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THE STRUGGLE TO MAKE
THE ACCUSED COMPETENT
IN ENGLAND AND IN CANADA

RONALD D. NOBLE*

INTRODUCTION

We are all familiar with the fundamental principle that an accused can only be convicted if his guilt is demonstrated beyond a reasonable doubt. That principle is firmly entrenched within the tradition upon which our law is based.¹

This brief quotation reflects a premise accepted by lawyers and laymen alike, that the accused has for generations enjoyed the benefits of the “reasonable doubt” doctrine and has been presumed innocent till that same doubt has been dispelled by the Crown. How long has this presumption existed? Is it really a time-honoured precept or is it a relatively recent innovation? These are the questions which this inquiry seeks to answer by looking to some of the historical rules and procedures of English law respecting the accused’s position in criminal proceedings. The inquiry was prompted, in part, by Jeremy Bentham’s conclusion that:

Were we to go over the history of tribunals, and select all the rules of practice which have been established to the prejudice of truth, to the ruin of innocence and honest right, the picture would be a most melancholy one. . . . It must be acknowledged, that legislators, timid from their ignorance, have allowed lawyers to assume absolute empire in forms of procedure; and the latter, contemplating every judicial operation as a source of gain, have laboured to multiply unjust suits, unjust defences, delays, incidents, expenses. . . . Legal fictions, nullities, superfluous forms, privileged lies, have covered the field of law; . . . ²

Jeremy Bentham’s acidic attack was directed generally against English law and its practitioners in the early 1800s. His ambitious undertaking ran the gamut of evidence from the purpose of its taking, through the methods of obtaining it, to the deficiencies of the English system. This essay is decidedly less ambitious in scope in that a specific area of inquiry, the evolution of the right of the accused to testify on his own behalf in criminal proceedings in England and Canada, is the central theme. Other related areas are touched upon in the course of this examination, such as the relationship of “competence” and “compellability”, but the primary concern is with the competence of the accused himself.

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The paper contains an historical outline of both the English and Canadian positions leading up to the passing of Acts in both countries which allowed the accused to testify on his own behalf, arguments of the leading critics and supporters of those Acts, and relevant statutory material coupled with social and legal comment upon statutory changes. Finally, an effort is made to examine some of the problems that have developed because of varying interpretations of the purposes and implementation of the statutes. It is hoped that this will provide some insight into a legal right which has only recently become a fragment of the elusive institution, justice under the law.

PART I The English Experience

Today, in any common law criminal proceeding, the presumption in favour of the innocence of the accused until he is proven guilty is commonplace. Such a presumption is a comparatively recent development and even a brief excursion into the field of English legal history reveals a contrary presumption holding favour with the courts for several hundred years. England was not alone in looking with disfavour upon the position of the accused.

In the course of Roman trials, although both sides could apparently call witnesses, only the prosecutor could compel the attendance of witnesses. This indicates a presumption as to guilt rather than innocence in that Roman procedure deliberately weakened the defendant's case. Early English legal procedures were founded upon Roman law, as no other system to which the English had access was then in existence.

The early English criminal procedure was of two kinds: the law of infangthief, an anglo saxon summary proceeding, and the law of purgation and ordeal. During this period, the accused was allowed to deny in general terms and upon oath the crime imputed to him. The form of his oath was: "By the Lord I am guiltless, both in deed and counsel of the charge of which N accuses me." Although at this time the accused was allowed to attest to his innocence under the sanction of oath, in reality it meant little unless the accused was considered oath-worthy and this necessitated testimony as to the character of the accused. If the accused could find witnesses who would swear as to his good character, then the oath succeeded and the accused was acquitted. If such witnesses could not be found, or would not swear, or if the accused were a man of bad character, then he had to suffer the ordeal, that is to handle three pounds of red-hot iron or to plunge his arm to the elbow in boiling water. Obviously the systems of ordeal were appeals to God to work miracles to show the innocence of the accused and the strength of the oath of the accused meant little regarding the actual outcome of the trial even though he was permitted to swear as to his innocence.

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4 Id., p. 59.
5 Id., p. 70.
Although ordeals were abolished about 1215, it was to take several hundred years before the bias operating against the accused was to be substantially altered. The following review of ingrained traditions will supply at least a partial answer to the slow progression toward competence.

A startling example of procedure that operated to the detriment of the accused was contained in the fashion in which original jury trials were conducted. The accusation was made by the jury of presentment and the same jurors formed the trial jury! If the body of men which had already found that the evidence was sufficiently prejudicial to the accused to demand that he be tried was to form the trial jury, the chance of acquittal was slim. This procedure was followed until the fourteenth century when the accused was allowed to challenge any of the indicting jury who were put on the jury of deliverance.

A second example of the early bias operating against the accused in pre-trial proceedings is revealed in the states of Philip & Mary 1554 and 1555. Under these acts the accused was to be fully questioned as to all the circumstances connected with the alleged offence. But the examination of the witnesses and the recording of their depositions was for the court's information only and the accused had no right to be present. Further, under the statutes of Philip and Mary, the depositions were to be returned to the court and the accused was not even allowed to see them. These particulars clearly point out that the object of the statutes was to expose a man assumed guilty.

Similarly a cursory examination of criminal proceedings in the century preceding the civil war reveals concepts of criminal procedure diametrically opposed to our present notions of fair or just procedure. The prisoner was secretly confined until his trial and could make no adequate preparations for his defence as he had no notice beforehand of the evidence that would be used against him at his trial. He had no counsel either before or at the trial. During the trial the witnesses for the prosecution were not confronted by the accused and the confessions of accomplices were considered especially cogent evidence. Finally it does not appear that the prisoner was allowed to call witnesses on his own behalf but it really mattered little as he had no means of ascertaining what evidence they would give or of procuring their attendance. In later times when witnesses were allowed for the defence, they were not allowed to testify under oath, seemingly on the theory that such witnesses, if they contradicted the witnesses for the prosecution, were probably lying.

Sir James Fitzjames Stephen gave a very plausible explanation as to why such an extraordinary rule was implemented. According to his theory the rule was based on simple expediency. It increased the power of the prosecution and minimized the difficulties of those conducting the proceedings. Stephen

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6 Id., p. 300.  
8 1 and 2 Philip and Mary, (1554), c.13; 2 and 3 Philip and Mary, (1555), c.10.  
9 Stephen, supra, note 3, p. 221.  
10 Id., p. 350.  
11 Williams, supra note 7, p. 6.
further submits that presumptions as to innocence or guilt can be greatly influenced by the strength of the society in which those presumptions are made. In times when there is no standing army, no organized police force upon which the government can rely and the maintenance of public peace depends mainly on the life and strength of the sovereign, then it is not unnatural that some of the individual rights which modern society views as fundamental are subverted.

There is a logical ring to Sir James Fitzjames Stephen's arguments and they should be borne in mind when we are tempted to castigate old laws from a purely modern viewpoint. The generosity of spirit which allows a presumption of innocence may only be possible in a society which is so much stronger than the individual that it no longer fears the individual.

It has already been stated that witnesses for the defence were not permitted to testify under oath in the latter half of the seventeenth century. The amount of harm done by this really depended upon the weight given to evidence under oath as compared to unsworn testimony. If equal weight could be given to either method of presenting evidence, then the accused would suffer little from the fact that his witnesses were not under oath. Such was not the case, however, in the trials of that period. Juries were encouraged by the judges in the belief that a direct unqualified oath by an eye- or ear-witness had a distinct mechanical value and must be believed unless directly contradicted. If the court declared that a man was a competent witness, then it appeared in the majority of cases that the jury believed him as a matter of course. When this is coupled with the fact that the court operated with a definite bias against the accused, the number of good or competent witnesses which the accused could produce was small indeed.

The scandals of the trials in the days of the late Stuarts produced legislative changes that operated to the benefit of the accused. In 1702, it was enacted that in cases of treason and felony the prisoner's witnesses should be sworn and in 1708, the prisoner was allowed to have a list of witnesses and of the jury ten days before his trial. At this time only slight public attention was paid to the defects of the criminal law and it remained for successive generations to adopt those reforms which are considered significant today.

The outstanding feature of the preceding historical review is the utter absence of serious attempts to place the accuser and the accused on approximately equal footings regarding criminal procedure. Throughout the centuries the accused was made to appear a second-class citizen by courts which paid only lip-service to such high-minded phrases as equality and justice under the law.

By depriving the accused of the right to testify under the alleged sanction of the oath, the testimony of the accused was made inferior. In effect, the

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12 Stephen, supra, note 3, p. 400.
12A 1 Anne, St. 2, c.9.
13 7 Anne, c.27, s.14.
13A Stephen, supra note 3, p. 416.
courts were saying to the accused—You are probably guilty and anything you have to say by way of defence will be a lie, therefore to safeguard you against perjury and to preserve the sanctity of the oath, we will put the possibility of perjury out of your reach. This argument has strength as long as the only concern is to preserve the religious significance of the oath but what of the harm done to the position of the accused? Perhaps Sir James Fitzjames Stephen’s concept of a relatively weak society only concerned with preserving order helps to explain the situation.

By the early nineteenth century concessions were grudgingly made which helped to equalize the prosecution and defence. In 1836 *The Prisoners Counsel’s Act*\(^{14}\) was passed which allowed prisoners accused of felony to make their full defence by counsel. This overdue measure was strongly opposed at the time by twelve out of the fifteen judges, one of them threatening resignation if it were made law.\(^{15}\) This enactment opened the door to the famous defence counsel plea: “My client’s mouth is closed. If he could speak he might say . . .”. Prior to the Act the prisoner in a felony case was forced to speak for himself as the evidence given against him operated as a form of indirect questioning and if the prisoner did not answer, then his chances of conviction were multiplied. However, two things must be kept in mind regarding the ability of the prisoner to speak for himself. First, though down to the Civil Wars, interrogation of the prisoner formed the most important part of the trial and under the Stuarts questions were still asked of the prisoner,\(^{16}\) soon after the Revolution of 1688 this practice died out and the civil rules that parties were incompetent as witnesses became extended to criminal trials.\(^{17}\) Thus the practice of the prisoner speaking for himself is the exception, not the rule in the latter period. Secondly, the evidence of the prisoner was not allowed the added credibility of being under oath. Thus by the mid-nineteenth century the prisoner was absolutely protected against all judicial questioning before or at the trial but he was also deprived of giving evidence on his own behalf.

During the latter half of the nineteenth century the movement to obtain for the accused the privilege of testifying under oath accelerated, finally culminating in Lord Halsbury’s Act.\(^{18}\) In the early part of the century Bentham had decried the enforced silence of the accused. His opposition argued that to allow the accused to testify was to invite the accused to convict himself. Bentham replied: “Why not?” If the accused is guilty of the crime alleged, then no miscarriage of justice is present and if he is innocent, what

\(^{14}\) Prisoners Counsel’s Act, 1836, 6 & 7 Will. 4, c.104.

\(^{15}\) Williams, *supra*, note 7, p. 8.


\(^{18}\) *The Criminal Evidence Act*, 1898, 61 & 62 Vict. c.36.
better opportunity has the accused than to attest to his innocence? His highest interest is to dissipate the cloud which surrounds his conduct, to provoke questions and answers that force examination of the chains of evidence that have brought him to the unfortunate position of being suspect. In summary: "If all the criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking as guilt invokes the privilege of silence." With this condemnation burning in the ears of the legislators it still took over seventy years to remedy the situation.

In 1843 Lord Denman’s Act declared that witnesses who had been convicted of crime, or who had an interest in the case, should no longer be excluded from giving evidence. The preamble stated:

"Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony."

The Act, however, failed to make parties to suits competent witnesses even though the “inquiry after truth” was purportedly paramount.

When the County Court Act of 1846 was passed, a section was put in enabling and compelling parties, their wives and all other persons to give evidence in those courts, but it was not until the passing of Lord Brougham’s Act in 1851 that parties were made competent witnesses in Superior Courts and not until 1853 that the husbands or wives of the parties were declared to be admissible witnesses. The latter two Acts did not apply to criminal proceedings.

"Although the tide in favour of admission as against exclusion had begun to flow," it was not until 1872 that any Act expressly made the accused and the wife or husband of such person, a competent witness. During the next twenty-seven years some twenty-five Acts were passed making the accused, or the wife or husband of the accused, competent witnesses.

While those Acts were being passed various attempts were made to enact one general law on the subject. In 1878 Mr. Evelyn Ashley succeeded in getting such a Bill read a second time in the House of Commons but after it was referred to a Select Committee, nothing came of it. Between 1884 and 1898 some fourteen general Bills were introduced by such eminent figures as Lord Bramwell, Sir Henry James, Lord Herschell, Sir Richard Webster and Lord Halsbury to overcome the absurd anomalies that had been created by dealing piecemeal with the subject. One of those absurdities was that a

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20 Evidence Act, 1843, 6 & 7 Vict. c.85.
21 County Court Act, 1846, 9 & 10 Vict. c.95.
22 Evidence Act, 1851, 14 & 15 Vict. c.99.
23 Evidence Amendment Act, 1853, 16 & 17 Vict. c.83.
person charged under the Criminal Law Amendment Act, 1885\textsuperscript{25} could testify on his own behalf while a man charged with murder could not do so.\textsuperscript{26} Secondly, a man charged with libel could give evidence but a person charged with sending a threatening letter could not.\textsuperscript{27} A third anomaly was pointed out by a Metropolitan Police Magistrate when he noted that a charge of drunkenness under The Licensing Act 1872 allowed the accused to be a competent witness, but if use were made of the Town Police Clauses Act or of the Metropolitan Police Act, then the accused was incompetent.\textsuperscript{28} This meagre list could be expanded indefinitely and well deserved Lord Salisbury's label of "atrocious anomalies."

One of the reasons as to why the original attempts at consolidation failed was the inability of the promoters to agree on specific issues. The first major issue was whether the accused, upon being made a competent witness, should be made subject to cross-examination as to credit. Lord Russell, in his position as Lord Chief Justice, stated that the only way to get a true appreciation of the force and effect of the defendant's statement was to subject him to the ordinary test of cross-examination.\textsuperscript{29} He was supported in this view by Mr. Justice Hawkins and Sir Harry Poland.

Whether the absence of the defendant from the witness-box should be made the subject of judicial comment was a second problem. The eventual solution was a compromise in which such decision was left to the judge presiding at any given trial. (More will be said regarding this point in the discussion of the Act of 1898 itself.)

The inability on the part of promoters to concur on the items to be included in general legislation rendering the accused competent, aided the parliamentary defeat of the Draft Criminal Code of 1879. That piece of legislation would have allowed the accused to be sworn at his option and would have subjected him to compulsory cross-examination. However, the Commissioners were divided in opinion as to its policy\textsuperscript{30} and this, coupled with external opposition, brought about its rejection. Still smarting from this defeat, rescuers were quick to salvage the issue of the competence of the accused from the wreck of the Draft Code. Foremost among these was R. C. Webster,\textsuperscript{31} who was so convinced of the necessity for an amendment of the law that he introduced a Bill for several sessions in the House of Commons. The opposition to the reform argued that the proposed change was against the spirit of the law since a guilty person would be unfairly compelled to testify to his own disadvantage. Probably the most repeated harangue was that advanced by the traditionalists. The old system had worked fairly well for over a

\textsuperscript{25} The Criminal Law Amendment Act, 1885, 48 & 49 Vict. c.69.
\textsuperscript{28} Id., p. 603.
\textsuperscript{29} Id., p. 603.
\textsuperscript{30} Stephen, supra, note 3, p. 445.
\textsuperscript{31} Williams, supra, Note 7, p. 46.
century and there was little practical experience of the new system. In reality
the experience under the Criminal Law Amendment Act of 1885 could have
been drawn upon to furnish factual conclusions to the problem of allowing
the accused to testify on his own behalf and there was a thirty-six year history
of the competence of parties in civil trials. The Criminal Law Amendment
Act, 1885 had made the accused competent in certain classes of offences and
the Evidence Act, 1851 had made parties in most civil proceedings competent
and compellable.

The opposition to making the accused competent waited until 1897 to
launch an all-out attack. Their clamouring became so great that the Govern-
ment Bill of 1897, introduced by Sir Richard Webster, which made the wife or
husband of the accused competent and compellable, and which subjected the
accused and all other witnesses to cross-examination, had to be substantially
altered. The alternation left this strange anomaly: If a father half-killed his
child and was charged with an offence under the Prevention of Cruelty to
Children Act, 1894, his wife could be compelled to give evidence against
him, but if he killed the child outright and was charged with murder or
manslaughter, she could not give evidence against him, even if she were
willing to do so.

The arguments of those opposed to allowing the accused to become a
competent witness are worth examining in greater depth. The most vocal
member of the opposition appears to have been Sir Herbert Stephen. The
corner-stone of his attack was experience. In speaking for the collective
opposition he stated:

... we, who are opposed to the competence of prisoners as witnesses, base our
objections chiefly upon the solid experience of twelve years during which prisoners
have been competent witnesses, and have constantly given evidence in about
twenty per cent of the indictable offences tried at Courts of Assize, ... this
experience is almost entirely ignored by our opponents, ... there is an excellent
reason why this is so. The supporters of the Bill ignore the experience because
they have not got it. No single one of the eminent supporters of the Bill—
excluding some of the judges ...—has had any continuous criminal practice
in Courts of Assize since 1885, and it is only in those courts since that date that
actual practical experience of the competence of prisoners as witnesses has been
possible. In his position as an officer of the Court of Assize, Stephen had considerable
opportunity to view the actual result of allowing the prisoner to testify. His
claim of having been present at some eight to sixteen hundred cases within an
eight year period in which the prisoner was competent is impressive. From his
experience he drew the conclusion that the conviction of innocent persons was
more likely when prisoners were competent witnesses. As proof of this
conclusion he tendered in evidence his own understanding of how the minds
of juries worked. As long as the prisoner could say nothing, the jury really
demanded that the prosecution prove its case beyond all reasonable doubt.
However, as soon as the prisoner had a chance to tell his story, then the jury

32 Allen, supra, Note 24, p. XXV.
34 Stephen, Sir Herbert, supra, Note 27, p. 8.
no longer demanded such a high standard of proof to convict. Instead they
struck a balance of probabilities which did a disservice to the accused.

At first glance such an interpretation appears to have considerable merit
but upon closer scrutiny two important questions arise which demand
answers. Firstly, Stephen's conclusion was only true if that which the
accused had to say was such that it prejudiced the jury against him. This
could feasibly consist of either the factual content of the statement or of the
manner in which the facts were stated. Obviously either a guilty or an inno-
cent accused could prejudice his case by testifying, but was it not also true
that in other cases the testimony of the accused was most necessary to his
acquittal? The significance of this was compounded by the fact that in
that period the majority of accused persons did not have the benefit of legal
counsel. Under such circumstances the accused party would possibly be the
only person in possession of facts that could establish his innocence. Secondly,
Sir Herbert based his conclusion that the jury would inevitably strike a balance
of probabilities when the accused was made competent primarily upon the
single fact that the accused was competent. Were there not other factors
which should have been considered? Did the conduct of the judge and his
comments mean nothing? Was the jury not influenced by the latitude allowed
the prosecution in commenting upon what the accused has said or failed to
say? Without some plausible accounting of these influences it was highly
doubtful if Stephen's conclusions were as meaningful as he contended.

A more plausible theory was advanced by Sir Herbert Stephen when he
spoke of the likelihood of conviction when the prisoner told lies in his
evidence, even though such lies were not directly connected with the charge
faced by the prisoner. He felt that many people might fall prey to convicting
a man of any charge simply because that man lied about some external fact.
There was truth in this contention but Stephen failed to comment upon the
role of the judge in criminal proceedings. In summing up, the judge's duty was
to point out to the jury that because a lie was told, this was hardly conclusive
proof of guilt. Although this could not be construed as an absolute safeguard
against wrongful conviction, it would certainly have some impact upon the
jury.

A third argument advanced by Sir Herbert Stephen, that the prosecution
would be tempted to get up their case in a slovenly fashion because the
accused would surely convict himself by his own evidence, can be dismissed
summarily. Lord Sankey in Woolmington v. D.P.P. stressed the fact that
it is the duty of the prosecution to prove the accused's guilt in every case,
although special rules govern the onus under some statutes and at common
law regarding the defence of insanity. Usually the legal burden of establishing
every issue in all criminal cases rests at the outset upon the prosecution, even
though the accused bears the evidential burden in some special cases.

Stephen's strongest logical argument was made in connection with the
value of the oath if accused parties were allowed to swear under it. The

36 Id., p. 17.
37 Id., p. 19.
guilty prisoner, called as a witness, would be bound to tell a lie by knowing that he could not escape conviction by telling the truth. That temptation would be so strong that the fear of breaking an oath or fear of prosecution for perjury, would be trifling in comparison with it.\(^3\)

This point was well taken. Probably the real value of the oath was not that it restrained the mendacity of dishonest witnesses, but that it made honest witnesses more careful. If any kind of sanctity of oath was to be preserved, then the oath should not be administered in circumstances where it was certain to be broken. Although the arguments surrounding the oath were enticing it must be remembered that the prime purpose of making the accused competent was to approximate equality between the prosecution and the defendant and that this end was probably considered of greater value than any oath.

Stephen’s closing arguments dealt with cross-examination.\(^4\) In his view the inability of the accused to testify invoked a special softness of heart on the part of prosecutor, judge and jury. He felt that once the Crown was confronted with a prisoner lying under oath, it would be impossible for the Crown to maintain impartiality in cross-examination. In speech, action and methods the Crown would resemble counsel for one of the parties in a fiercely fought libel action. This change of attitude would, of course, have a decided impact upon the jury. Also the judge would find it more difficult to be impartial in summing-up when he had been faced with a lying witness. When these factors were coupled with the jury’s change of attitude, that is, no longer demanding that the prosecution prove its case beyond all reasonable doubt, the number of convictions would soar. Thus the innocent would suffer at the hands of a reform purportedly designed for their benefit.

Stephen fought valiantly against the passing of the Act of 1898 because he honestly believed that to make the accused a competent witness was to increase the likelihood of his conviction. Further, to allow prisoners to be called as witnesses would be an invitation to the guilty to commit perjury and the sacredness of the oath would be made even less impressive to the public. Finally the whole tone and character of criminal proceedings would be appreciably altered and the jury would replace “benefit of doubt” with “balance of probabilities”. Whether his conclusions were well-founded or illogical was of little importance for there were many who held similar views and in the final analysis they succeeded in having the Government Bill substantially altered.

A variety of the arguments used by both the promoters and the opposition to the Act of 1898 had been aired some ten years previously by Mr. Justice James Fitzjames Stephen,\(^4\) when he spoke of his experiences under the *Criminal Law Amendment Act* of 1885. The learned justice stated that after having had first-hand experience of how the system worked

\(^3\) Stephen, Sir Herbert, *supra*, Note 27, p. 22.
\(^4\) Id., pp. 24-29.
when prisoners were competent, he was thoroughly convinced that this was
favourable in the highest degree to the administration of justice. He felt
that the evidence of the accused was often of great and decisive importance
and was invariably of equal value to that of other witnesses.

The strong argument in favour of the accused giving evidence was that
a presumably innocent man could escape an unjust conviction by telling his
story whereas the weakness consisted of providing an opening for artfully
contrived frauds and evasions of justice.

To develop his theme, Mr. Justice Stephen contrasted the ability of the
accused to secure adept counsel or poorly qualified members of the lower
class of solicitor. In the latter case, the accused might be saved from a grave
injustice by telling his own story to a patient judge. This picture of the patient
judge listening carefully to the imperfect allusions of the accused was exactly
opposite to that drawn by Sir Herbert Stephen when he spoke of the judge who
would become increasingly irritated by the stumbling testimony of the accused.
These contrasting views say much about the opposing parties' views of the
judiciary.

A further point of contrast between Mr. Justice J. F. Stephen and Sir
Herbert Stephen was in their approach to the old doctrine of reasonable
doctrine. The latter felt that the jury would sweep this concept aside in their
eagerness to strike a balance of probabilities, while the former thought the
concept would have to be modified to prevent unjust acquittals as the jurors
would be only too willing to accept any plausible story tendered by the
accused.

One article written in support of the competency of the accused appeared
in *The Juridical Review*. The writer declared that the old approach to
disallowing certain classes of potential witnesses was based on a rooted dis-
trust of human nature and on a strange belief that people were more likely to
lie than to tell the truth. This simple testimonial, though admirable as a
tribute to faith in mankind, completely missed the key issues involved in
whether the accused should be competent.

A more reasonable view of the problem was taken by four members of
the legal profession who supported the Government Bill. Their views appeared
in *The Law Journal* and were held out by the editor as representing the
profession as a whole.

Sir Frank Lockwood, Q.C., M.P., was convinced of the value of allowing
the accused to testify and discarded the idea that innocent witnesses would
suffer because of their nervousness in the box because competent juries
could readily understand the situation. On the other hand he did not fail to
recognize the reality that the accused who did not testify under the proposed
Act would likely prejudice his case.


Mr. Alfred Cock, Q.C., agreed on the latter point and further pointed out the danger of the accused becoming unnerved under stiff cross-examination. The best proposed solution to that problem was given by Sir Alexander Cockburn, Lord Chief Justice of England, in a speech given to the Bar of England in 1864. He stated, in effect, that an advocate should be fearless in carrying out the interests of his client but that the arms which he wields should be the arms of the warrior and not of the assassin.\textsuperscript{44}

A third supporter of the Bill, Mr. Charles W. Mathews, used a striking illustration to point out the value of allowing the accused to testify. He used the example of the police coming upon three men in the road. One man lay dying, one had stopped to help and the third had done the act. Under the law as it existed, both the guilty and the innocent party would be forced to be silent. The injustice of the situation is obvious.

Mr. Matthews also pointed out a weakness that was to be later vehemently used by Sir Herbert Stephen. That point involved the danger to the witness who told the truth about the main facts but who lied or was mistaken about minor details. He would run the risk of having his entire testimony discredited. Even though this was an admitted danger, Mr. Matthews felt that the worth of allowing the accused to testify outweighed any drawbacks.

Mr. Horace Avory defended the Bill on the ground that in the past defence counsel had attracted undue sympathy for their clients from the jury by harping upon the inability of the accused to testify. He felt that this had given rise to wrongful acquittals. The accuracy of this assumption is doubtful in view of the Criminal Statistics published by the Home Office in 1894 which showed that eighty-two per cent of the persons tried for indictable offences were convicted.\textsuperscript{45}

At the time that this controversial issue was being debated in England, other parts of the English-speaking world adopted a similar reform. Legislation allowing the accused to testify had already been passed in India, the United States, Australia and Canada.\textsuperscript{46} One of the judges of the Supreme Court of New Zealand, Sir William Windeyer, declared that his experience was altogether favourable to the competence of prisoners and that he should be sorry to have to try a prisoner who could not give evidence.\textsuperscript{47} Sir Herbert dismissed Sir Williams' testimony by saying that New Zealand was not England, the accuracy of which Sir William was undoubtedly aware.

Before proceeding to other arguments a brief outline of the principal reasons given in support of the Bill during its second reading in the House of Commons will be drawn. The supporters of the Bill contended that, in the past, innocent accused had been convicted because they had not been able to give evidence; that the preponderance of professional and judicial opinion was in favour of the change, and that every country that had previously

\textsuperscript{44} Cockburn, Sir Alexander, as quoted by Allen, \textit{supra}, Note 24, pp. XXI-XXII.
\textsuperscript{46} Williams, \textit{supra}, Note 7, p. 48.
\textsuperscript{47} Stephen, Sir Herbert, \textit{supra}, Note 27, p. 51.
adopted this reform was in favour of its continuance. As far as possible drawbacks such as oppressive cross-examination and discredit through nervous or elusive testimony were concerned, the promoters felt that discerning judges and juries would render such disadvantages negligible. The pervasive theme throughout the debate was that as the accused was already competent under some twenty-five to thirty Acts, why not take the next logical step and make him competent generally?

Prior to, during, and after the debate in the House of Commons, the controversy was carried to the public through letters written to “The Times”. Of all the arguments used in favour of the change, only that of Mr. Pitt-Lewis contended that the search for truth was the ultimate quest of criminal courts. Nearly all of the others indicated a lesser and more pragmatic aim.

Mr. Castle was concerned with protecting the competent prisoner, who refused to testify, from any adverse comment by the prosecution or judge. By so doing he was willing to give the accused a greater margin of benefit of doubt than a “search for truth” would have permitted.

On the other hand, Mr. Plowden, who was obviously conviction-minded, wanted the failure of a competent accused to testify to be evidence of his guilt. By advocating that silence was synonymous with guilt, Mr. Plowden showed that his primary aim was not a search for truth, but to strike a balance of probabilities. In other words, he simply assumed that only the guilty would shelter themselves in secrecy.

Those who desired to make the accused a competent witness contended that such a change could only benefit the innocent accused. The opposition maintained that the likelihood of convicting the innocent was made greater by allowing the accused to enter the witness-box. Some feared that cross-examination would unnerve the guilty and the innocent alike as both judge and prosecutor would lose all sense of impartiality and fiercely attack the witness in a manner similar to that of a French trial. The promoters of reform replied that it was the duty of the administrators of English justice to rise above such base temptations and to imbue the spirit of the English trial with a characteristic sense of fair play. The opposition argued that to allow the accused to convict himself out of his own mouth was unsportsmanlike and the promoters countered that it was unsportsmanlike to enforce the silence of the accused.

The promoters maintained that the present state of the law was both anomalous and unjust. The opposition replied that the best way to remove the anomalies was to repeal all of the statutes which had previously made the accused competent.

Those in favour of the change pointed to the United States, Canada and Australia and contended that the experience of those countries was proof that such a legal reform worked well. The opposition cried that those countries were not England.

Thus the controversy continued. The arguments on both sides were sometimes meritorious, sometimes fallacious, but in the end The Criminal Evidence Act of 1898 was passed. Its provisions reflected the battle that had taken place in that certain compromises had to be reached regarding the
competence, compellability and cross-examination of the accused and his spouse.

Section one of the Act stated: 48

"Every person charged with an offence, and the wife or husband, as the case may be, of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application; E

(b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged to give evidence shall not be made the subject of any comment by the prosecution; F

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

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

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

48 The Criminal Evidence Act, 1898, s.1(a)-(h).

48A The Act applied to every case in which a person was charged with an offence except for those cases which were in substance civil and came under the Evidence Act, 1877, 40 & 41 Vict. c.14.

48B This section only applied to the accused or the wife or husband being called for the defence. Those instances in which the husband or wife were competent witnesses for the prosecution before the passing of this Act were not affected. (see s.4(2) of the Act).

48G This part did not make witnesses competent before a grand jury as only witnesses for the prosecution were called to see if a prima facie case could be made out against the defendant.

48D Co-defendants were thus made competent for themselves and for each other.

48E The problem that evolved from this part concerned the prisoner who was undefended by counsel. In order to make his application, he had to be aware of his right to testify. The Act itself failed to provide a standard form of words for this purpose and also failed to point out when such advice should be given. The problem was discussed in "The Evidence of Prisoners" in the Justice of the Peace, Vol. LXXIII (London: 1909), pp. 441-3 where the writer stated that he had heard a deputy chairman of quarter sessions, with a strong distaste for perjury, endeavour to persuade a prisoner not to give evidence, pointing out that the prisoner would be exposed to cross-examination by the Crown. If the prisoner took the advice under such circumstances, the inference to be drawn by the jury would be plain.

48F Although the prosecution was forbidden to comment on a competent prisoner’s failure to testify, the judge was free to do so and this right was clearly enunciated in R. v. Rhodes [1899] 1 Q.B. 77.

48G This meant cases which came under enactments mentioned in the Schedule to the Act and at Common Law. (see s.4(1) and (2) of the Act.)

48H This part preserved the Common Law rule and was similar to section three of the Evidence Amendment Act, 1853.

48I This part made the accused subject to cross-examination like any other witness except in those circumstances which came within ss.f.

The cross-examination of the accused had been one of the areas in which even the promoters of the Act had not been able to agree. Some, like Lord Russell and Sir Harry Poland, had felt that the only way to establish the strength of the prisoner’s testimony was to subject his testimony to cross-examination. Those who were more concerned with preserving a jury sympathy for the accused had felt that cross-examination would disserve the guilty and innocent alike. The controversy between the two factions produced s.1(f)(i),(ii), and (iii) of the Act, areas in which the prisoner could not be examined.
(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

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

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

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483 Proof that the accused had committed an offence other than that charged might be relevant to the issue as tending to show motive, intention or guilty knowledge. One case which illustrated the purpose of the section was *R. v. Forster*, (1855) 6 Cox. C.C. 521 in which, on an indictment for issuing counterfeit coin, it was held that evidence of either prior or subsequent issuings of counterfeit coin by the prisoner was admissible. The case of *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 contains a large number of cases bearing on this subject.

48E Evidence that the prisoner had been convicted of any offence other than that charged in the indictment might be relevant to the issue. An example of this reasoning was found in section nineteen of the *Prevention of Crimes Act*, 1871, 34 & 35 Vict. c. 112, s.19 where it was provided:

"Where proceedings are taken against any person for having received stolen goods knowing them to be stolen . . . , then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; . . ."

48L This part posed a great danger for the accused. Evidence as to the bad character of the accused could be let in where the accused had personally or through his advocate, asked questions of the prosecution witnesses with a view to establishing his own good character, or the nature of the defence was such as to involve imputations on the character of the prosecutor or the witness for the prosecution. There was little difficulty with the first part because a discreet warning by the judge would usually suffice but the second part was considerably more difficult.

The following cases and comments point out the inherent problem. In *R. v. Rouse and Burrell*, (1903), 1 Q.B. 184 evidence of bad character was not allowed even though the accused called the prosecutor a liar. For a second view of excluding evidence as to bad character, see *R. v. Bridgewater*, [1905] 1 K.B. 131.

The rule was expressed extra-judicially by Lord Alverstone, C.J., in "The Evidence of Prisoners" in the *Justice of the Peace*, Vol LXXIII (London: 1909), p. 442., when he stated:

"If the evidence of the prisoner is merely the assertion of that which is a defence in law, and which cannot be stated without apparently contradicting the case for the prosecution, and in all probability the evidence of some of the material witnesses for the Crown, that does not of itself entitle the prosecution to cross-examine the prisoner as to his character; if on the other hand, in the way in which it is stated, the statement of the case goes beyond the mere assertion of a legal defence, then it would come within the words of the section."

The real difficulty is in knowing where to draw the line. For a case which gave the prisoner a very wide scope, see *R. v. Preston*, (1909), 73 J.P. 173. That case went very far, seemingly holding that evidence of bad character could only be admitted where the defence made an attack upon the prosecutor or his witnesses quite apart from the conduct of a relevant defence.
he has given evidence against any other person charged with the same
offence. M

g) Every person called as a witness in pursuance of this Act shall, unless other-
wise ordered by the court, give his evidence from the witness box or other
part from which the other witnesses give their evidence;
(h) Nothing in this Act shall affect the provisions of section eighteen of the
Indictable Offences Act, 1848, or any right of the person charged to make a
statement without being sworn. N

Section two of the Act of 1898 was only of importance in cases where
the prisoner was defended by counsel and spelled out the time in the trial when
he was to be called as a witness.

Section three dealt with the prosecution's right to reply and was not
of importance for the purposes of the present discussion. This was also true
of sections five and seven of the Act.

Section four of the Act made the husband or wife of the accused both
competent and compellable for either the defence or the prosecution in
regard to offences under any enactment mentioned in the schedule to the
Act. The compellability of the wife as a witness for the prosecution was later
rejected in Leach v. R. 49

Under subsection two of section four the instances at common law
where the husband or wife of the accused might be called as a witness
without the consent of that person were preserved. At common law neither
a husband nor a wife was a competent witness for or against the other except
in cases of necessity. Lord Castlehaven's case 50 in 1631 serves as an example
of what constitutes necessity. There a wife was permitted to testify against her
husband regarding a rape charge to protect herself from further abuse. Ap-
parently the concept of necessity was originally restricted to particular
instances in which the husband or wife would be without remedy and would

48M This part was included because where one defendant X gives evidence in his
defence by stating that he is innocent and that his co-defendant Y committed the crime
alone, X is giving evidence then not only in his defence but also against Y and there-
fore X's character should be cross-examined to see if he is a credible witness.

In the case of Allen v. Allen and Bell, [1849] 70 L.T. 783 it was decided that the
evidence of one party could not be received in evidence against another party unless the
latter had an opportunity of testing it by cross-examination. Further, in the case of
Reg. v. Burditt, (1855), 6 Cox. C.C. 458 it was held that where two prisoners were
jointly indicted and one of them called witnesses against the other, the latter had the
right to cross-examine those witnesses.

48N For many years after the Prisoners Counsel's Act, 1836, a prisoner who was
defended by counsel was not allowed on his trial to address the jury as well as his
counsel (see Reg. v. Manzano (1862), 8 Cox. C.C. 321.) In later years this rule was
relaxed and in Reg. v. Shimmin, (1882), 15 Cox. C.C. 122 it was expressly laid down
that the prisoner could make his own statement to the jury before his counsel addressed
the jury. A strange interpretation was given to the weight of the unsworn statement by
the Divisional Court in Shankley v. Hodgson, [1962] Crim. L.R. 248. There it was
held that an unsworn statement was not evidence so that justices were bound to ignore
it in deciding whether the case had been proved. If that holding were to be followed,
it would defeat the purpose of the preservation of the unsworn statement in the Act
of 1898 and would turn the legal procedure into a trap for unwary defendants.


60 “Competence and Compellability” in The Law Times, Vol. CLXX. (London:
otherwise be exposed to personal injury. This concept was relaxed during the last thirty years of the nineteenth century.\textsuperscript{51}

The final section to be examined of the Act of 1898 is section six. That part provided that the Act should apply to all criminal proceedings except those which came under the \textit{Evidence Act}, 1877. The reason for this was that such proceedings were only criminal in form and were in substance of a civil nature.\textsuperscript{62}

To conclude this part of the essay, a brief look will be taken at the comments of some of the observers of the Act after it had been in operation for some time.

It was reported in \textit{The Law Journal}, in 1909 that Mr. Justice Self had paid a notable tribute to the Criminal Evidence Act at the close of a murder trial at the Staffordshire Assizes. He was quoted as saying that:

"... if this was the only case he ever tried, he should be thankful for the chance, because without the opportunity thus presented it was unlikely that the prisoner, who was the only person present at the tragedy, could have escaped at least a verdict of ‘Manslaughter‘.\textsuperscript{53}"

In the same article Lord Brampton's change of heart regarding the wisdom of the Act was noted. In referring to a past case, Lord Brampton purportedly stated that the prisoner was saved from an ignominious doom by the new Act, and from that moment Lord Brampton went heart and soul with the Act.

A considerably less enthusiastic opinion was recorded in \textit{The Law Times} in 1912.\textsuperscript{64} The author of that article felt that the number of convictions had increased since the passing of the Act and that any benefit to the accused was doubtful. One of the reasons for this was that no standard form of caution was administered to the prisoner about his ability to testify under the Act. The election to which he was entitled was seldom clearly explained to the prisoner and only sometimes was he warned of possible cross-examination. This, coupled with the fact that the average prisoner seldom made a good impression upon the jury, tended to work to the prisoner's detriment. In fact, the deplorable but not uncommon practice of putting the evidence of the different witnesses for the prosecution to the prisoner, obtaining doubtful statements from him that they were liars, and then asking him whether he could suggest any motive for their lying, usually reduced the accused to silence or evoked an exasperated attack charging the prosecution, and particularly the police, with conspiracy.

A further blot on the Act was that prosecution witnesses were protected from attack in the sense that, except for a very good reason, it was bad policy for the defence to make imputations against their character, while no similar protection was afforded defence witnesses.

\textsuperscript{62} See \textit{Reg. v. Stephens} (1866) 1 Q.B. 702 for an example of this type of case.  
When the door was opened to cross-examination of the accused's character and the accused had been convicted of past offences, few jurymen were able to put away the impression that previous convictions made probable the prisoner's guilt as to the offence presently charged.

At least one writer felt that Sir Herbert Stephen's predictions had come true and said as much in The Canada Law Journal. His view was that the Act of 1898 had gradually and imperceptibly shifted the onus of proof in a criminal trial until the accused was responsible for establishing his innocence instead of having the prosecution prove its case beyond reasonable doubt. This was one of the results that Stephen had feared some twenty-three years previously and perhaps the decision in Woolmington proved him right in that the "Golden thread" had to be re-iterated.

Mr. Leo B. Cussen made a dramatic plea for the plight of the accused in 1908:

The witness knows what he has to go through, and hence his over-strung nerves, his panting heart... the witness knows that as soon as he pledges his solemn oath he will be regarded as fair game to be bullied and badgered by counsel... who seeks to make him, by hook or crook, and what is called the art of cross-examination, tell a story favourable to his contention.

When these few observations are considered in connection with the arguments that were made both for and against allowing the accused to become a competent witness, it is obvious that both supporters and detractors had made valid points. Hard and fast conclusions, however, are difficult to draw in this area. Undoubtedly, the majority of people today are in favour of having the accused as a competent witness because any other pattern appears unjust. But the question still lingers as to whether, in certain cases, the accused would be better off if judge and jury alike knew that he could not take the stand.

PART II The Canadian Experience

It was mentioned earlier that several countries had passed Acts making the accused competent before England finally took that step. One of those countries was Canada. Before the conquest of Quebec in 1759, the criminal law of New France was contained in the ordinance promulgated by Louis XIV in 1670. French criminal law employed torture and judges appeared more eager to convict the accused than to get at the truth.

The situation was deplorable and Voltaire, in his Dictionary of Philosophy, described it in the following way:

In the Dens of Chicanery the title of Grand Criminalist is given to a ruffian in a robe who knows how to catch the accused in a trap, who lies without scruple in order to find the truth, who bullies witnesses and forces them without their

55 "Prisoners Testifying On Their Own Behalf" (1911), 47 The Canada Law Journal, pp. 252-3.
knowing it to testify against the accused . . . He sets aside all that can justify an unfortunate, he amplifies all that can increase his guilt; his report is not that of a judge, it is that of an enemy. He deserves to be hanged in the place of the citizen whom he causes to be hanged.

In 1763, by the Treaty of Paris, the French King ceded to Great Britain, Canada and all her dependencies. In the same year George III issued a royal proclamation by which power was given to the Governors of the various English colonies to enact and institute courts of public justice for the hearing of all matters civil, criminal and in equity, as near as may be agreeable to the laws of England. This purportedly introduced English criminal and civil law into what is now known as Canada.

Governor Murray carried out the proclamation to the letter by an ordinance of 1764 and chaos ensued. The French Canadians were so unhappy with the administration of the civil law that to allay their dissatisfaction, the Quebec Act of 1774 was passed which provided that in matters of controversy related to property and civil rights, the laws of Canada should apply. By this the body of French laws and customs that were in use in New France at the time of the conquest in relation to civil matters, were re-introduced. The Quebec Act firmly established two legal systems in Canada.

As to the criminal law, that of England was to prevail because of its certainty and lenity. Although lenity appears a misnomer, as in 1800 there were still one hundred and sixty offences punishable by death, the English criminal law was less severe than the criminal law of the continent.67

The French were not unhappy with this and thus English criminal law was retained and extended to the whole Province, including what afterwards became known as Upper Canada.

In 1791 the Constitutional Act 68 was passed by which the Province of Quebec was divided into the Provinces of Upper and Lower Canada, and in both English criminal law prevailed.

At the first meeting of the Legislative Assembly of Upper Canada in 1792, it was decided that all matters relative to testimony and legal proof were to be regulated by the rules of evidence established in England.69 This meant, of course, that the accused was an incompetent witness.

The movement toward inclusion instead of exclusion began in 1837 when it was decided that witnesses were not to be disqualified on the ground that the verdict could be used either for or against them.60 This Act substantially adopted the English Act of 1833.

68 The Constitutional Act, 1791. 31 Geo. III, c. 31.
69 The Statutes of the Province of Upper Canada (1831), p. 30. 5 Geo. II to 1 Wm. IV.
60 Revised Statutes of Upper Canada, 1837, c. 3, s.18.
A short-lived advance was made toward general inclusion in 1849 when an Act to Improve the Law of Evidence in Upper Canada was passed. The preamble to the Act declared:

Whereas the inquiry after truth in Courts of Justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the fact in issue, both in criminal and in civil cases, should be laid before the persons . . . .

and the substance of the Act continued:

. . . no person offered as a witness shall hereafter be excluded by reason of incapacity, from crime or interest, from giving evidence . . . of any matter or question . . . civil or criminal, in any court . . . every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation . . .: Provided that this Act shall not render competent any party to any suit . . .

This Act mentioned both civil and criminal cases and under it persons were no longer disqualified as witnesses because of interest or crime. However, parties to suits were still incompetent and this situation was partially remedied by the Act of 1851. That Act stated:

". . . that all persons should be admitted to give evidence on oath . . .: Provided always, that no married woman shall be allowed as a competent witness in any civil proceeding, either for or against her husband. II . . ., that any party to any civil proceeding may be examined as a witness in any suit or action, at the instance of the opposite party in such suit or action; . . .".

The effect of the Act of 1851, which was similar to but not identical to Lord Brougham's Act, was minimal as it was repealed in 1852.

The provisions of the Act of 1852 were:

". . . it is desirable that full information as to the facts in issue both in Criminal and in Civil cases, should be laid before the persons who are appointed to decide upon them, . . . That no person offered as a witness shall hereafter be excluded by reason of incapacity from Crime or interest, from giving evidence . . . that every person so offered, may and shall be admitted and compellable to give Evidence on Oath, or solemn affirmation . . ., notwithstanding that such person may or shall have an interest in the matter in question . . ., and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: Provided that this Act shall not render competent or authorize or permit any party to any suit or proceeding . . ., to be called as a witness on behalf of such party, but such party may in any Civil proceeding be called and examined as a witness in any suit or action at the instance of the opposite party. IV . . . nothing herein contained shall render any person, who, in any proceeding, is charged with the Commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself . . ."

This state of the law was substantially repeated in An Act Respecting Witnesses and Evidence, 1859. Thus matters stood until Confederation. By section one hundred twenty-nine of the British North America Act, 1867, the laws in force in each of the provinces at the date of Confederation were to be continued until repealed or altered by the proper Legislature. By section

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61 An Act To Improve The Law of Evidence in Upper Canada, 1849, 12 Vict. c. 70.
62 An Act To Improve the Law of Evidence in Upper Canada, 1851. 14 & 15 Vict. c. 66.
62A Evidence Act, 1851, 14 & 15 Vict. c. 99.
63 An Act to Repeal the Acts therein mentioned and to improve the Law of Evidence in Upper Canada, 1852. 16 Vict. c. 19.
64 An Act Respecting Witnesses and Evidence, 1859, as found in the Consolidated Statutes of Upper Canada, 1859, c. 32.
ninety-one, subsection twenty-seven of the *British North America Act*, the criminal law including procedure in criminal matters was placed within the exclusive jurisdiction of the Dominion Parliament. Thus the accused party in a criminal trial generally remained incompetent until the passing of the *Canada Evidence Act*, 1893.

The phrase "generally remained incompetent" is used because the accused was made competent in special cases before 1893. Under section two hundred sixteen of the *Criminal Procedure Act*, 1886 the accused was made a competent witness either for the prosecution or the defence upon any complaint, information or indictment for common assault, or for assault and battery. Also under section one hundred twenty-three of the *Canada Temperance Act*, 1878, the Legislature declared that those charged in contravention of the Act were both competent and compellable witnesses. With these few exceptions, the accused remained generally incompetent until 1893.

During the ten years prior to 1893 various attempts were made to introduce legislation making the accused a competent witness. There was considerable argument as to the provisions that such legislation should contain and the reform was not welcomed by a very conservative legal profession. Finally, under the sponsorship of Sir John Thompson, Bill Number 69 was introduced to the House of Commons on Tuesday, April 21, 1892. This Bill contained clauses that would regulate the taking of evidence in criminal suits and included an amendment to enable a defendant to testify on his own behalf.

On Tuesday, May 3, 1892, Sir John Thompson moved that the Bill be referred to the Select Joint Committee to which had been referred Bill Number 7 respecting the Criminal Law. Progress reports were made on the Bill until June 30, 1892, when the matter was apparently left over for the next session. During the period from the end of June, 1892 to the beginning of March, 1893, a major change was made regarding the scope of the Bill. Formerly Bill 69 had only purported to make witnesses competent, whereas the revised Bill 23 intended to make them both competent and compellable.

The exact provisions of Bill 23 are worth noting, especially in view of current controversies regarding competence and compellability. Section two of the Bill provided:

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

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65 *The Criminal Procedure Act*, R.S.C. 1886, c. 174, s.216.
66 For a more thorough examination of the terms "competent" and "compellable" and a review of the English position on competence and compellability, see *Regina v. Fee* (1887), 13 O.R. 590.
69 The exact provisions of Bill 23, *An Act Respecting Witnesses and Evidence*, are reproduced from the copy held in the Public Archives, Ottawa.
The other important parts of the Bill for this discussion were as follows:

3. A person shall not be incompetent to give evidence by reason of interest or crime.

4. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent and compellable witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be compellable to disclose any communication made to him by his wife during their marriage, and no wife shall be compellable to disclose any communication made to her by her husband during their marriage.

5. No person shall be excused from answering questions upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person: Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence.

The two most controversial issues in the subsequent debate in the House of Commons were the compellability of the accused and the competence of the husband or wife to testify, one against the other.

Sir John Thompson contended that witnesses should be competent and compellable in order to ascertain the truth and he was supported in that view by Mr. Amyot, Mr. Davies, and Mr. Fraser. The arguments used were reminiscent of those advanced by Bentham. If a person was guilty, why give him a chance to escape? Others wanted the laws of the country to be in favour of society as well as in favour of the individual. Even though it was expected that such a law would increase the amount of perjury, the promoters felt that fear of perjury was an insufficient reason to prevent those who best knew the facts from testifying. Supporters of the Bill further argued that if you were willing to make a prisoner competent, you might as well go all the way and make him compellable, as the jury would be prejudiced anyway against the competent witness who failed to testify. Another argument advanced was that the evidence of the accused of a capital offence could be conclusive in establishing how the crime was committed by persons other than the accused, or how it was homicide by misadventure, or in self-defence. Finally the promoters felt that the protection given by the existing law to the guilty accused was too great and should be remedied.

The arguments against making the accused a compellable witness were pushed with equal vigour. Mr. Lister maintained that the accused stood in a different position than other witnesses and that to compel him to testify was to force him to commit perjury. Mr. Mills agreed and was joined by Mr. Langelier who stated that the Bill proposed to introduce into Canada the system of interrogating the accused that was condemned by every...
criminalist of renown in France. Mr. Lister pointed out that no other English-speaking colony in the world had passed such a law and that to do so would be to violate the rule that a man is assumed innocent until proved guilty. Mr. Tisdale substantially reiterated this argument and Mr. McLeod agreed in principle that the accused should be made competent but not compellable. Mr. Lister went so far as to move that the words “and compellable” be struck out as applying to the accused but this amendment was negatived by a vote of twenty-seven to twenty.

Throughout the course of the debate no Canadian case is mentioned. The legislators argued on principle only and those Acts which had made the prisoner competent formerly were not referred to. This can be contrasted with the debate in the English House of Commons where the promoters of the reform strove to back their principles with practical examples of how making the accused competent would work to his benefit. On the other hand, one particular point of similarity between the English and Canadian debates was the inability of the promoters to agree upon the ramifications that would result from passing such an Act. It appears that although many had a feeling that the accused should be allowed to testify, the result of making him competent was so speculative that few common conclusions could be drawn.

The Canadian legislators spent considerable time debating the issue of whether husbands and wives should be made competent and compellable, both for and against each other. The critics of the proposed change argued that it was a mistake to interfere in the slightest degree in the communications between husband and wife and that such a move would only tend to create marital discord, thus attacking the fundamental unity of the home. As the household was considered the foundation of society, it was useless to talk about protecting society if the household was not protected.

Those who wished to make the husband and wife competent and compellable said that only a false philosophy could respect family relations so much that it would rather allow an innocent man to suffer death than allow family secrets to be disclosed. They pointed to theoretical examples where information in the possession of a husband or wife of the accused was essential to the acquittal of the accused. The general feeling, however, was against compellability in this area. The word “compellable”, as referring to the husband or wife of the accused, was voted out and replaced with “competent”.

Thus with the accused both competent and compellable and the proviso that no husband or wife should be competent to disclose any communication

78 Id., p. 1685.
79 Id., p. 1687.
80 Id., pp. 1690-1691.
81 Id., p. 1695.
82 Id., pp. 1690-1691.
83 Id., p. 1693.
84 Id., p. 1695.
made during marriage, the Bill passed its third reading on March 6, 1893 and was sent to the Senate.  

On Wednesday, March 29, 1893, the Senate passed the Bill with certain amendments. The three important changes made by the Senate were:
1. The first part of section four of the Bill was made to read that every person charged with an offence and the wife or husband of that person should be a competent witness. The Senate had deleted “and compellable”;
2. The next amendment was that no person should be compellable to disclose information communicated during marriage. This was really a return to the original wording of Bill 23 before it was amended by the House of Commons; and finally
3. The Senate added a subsection to section four providing that failure of the husband or wife of the accused to testify should not be made the subject of comment by counsel for the prosecution when addressing the jury.

After some discussion the House of Commons decided that the second amendment made by the Senate should be rejected for the reason that it was contrary to public policy that husbands or wives should be allowed to disclose conversations between them during marriage. It was also decided that the words “or the judge” be included in the subsection added by the Senate. The first amendment made by the Senate was allowed to stand.

A clerk carried a message of the changes made in the Commons to the Senate and on the same day the Senate approved the alterations.

On Saturday, April 1, 1893, the Bill received Royal Approval and thus the Canada Evidence Act, 1893 became law. The battle to make the accused a competent witness had been won but one more major change remained to be made. This last point was brought out in Gosselin v. The King, where the court held that the husband or wife of a person charged with an indictable offence was not only a competent witness for or against the accused but could also be compelled to testify. It had already been held in R. v. D'AUost that the accused was not a compellable witness and therefore could not be directly called upon to testify by or on behalf of the Crown. As a result of the decision in Gosselin, the Act was amended in 1906 so that the words “for the defence” were inserted after the word “competent”.

Four years after the passing of the Act, a Mr. Johnston wrote a scathing criticism concerning the competence of prisoners in The Canada Law Journal. His advice was never to put the accused in the box because he invariably convicted himself. Mr. Johnston felt that this was only right
because the prisoner in the dock was probably guilty or else he would not be there. One of his statements is worth quoting to reveal the spirit in which the article was written.

"The crimes of intent, such as stealing, arson, counterfeiting, etc., are the acts of men criminal at heart. Unlike murder and assaults, and even unlike rape, which are largely the result of passion overcoming the better nature of the offender, they are the outcome of a man of wicked and evil spirit—the man who is the true criminal, and to whom perjury has few terrors on moral grounds."

Mr. Johnston's cynical argument had some practical basis. If a man was faced with a conviction on the one hand and an acquittal through perjury on the other, the latter would be invariably more attractive. Thus the moral significance of the oath would be cheapened.

PART III  Conclusions

What did the struggle to make the accused a competent witness accomplish? The answers ultimately depend upon personal philosophies regarding the purposes of criminal law and procedure.

Those who would agree with Jeremy Bentham that the ultimate goal of criminal procedure is the discovery of 'truth', might regard making the accused competent as one step in that direction. The most vexing problem lies in trying to define 'truth'. Black's Law Dictionary contains three conceptions:

1. Agreement of thought and reality;
2. Eventual verification; and

These conceptions are not very helpful as "thought" and "reality" are not defined within the dictionary and "verification" is defined as a,

"Confirmation of correctness, truth, or authenticity by affidavit, oath or deposition."

The latter definition of 'truth' is circular. That which is authenticated as, or sworn or deposed to as true, is 'truth'.

The purpose of looking to these few legal definitions is not to begin an exhaustive discussion of the semantic difficulties surrounding 'truth', but to emphasize the problem of trying to assess in what ways the competence of the accused may contribute to 'truth'.

If, from the legal viewpoint, 'truth' consists of finding out whether an accused did or did not commit certain acts, then disclosure of facts contributes to the discovery of 'truth'. By making the accused competent, the sources from which facts can be drawn are enlarged. But enlarging the fact disclosure sphere is no guarantee of getting at 'truth'. Granted there are instances in which the accused is solely in possession of material facts surrounding the

\footnote{\textit{Id.}, 1732.}
crime with which he is charged, but the accused will only be willing to relate
those facts when they tend to establish his innocence. This is also true of those
facts which may tend to establish mitigating circumstances. When the factual
knowledge of the accused is such that it would indicate his guilt, then he is
naturally unwilling to discuss that knowledge. His only alternative, when in
the witness box, is to perjure himself.

Very few people accept such a narrow definition of 'truth'. The history
of the criminal law defeats the concept of only looking to the act itself. The
courts generally require an element of moral blameworthiness in the accused
before his act constitutes a crime. Thus it becomes necessary to establish
mens rea as well as an act in the majority of criminal cases before the courts
are satisfied that they are approaching the 'truth'. 'Truth' in this sense
requires a knowledge of what went on inside the mind of the accused at the
time the act was done. The logical difficulties of discovering this kind of
'truth' are staggering. Does the accused's competence help in arriving at this
'truth'? Probably not, because even if the accused is capable of understanding
his own intricate mental processes and is further capable of communicating
this knowledge to the court, he would only be willing to do so when it would
benefit his case.

It is difficult to see where making the accused a competent witness has
contributed to the discovery of 'truth' except in those instances where the
accused is the sole possessor of knowledge which he is both able and willing
to communicate. Perhaps those instances are sufficient justification for
making the accused competent.

A second view of the problem is that the search after 'truth' is of less
immediate importance than equalizing the formal, testamentary positions of
the prosecution and defence. Theoretically this was accomplished by allowing
the evidence of the accused to be admitted under oath. What practical signifi-
cance does this have? If, in the minds of juries, sworn evidence has a distinct,
mechanical superiority to unsworn evidence, then the cogency of the accused's
argument is strengthened under oath. If, however, the jury in a criminal trial
simply weighs all the evidence, striking a balance of probabilities, then sworn
evidence has no inherent superiority. Much depends upon the attitude of the
judge. If he impresses upon the jury that unsworn evidence is inferior and the
jury is influenced by these judicial remarks, then the accused's case is
damaged. Allowing the accused to testify under oath is not a total solution to
the problem. Aspersions can still be cast upon the value of the accused's
evidence through the judge's attitude, his words and even his gestures. To
soundly evaluate this conclusion detailed studies of the psychological reactions
of juries would be required, but it is safe to assume that judicial comments
and actions have some significant effects on jury decisions.

Thus, allowing the accused to become a competent witness overcame
the formal inequality existing between the accused as a witness and a prosecu-

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92 Many legal historians agree that prior to the twelfth century a man could be
held liable for harms done, simply because he caused the act to happen. After that
time the influence of canon law and the Roman law required an element of moral
blameworthiness, a kind of "guilty mind".
tion witness but did not guarantee that the evidence of each would be given equal weight. This is only natural as there is no inherent magic in sworn testimony that can increase its persuasive power. Allowing the accused to testify under oath only ensures that his evidence will not systematically be classed as inferior.

A third consideration is the effect upon the value of the oath by allowing the accused to give sworn testimony. Logically it could only result in weakening the moral and religious significance of the oath. Rarely would prosecution for perjury appear less attractive than the lure of acquittal on a more serious charge. If the legislators had wished to preserve respect for the religious qualities of the oath along with equalizing the position of the accused, they would have been better advised to decide that neither the prosecution nor defence would give sworn evidence in a criminal proceeding. The desirability of telling the truth can be impressed upon the parties in other ways without invoking religious sanctions.

Finally, what effect did making the accused competent have upon the presumption of innocence until proven guilty beyond reasonable doubt? The courts were paying lip-service to this concept long before the accused was made competent but this was an obviously illogical practice. The accused was not considered oath-worthy and thus was branded as an inferior witness. Would not a man presumed innocent be considered oath-worthy? Would the courts assume that an innocent man would endanger the sanctity of the oath? The presumption of innocence had a distinctly hollow ring before the accused was made competent.

Sir Herbert Stephen argued before the passing of the *Criminal Evidence Act* of 1898 that juries could only maintain a presumption of innocence as long as they were not confronted with the sworn testimony of the accused. He apparently confused that presumption with the sympathy the jury probably felt for a man placed in inequitable circumstances. That sympathy might have given the accused a distinct psychological edge in a jury trial which would outweigh our modern notions of presumption as to innocence, but they are two distinct entities and should be recognized as such. Thus there could be no meaningful application of a presumption as to innocence until the accused was made competent.

In summary, making the accused a competent witness cheapened the value of the oath and it is doubtful if the search after ‘truth’ was enhanced. On the other hand, it placed the accused on an equal, formal footing with prosecution witnesses and was a prerequisite of our modern conception of a presumption as to innocence. Perhaps the latter point alone is sufficient justification for the passing of those Acts which made the accused a competent witness.