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REFORM OF THE LAW OF EVIDENCE

INTRODUCTION

EV & FM

Few areas in the law have suffered more than evidence from piecemeal reform. To a large extent it is now therefore more of a collection of rules, rather than the integrated, systematic code for the conduct of trials that it ought arguably to be. One commentator has described the present law in this way:

> "Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builders' debris".[1]

The law of evidence is in fact a fit subject for codification and if and when our time comes useful precedents may be found in India, in the United States and, closer home, in the Bahamas. The scope of this paper is naturally less ambitious and what I want to do is to look at some pieces of the "builders' debris" that are of particular interest to me and which in my view could benefit from some examination with an eye to reform and, hopefully, improvement. I hope that you will find the topics of interest; if you agree with any of my proposals, that will be an added bonus.

RELUCTANT FATHERS

By virtue of section 5 of the Affiliation Act a Resident Magistrate may only adjudge a defendant in affiliation proceedings the father of the complainant's child where "the evidence of the complainant be corroborated in some material particular by other evidence to the satisfaction of the Resident Magistrate". Actions for affiliation orders therefore provide an example of the kind of case in which corroboration is required as a matter of law and not just as a requirement in practice. The fact that the charge of paternity is easy to make and difficult to refute is generally regarded as sufficient justification for what is in practice a stringent requirement.[1A]

In 1976 the Status of Children Act was enacted, with the main object of removing the legal disabilities of

children born out of wedlock. However, notwithstanding the removal of the legal disabilities, there are still practical consequences to whether or not a particular child was born in wedlock because of the procedural steps that are necessary in order to establish paternity in the case of children born out of wedlock. The action for affiliation provides one approach and section 8(3) of the Status of Children Act provides that an affiliation order shall be prima facie evidence of paternity in any subsequent proceedings. However, the primary mode of establishing paternity under the Status of Children Act is set out in section 10(1), whereby a mother or other person having a proper interest in the result may apply to the Supreme Court or the Family Court for a declaration of paternity.

Section 8(4) provides that a declaration of paternity made under section 10 "shall, for all purposes be conclusive proof of the matters contained in it". A major and welcome reform in Family Law, the Status of Children Act has nevertheless revealed one significant lacuna in practice, when compared with the Affiliation Act, because of the absence in the former of any requirement that the evidence of the complainant be corroborated. When it is considered that the declaration of paternity under the Status of Children Act has, and is obviously designed to have, conclusive effect while an affiliation order is more limited, it might be thought to be a strange anomaly that it is theoretically open - and happens in practice - to an applicant who fails under the Affiliation Act for want of corroboration to reapply and succeed under the Status of Children Act in obtaining the far more sweeping declaration of paternity. Such a declaration may then be used to ground an application under the Maintenance Act, at which stage the applicant will then have placed herself - albeit by an additional procedural step - in the same position as an applicant who succeeded originally under the Affiliation Act.

This is an untidy anomaly and there appear to me to be two possibilities for reform. The first - a radical one - is to abolish the Affiliation Act altogether and to leave the provisions of the Status of Children Act as the only mode of establishing paternity. But I am concerned with evidence and I will say no more about this possibility, save to observe that it still leaves open the question of whether the provisions of section 10 of the Status of Children Act ought to import some requirement of corroboration, which is in fact

the second possibility: that is, to amend section 10 to require corroboration of the applicant's evidence as a matter of law on applications for declarations of paternity, in terms similar to section 5 of the Affiliation Act. There may well be though yet a third possibility, which is to abandon the rigorous mandatory corroboration requirement in paternity cases altogether and to substitute a more flexible requirement in practice for evidence of corroboration, as in cases of the sworn evidence of children, the evidence of accomplices and of complainants in sexual cases generally. The effect of this would be that while the Resident Magistrate might usually look for corroboration as a practical matter, he may nevertheless make a declaration of paternity without it if he is satisfied on his assessment of the applicant's evidence that she is speaking the truth. My own preference would in fact be to abolish the Affiliation Act and to make provisions in section 10 of the Status of Children Act for this more flexible approach to the question of corroboration. Even if the Affiliation Act is preserved, I think that the corroboration requirement ought to be liberalised so as to allow the Resident Magistrate a discretion to accommodate those cases in which the clear and cogent evidence of the complainant satisfies him as to the truth of her complaint, notwithstanding the absence of corroboration. I think that the more stringent requirement results more often than is tolerable in injustice in practice and imposes an unnecessarily rigid burden on an applicant.

TO SWEAR OR NOT TO SWEAR (1)

R v Hines & King[2] is a well known decision of the Jamaican Court of Appeal. In that case one of the accused, a Rastafarian, elected to give evidence on oath in his defence on charges of assault, robbery and malicious damage. However, he declined to take the oath in the usual form commencing "I swear by Almighty God...", but instead proposed to take an oath in the form, "I swear by Almighty God, King Rastafari...". The trial judge refused to allow the accused to be so sworn, saying that as far as he was aware "that form of oath is not lawful". In holding that the trial judge fell into error in so ruling, the Court of Appeal held that the provisions of section 3 of the Oaths Act were permissive and not compulsory and that the accused ought therefore to have been permitted to take the form of oath considered by him to be binding on his conscience. At the end of a learned and interesting judgment, Luckhoo J.A., observed:[3]

> "However misguided one may think Hines to be in his professed belief as a member of the Rastafarian sect that the Emperor of Ethopia is a Divine Being, the fact remains that such is his professed belief and indeed the professed belief of the sect to which he belongs. The form in which Hines wished to take the oath was consistent with that professed belief and declared by him to be binding on his conscience and on so taking the oath he would have become subject to the provisions of the Perjury Law..."[4].

I do not suppose (is this a rash hope?) that anyone would disagree with this decision in the context of modern Jamaica. But the question of the form of the oath continues to be a troublesome one: while the authorities are clear that it should "not be repugnant to justice or decency"[5], there remains a large area in which individual values (and prejudices) may still operate to limit the rights of witnesses to take a form of oath binding on their conscience. Of equal concern is the question of the efficacy of the oath and whether the praying in aid of the religious beliefs that underpin it continue to be meaningful today. Section 4 of the Oaths Act itself recognises that a person who takes an oath might in fact have no religious belief and provides that that fact "shall not for any purpose affect the validity of such oath". Which is a curious provision, since presumably the real weight of the oath lies (or ought to lie) in the perceived religious sanction upon which it is predicated. The English Court of Appeal decision of R v Hayes[6] provokes a similar disquiet more sharply. In that case a young boy of 12 was being examined by the trial judge on a voir dire with a view to establishing his competence to give evidence on oath. When asked by the judge if he had religious instruction at school, he shook his head. Then the judge said: "you don't? Do they teach you about the Bible? Have they told you about God or Jesus?" and the boy answered "no". And then, "Do you know what I mean by God? Have you heard of God?", to which the boy again answered "no".

By these questions and answers the boy expressly declared that he was wholly ignorant of the existence of God and it might have been thought that if the essence of the oath is a divine sanction, and if it is an awareness of that divine sanction which the court is looking for in a child of tender years, then here was a case where, on the face of it,

that awareness was absent. Nevertheless, the judge permitted the child to give sworn evidence and the Court of Appeal declined to interfere with this exercise of his discretion. Bridge L.J. (now Lord Bridge of Harwich), summarised the reasoning of the court in this way:[7]

> "It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct."

Two things about this decision concern me. The first is that the test of whether a child can be sworn which the court applied appears to be virtually identical to the test prescribed in section 54 of the Juveniles Act (the equivalent of section 38 of the English Children and Young Persons Act 1933) whereby a child who does not understand the nature of an oath may nevertheless be permitted to give unsworn evidence provided he understands and appreciates "the duty of speaking the truth". In Hayes the Court of Appeal appears to have assimilated the two tests, which may not be altogether a bad thing, save that of course the unsworn evidence of a child must be corroborated as a matter of law, while the sworn evidence of a child need not be.

But my more fundamental problem with Hayes is that I think a very real sense of repugnance - from the logical as well as from the moral standpoint - may be engendered by the spectacle of a witness, perhaps particularly so in the case of a child, clutching a bible and swearing by Almighty God, having minutes before assured the Court that he had never heard of Almighty God. But Hayes was followed and approved in R. v Campbell[8] (a case of another young child) and most recently in R. v Bellamy[9] (a case involving a witness of low mental ability). Which leads me to suggest that the time may well have come for us to consider abolishing the taking of an oath altogether and replacing it with a declaration in an appropriate form undertaking to speak the truth. This is not a novel suggestion, as it was in fact made by the English

Criminal Law Revision Committee in 1972[10]. But the recommendation has never been implemented because the larger issues of social, religious and moral policy involved have yet to be settled. However, at least two of the reasons for the recommendation, which are set out below, might be thought to be of particular interest in the hindsight of Hayes and in the light of contemporary Jamaican experience.

> "(i) The oath is a primitive institution which ought not to be preserved unless there is a good reason for preserving it. Its use has been traced back to times when man believed that a verbal formula could itself produce desired results, as in the case of the curse. Curses were operative magic performances, and the oath was a conditional self-curse. With the growth of religious belief it was thought that God was the executor of man's oath. He was believed to respond to its magic. The oath was an imprecation to heaven calling upon the supernatural powers to bring disaster on the speaker if he uttered falsehood. This was the basis of the Anglo-Saxon system of compurgation, which rested on the belief that the taking of a false oath brought automatic supernatural punishment."

> "(vi) There would be a good case for keeping the oath if there were a real probability that it increases the amount of truth told. The majority do not think that it does this very much. For a person who has a firm religious belief, it is unlikely that taking the oath will act as any additional incentive to tell the truth. For a person without any religious belief, by hypothesis the oath can make no difference. There is value in having a witness 'solemnly and sincerely' promise that he will tell the truth, and from this point of view the words of the affirmation are to many at least more impressive than the customary oath. The oath has not prevented an enormous amount of perjury in the courts. A witness who wishes to lie and who feels that the oath may be an impediment can easily say that taking an oath is contrary to his religious belief."

It is my respectful submission that the decision in Hayes has reduced the taking of the oath to the mere repetition of a verbal formula, a breach of which has manifestly ceased to produce results, either in terms of swift and visible retribution or a greater incidence of truthfulness in the witness box. Its replacement by a simple and straightforward declaration will at the very least relieve those of us who still fear the immediacy of divine sanctions from the apprehension of a lightning strike on the Supreme Court that habitually overtakes us in the face of the mendacious - sworn - witness.

TO SWEAR OR NOT TO SWEAR (2)

In the days before the accused was allowed legal representation or the right to testify on oath on his own behalf, the practice developed for him to make an unsworn statement from his place in the dock. When the Criminal Evidence Act 1898 (U.K.) granted him the right to testify on oath on his own behalf, it expressly preserved by section 1(b) his right to make an unsworn statement. In Jamaica the equivalent provision is to be found at section 9(b) of the Evidence Act. There have from time to time been differences of opinion as to the proper direction to a jury on how to treat an unsworn statement[11], but I think that the question may now be taken as authoritatively settled in Jamaica by the decision of the Privy Council on appeal from Jamaica in D.P.P. v Walker[12] and the decision of our Court of Appeal in R. v Hart[13], in both of which it is said that the questions of the weight and value of an unsworn statement are exclusively for the jury.

However, academics and reformers have never had much love for the unsworn statement and they have been influenced largely by the disappearance of the mischief which historically it sought to address and the consequent appearance of anomaly. In the penultimate edition[14] of Cross on Evidence, for instance, it was described as "a harmless survival from a former age when it was a valuable concession"[15]. Professor Haydon,[16] was more recently even less enthusiastic:

> "The right to make an unsworn statement does little harm, but it is hard to discover any good in it".

The English Criminal Law Revision Committee in its 11th report recommended the abolition of the right to make an unsworn statement and finally section 72 of the Criminal Justice Act 1982 abolished the accused's right to make an unsworn statement in any criminal proceedings in the United Kingdom.

The present position in Jamaica is well summarised by Mr. Richard Small in a learned article on "Unsworn statements from the dock", published in the West Indian Law Journal:[17]

> "In 1974 the Law Reform Committee under the chairmanship of Sir Joseph Luckhoo of the Jamaican Court of Appeal adopted a report which recommended that the right should be abolished and that the prosecution should be at liberty to comment freely to the jury on an accused's failure to give evidence in his own defence. The report states that the proposal was first mooted by Mr. L.E. Ashenheim whose attributed views were set out in detail in the report. He described the right to make an unsworn statement as:
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> > "an anachronism which tends to distort the course of justice and let loose on the community a number of criminals whose conviction by any ordinary standards of justice would be fully justified by the evidence".
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> A minority of the members of the committee opposed the abolition. It consisted of Dr. Lloyd Barnett and Dr. Adolph Edwards whose main contention was that the accused was usually under a heavy psychological pressure and that indeed if he is of good character or innocent the anxiety will in many cases be even greater than if he is of bad character or guilty. It was their view that it was therefore fair that he should be able to decide whether it was advisable to give evidence or make an unsworn statement. The matter came to public attention again in March 1976 when Mr. Justice Parnell in one of his many addresses to police gatherings suggested that the right to make unsworn statements should be abolished. He contended that the present right allowed a situation which brings about several miscarriages of justice. He was met by a public statement made by a number of attorneys which took him

to task on the above and various other proposals that he made for the revamping of the law of criminal procedure. Sometime in 1978 it became known that the Cabinet had approved draft legislation for the abolition of the right and this resulted in a position paper being issued by the Bar Council which was eventually published in Jambar the publication of the Jamaica Bar Association on March 5, 1979."

For my own part, I must now confess some ambivalence on the question. Bearing in mind that I was a member of the Council of the Bar which in 1979 issued a statement in support of the retention of the right to make an unsworn statement, I suppose that the above confession is in itself controversial enough and that I ought perhaps to refrain from getting myself into further trouble. The more I read and think about it, though, is the more inclined I am to the view that the continued existence of the right is difficult to justify in principle or in policy and that it cannot be said to be grounded, as Mr. Small asserts, "in the right of an accused person not to be questioned".[18] If its retention can at all be justified today, I would prefer to see it based on its being a further corollary of the presumption of innocence, particularly bearing in mind that a Jamaican accused may well be, moreso than his English counterpart, under very special pressures when confronted with the wig and gown.

A final, not entirely related, point: under our practice, an accused who calls a witness to fact in addition to himself loses his right to the last word to the jury. In the United Kingdom the Criminal Procedure (Right of Reply) Act 1964, provided that the right of reply or the last word would always be the accused's, whether he calls witnesses or not.[19] In my view this is a most desirable reform, bearing in mind again the presumption of innocence and the burden and standard of proof and I think that it is worthy of consideration quite independently of whether the right to make an unsworn statement remains or goes.

WHY ARE WIVES SO INCOMPETENT?

It is a commonplace of the law of evidence that one spouse is not generally competent to give evidence on behalf of the prosecution against another in a criminal case.[20] The older justifications of the rule were based upon the

theoretical unity of the spouses, while more modern formulations emphasise the need to preserve marital harmony as much as possible as well as to avoid compelling one spouse to give evidence against another.

However, the rule can produce odd - and, arguably, unjust - results. In R. v Mount[21], for example, the wife of one of three co-accused persons gave evidence for the Crown implicating a co-accused, but not her husband, and it was held on appeal that all three convictions had to be quashed.[22] More alarming is R. v Deacon,[23] in which the accused was charged with murdering his brother-in-law and attempting to murder his wife. She gave evidence that she saw her husband shoot and kill the deceased, after which he shot at her. He was convicted of murder, no verdict being taken on the charge of attempt. On appeal, his conviction was quashed because, in relation to the murder charge, his wife was an incompetent witness for the Crown.

I doubt very much whether either of the decisions in Mount or Deacon does anything to advance marital harmony: certainly in Deacon, that state appears to have dissipated some time before the trial and, where the wife is willing to give evidence for the prosecution, I think the law is showing excessive concern for the preservation of marital harmony by preventing her from doing so. For my own part, I would therefore support the position of the English Criminal Law Revision Committee in its 11th report (1972)[24], which recommended that spouses should be competent witnesses for the prosecution in all cases, subject only to the minor exception of proceedings in which the spouses are being tried jointly. This recommendation has now been enacted into law in England by section 80 of the Police and Criminal Evidence Act 1984.

A more difficult question is whether a competent spouse ought also, in common with all other witnesses, to be compellable. At common law, a spouse was always competent for the prosecution in cases in which the charge involved the use of personal violence by one spouse against the other. Prior to 1978, it was thought that in such cases she was also compellable and it had indeed been so held in R. v Lapworth[25], which was cited in all books as authority for that proposition.[26] However, in Hoskyn v Metropolitan Police Commissioner,[27] this position was overturned. In that case the accused was charged with wounding a woman. She

gave evidence at the committal proceedings and Hoskyn was committed to stand trial. Two days before the trial, however, she married Hoskyn and when the matter came on for trial she refused to give evidence. She was compelled by the judge to testify, gave evidence for the prosecution (somewhat unhelpfully at first - in fact she was ultimately treated as hostile) and Hoskyn was committed. The House of Lords allowed his appeal, in the process overruling Lapworth, and held that in cases where a spouse was rendered competent for the prosecution because of the personal violence exception, she was not compellable. Hoskyn was subsequently followed in R. v. Pitt,[28] in which it was held to be desirable that before a spouse who is a competent witness takes the oath, and in the absence of the jury, the judge should explain to her that she has the right to refuse to give evidence against her husband, but that once she chooses to do so she will be treated like any other witness and may if necessary be treated as hostile.

The decision in Hoskyn raises important questions of principle and of policy. The overriding policy consideration, which justified in the view of the majority a departure from the established principle that all competent witnesses are compellable, is that the relation of husband and wife is in a special and exceptional category. Lord Salmon put it in this way:[29]

> "The main argument on behalf of the Crown is that all persons who are competent witnesses normally are also compellable witnesses. And therefore, so the argument runs, in cases in which wives are competent witnesses it follows that they also must be compellable witnesses. This seems to me to be a complete non sequitur for it takes no account of the special importance which the common law attaches to the status of marriage. Clearly, it was for the wife's own protection that the common law made an exception to its general rule by making the wife a competent witness in respect of any charge against her husband for a crime of violence against her. But if she does not want to avail herself of this protection, there is, in my view, no ground for holding that the common law forces it on her.
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> In many such cases, the wife is not a reluctant or unwilling witness; she may indeed sometimes be an enthusiastic witness against her husband. On the other

hand, there must also be many cases when a wife who loved her husband completely forgave him, had no fear of further violence, and wished the marriage to continue and the pending prosecution to fail. It seems to me altogether inconsistent with the common law's attitude towards marriage that it should compel such a wife to give evidence against her husband and thereby probably destroy the marriage."

Viscount Dilhorne found it "very repugnant" that "a wife could be compelled at the instance of any prosecutor to testify against her husband on a charge involving violence, no matter how trivial and no matter the consequences to her and to her family."[30] Lord Edmund-Davies on the other hand, in a powerful dissent, thought that the requirements of public policy and the administration of justice dictated the opposite conclusion and he would have dismissed the appeal on the ground that Mrs. Hoskyn was a compellable witness for the prosecution. That learned judge was of the view that "the law as your Lordships conceive it to be is inimical to the public weal, and particularly so at a time when disturbing disclosures of great violence between spouses are rife."[31]

I think that a wife who is a competent witness ought also to be compellable. I think that the society as a whole has a distinct and overriding interest in making it clear to perpetrators of domestic violence that there is a law that applies to and can reach them as well. In this context, I find it difficult to appreciate what might be described as "trivial" violence and, on the facts of Hoskyn, I certainly find his ultimate acquittal more repugnant than Mrs. Hoskyn having been compelled to give evidence against him. It follows that I would also support legislation along the lines of section 80 of the U.K. Police and Criminal Evidence Act 1984 which restores the Lapworth position whereby a competent spouse is also compellable. In so saying, I am assuming that Jamaican courts would consider themselves bound to follow Hoskyn on this point; in the event that they would not, I would certainly want to argue that it ought not to be followed.

CAN COMPUTERS "HEAR SAY"?

The decision in Myers v D.P.P.[32] is well known, some would say notorious. There the House of Lords held that a written record, made by an unidentifiable workman, of the

engine and chassis number of a car was inadmissible in evidence. The statement was hearsay because it said "engine no. 123 has been installed in chassis no. 456" and was tendered in evidence to prove that very fact. This decision was followed by the Jamaican Court of Appeal, on not dissimilar facts, in R. v Homer Williams.[33] While it has had its critics, and was swiftly neutralised in part by the Criminal Evidence Act 1965, I have no doubt that it is a sound application of the rule against hearsay. Indeed, as the more recent decision in R v. Patel[34] illustrates, the doctrine continues to enjoy some vitality in the areas not covered by the legislation.

What has caused some problems in this area in recent times, though, is evidence generated as a result of the operation of computers, and its relationship with the hearsay rule as formulated in Myers. I intend to argue that, in at least one respect, the law in this area has been misunderstood and misapplied and that the common law of evidence is flexible enough to accommodate some kinds of computer evidence. R. v Margaret Heron,[35] a local decision, is a good starting point. In that case the accused was charged under the Public Utilities Protection Act for trespassing upon the works of the Jamaica Telephone Co. Ltd. Among the items of evidence tendered against her, was a computer printout disclosing various calls made, the originating number, the destination of the call and the charges which were applicable. The information recorded on the printout was initially generated automatically in the sense that, once a number was dialled, the recording process was activated without any human intervention and the information stored on magnetic tapes. It appears that these magnetic tapes were then removed from the recorder and the data thereon would be loaded manually onto the computer. The Court of Appeal held that, "in the absence of statutory authority and based on the decided cases, the computer printout was not admissible in proof of its contents."[36]

It is not entirely clear to me from a reading of the transcript of Margaret Heron whether the loading of the recorded information into the computer involved the actual transcription of the information by an operator: if this is so, and it appears that it may have been, then the exclusion of the printout can in my respectful view be supported on the ground that, as in Myers, it would be a statement from an unidentified operator that he or she transcribed accurately

the information from the magnetic tape onto the computer. What worries me about Margaret Heron, though, is the failure to distinguish between a system in which there is some human intervention, which is the Myers situation, and one which operates totally automatically. In my submission, the admissibility of a printout produced as a result of a totally automatic system has nothing to do with the rule against hearsay. The reliance by Rowe J.A. in his judgment on the decision in R. v Pettigrew,[37] fortifies me in the view that the distinction was not apprehended. That was a case in which the Court of Appeal held that a printout produced by a Bank of England computer was inadmissible on the ground that it was hearsay and not within the exception created by the Criminal Evidence Act 1965. However, the decision has been criticised[38] and it does appear to conflict with the earlier decision in the Statue of Liberty[39] in which Simon P. held that the record made by a radar set by purely mechanical means without any human intervention was admissible to prove the movement of ships and the place where a collision occurred. As Simon P observed, "the evidence in question in the present case has nothing to do with the hearsay rule ..." The later case of R. v Wood[40] tends to confirm my view that Pettigrew was decided per incuriam. In Wood it was ruled that a computer printout showing the result of certain calculations performed by the computer without human intervention was admissible at common law as an item of real evidence and did not fall within the rule in Myers at all. To similar effect is the most recent case of Castle v Cross,[41] in which it was held that a printout from an Intoxicator health testing machine was admissible as an item of real evidence in the absence of any challenge to the efficiency of the machine and any finding that it was defective.

On the basis of the foregoing I therefore think that where information is recorded by mechanical means without the intervention of the human mind, the record made by the machine is admissible provided, of course, that it is accepted that the machine is reliable. In this respect a computer printout is no different from a camera or a tape recorder. Notwithstanding this view, however, it is clear that some legislation of a general nature may well be needed to regulate cases such as where the information recorded by the computer is a statement of fact derived either directly or indirectly from a human mind, in which case the hearsay rule will again be operative. Even in cases where the

computer is simply observing facts, legislation remains desirable because it can specify conditions for admissibility to ensure the reliability of the information supplied. I was very pleased therefore to learn a few weeks ago that a bill has been tabled to amend the Evidence Act to make provisions for the admissibility in evidence of "computer output". I am doubly happy to see that there is an area in which the need for reform appears to have been perceived other than by those, such as ourselves, who are not in authority.

CRIMINAL CIVILIANS

The rule in Hollington v Hewthorn[42] is that convictions and judgments are not evidence in later proceedings of the facts on which they were founded. There are exceptions to the rule: the proof of convictions in cross examination as to credit, judgments as evidence of public rights, judgments as facts in issue or relevant facts (as to which, see Ingram v Ingram).[43] In certain respects it is not a bad rule: plainly acquittals in criminal cases - for example, on a charge of dangerous driving - should not be taken as evidence of innocence in a later civil suit - for damages for negligence - because of the higher standard of proof in criminal cases. But the converse is also true and it is difficult to see why a conviction - for say fraud - ought not to suffice as proof of the facts in subsequent civil proceedings in which proof need only be on a balance of probabilities. It is for these reasons that the Civil Evidence Act 1968 (U.K.) made convictions, but not acquittals, admissible in evidence as proof of the facts upon which they were based in subsequent civil proceedings.

I think that this makes sense, and I would support a similar reform in Jamaica. The one area of doubt that I have has to do with whether any distinction ought to be made between convictions in courts of co-ordinate jurisdiction to the one in which the subsequent civil proceedings arise and convictions in courts of inferior jurisdiction. I can envisage some very real problems if convictions in Traffic Courts are to be taken in all cases to be proof of negligence in the Supreme Court.

CONCLUSION

There are many other areas of the law of evidence urgently in need of reform: documentary evidence and the

rule against hearsay generally, rules relating to confessions and illegally or unfairly obtained evidence, the extent of permissible cross-examination of complainants in rape cases, to name a few. The continued credibility of the system demands that the rules do not fall short of the public perception of the requirements of common sense and justice. For if that ever happens, only the lawyers will be left to play around in the debris.

DM
July 18, 1986

1. C.P. Harvey, "The Advocate's Devil" (1958) 79

1A. Cross on Evidence, 6th edition, p. 212. See generally my "Affiliation Proceedings: Aspects of Jamaican Law & Practice" (1981) West Indian Law Journal (May) p. 77

2. (1971) 17 WIR 326

3. ibid at p. 332

4. See, to similar effect. R. v Chapman [1980] Crim. L.R. & 42

5. Lala Indar Prasad v Lala Jaymohan (1927) 43 TLR 536, 541.

6. [1977] 2 All ER 288

7. ibid at p. 291

8. [1983] Crim LR 174

9. [1986] Crim LR 54

10. 11tth report, paras 279-81 - For the relevant part of the text see Heydon's Cases & Materials in Evidence, 2nd edition, pp. 391-2

11. See, for instance R. v Coughlan (1976) 64 Cr. App. Rep. 11

12. [1974] 1 WLR 1090

13. (1978) 27 WIR 229

14. 5th edition (1979)

15. ibid, at page 187

16. Cases & Materials in Evidence, 2nd ed. (1984) at page 393

17. WILJ, vol. 8, No. 1 May 1984, p. 83, 95-6

18. ibid, p. 83

19. The present English practice is summarised in Archbold's 40th edition at para. 578

20. See for example R v. Powell (1963) 6 WIR 176

21. (1934) 24 Cr. App. Rep. 135

22. See an article by Michael Cohen "Are wives really so incompetent?", [1980] Crim. L.R. 222, in which it is argued convincingly that the common law rule did not go so far as to make her incompetent where her evidence does not implicate her husband

23. [1973] 2 All ER 1145

24. paras. 147-156

25. [1931] 1 KB 117

26. See Cross on Evidence, 4th edition, 156. Indeed, the Criminal Law Revision Committee's 11th report cited this with approval as representing the law.

27. [1978] 2 All ER 136

28. [1982] 3 All ER 63

29. [1978] 2 All ER 136, 149

30. ibid, p. 148

31. ibid, at p. 153

32. [1965] AC 1001

33. (1969) 11 JLR 185; see also R. v Paulette Williams R.M.C. A 125/79 (unreported judgment of the Court of Appeal delivered 19/12/79)

34. [1981] 3 All ER 94

35. RMCA 1/83, unreported judgment of the Court of Appeal delivered 24/3/83

36. per Rowe J.A., as he was then, at p. 8 of the transcript

37. [1980] Crim. L. R. 239

38. See J.C. Smith "The admissibility of statements by computer" [1981] Crim. L.R. 387

39. [1968] 1 W.L.R. 739

40. [1982] Crim. L.R. 667

41. [1984] Crim. L.R. 682

42. [1943] KB 587

43. [1956] 1 All ER 785