Committee issued a Report on the matter. Its recommendations, supported by the Law Society of Western Australia, were:

- (1) that the rule in *Hollington v. Hewthorn* not be abolished by statute; and
- (2) that legislation be enacted providing that in defamation actions in which the commission of an offence is in issue or is relevant to an issue, a conviction after trial shall be admissible and shall be conclusive evidence that the party committed the offence.

The Committee's reasons for its first recommendation were:

- (1) Under s. 79 C of the *Evidence Act*, evidence given and recorded in a criminal proceeding would if relevant be admissible in a subsequent civil action. This would alleviate any possible hardship from the rule in *Hollington v. Hewthorn* in the vast majority of cases.
- (2) The question of the weight to be given to the evidence of the conviction would, in the Committee's opinion, raise real difficulties and the abolition of the rule excluding such evidence would create as many problems as it would solve.

The misgivings of the Committee in its second reason appear to stem largely from the issues and differences of opinion raised by *Stupple v. Royal Insurance Co.* 32. N. 27 *supra*, 4.

The Committee pointed out in its working paper that section 101 of the *Matrimonial Causes Act 1959* (an Australian federal statute) provides that evidence that a party to a marriage had been convicted of a crime is evidence that the party did the act or thing constituting the crime.

The Committee's recommendation on defamation has not, so far, been implemented.

G. ___New Zealand

In July 1972 the Torts and General Law Reform Committee in New Zealand also presented a report to the Minister of Justice on the rule in *Hollington v. Hewthorn*.

We can do no better than to use the Committee's own summary of recommendations, expanding upon them where appropriate with summaries of the reasons which led up to those recommendations.

1. A conviction recorded in a New Zealand court should be admissible, under certain stringent conditions, in subsequent civil proceedings as evidence of the facts upon which that conviction was founded.

The "stringent conditions" referred to narrow down considerably, in comparison with the English legislation, the occasions upon which a previous conviction would be admissible. Essentially, the condition of admissibility would be met only if the witness who gave the evidence which supported the conviction were unavailable, and then only if the trial judge exercised a discretion to admit. The Committee's reasoning is as follows:

If, in the case of *R v. X*, X pleaded not guilty but was convicted on the evidence of Z, we do not consider that the conviction should be admissible if Z is still available to give evidence. Let us assume that Z was not effectively cross-examined in the criminal proceedings but that his evidence is particularly vulnerable to cross-examination. In an English civil action the opponent of X may now simply rely on the conviction and avoid calling Z, so depriving X's counsel of any opportunity to cross-examine. Z's non-attendance at the civil trial does more than affect the weight to be attached to the conviction; it affects the conduct of the trial in an important respect. We think that it is undesirable that X's opponent should be entitled, at his option, to deprive the court of an available witness and to proceed on the basis of a conviction founded on the evidence of that very witness. The view that we have formed, after anxious consideration, applies whether the later civil proceedings are heard by a magistrate, by a judge alone, or by a judge and jury. No one can weigh the probative value of a conviction against the probative value of evidence which has not been heard. The position is different when the defendant pleaded guilty in the earlier criminal proceedings: in that event no witness would be called in the criminal proceedings, and the foregoing reasoning does not apply. The defendant's guilty plea already operates as an admission and is admissible accordingly, and we have no wish to alter the present law in this respect.

The Committee went on to recommend that if a witness for the prosecution or the defence was called in defended criminal proceedings but was unavailable to give evidence in later civil proceedings, the judge in the civil proceedings should have a discretion to admit the conviction

as evidence. The discretion ought, in the Committee's view to be exercised having regard to:

- (1) the importance of the fact which the conviction, if admitted, would tend to prove;
- (2) the availability of any other witness to the same fact;
- (3) when the trial is with a jury, to the likely prejudicial effect of the conviction upon the jury as compared with its probative value;
- (4) all other such circumstances as the court considers relevant.

The Committee then went on to make further recommendations:

2. *The contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or chargesheet should be admissible for this purpose, but nothing else from the record of transcript of the criminal proceedings. Evidence should be admissible to connect the conviction with the question in issue before the civil court.*
3. *Verdicts of acquittal in criminal proceedings should not be admissible in subsequent civil proceedings.*
4. *The effect of admitting a conviction should not be to cast an onus of disproving its correctness on the party against whose interest in the litigation the conviction operates.*

The Committee was anxious to avoid the difficulties raised by *Stupple v. Royal Insurance Co.*, and was of the opinion that it would be wiser simply to admit the conviction for what it was worth as evidence in the particular circumstances of each case. more specifically it was said:

It should always be possible for a party to cast doubt on the reliability of a conviction, or to show that the facts upon which it was founded did not justify it. If he cannot show, on the balance of probabilities ..., that a conviction was erroneous, he should still be entitled to try and convince the trier of fact that there is a substantial possibility that the facts did not support the conviction, and that on the whole of the evidence in the instant case, including but notwithstanding the conviction, his antagonist has failed to discharge the onus of proof placed upon him in accordance with the maxim "he who asserts must prove".

The Committee's next recommendation was that:

5. *A conviction recorded in a New Zealand court should be admissible and conclusive evidence in any subsequent proceedings for defamation that the defendant committed the acts founding the offence of which he stands convicted.*

The Committee took issue with the criticism levelled by the New South Wales Commission at the English legislation by means of their hypothetical situation. The Committee said:

The [New South Wales] Commission assumes that the conviction of B for murder would in itself prove that the facts on which the conviction was based were consistent only with there being but one man guilty of the murder. The assumption is incorrect. As the evidence in the criminal trial would not be admissible, D, before he could get any help from s.13 of the 1968 Act, would have to call evidence tending to show that only one man could have committed the murder. All the witnesses on this point could be crossexamined to show (1) that two men were in-

volved; and (2) that D was the second man. Thus virtually everything agitated in the criminal trial will have to be reagitated in the defamation proceedings. In the particular situation with which we are dealing this is as it should be.

The Committee's final recommendations are as follows:

6. *A party seeking to have a conviction admitted in civil proceedings should be required to make an interlocutory application to the court.*
7. *Findings of adultery in matrimonial proceedings in the Supreme Court should be admissible in subsequent matrimonial or other civil proceedings, subject to the same conditions as we recommend for criminal convictions.*
8. *Paternity orders should also be admissible on those conditions.*
9. *The findings of administrative tribunals should be inadmissible in subsequent civil proceedings.*

The Committee's recommendations have not, so far, been implemented.

H. ___ Alberta

Alberta appears to be the Commonwealth jurisdiction in which a report devoted exclusively to the rule in *Hollington v. Hewthorn* has been most recently published.

The Institute of Law Research and Reform summarizes its recommendations as follows:

- (1) that evidence of the conviction of any person in a Canadian court for an offence whether federal or provincial be admissible to prove that he committed that offence, whether he was convicted on a plea of guilty or otherwise, and whether or not he is a party to the civil proceeding;
- (2) that the contents of the information, complaint, indictment or charge sheet also be admissible;
- (3) that in actions of defamation, proof of a subsisting conviction be conclusive evidence that the convicted person committed the offence; and that in all other cases it be simply admissible.

The Institute also provided a draft statute to serve as a model for the implementation of these recommendations. It is attached to the Institute's Report as Appendix B and to this Report as Appendix C.

It is, we think, worthwhile to examine in more detail some of the background to the Alberta Institute's conclusions.

1. The Institute considered whether an order of acquittal or dismissal should also be made admissible. The conclusion was that neither should be admissible, "as an order of acquittal is not evidence of innocence in the sense that a conviction is evidence of guilt."
2. The Institute also briefly considered whether evidence of previous convictions ought to be admissible in subsequent *criminal* proceedings as evidence of the facts upon which the conviction was based. It was decided, however, that this issue ought to be considered outside the context of the rule in *Hollington v. Hewthorn*.
3. The question of the evidentiary effect of admitting evidenced of a previous conviction was, in the light of the United Kingdom experience, given anxious consideration.
48. *Ibid.* 1314.
49. *Ibid.* 14.

50. *Ibid.* 1415. One alternative canvassed was a provision that the conviction be *prima facie* evidence of the facts leading to it. This, however, was rejected because of the imprecision surrounding the effect of declaring evidence to be *prima facie*. It was finally decided that, except in one case, "the legislation should simply make a conviction admissible without specifying the weight to be attached to it." The exception, as is obvious from a reading of the recommendations set out above, involved subsequent actions for defamation, where, the Institute recommended, proof of a previous conviction ought to have a conclusive evidentiary effect.
4. The Institute saw no reason to distinguish between convictions effected at various levels in the court structure in any Canadian jurisdiction, but were not in favour of admitting convictions by courts-martial.
5. For the Institute, the question whether judgments in previous matrimonial causes and filiation proceedings should be admitted in subsequent civil proceedings raised the entire question whether, and to what extent, previous civil judgments should be admitted where there is some identity of parties and issues. It was concluded that this was too large an issue for a report on a limited topic, and thus it was decided to make no provision for the admission of prior findings of adultery in subsequent divorce proceedings. The Institute also preferred to delay a decision on the admissibility of prior filiation findings until it had completed a separate study on the status of illegitimate children in Alberta.

The Alberta Report was submitted in February 1975 and as far as we know, no legislative action has yet been initiated for its implementation.

I. Ontario

In 1976 the Ontario Law Reform Commission submitted to the Attorney General its Report on the Law of Evidence. In that Report a chapter is devoted to the rule in *Hollington v. Hewthorn*, and the following recommendations are made.

1. *No amendment to The Evidence Act should be made to make previous convictions for criminal or provincial offences generally admissible in subsequent civil proceedings as proof of the facts giving rise to the conviction.*
2. *The Evidence Act should be amended to provide that a plea of guilty to an offence under the laws of Canada or the laws of a province of Canada or a municipal bylaw, should be inadmissible in any civil proceeding to prove the facts constituting the offence to which the plea of guilty was entered.*

These recommendations are justified in the body of the Report in the following terms:

... it would not be wise, in our view, to amend the law to permit a court to receive in evidence, in civil proceedings, proof of a prior conviction for an offence arising out of the same facts. This issue is particularly significant in negligence actions. The result of a conviction for a breach of a provincial statute or a municipal bylaw may be very minor, while the consequences of a judgment in a civil action may be great. In our view the results of the proceedings in the criminal court are quite irrelevant to the issues between the parties in the civil suit. In most negligence cases the real defendant in the civil suit is the insurer. Since the insurer is not before the court in the criminal proceedings, it would be unjust if it were to be prejudiced by the result of those proceedings. If such an amendment were made, it would tend to encourage the use of the criminal courts to promote civil interests.

We do not think that a plea of guilty to an offence should be admissible in evidence in civil proceedings ... Very frequently where an accused person is charged with a minor offence under a provincial statute ..., he will plead

guilty and suffer a small fine rather than pay counsel to present a defence and lose time from his employment. In so doing he may not realize that the plea of guilty is not warranted and that the result may be to burden him or his insurer with an evidentiary handicap in subsequent civil proceedings.

The Commission, however, made further recommendations and concluded by suggesting amendments to the Ontario *Evidence Act*.

3. *In an action for libel or slander in which the question whether a person did or did not commit a criminal or provincial offence is relevant to an issue arising in the action, proof that the person has been convicted of the offence alleged in a court of competent jurisdiction in Canada should be made conclusive proof that he committed the offence.*
4. *Where in a proceeding under the Divorce Act of Canada a corespondent has been found to have committed adultery, the judgment of the court should be proof, in the absence of evidence to the contrary, of the corespondent's adultery in any subsequent proceeding.*
5. *Legislation should be enacted to provide that conviction for any of the offences named as grounds for divorce in sections 3(b) and 3 (c) of the Divorce Act should be evidence that the convicted person is guilty of the named offence.*
6. *A conviction for bigamy should be evidence that the convicted person committed adultery, where proof of adultery is relevant in any proceeding under The Deserted Wives' and Children's Maintenance Act or for alimony.*

The Evidence Act should be amended to include the following sections:

Except as provided in this or any other Act, no plea of guilty to or conviction of an offence under the laws of Canada or any province or territory of Canada or a municipal by-law is admissible in evidence in any civil proceeding as proof of the facts constituting the offence to which the plea of guilty was entered or upon which the conviction was based. [*Draft Act*, Section 29.]

In an action for libel or slander in which the question whether a person has or has not committed an offence under the laws of Canada or any province or territory of Canada is relevant to an issue in the action, proof that that person was convicted of that offence is conclusive evidence that he committed that offence. [*Draft Act*, Section 30.]

- (1) Where in a proceeding for divorce before a court having jurisdiction in Canada a corespondent has been found to have committed adultery with a party to the proceeding, proof of the judgment of such court is, in the absence of evidence to the contrary, proof of the adultery of the corespondent in a subsequent proceeding.
- (2) Where in a proceeding for divorce it is alleged that the respondent went through a form of marriage with another person after the marriage in issue was entered into, proof that the respondent was convicted of bigamy in Canada is evidence that he was guilty of the offence.
- (3) Where in a proceeding for divorce it is alleged that the respondent has been guilty of sodomy, bestiality or rape after the marriage in issue was entered into, proof that the respondent was convicted of the alleged offence in a court having jurisdiction in Canada is evidence that he was guilty of the offence.
- (4) Where in a proceeding under *The Deserted Wives' and Children's Maintenance Act* or for alimony it is relevant to prove adultery, proof of a conviction for bigamy during the marriage of the spouses is evidence of adultery. [*Draft Act*, Section 31.]

J. Canada

The Law Reform Commission of Canada, in its Report on Evidence, makes an indirect reference to the rule in *Hollington v. Hewthorn* in the context of an exception to its recommendation on the exclusion of hearsay evidence. The draft Evidence Code provides in section 27 that hearsay evidence is inadmissible. Section 31, however, provides for a number of exceptions to section 27, and section 31(h) provides that:

31. The following are not excluded by section 27: ... ;
- (h) evidence of a final judgment adjudging a person guilty of a crime, to prove any fact essential to sustain the judgment, except when tendered by the prosecution in a criminal proceeding against anyone other than the person adjudged guilty; ...

The Commission's Report was submitted in December 1975, and at the time of writing no Bill has been introduced in the House of Commons which would implement the Commission's recommendations.

K. Uniform Law Conference of Canada

In 1971 the Alberta Commissioners of the Uniform Law Conference of Canada asked that the rule in *Hollington v. Hewthorn* be placed on the programme of the Conference, and this was agreed to.

In 1975 the Alberta Commissioners submitted the following report:

The Alberta Commissioners reported last year (1974 Proceedings, pp. 96107) . The matter was referred back to the Alberta Commissioners to prepare a draft to include the principles agreed upon.

We point out that the Institute of Law Research and Reform in Alberta issued a report on the same subject in February, 1975. Most of its recommendations are the same as the policy decisions that were reached here last year. The only differences of substance are these:

- (1) In connection with filiation orders and divorce decrees, the Conference favoured admissibility on the lines of the *English Act*; whereas the Alberta Institute did not.
- (2) On the question as to the persons against whom the conviction should be admissible, the Conference thought that admissibility should be confined to admissibility against the convicted person or those privy to him, or those claiming through or under him, in the words of South Australia's statute. In most cases the party against whom the evidence is tendered is in fact the convicted person or someone privy to him. There are, however, cases where this is not so for example, a defence of forgery in an action on a bill of exchange, and cases on insurance policies where the commission of a crime is the basis of a claim, or a defence to a claim.
- (3) The Alberta Institute recommended against extension of the new rule to acquittals. The Conference rejected the recommendation of the Alberta Commissioners to the same effect on a vote of 1512. The Alberta Commissioners think that this policy decision should be reconsidered. In the meantime, the draft Act attached to this report as the Schedule incorporates the policy decisions made in 1974 other than the restricted application to parties and those privy to them.

The draft Act referred to by the Alberta Commissioners appears ad Appendix D to this Report.

At the 1975 meeting of the Uniform Law Conference it was:

RESOLVED that the matter be referred back to the Alberta Commissioners to prepare a fresh draft having regard to the decisions taken at this meeting and that the new draft be circulated in the usual way and considered at the 1976 annual meeting.

CHAPTER III

RECOMMENDATIONS FOR CHANGE IN BRITISH COLUMBIA

A. Introduction

We have reached the conclusion that the rule in *Hollington v. Hewthorn* is sufficiently illogical, and that it gives rise to sufficiently anomalous and inconvenient results, to justify its modification by statute.

As we noted in the first chapter, apart from precedent the original justifications for the rule, as set out in the decision itself, were threefold. First, Goddard L.J. was of the view

2. *Ibid.* 595596.

3. *Ibid.* 601. that the opinion of a criminal court on whether the accused was guilty of the acts with which he was charged is entitled to no more weight than that of a bystander. While it is true that there may be little consistency in the quality of evidence which leads to criminal convictions, we think it is going too far to equate the opinion of a criminal court, formulated according to the processes of law, with that of a bystander. There may indeed arise questions as to the identity of facts and issues involved in the criminal and civil proceedings, and there may in certain circumstances be so little identity as to entitle the fact of the conviction to very little weight. Nonetheless, we do not believe that the fact of a criminal conviction is invariably without evidentiary value, and it is our view that under certain conditions it ought, where relevant, to be admitted in subsequent civil proceedings and its weight assessed for what it is worth.

Secondly, Goddard L.J. adverted to the general proposition that it is unfair in an action between A and C to make binding on a finding in an action between A and B. While this proposition has undoubted merit in many instances, particularly when two sets of civil proceedings are involved, we think it to be inapposite where the criminal process, with its insistence on proof beyond a reasonable doubt and other procedural safeguards, is involved, followed by civil proceedings in which the balance of probabilities is the appropriate standard of proof. There is a considerable difference between the deduction that because A has been found to have acted negligently towards B that he must also be taken to be liable to C on the same basis, and the introduction in evidence in subsequent civil proceedings involving A of the fact that a criminal court has found him to be guilty of certain acts or omissions which may, to a greater or lesser extent, be relevant to the question of civil liability. The recommendation which we will be putting forward in this chapter would not prevent A from attacking the merits or relevance of the conviction in civil proceedings, and the only matter on which an estoppel would be raised would be that of denying that there was, in fact, a conviction.

Thirdly, Goddard L.J. advanced the proposition that if evidence of previous convictions were to be introduced in subsequent civil proceedings, it ought also to follow that evidence of previous acquittals should be likewise admissible. The suggestion that the admission of previous acquittals should have any probative value in civil proceedings was thought to be wrong, and thus an argument by analogy for the inadmissibility of previous convictions. While we agree that no conclusions may logically be drawn in civil proceedings from an acquittal in criminal proceedings arising out of the same facts, we cannot agree that it follows that a previous conviction is without probative value. Where there is some identity of facts and issues it seems to us that the finding beyond a reasonable doubt of a criminal court that A was guilty of a certain act or omission is at least relevant to a civil proceeding in which the likelihood of A's act or omission must be established only on the balance of probabilities. It is, however, quite a different matter to propose that because the prosecution has failed to establish A's criminal liability beyond a reasonable doubt, this is relevant in disproving the likelihood of his act or omission on the balance of probabilities.

We do not, therefore, find any of the original arguments advanced for the rule in *Hollington v. Hewthorn* to be persuasive for its retention in an unmodified form.

The Commission recommends that:

1. *Subject to a number of qualifications, the rule in Hollington v. Hewthorn should be repealed by statute.*

Having made this recommendation, we now turn to the specific issues which are raised by the prospect of repeal, and the way in which we propose that they ought to be resolved. As, however, the issues are quite closely interrelated, it may be helpful to summarize our recommendations here, in order that each separate issue and recommendation may be evaluated in its context.

Apart from one exceptional circumstance, we do not believe that evidence of a previous conviction ought to be conclusive evidence of the facts upon which it is based. It ought, rather, to be admissible, but its probative value open to attack by the party against whose interest the conviction lies, and evaluated by a judge or jury or both. For this reason we believe it to be necessary that that party have adequate notice before trial that it is the intention of his opponent to introduce evidence of the conviction. Related to this issue is whether or not the trial will be conducted before a jury. While we believe that a judge alone will be able properly to assess the probative value of evidence of a previous conviction in the subsequent civil proceedings, we can envisage situations in which the mere introduction of the evidence before a jury, regardless of the scarce probative value of the evidence, would prejudice the jury's view to such an extent that it ought not to be introduced at all. The trial judge ought therefore to have a discretion to exclude the evidence entirely where there is a jury.

Our recommendations do not involve a statutory reversal of the onus of proof by introduction of evidence of a previous conviction, and only convictions recorded in Canadian courts should be admissible, provided that they were not, during the civil proceedings, the subject of an appeal. We make no suggestion that there be a distinction between convictions recorded after pleas of guilty and those recorded after pleas of not guilty, although this may in some circumstances affect the weight to be accorded to the evidence. Neither do we make an exception for the situation where the conviction is introduced against the interest of a person who was not a party to the criminal proceedings, although once again this might be a factor which would affect weight.

We see no reason to change the present law regarding the introduction of evidence of previous acquittals, but where the issue in the civil proceedings is whether it was defamatory to describe a man as having committed a certain criminal act, the fact of his conviction should constitute a complete defence of justification.

Where it is sought to introduce evidence in subsequent matrimonial proceedings of a prior finding of adultery, we believe, for reasons which we will explain in more detail, that the evidence should be admissible but not conclusive. We deliberately refrain from dealing with the issue of prior findings of paternity.

B. Relevance or Weight

It must already be apparent that our view of issues raised by the rule in *Hollington v. Hewthorn* is that, given a certain identity of facts and issues at stake in criminal proceedings and subsequent civil proceedings, evidence of a conviction in the criminal proceedings should be admissible in the civil proceedings for the purpose of tending to prove the fact of certain acts or omissions. We base this view on our judgment that the opinion of a criminal court, arrived at through the process of law that beyond a reasonable doubt there were certain acts or omissions, is at least relevant in subsequent civil proceedings where there is a question whether they occurred.

Under our recommendations it would be up to counsel in the first instance, and ultimately the court, to decide whether there is sufficient identity of facts and issues between the two sets of proceedings to make the fact of a conviction relevant in the civil proceedings, and it would be up to the court, having once decided that the evidence is relevant, to decide what weight should be accorded to it. We will refer in more detail, throughout the succeeding sections of this chapter, to those factors which the court might want to take into account in assessing the weight of a previous conviction.

We should point out here, however, that we are in disagreement with the New Zealand Torts and General Law Reform Committee in their view that evidence of a previous conviction should be admissible only where the witnesses whose evidence led to the conviction are unavailable. We agree that that view is a defensible one, but it does seem to us to be inconsistent to an extent with the opinion that evidence of a previous conviction should be admissible because it has the value of representing the judgment of a criminal court. Moreover, the New Zealand proposal involves a somewhat cumbersome procedure, based on rather loosely formulated guidelines, for determining when a witness is "reasonably" available or unavailable. While that in itself would not be an entire justification for not supporting the New Zealand proposal, it lends weight to a judgment which we are in any event disposed to make.

The Commission recommends that:

2. *Given a certain identity of facts and issues at stake in criminal proceedings and subsequent civil proceedings, evidence of a conviction in the criminal proceedings should, as a general rule, but subject to certain exceptions, be admissible in the civil proceedings for the purpose of tending to prove the fact of certain acts or omissions.*

C. ___The Presence of a Jury

While our basic position is that there should be no formal barriers to the introduction of evidence of a previous criminal conviction in subsequent civil proceedings beyond the judgment of counsel that the evidence is relevant, we have a different view where the civil proceedings will be conducted with a jury.

Where a trial is to be conducted by a judge alone it does not trouble us unduly that the only check on the introduction of evidence of a conviction which is irrelevant (or, if relevant, entitled to so little weight as to be virtually without probative value) is the judgment of counsel. Where there is a jury, however, we share the apprehensions of the New Zealand Torts and General Law Reform Committee and can envisage situations in which the introduction of evidence of a previous conviction, however irrelevant or however little deserving of weight, would be taken much too seriously by the jury and thus unduly prejudice the party against whose interest the introduction of evidence of the conviction lies.

Where, therefore, there is to be trial by jury, we recommend that the party against whose interest the conviction lies should have the right to argue at trial, but in the absence of the jury, the question whether the evidence is so irrelevant, or entitled to so little weight, and yet so potentially prejudicial to him, that the evidence ought not to go before the jury.

A situation where this might, but not necessarily would, arise is that in which a man pleaded guilty to a traffic offence on the ground that it would be too costly or timeconsuming to defend it, but is later faced with a suit for negligence based on the actions or omissions which gave rise to the charge and conviction. Another such situation is that involving vicarious or indemnity liability, where the party against whose interest the conviction is introduced, was not a party to the criminal proceedings. Yet another such situation is where there is simply not sufficient connection between the acts or omissions which gave rise to the conviction, and those which it is sought to prove in the civil proceedings.

The Commission recommends that:

3. *Where civil proceedings are to be conducted before a jury, the party against whose interest the evidence of a conviction lies, should have the right to argue, at trial but in the absence of the jury, the issue whether the introduction of the evidence would, in relation to its probative value, have an unduly prejudicial effect upon the jury.*

D. ___Notice Provisions

We have already adverted to our belief that, because evidence of a previous conviction ought to be probative rather than conclusive, the party against whose interest the conviction lies ought to have notice of the fact that the conviction will be introduced. In other words, he ought to have an opportunity to prepare himself for an argument either that the conviction is entirely irrelevant or is not entitled to much weight, or that (in jury cases) its introduction in evidence would unduly prejudice the jury.

Having decided this, we should now confront the issue of the stage at which, in the pretrial proceedings, the notice should be issued. In coming to grips with this question we recognize that the notice must be issued after the close of pleadings yet before the trial itself, and that as a practical matter there is generally a substantial lapse of time between the two events. This would seem to indicate that we could afford to be generous to the affected party and insist that the introducing party be required to give notice at a stage which would allow the affected party a fairly lengthy period in which to prepare his argument.

Unfortunately for the affected party, however, we cannot assume that there will always be substantial delays between the close of pleadings and the trial, particularly as contemporary trends in the administration of justice are towards reducing delays in the courts. Logically, we must address ourselves to the shortest times which the law allows between the two events, and tailor our proposed notice period to them.

Rule 39 (6) of the new *Supreme Court Rules* of this Province provides that:

Within 7 days after issue of the notice of trial, and not less than 28 days before trial, the notice of trial shall be delivered by the party obtaining it to all other parties of record.

It is also relevant to note that Rule 1 of the *County Court Rules, 1968* provides that:

The Rules of the Supreme Court of British Columbia from time to time in force and the practice and procedure of the Supreme Court of British Columbia shall apply *mutatis mutandis*, in so far as applicable, to causes and matters in the County Courts and the conduct of business coming within the cognizance of the County Courts.

Even more relevant is section 20 (2) of the *Small Claims Act* which provides in part that:

Where a defendant files a notice of intention to dispute, the judge, registrar or clerk shall, not less than 10 days before the date of the hearing, send by registered mail to both the claimant and the defendant, or to their solicitors, a notice of the time, date and place of the hearing ...

In view of at least the theoretical possibility of very short periods of time between the close of pleadings and the trial of an issue we are led, albeit reluctantly, to the conclusion that a party who wishes to introduce evidence of a previous conviction need give notice of his intention to do so only seven days prior to trial, to the party or parties who might be adversely affected by this evidence.

At the same time we recognize that in some, although we hope not many, cases, the adversely affected party may believe that this does not give him sufficient time to gather his own evidence and prepare an argument to rebut the force of the introducing party's evidence. Similarly, in exceptional circumstances, an introducing party may not have discovered the fact of the previous conviction until it is too late for him to give the adversely affected party the required notice of seven days.

In order to meet the exigencies of these exceptional cases we think it appropriate that an adversely affected party be given an opportunity to apply at trial for an adjournment, and that the trial judge be given a discretion to grant the adjournment on the basis that the adversely affected party has been or will be unduly prejudiced by the short notice period. The introducing party should also have an opportunity at trial to apply for leave to introduce evidence of a conviction without having complied with the notice requirement, on the basis that the evidence could not, by reasonable effort, have been discovered at an earlier stage. The trial judge, in the face of such an application, should have a discretion to admit the evidence without granting an adjournment if he thinks that the adversely affected party will not be unduly prejudiced by such a course. Alternatively, while accommodating the introducing party, the trial judge should, as part of his discretion, be free to recognize the possibly difficult position of the adversely affected party and adjourn the trial.

It is at this point that we wish to raise a side-issue in order to demonstrate that we have considered its implications. Section 17(1) of the *Jury Act*

7. See also Rule 37(1) of the *County Court Rules, 1968* (jury demand to be delivered no later than 21 days before the trial).

provides in part that:

The party requiring a [civil] jury shall leave, at the office of the sheriff, not less than thirty days' notice of the day, time, and place fixed for the trial, ...

Similarly, Rule 39 (19) of the new *Supreme Court Rules* of this Province provides in part that:

... a party may require that the trial of an action be heard by the Court with a jury by filing and delivering to all parties of record, within 21 days after delivery of the notice of trial and not later than 30 days before trial, a [jury] notice ...

These provisions give rise to the possibility that an adversely affected party will have asked for a jury trial before receiving notice that evidence of a previous conviction will be introduced against him, and it may be that had he known this, he would not have opted for trial by jury. We are not unduly disturbed by this in view of our earlier recommendation that an adversely affected party have an opportunity to argue at trial that he will be unduly prejudiced if the evidence goes before the jury.

A complicating factor in our recommendations is the matter of interlocutory proceedings which, by their very nature, may preclude the introducing party from giving the adversely affected party the seven days' notice which we recommend. Rule 44 of the new *Supreme Court Rules* provides in part that:

(10) Unless otherwise ordered there shall be at least two days between the service or delivery of a notice of motion and the day named in the notice for the hearing.

On the one hand, it may be plausible to say that the introducing party will normally be the applicant and that if he is not prepared to wait for seven days between the giving of his notice of motion and the hearing of the application, he should forego the benefits which our reform would bestow, and in the ordinary course of events this ought to be the case.

On the other hand, however, there may be exceptional cases in which it is in the general interest for an interlocutory application to be heard quickly and in which the chambers judge ought to be aware of a previous conviction of one of the parties. For this reason we believe that the chambers judge ought to have a discretion to abridge the seven-day notice period if he believes that the adversely affected party would not be unduly prejudiced thereby. What we envisage is that the applicant, in giving his notice of motion, or the respondent, in filing his affidavits in response, should also give notice that he intends to ask the chambers judge to abridge time. At the hearing the matter could be spoken to by both the introducing party and the adversely affected party, and the chambers judge would be free either to grant the abridgment or to adjourn the hearing in order to allow the adversely affected party time to prepare for a rebuttal of the force of the evidence of the conviction.

A further complicating factor in our recommendations is the matter of the *ex parte* application, since our basic position is that evidence of previous convictions ought to be probative rather than conclusive, and that an adversely affected party ought always to have notice and an opportunity to rebut the force of the evidence. Nonetheless we think that there is a case to be made for a modification of our position in the context of *ex parte* applications, because we are reluctant to foreclose entirely the possibility of evidence of a relevant previous conviction being placed before the chambers judge in circumstances in which it may be crucial. In defence of this position, we point to the fact that *ex parte* applications are made and granted in only the rarest of exceptional circumstances, almost always involving urgency, and that the person against whose interests the order is made invariably has an early and full opportunity to have the order discharged on a wide variety of grounds. We are confident that if the making of an *ex parte* order turned on a previous conviction's being accorded a greater weight than the adversely affected party was subsequently able to show that it deserved, the order's discharge would be inevitable. Accordingly, we have concluded that applicants for *ex parte* orders should be permitted to take advantage of the general reform which we recommend, but do not believe it necessary to make specific recommendations for the discharge of such orders where the previous conviction proves to be less relevant or weighty than was at first thought, because the *Supreme Court Rules* are sufficiently broadly framed to provide for the situation.

We make further reference later in this chapter to the question of notice periods in matrimonial causes.

The Commission recommends that:

4. (i) *A party who wishes to introduce evidence of a previous conviction in any proceedings should give notice of his intention to do so not less than seven days prior to the day fixed for the hearing of those proceedings, to the party or parties who may be adversely affected by the evidence.*
 - (ii) *Notwithstanding the previous recommendation,*
 - (a) *the judge having the conduct of the hearing should have a discretion, exercisable upon the application of any party having an interest in the matter, either to vary the period of notice or to adjourn the hearing, or both, if he thinks the interests of justice will be served, and*
 - (b) *the reforms which we recommend in this Report should apply, mutatis mutandis, to proceedings which are ex parte.*

E. What May Be Proved

We have so far discussed the introduction of evidence of a previous conviction without adverting to the precise nature of the documentary evidence which, in our view, ought to be sufficient.

In other jurisdictions where changes or proposals for change have been made, the United Kingdom model has generally been followed. Section 11(2) (b) of the *Civil Evidence Act, 1968* provides that:

Without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or chargesheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

On the other hand, section 18(1) of the British Columbia *Evidence Act*, which relates to the interrogation of witnesses as to convictions for the purpose of impugning their credibility, provides that:

... a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the offense, purporting to be signed by the Registrar or Clerk of the Court, or other officer having the custody of the records of the Court at which the offender was convicted or by the deputy of the Registrar, Clerk, or other officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of his conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

The purpose of introducing a certificate of conviction under section 18(1) of the *Evidence Act* differs quite substantially from the purpose of introducing evidence of a previous conviction as part of a modification of the rule in *Hollington v. Hewthorn*. What is at stake in the former case is simply the credibility of a witness. What is needed under our recommendations is sufficient information about the previous conviction to enable the court to assess the identity of facts and issues (if any) between the criminal and civil proceedings, and the relevance of, and weight to be attached to, the previous conviction. Thus, something more than a certificate of conviction is needed, and we think it desirable to follow the English precedent. We think that a party wishing to introduce evidence of a previous conviction should be entitled to introduce:

- (i) the certificate of conviction or any other document which serves a like purpose;
- (ii) the information or indictment upon which the conviction was based; and to be selective in the before the court. All have referred to above the court may be in as weigh the implications
- (iii) the reasons for judgment (if any) which accompanied the conviction.

We also believe that if a party is going to take advantage of the reform which we propose, he should not be entitled to be selective in the documentary evidence which he places before the court. All the documentary evidence which we have referred to above should be introduced, in order that the court may be in as informed a position as possible weigh the implications of the conviction.

We realize that in suggesting that the "introducing party" be entitled and obliged to submit reasons for judgment (if any) we have gone further than other jurisdictions in which the matter has been studied, and we are also aware of the dangers of reasons for judgment going to the jury. In defence of our position, however, we point out that reasons for judgment may frequently be helpful in determining the identity of facts and issues between the criminal and civil proceedings, and that in the event of a civil jury trial, it will always be open to a judge to exclude the reasons on the basis that they may be unduly prejudicial.

In the previous section of this chapter, relating to notice periods, we referred at some length to the use which might be made of the abrogation of the rule in *Hollington v. Hewthorn* in the context of interlocutory, including *ex*

parte, applications. These applications are, of course, supported by affidavits, and the question arises whether, and to what extent, parties who wish to take advantage of the reform should be entitled merely to rely on assertions, in affidavits, of previous convictions and the facts surrounding them, rather than tendering, in addition to the ordinary affidavits, the documentary evidence we have referred to above.

The key to this issue lies, we think, in whether, given the nature and subjectmatter of the proceedings and the availability of the documents, it is reasonable to expect the introducing party to have tendered the documents. In cases where a resolution of the issue is a matter of urgency and the documents cannot, assuming reasonable diligence, be secured, we think that the possibility of affidavit evidence being sufficient should be left open. We take this position in relation to interlocutory matters simply because they are interlocutory, and therefore no final disposition will be made on the basis of affidavit evidence. We are clear that where any final disposition turns on the admissibility of evidence of a previous conviction, the introducing party ought to be prepared either to introduce the documentary evidence or to forego the benefits of the reform.

Because, in our view, the decision whether an introducing party should be entitled to substitute affidavit evidence of a conviction and the facts surrounding it for the documentary evidence we have referred to above, turns on the nature and subjectmatter of the interlocutory proceedings, their urgency, and the availability of documents, it is also our view that this decision ought to be one made in the discretion of the judge having the conduct of the proceedings.

The Commission recommends that:

5. (i) *For the purpose of our recommendations, the party who wishes to prove the facts upon which a previous conviction was based may, in addition, or as an alternative, to other forms of proof permitted by law, tender in evidence:*

(a) *the certificate of conviction or any other document which serves a like purpose;*

(b) *the information or indictment upon which the conviction was based (and for this purpose a violation report which is issued under the provisions of the MotorVehicle Act, which is disputed, and which is followed by a finding of guilt, shall be deemed to be an information);*

(c) *the reasons for judgment (if any) which accompanied the conviction; and*

(d) an undisputed violation report issued under the provisions of the _____ MotorVehicle Act.

(ii) *Where a party elects to tender in evidence any of the documents referred to in (i) hereof, he ought, to the extent that it is appropriate and they are reasonably available, tender all such documents.*

(iii) *For the purpose of our recommendations, in any interlocutory proceeding, the judge having the conduct of the proceeding should have a discretion, exercisable upon the application of the party who wishes to prove the facts upon which a previous conviction was based, to accept affidavit evidence of the conviction and the facts; and that discretion should be exercised having regard to all the circumstances of the proceeding.*

Burden of Proof

In view of the difficulties relating to alterations in the burden of proof generated by the wording of section 11(2) (a) of the United Kingdom *Civil Evidence Act 1968*, we think it appropriate to make our position on this matter clear, even though it is implicit in the recommendations we have already made under the heading of "Relevance or Weight." In company with the Alberta Institute of Law Research and Reform and the New Zealand Torts and General Law Reform Committee, we do not think that introduction of evidence of a previous conviction should in any way alter the existing rules relating to burdens of proof in civil proceedings. Rather, evidence of a previous conviction should simply be treated as any other evidence and assessed for what it is worth.

The reasons advanced by the New Zealand Torts and General Law Reform Committee for its position we find to be particularly convincing, and we make no apology for quoting them at some length.

A party to a civil action, who may not be the convicted person himself, should not be debarred from proving if he can that a conviction was erroneous. The question arises, however, whether there should be an onus upon the person against whose interests in the civil litigation the conviction operates to prove that the conviction was erroneous ... We differ in this respect from [the English Committee] ... [I]t is hardly ever likely to be relevant in subsequent civil proceedings whether the conviction as such was erroneous. The question of most relevance is whether the defendant in criminal proceedings committed certain acts or not. Whether those acts constitute a criminal offense is a question of law, and whether a person was properly convicted may involve considering such matters as whether some of the evidence in the criminal proceedings was properly admitted, and perhaps other legal questions as well. In some of the passages in its report the English Law Reform Committee unfortunately tended to confuse *the facts upon which the conviction was founded with the conviction founded upon those facts*. The correctness of the *conviction* involves questions of law which are almost certainly irrelevant to later civil proceedings, and with which the later civil court should not have to concern itself. Thirdly, there may be cases where the defendant's innocence could be proved if certain witnesses were available, but is unprovable in their absence. In such cases, whenever they exist, to require a party to the subsequent civil proceedings to prove that the conviction was erroneous saddles him with a burden greater than he should have to bear. It should always be possible for a party to cast doubt on the reliability of a conviction, or to show that the facts upon which it was founded did not justify it. If he cannot show, on the balance of probabilities ... that a conviction was erroneous, he should still be entitled to try and convince the trier of fact that there is a substantial possibility that the facts did not support the conviction, and that on the whole of the evidence in the instant case, including but notwithstanding the conviction, his antagonist has failed to discharge the onus of proof placed upon him in accordance with the maxim "he who asserts must prove."

The Commission recommends that:

6. *In any legislation which may ultimately arise out of these recommendations, it should be made clear that the introduction of evidence of a previous conviction does not matter the conventional burdens of proof in civil proceedings.*

G. Courts and Convictions

One of the more important issues involved in an effort to modify the rule in *Hollington v. Hewthorn* is what convictions, recorded in what courts, should be admissible in subsequent civil proceedings. Although we note that this issue has not apparently given difficulty under section 18(1) of the *Evidence Act*,

17. We do not believe that the importance of this project warrants the invidious task of examining the legal system of every country in the world, and all levels of criminal courts in those countries, for the purpose of deciding which countries and courts are likely to produce convictions upon which a British Columbia court might properly rely. Neither do we regard the matter of sufficient importance to warrant a recommendation that all convictions, wherever obtained, should be potentially admissible, subject to complicated and expensive arguments at trial about the quality and content of foreign law.

we think it proper nonetheless to advert to it here, and set out our views.

We might, for example, suggest that only convictions recorded in British Columbia courts fall under the umbrella of our recommendations. We might also suggest that convictions recorded in the superior courts of other Canadian jurisdictions be included, or else go to extremes and suggest that all convictions, whether Canadian or for-

eign, be admissible. What is involved in this decision is a judgment as to the reliability of convictions recorded in certain courts, together with a judgment as to the difficulty which an adversely affected party might have in attacking the reliability of a conviction recorded, say, in a lower court in a remote part of the world.

We concede from the outset that unless we are prepared to regard all convictions, wherever obtained in any part of the world, as potentially admissible, then any recommendation we make may be regarded as arbitrary. Nonetheless we think that practicality demands that only those convictions recorded in Canadian courts fall under our proposals. In the light of this, is there a case to be made for determining that only convictions recorded in certain Canadian courts be potentially admissible? We think not. All Canadian criminal courts are governed by a set of uniform basic substantive and procedural rules, and this, in our view, justifies the position that any Canadian conviction is entitled at least to some evidentiary weight. This is not to say that convictions recorded in some courts may not be entitled to more evidentiary weight than others, but under our recommendation this would be a matter to be argued at trial.

We have noted that the Alberta Institute were not in favour of including convictions resulting from courtmartial in their proposals for change, and we are of the same mind because of the specialized nature of military law and procedure.

Two further matters should be mentioned in this section. First, it is our view that it would be wrong to accord any evidentiary value to a conviction against which an appeal is pending. Our basic recommendation is founded on the proposition that evidence of a conviction has evidentiary value because it represents the final finding of a court, arrived at according to processes of law. If an appeal is launched against a conviction there is a possibility that it may be quashed and thus rendered valueless for evidentiary purposes.

The second matter relates to the *Criminal Records Act*. Section 5 of that Act provides in part that:

The grant of a pardon

- (b) unless the pardon is subsequently revoked, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of such conviction, subject by virtue of any Act of the Parliament of Canada or a regulation made thereunder.

Section 6 of the Act relates to the sequestration, following the grant of a pardon, of records of a conviction, and subsequent disclosure may be permitted only by the Solicitor General after he has satisfied himself that it is "desirable in the interests of the administration of justice."

The effect of this Act on our recommendations, were they to be translated into legislation, is debatable. The words of section 5(b) seem definite enough, but it might well be argued that the Act as a whole is directed towards the rehabilitation of an offender's reputation in society and is neutral on whether a conviction should subsequently be available as evidence in a civil suit. It is worth noting in particular in this connection that the Act is silent on the question whether an offender who has been pardoned may bring an action for defamation against anyone who states that the offender has committed the acts which led to his being convicted. We assume, although we are not certain, that the Act does not go so far.

The issues raised by the Act may, however, turn out to be academic if the Solicitor General, in a given case, does not regard it as desirable in the interests of the administration of justice that documentary evidence of the conviction be released.

Although the Act is a federal statute it is open to us to conclude any debate by recommending that no conviction to which the Act applies should fall within our general recommendations. We are not, however, disposed to go to this extent. There may be civil suits in which evidence of a conviction is crucial and in which the evidence may be introduced in such a way as to maintain the partial protection to the offender's reputation which the Act affords. We therefore prefer to leave it to British Columbia courts to decide whether the Act precludes the introduction of evidence of convictions to which the Act applies, and to the Solicitor General to decide whether to release any documents which may be in his custody.

In this context we should also consider section 662.1 of the *Criminal Code*, which provides that:

- (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or for life or by death, the court before which he appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or upon conditions prescribed in a probation order ...
- (3) Where a court directs under subsection(1) that an accused be discharged, the accused shall be deemed not to have been convicted of the offence to which he pleaded guilty or of which he was found guilty and to which the discharge relates ...

These provisions, if not dealt with specifically, might also cause some confusion under our recommendations. Indeed, they have already done so in other contexts. In *R. v. Tan* the question arose whether the Crown might adduce evidence of a previous conditional discharge for the offence of shoplifting, in opposition to an application by the accused for an absolute discharge on a later similar offence. Despite the wording of section 662.1(3), it was held by the British Columbia Court of Appeal that the grant of a previous discharge was a factor which might be taken into account in a decision whether to grant a subsequent discharge. This decision fortifies us in the view we take that despite an absolute or conditional discharge, the plea or finding of guilt should be admissible in subsequent civil proceedings for the purposes of our proposals. We regard the matter in much the same light as the *Criminal Records Act*. Section 662.1 of the *Criminal Code* manifests a policy concerning the sentencing of offenders, but appears to be neutral on the matter of the subsequent evidentiary value of a plea or finding of guilt.

The issues raised by the *Criminal Records Act* and section 662.1 of the *Criminal Code* may also arise should any Province have enacted, or decide to enact, complementary legislation in relation to provincial offences, but our position here remains the same. It should be open to British Columbia courts to examine the terms of any such legislation and to decide whether they in fact go so far as to deem certain offenses never to have occurred. In the absence of clear statutory words to this effect, a plea or finding of guilt should, in accordance with our recommendations, be admissible in subsequent civil proceedings.

The Commission recommends that:

7. *All convictions recorded in any court in Canada (but not those arising out of courtmartial) should be admissible in subsequent civil proceedings according to our earlier recommendations.*
8. *Until the time for lodging an appeal against a conviction has expired, or if appeal against a conviction has been lodged and the hearing of the appeal is pending, evidence of that conviction should not be admissible under our recommendations unless the appeal is against sentence alone.*
9. *Any legislation arising out of our recommendations should not prohibit the admissibility of convictions which have been the subject of:*

- (i) *a pardon under the Criminal Records Act (R.S.C. 1970, 1st Supp., c. 12);*
- (ii) *an absolute or conditional discharge under section 662.1 of the Criminal Code; or*

- (iii) *any provincial legislation comparable to (i) and (ii) hereof.*

Whether such convictions should be admissible should be a matter for the courts to determine after an examination of the words of the particular statutes in question.

H. Pleas of Guilty

The rule in *Hollington v. Hewthorn* does not extend to the inadmissibility of pleas of guilty, and it would be entirely inconsistent of us to recommend a change in this situation. It is not clear, however, whether at present a plea of guilty is taken to be conclusive evidence of the facts upon which it is based, or whether it is merely probative. This is a matter which should, in our view, be clarified.

Because a plea of guilty may be entered on a number of matters particularly those relating to traffic offences for reasons relating to the time and cost involved in entering a defence, rather than as a result of a true belief in guilt, we do not recommend that convictions resulting from pleas of guilty should, for the purposes of our basic recommendation, be treated differently from convictions resulting from pleas of not guilty. In other words, a conviction resulting from a plea of guilty should be admissible in subsequent civil proceedings, but its evidentiary effect should be probative rather than conclusive, and it should be open to the party against whose interest the admission of the conviction lies to attempt to prove that the admission of guilt was made for reasons other than a true belief in the occurrence of the acts or omissions which constituted the offence.

There is one other matter to which we should advert in this context. This is the nondispute of a violation of a traffic rule under section 126A of the *MotorVehicle Act*. Technically, of course, where there has been an alleged violation of a traffic rule and the alleged violator has not invoked his right to have the matter determined in a Provincial Court, there is no plea of guilty in the traditional sense. Neither does the nondispute of traffic rule violation by itself result in a conviction under the *MotorVehicle Act* or the *Summary Convictions Act*. Nonetheless, we are of the view that the reality of the situation, as well as consistency, demands that the nondispute of a traffic rule violation be treated as if it were a plea of guilty resulting in a conviction for the purpose of our recommendations. If this seems to be an extreme step, we think it worth pointing out that the alleged violator does have a right to have his guilt or innocence determined in a Provincial Court, and that under our recommendations a conviction (or more specifically in this case a nondispute) is of probative evidentiary effect only. It may be that if our recommendations are accepted, it will be in the case of nondisputes of traffic rule violations that the person against whose interest the introduction of evidence of the violation lies will most commonly be able to reduce its evidentiary value, by showing that the reason for the nondispute was related not to a belief in guilt but rather to the time and money involved in entering a dispute and the lack of ability to predict the likelihood, or appreciate the significance, of subsequent civil proceedings.

The Commission recommends that:

10. (i) *A conviction resulting from a plea of guilty should, for the purposes of our earlier recommendations be treated in the same way as a conviction resulting from a plea of not guilty.*

- (ii) *A nondispute of an alleged violation of a traffic rule under the MotorVehicle Act should, for the purposes of our earlier recommendations, be treated in the same way as a conviction resulting from a plea of guilty.*

I. Acquittals

In *Hollington v. Hewthorn* Goddard L.J. said:

If a conviction can be admitted, not as an estoppel, but as prima facie evidence, so ought an acquittal, and this only goes to show that the court in trying the civil action can get no real guidance from the former proceedings without retrying the criminal case.

The logic of this statement has defied all subsequent commentators, and we have already pointed out our belief that the failure of a prosecutor to satisfy a standard of proof beyond any reasonable doubt has no relevance to proceedings in which a plaintiff must only prove a case on the balance of probabilities.

One of the respondents to our working paper took issue with us on this matter in the following terms:

With respect to this conclusion I have had more difficulty. It is true that the standard of proof in the subsequent civil proceedings is different from that in the criminal proceedings: but so far the Commission seems to have proceeded on the basis that records of the results of previous criminal proceedings should be admitted for what evidentiary value they may have. So here, the record of acquittal would not be conclusive, but probative only, and I am not convinced that it should be excluded. It seems to me that the questions should continue to be answered on the basis of whether the evidence is relevant, and whether it is of some probative value, and I am not convinced that those two considerations should be answered in the negative. The only qualification I would suggest is that in this case, the evidence can only be tendered by or on behalf of the party concerned, and not by or on the initiative of the other party.

We were impressed by this comment, and devoted some considerable time to considering its implications. What we took our respondent to be saying was, by way of example, this. If a man is being sued for negligence in a runningdown case, and the record of prior criminal proceedings, arising out of the same facts, shows that he was acquitted because he was not proved to be at the scene of the accident, then this has some probative value in the civil proceedings.

Yet this is an easy case. In other cases the reasons for judgment may state that there was reasonable doubt whether the man was at the scene of the accident, yet not state whether there was a complete absence of evidence, or whether there was a good deal of evidence which happened to fall just short of proof beyond a reasonable doubt. Alternatively there may be no reasons for judgment at all, in which case introduction of evidence of the acquittal would prove nothing. Yet again there may be reasons for judgment which simply do not indicate on what grounds the accused was actually acquitted. If he was acquitted on a matter of fact, this may have some probative value, but if he was acquitted on a point of law, this would presumably have no probative value at all.

Our respondent might reiterate the point that these are all matters which the trier of fact in the subsequent civil proceedings could evaluate, but we are reluctant to let an important matter of principle such as this turn on whether there are reasons for judgment or not. The introduction of evidence of a prior conviction, with or without reasons for judgment, has some probative value, however small. The introduction of evidence of a prior acquittal has no probative value unless there are reasons for judgment which are specific as to the point at issue in the civil proceedings. In the latter case it seems to us that the element of chance is too great to justify a rather substantial recommendation for change.

The Commission therefore recommends that:

11. *Verdicts of acquittal in previous criminal proceedings should continue to be inadmissible in subsequent civil proceedings arising out of the same facts.*

J. NonIdentity of Parties

Perhaps one of the more controversial issues raised by the prospect of repeal of the rule in *Hollington v. Hewthorn* is whether a previous conviction may be admissible in subsequent civil proceedings involving a person who was not convicted in the criminal proceedings. Examples of such situations are those involving insurance companies, those persons who may be held vicariously liable for the wrongdoing of others, and persons who may be held liable on forged bills of exchange. To give a more specific example, an insurance company which has issued a policy to a company insuring that company against theft by company employees, may not, under the present law, interest itself particularly in whether a company employee is in fact convicted of theft. As things stand, the insurance company knows that the fact of that conviction may not be used in subsequent proceedings against it by the insured, and that the insured will have to prove the fact of theft by conventional modes of proof according to a civil standard. Accordingly the insurance company may tend to discount or ignore the criminal proceedings against the employee. Neither the English Law Reform Committee nor the Alberta Institute was disposed to spend much time on this issue, but the New Zealand Torts and General Law Reform Committee paused to consider its implications more fully, and asked the question:

Is it fair that a party to civil proceedings should have the defendant's conviction thrown into the scales against him when he took no part in the criminal proceedings (which may, indeed, have been undefended or poorly defended) and thus had no opportunity to cross-examine the prosecution witnesses?

Ultimately the New Zealand Committee reached the same conclusion as the English Committee and the Alberta Institute that on the assumption that evidence of a previous conviction should be probative rather than conclusive, the advantages of allowing the conviction in as evidence outweighed the case for excluding it. It was pointed out that the "third party" could attempt to reduce the probative value of the conviction not only on the grounds available to the convicted person, but also on the very ground that he the third party was unrepresented in the criminal proceedings. Before a jury this might very well be a factor which a judge might take into account in deciding to exclude the evidence altogether.

In our working paper we tentatively adopted the English, Alberta and New Zealand position, but specifically invited comment on the matter. As we have already stated, the working paper drew very little response, but the one respondent who addressed himself to this issue agreed with our tentative position, and the Commission now recommends that:

12. *The fact that the party against whose interest it is sought to introduce evidence of a previous conviction was not a party to the criminal proceedings should not necessarily be a bar to the introduction of the evidence.*

K. Defamation Proceedings

The issue of defamation proceedings resulting from a statement that a person committed or omitted acts which led to his conviction, highlights the illogicality of the rule in *Hollington v. Hewthorn*. It was this issue, raised in a number of comparatively recent English cases, which led to the deliberations of the English Law Reform Committee and the enactment of the English legislation.

It is our view that if, for example, A has been convicted of robbery involving money from a bank, B should not be exposed to the risk of defamation proceedings if he says that "A robbed a bank" rather than "A was convicted of robbing a bank." Not only does this kind of distinction tend to hold the law up to ridicule, but there is also a very substantial question in our minds whether A should be entitled to a retrial of his guilt or innocence on the criminal charge through the medium of defamation proceedings. In the case of defamation proceedings following a previous conviction, therefore, we recommend rules different from those which we have earlier set out. In particular, we rec-

ommend that evidence of a previous conviction should be conclusive evidence of the fact that a person committed or omitted the acts which led to the conviction, where that person seeks to base proceedings for defamation against someone who has stated that the acts were committed or omitted.

Having made this recommendation we ought also to advert to the situation where the statement is made, and defamation proceedings commenced, prior to the conviction. Although we realize that a person who makes the statement prior to the conviction may be considered to be more irresponsible than the person who awaits the conviction, defamation proceedings are concerned more with the truth or falsity of the statements made than with the sense of responsibility of the maker. It therefore seems logical to us to recommend that where defamation proceedings are commenced prior to the conclusion of the criminal proceedings, the judge having the conduct of the defamation trial should have a discretion to adjourn that trial until the outcome of the criminal proceedings is known, or until the effluxion of some reasonable period of time in which it ought to become apparent whether criminal proceedings will in fact be brought. It need hardly be said that one of the facts upon which a judge would want to have a certain assurance before exercising the discretion is that the defendant intends to rely heavily or exclusively for his defence on the reforms which we recommend.

Because we recommend that evidence of a previous conviction ought to be conclusive in subsequent defamation proceedings, it follows that two of our earlier recommendations relating to the general modification of the rule in *Hollington v. Hewthorn* should not apply in this particular case. These are:

- (i) Recommendation (2) relating to weight; and
- (ii) Recommendation (3) relating to the presence of a jury.

In short, we hope that if our recommendations are accepted, convicted persons will be discouraged altogether from bringing defamation proceedings against those persons who rely on the fact of a conviction in reporting that the convicted person committed or omitted the acts of which he was accused.

The Commission recommends that:

13. (i) *Notwithstanding a number of our earlier recommendations, evidence of a previous conviction should be conclusive evidence of the fact that a person committed or omitted acts which led to his conviction, where that person seeks to base proceedings for defamation against someone who has stated that the acts were committed or omitted.*

(ii) *Where the statement is made, and defamation proceedings commenced, prior to the conviction of the accused person, the judge having the conduct of the defamation trial should have a discretion to adjourn that trial until the outcome of the criminal proceedings is known, or until the effluxion of some reasonable period of time in which it ought to become apparent whether criminal proceedings will in fact be brought.*

(iii) *The following among our earlier recommendations should be regarded as inapplicable to the present recommendation:*

- (a) *Recommendation (2) in so far as it relates to weight; and*
- (b) *Recommendation (3).*

Adultery

In considering the use which may be made of a previous finding of adultery against a corespondent who is subsequently involved in divorce proceedings concerning his or her spouse, we pass out of the theoretical confines of the rule in *Hollington v. Hewthorn* into a speculation on the use which may be made of a finding in one civil proceeding in a subsequent civil proceeding. The justification for this lies in the fact that the issue has traditionally been resolved by reference to *Hollington v. Hewthorn*, and we find that resolution to be, on the whole, unsatisfactory. Doctrinally, we prefer the common law position in Ontario, but realize that change in this Province must be brought about by statutory means. This has the happy sideeffect of allowing us to propose what we believe to be desirable modifications for British Columbian purposes in the law as it now stands in Ontario.

Ontario law now makes a finding of adultery against a corespondent conclusive in the corespondent's own subsequent divorce proceedings, but we find this to be out of accord with the realities of the way in which many corespondents approach the original proceedings. In our experience, a number of corespondents, when notified of the proceedings, either do nothing or, if they attend, do so unrepresented by counsel. Thus, findings of adultery against corespondents at present commonly go by default, in the ordinary sense of the phrase. Under the law as it now stands this can scarcely have significant legal consequences, but if the changes which we recommend come into effect, the position of the corespondent who does not seek legal advice could be put at considerable risk. We are therefore disinclined, while seeking to effect some change, to make a finding of adultery against a corespondent conclusive in his or her own subsequent divorce proceedings. We prefer rather to recommend that such a finding should be treated in much the same way as that which we have recommended for criminal convictions in subsequent civil proceedings exclusive of defamation proceedings. Thus, in our view, a previous finding of adultery should be considered to be probative rather than conclusive evidence, and its weight should be open to attack on the basis that the corespondent either did not defend his position vigorously at the first trial, or did not defend it at all.

Having said this, we must now refer to the question of the procedure by which evidence of a previous finding of adultery should be introduced in the subsequent divorce proceedings.

Section 9(1) of the *Divorce Act* provides in part that:

On a petition for divorce it is the duty of the court

- (a) ... not to grant a decree except after a trial which shall be by a judge, without a jury.

By the same token, section 3(2) of the *Divorce Rules, 1975* provides that:

In any matter of practice or procedure which is not governed by statute or dealt with by these Rules the Rules of the Supreme Court apply.

Because we think a previous finding of adultery should be probative rather than conclusive, it follows that we also think that a party who intends to rely on such a finding in subsequent proceedings should also give notice of his intention to do so to any other party who will be adversely affected by the introduction in evidence of the finding. In the interest of consistency with our earlier recommendations we recommend a notice period of not less than seven days prior to trial, with the trial judge having a discretion to vary the notice period if he thinks the interests of justice would be served by variation.

As to the remainder of the subsidiary issues which are raised by our recommendation to permit the introduction of evidence of a previous finding of adultery, the principles which we have expounded for the introduction of evidence of previous convictions should apply *mutatis mutandis*, and are set out in the summary which follows.

The Commission recommends that:

(i) Where a finding of adultery has been made against any person in matrimonial proceedings in Canada, evidence of that finding should be admissible in subsequent divorce proceedings for the purpose of tending to prove the fact of adultery by that person.

(ii) A party who wishes to take advantage of the reform recommended in (i) should give notice of his intention to do so not less than seven days prior to the day fixed for the hearing of the proceedings, to the party or parties who may be adversely affected by the evidence.

Nonetheless, the judge having the conduct of the hearing should have a discretion, exercisable upon the application of any party having an interest in the matter, either to vary the period of notice or to adjourn the hearing, or both, if he thinks that the interests of justice will be served.

(iii) (a) For the purposes of this recommendation, the party who wishes to prove the fact of previous adultery may, in addition, or as an alternative, to other forms of proof permitted by law, tender in evidence:

(1) a copy of the original petition for divorce;

(2) a copy of the decree nisi or decree absolute; and

(3) a copy of the reasons for judgment (if any).

(b) Where a party elects to tender in evidence any of the documents referred to in (a) hereof, he ought to tender all such documents where they are reasonably available.

(iv) In any legislation arising out of this recommendation it should be made clear that the introduction of evidence of a previous finding of adultery does not matter the conventional burdens of proof in divorce proceedings.

(v) All findings of adultery made in any court in Canada (but no others) should be admissible in subsequent divorce proceedings.

(vi) Until the time for lodging an appeal against a previous finding of adultery has expired, or if an appeal has been lodged and the hearing of the appeal is pending, evidence of the previous finding should not be admissible under our recommendations.

(vii) A finding of adultery made as the result of an admission of adultery by a corespondent in previous divorce proceedings should, for the purposes of our recommendations, be treated in the same way as if the allegation had been contested.

(viii) Where, in the original proceedings, the court held that adultery must be proved beyond reasonable doubt, and in the subsequent proceedings the standard of proof is held to be that of the balance of probabilities, evidence of the fact that adultery was not found in the original proceedings should not be admissible in the subsequent proceedings.

M. __Filiation

Having discussed the probative effect of a previous finding of adultery in subsequent divorce proceedings, it would seem logical for us to discuss the admissibility in subsequent proceedings of a finding that a particular man was the father of a particular child. We specifically refrain from doing so, however, as the law relating to filiation may well undergo significant changes as a result of the Fifth Report of the Royal Commission on Family and Children's Law. Until it becomes clear what the law relating to filiation will be in the future, and in particular what effect a decree of filiation will have if the Royal Commission proposals are implemented, it seems to us that it would be wiser to make no concrete recommendation in the narrow context of the rule in *Hollington v. Hewthorn*. We note that this course of action commended itself to the Alberta Institute, which is faced with a similar situation.

If our recommendations gain legislative acceptance in, say, an amendment to the *Evidence Act*, it should be a comparatively simple matter to amend the Act further, in accordance with the general tenor of our recommendations, when the future of the law of filiation is settled.

N. Other Matters

There are two further matters to which we ought to refer before concluding this chapter. The first relates to existing statutory provisions which have repealed the rule in *Hollington v. Hewthorn* in specific contexts.

The second relates to section 18 of the *Evidence Act*.

Section 14 of the *Automobile Insurance Act* provides that:

- (1) In any action, cause or proceeding in which any of the provisions of this Act or the regulations and any plan are invoked and in which it is material to establish that a person using or operating a vehicle was so using or operating the vehicle under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the vehicle, there shall be received, as admissible evidence on the issue, proof that that person has been convicted of an offence committed at the material time under section 234, 235, or 236 of the *Criminal Code* (Canada), whether or not that person is a party to the action, cause, or proceeding and whether or not he is a witness at the trial and whether or not he has first been questioned as to whether he has been convicted of that offence.
- (2) For the purpose of subsection (1), a certificate containing the substance and effect only of the conviction of a person for an offence under section 234, 235, or 236 of the *Criminal Code* (Canada) and purporting to be signed by the officer having custody of the records of the court in which the person was convicted, or by the deputy of that officer, shall, upon proof of the identity of the person so convicted, be sufficient evidence of the conviction without proof of the signature or official character of the person by whom the certificate purports to have been signed.

Where the Legislature has already directed itself to the repeal of the rule in *Hollington v. Hewthorn* in specific contexts and in specific ways, it is not our intention to subvert that process, and we do not suggest amendments to section 14 of the *Automobile Insurance Act* or any other similar statutory provision.

The Commission recommends that:

15. *These recommendations for the repeal of the rule in Hollington v. Hewthorn should not affect any existing statutory provisions by means of which the rule has already been repealed in specific contexts.*

There remains, however, the matter of section 18 of the *Evidence Act*, which provides that:

18. (1) A witness may be questioned as to whether he has been convicted of any offence, indictable or not, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may

prove the conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the offence, purporting to be signed by the Registrar or Clerk of the Court, or other officer having the custody of the records of the Court at which the offender was convicted, or by the deputy of the Registrars Clerk, or officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of his conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

(2) For such certificate a fee of one dollar and no more may be demanded or taken.

In Chapter I we referred to the decision of Aikins J. in *Clarke v. Holdsworth* in which it was specifically held that this provision did not abrogate the rule in *Hollington v. Hewthorn*, and was designed simply to allow a witness's credibility to be attacked. The provision had given rise to confusion and controversy in the past, and in this connection we refer to a Comment by Dean M.L. Friedland, written in 1969, in which the history of the analogous section in the Canada *Evidence Act* is examined. Nonetheless, the principle underlying the section has been at least partially retained by the Law Reform Commission of Canada in its Evidence Code, section 64 of which provides that:

- (1) Evidence of the conviction of a witness for a crime is inadmissible for the purpose of attacking his credibility if the witness has been pardoned for the crime or five years have elapsed from the day of his conviction or release from confinement for his most recent conviction of a crime, whichever is the later.
- (2) In a criminal proceeding no evidence of the accused's character, including evidence that he has been convicted of a crime, is admissible for the sole purpose of attacking his credibility as a witness, unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

It is inappropriate in this context for us to make comprehensive recommendations about the future of section 18, as this must await our complete study of the law of evidence. Yet we cannot ignore it entirely, as in an unmodified form it would make nonsense of the principle implicit in our Recommendation (3) that evidence of previous convictions may in some cases have an unduly prejudicial effect upon a civil jury. Indeed, it seems to us that Aikins J. in *Clarke v. Holdsworth* was implicitly acknowledging what we also believe to be the case - that section 18 tends to make the rule in *Hollington v. Hewthorn* itself academic, at least before a jury. We recommend, therefore, that in civil proceedings with a jury, a judge ought to be given a discretion as to whether he will allow the questioning of a witness under section 18, to be exercised according to the judge's view of whether it will have an unduly prejudicial effect upon the jury.

The Commission recommends that:

16. *Section 18 of the Evidence Act ought to be amended to provide that in civil proceedings before a jury, a judge should have a discretion whether to allow the questioning of a witness as to previous convictions, to be exercised according to the judge's view of whether the questioning would have an unduly prejudicial effect upon the jury.*

CHAPTER IV

CONCLUSION

A. Summary of Recommendations

1. *Subject to a number of qualifications, the rule in **Hollington v. Hewthorn** should be repealed by statute.*
2. *Given a certain identity of facts and issues at stake in criminal proceedings and subsequent civil proceedings, evidence of a conviction in the criminal proceedings should, as a general rule, but subject to certain exceptions, be admissible in the civil proceedings for the purpose of tending to prove the fact of certain acts or omissions.*
3. *Where civil proceedings are to be conducted before a jury, the party against whose interest the evidence of a conviction lies, should have the right to argue, at trial but in the absence of the jury, the issue whether the introduction of the evidence would, in relation to its probative value, have an unduly prejudicial effect upon the jury.*
4.
 - (i) *A party who wishes to introduce evidence of a previous conviction in any proceedings should give notice of his intention to do so not less than seven days prior to the day fixed for the hearing of those proceedings, to the party or parties who may be adversely affected by the evidence.*
 - (ii) *Notwithstanding the previous recommendation,*
 - (a) *the judge having the conduct of the hearing should have a discretion, exercisable upon the application of any party having an interest in the matter, either to vary the period of notice or to adjourn the hearing, or both, if he thinks the interests of justice will be served, and*
 - (b) *the reforms which we recommend in this Report should apply, mutatis mutandis, to proceedings which are ex parte.*
5.
 - (i) *For the purpose of our recommendations, the party who wishes to prove the facts upon which a previous conviction was based may, in addition, or as an alternative, to other forms of proof permitted by law, tender in evidence:*
 - (a) *the certificate of conviction or any other document which serves a like purpose;*
 - (b) *the information or indictment upon which the conviction was based (and for this purpose a violation report which is issued under the provisions of the MotorVehicle Act, which is disputed, and which is followed by a finding of guilt, shall be deemed to be an information);*
 - (c) *the reasons for judgment (if any) which accompanied the conviction; and*
 - (d) *an undisputed violation report issued under the provisions of the MotorVehicle Act.*
 - (ii) *Where a party elects to tender in evidence any of the documents referred to in (I) hereof, he ought, to the extent that it is appropriate and they are reasonably available, tender all such documents.*

- (iii) *For the purpose of our recommendations, in any interlocutory proceeding, the judge having the conduct of the proceeding should have a discretion, exercisable upon the application of the party who wishes to prove the facts upon which a previous conviction was based, to accept affidavit evidence of the conviction and the facts; and that discretion should be exercised having regard to all the circumstances of the proceeding.*

In any legislation which may ultimately arise out of these recommendations, it should be made clear that the introduction of evidence of a previous conviction does not alter the conventional burdens of proof in civil proceedings.

7. *All convictions recorded in any court in Canada (but not those arising out of courtmartial) should be admissible in subsequent civil proceedings according to our earlier recommendations.*
8. *Until the time for lodging an appeal against a conviction has expired, or if an appeal against a conviction has been lodged and the hearing of the appeal is pending, evidence of that conviction should not be admissible under our recommendations unless the appeal is against sentence alone.*
9. *Any legislation arising out of our recommendations should not prohibit the admissibility of convictions which have been the subject of:*
- (i) *a pardon under the Criminal Records Act (R.S.B.C. 1970, 1st Supp., c. 12);*
- (ii) *an absolute or conditional discharge under section 662.1 of the Criminal Code;*
- or*
- (iii) *any provincial legislation comparable to (i) and (ii) hereof.*

Whether such convictions should be admissible should be a matter for the courts to determine after an examination of the words of the particular statutes in question.

10. (i) *A conviction resulting from a plea of guilty should, for the purposes of our earlier recommendations, be treated in the same way as a conviction resulting from a plea of not guilty.*
- (ii) *A nondispute of an alleged violation of a traffic rule under the Motor Vehicle Act should, for the purposes of our earlier recommendations, be treated in the same way as a conviction resulting from a plea of guilty.*
11. *Verdicts of acquittal in previous criminal proceedings should continue to be inadmissible in subsequent civil proceedings arising out of the same facts.*
12. *The fact that the party against whose interest it is sought to introduce evidence of a previous conviction was not a party to the criminal proceedings should not necessarily be a bar to the introduction of the evidence.*
13. (i) *Notwithstanding a number of our earlier recommendations, evidence of a previous conviction should be conclusive evidence of the fact that a person committed or omitted acts which led to his conviction, where that person seeks to base proceedings for defamation against someone who has stated that the acts were committed or omitted.*

- (ii) *Where the statement is made, and defamation proceedings commenced, prior to the conviction of the accused person, the judge having the conduct of the defamation trial should have a discretion to adjourn that trial until the outcome of the criminal proceedings is known, or until the effluxion of some reasonable period of time in which it ought to become apparent whether criminal proceedings will in fact be brought.*
 - (iii) *The following among our earlier recommendations should be regarded as inapplicable to the present recommendation:*
 - (a) *Recommendation (2) in so far as it relates to weight; and*
 - (b) *Recommendation (3).*
14. (i) *Where a finding of adultery has been made against any person in matrimonial proceedings in Canada, evidence of that finding should be admissible in subsequent divorce proceedings for the purpose of tending to prove the fact of adultery by that person.*
- (ii) *A party who wishes to take advantage of the reform recommended in (I) should give notice of his intention to do so not less than seven days prior to the day fixed for the hearing of the proceedings, to the party or parties who may be adversely affected by the evidence.*

Nonetheless, the judge having the conduct of the hearing should have a discretion, exercisable upon the application of any party having an interest in the matter, either to vary the period of notice or to adjourn the hearing, or both, if he thinks that the interests of justice will be served.

- (iii) (a) *For the purposes of this recommendation, the party who wishes to prove the fact of previous adultery may, in addition, or as an alternative, to other forms of proof permitted by law, tender in evidence*
 - (1) *a copy of the original petition for divorce;*
 - (2) *a copy of the decree nisi or decree absolute; and*
 - (3) *a copy of the reasons for judgment (if any).*
- (b) *Where a party elects to tender in evidence any of the documents referred to in (a) hereof, he ought to tender all such documents where they are reasonably available.*
- (iv) *In any legislation arising out of this recommendation it should be made clear that the introduction of evidence of a previous finding of adultery does not alter the conventional burdens of proof in divorce proceedings.*
- (v) *All findings of adultery made in any court in Canada (but no others) should be admissible in subsequent divorce proceedings.*
- (vi) *Until the time for lodging an appeal against a previous finding of adultery has expired, or if an appeal has been lodged and the hearing of the appeal is pending, evidence of the previous finding should not be admissible under our recommendations.*

- (vii) *A finding of adultery made as the result of an admission of adultery by a corespondent in previous divorce proceedings should, for the purposes of our recommendations, be treated in the same way as if the allegation had been contested.*
- (viii) *Where, in the original proceedings, the court held that adultery must be proved beyond reasonable doubt, and in the subsequent proceedings the standard of proof is held to be that of the balance of probabilities, evidence of the fact that adultery was not found in the original proceedings should not be admissible in the subsequent proceedings.*
15. *These recommendations for the repeat of the rule in *Hollington v. Hewthorn* should not affect any existing statutory provisions by means of which the rule has already been repealed in specific contexts.*
16. *Section 18 of the Evidence Act ought to be amended to provide that in civil proceedings before a jury, a judge should have a discretion whether to allow the questioning of a witness as to previous convictions, to be exercised according to the judge's view of whether the questioning would have an unduly prejudicial effect upon the jury.*

B. Acknowledgment

The Commission wishes to acknowledge its gratitude to Professor Keith B. Farquhar, formerly the Commission's Director of Research, and now a member of the Faculty of Law at the University of British Columbia. Professor Farquhar was responsible for all the research and writing involved in this Report and the earlier working paper, and we wish to express our appreciation to him for his invaluable assistance to us.

Mr. Douglas Lambert did not take part in the Commission's work on this subject and accordingly does not join us in making these recommendations.

LEON GETZ, *Chairman*
RONALD C. BRAY
PAUL D. K. FRASER
PETER FRASER

January 11, 1977.