COMMENTS

THE PRIVILEGE AGAINST SELF-CRIMINATION

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I. DEFINITION OF PRESENT LAW

An admission of adultery is deemed to be incriminating because adultery was an ecclesiastical offence and subject to ecclesiastical censure. [1] It seems that the right to be protected against questions tending to show adultery exists independently of statute or rules of court, [2] but it is now governed and limited by express enactment in all of the Canadian common-law provinces. Following the policy of English legislation in this context, [3] the provincial statutes have recognized the common-law principle by expressly protecting the parties or witnesses from questions tending to show their commission of adultery unless such parties or witnesses have already given evidence in the same action or proceeding in disproof of the alleged adultery. [4]

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[1] *See* Redfern v. Redfern, [1891] P. 139, 60 L.J.P. (n.s.) 9 (C.A.).

> It is one of the inveterate principles of English law that a party cannot be compelled to discover that which if answered would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure . . . . Based upon the traditions of a law belonging to an earlier age and a fear of ecclesiastical monitions that is now technical and obsolete, the privilege in such a case has never been abrogated.

[1891] P. at 147 (per Bowen, L.J.).

[2] Harrison v. King (no. 2), 21 Alta. 381, [1925] 2 W.W.R. 407, [1925] 3 D.L.R. 395 (wherein it was held that, although the provisions of the Canada Evidence Act, CAN. REV. STAT. c. 145 (1906) and The Alberta Evidence Act, ALTA. REV. STAT. c. 87 (1922) did not apply to an examination for discovery, the common-law right of the witness to refuse to answer a question tending to incriminate him did apply). *See* now The Alberta Evidence Act, ALTA. REV. STAT. c. 102, § 2(c) (1955) which defines "witness" to include a person examined *viva voce* on discovery: *see* Williamson v. Werner, [1946] 1 W.W.R. 659, [1946] 2 D.L.R. 603 (Alta.).

[3] The source of such provisions is § 3 of the Evidence Further Amendment Act, 32 & 33 Vict., c. 68 (1869) (which applies to all witnesses). *See* now § 43(2) of the Matrimonial Causes Act 1965, c. 72.

[4] *See* Alberta Evidence Act, ALTA. REV. STAT. c. 102, § 9 (1955) (applies to all witnesses and in any action); Manitoba Evidence Act, MAN. REV. STAT. c. 75, § 9 (1954) (applies to all witnesses and in any action); New Brunswick Evidence Act, N.B. REV. STAT. c. 74, § 8 (1952) (applies to any party to a proceeding instituted in consequence of adultery and to the husband and wife of such party); Newfoundland Evidence Act, NFLD. REV. STAT. c. 120, § 3 (1952) (applies to all witnesses in any proceeding instituted in consequence of adultery); Nova Scotia Evidence Act, N.S. REV. STAT. c. 88, § 42 (1954) (applies to any party to a proceeding instituted in consequence of adultery and to the husband and wife of such party); North West Territories Evidence Ordinance, N.W.T. REV. ORD. c. 31, § 6 (1956) (applies to all witnesses and in any action); Ontario Evidence Act, ONT. REV. STAT. c. 125, § 10 (1960) (applies to all witnesses in any proceeding instituted in consequence of adultery); Prince Edward Island Evidence Act, P.E.I. REV. STAT. c. 52, § 8 (1951)

In Nova Scotia the provincial statute includes the further proviso "or unless permission to ask such question is given by the presiding judge." [5]

In several provinces the protection is not restricted, as it is in England, to "proceedings instituted in consequence of adultery" and it is available to all witnesses, whether parties to the suit or not. [6] It is the duty of the judge to protect the witness as soon as he or she claims the statutory privilege [7] and, as a matter of practice, the judge should inform the witness of the privilege before any evidence is given. [8] While a party who is silent on the examination in chief as to an alleged adultery cannot be cross-examined on the point, it does not follow that inferences may not be drawn from his or her failure to give evidence or refusal to submit to cross-examination. [9] The court is, however, entitled to take into consideration all the surrounding circumstances connected with the failure or refusal to give evidence in disproof of adultery and need not take it strongly against the party. [10]

II. Report of the Royal Commission on Divorce and Matrimonial Causes (England), 1909-1912

The statutory privilege applying in respect of questions tending to show the commission of adultery was criticized by The Royal Commission on

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(applies to any party to a proceeding instituted in consequence of adultery and to the husband and wife of any such party); Sask. Q.B.R. Order XL, R. 508 (1961) (applies to any party in matrimonial proceedings and extends to an examination for discovery); Yukon Territory Evidence Ordinance, Y.T. Rev. Ord. c. 37, § 6 (1958) (applies to all witnesses and in any action).

In British Columbia the only legislation on the subject appears to be § 32 of the Divorce and Matrimonial Causes Act, B.C. Rev. Stat. c. 118 (1960) which applies only to the petitioner: *see* McGee v. McGee (no. 2), 28 W.W.R. 46 (B.C. Sup. Ct. 1959); McGee v McGee, 27 W.W.R. 665 (B.C. Sup. Ct. 1959); Davison v. Davison, 10 W.W.R. 423, [1954] 1 D.L.R. 567. (B.C. Sup. Ct. 1953).

[5] Nova Scotia Evidence Act, N.S. Rev. Stat. c. 88, § 42 (1954). *See* Waugh v. Waugh, 19 Mar. Prov. 216, [1946] 2 D.L.R. 133 (N.S. Sup. Ct.); Laffin v. Laffin, 18 Mar. Prov. 417, [1945] 3 D.L.R. 595 (N.S. Sup. Ct.); Hawbolt v. Hawbolt, 14 Mar. Prov. 135, [1939] 2 D.L.R. 703 (N.S.).

[6] *See supra* note 4.

"Instituted in consequence of adultery" means that adultery must be the cause of action, as it is in divorce, not that the action may have resulted in fact from adultery, as in cases of bastardy or affiliation proceedings: *see* Einfeld v. Einfeld, 47 Man. 25, [1939] 1 W.W.R. 551, [1939] 2 D.L.R. 398; *Re* Hollum, [1960] Ont. W.N. 281 (High Ct.); Bradburn v. Bradburn, [1953] Ont. 882.

[7] Hebblethwaite v. Hebblethwaite, L.R. 2 P. & D. 29, 39 L.J.P. 15 (1869); Woodcock v. Woodcock, 49 Man. 113, [1941] 2 W.W.R. 111, [1941] 3 D.L.R. 207; Laffin v. Laffin, *supra* note 5; Elliott v. Elliott, [1933] Ont. 206, [1933] 2 D.L.R. 40 (High Ct.).

[8] As a matter of practice, the Judge, before any evidence is given, should inform the witness of the [statutory] privilege . . . , and it would be well for counsel to advise the witness before he or she goes into the box at the trial or before the party is sworn in an examination for discovery, that he or she is not liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery unless such witness falls within the exception provided by the [statute] itself.

Per Logie, J., in Elliott v. Elliott, [1933] Ont. 206, at 211, cited and approved by Mr. Justice Cartwright in Welstead v. Brown, [1952] Sup. Ct. 3, at 23, [1952] 1 D.L.R. 465.

Moreover, it is proper for counsel to remind the court, if necessary, that the witness is entitled to the protection: Woodcock v. Woodcock, *supra* note 7.

[9] Battersby v. Battersby, [1948] 2 W.W.R. 623, at 632 (Man. K.B.). *But see* Parker v. Parker, 33 Mar. Prov. 165, at 167-68, [1954] 2 D.L.R. 185, at 187-88 (N.B.).

[10] Poyser v. Poyser, [1952] W.N. 525, [1952] 2 All E.R. 949 (C.A.).

Divorce and Matrimonial Causes which sat in England under the chairmanship of Lord Gorell in 1909-1912 as "a survival of ancient rules of evidence, intended to prevent a party from incriminating himself, although adultery is not a crime, and its effect as an ecclesiastical offence may be now-a-days disregarded." [11] The Commission further stated:

> The result is that, however guilty the petitioner may be, and however much the judge may suspect his or her guilt, so long as he or she confines his or her evidence to the case against the respondent, no questions can be put to the petitioner as to guilt on his or her side, and all that the court can do is to direct the King's Proctor's attention to the case. Moreover, if a respondent does not choose to appear, and the co-respondent does and fights the case, he is in a difficulty about compelling the respondent to give evidence; so also is a respondent, if a co-respondent will not contest a case. These restrictions should in the interests of justice be done away with. [12]

The Commission accordingly recommended that the statutory privilege set out in the proviso to section 43 of the Divorce and Matrimonial Causes Act, 1857, [13] and in section 3 of the Evidence Further Amendment Act, 1869, [14] should be repealed. [15]

The Commission observed that such repeal would open the way for interrogatories and discovery of documents to prove adultery. It was of the opinion, however, that interrogatories for this purpose should not be permitted because they would lead to great expense and possible abuse. The Commission further considered that discovery of documents for the purpose of proving adultery should be allowed by order of the court, if it thinks such discovery should be made. The Commission recommended that these matters should be regulated by rules of court. [16]

III. Final Report of The Committee on Procedure in Matrimonial Causes (England), 1946-1947

The Committee on Procedure in Matrimonial Causes, which sat in England under the chairmanship of Mr. Justice Denning in 1946-1947, shared the opinion of the Gorell Commission that the statutory privilege governing questions relating to adultery was an anomalous survival of outmoded rules of evidence. [17]

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[11] Royal Commission on Divorce and Matrimonial Causes, Final Report, Cd. 6478, para. 383 (1912).

[12] Id. para. 384.

[13] 20-21 Vict., c. 85 (1857).

[14] 32-33, Vict., c. 68 (1869).

[15] *Supra* note 12.

[16] *Id.* para. 386.

[17] "This limitation seems to be a survival of ancient rules of evidence . . . . No such limitation applies in other proceedings such as proceedings instituted in consequence of desertion or cruelty. . . . In those proceedings questions tending to show adultery can be put. It is anomalous to retain the limitation in suits for divorce on the ground of adultery:" Committee on Procedure on Matrimonial Causes, Final Report, Cmd. 7024, para. 70 (1947).

The Committee observed that repeal of the statutory provision conferring such privilege would result in the petitioner being able to subpoena the respondent, co-respondent or woman named to give evidence to prove his or her own adultery. [18] The Committee concluded that this result would be welcome in that such direct evidence from the parties would often prove more satisfactory and less expensive than other circumstantial evidence. Furthermore, it would mean that both husband and wife would be present at the hearing and this would not only assist the court in ascertaining the truth but would also be a positive help in cases where there is a prospect of reconciliation. [19]

The Committee endorsed the opinion of the Gorell Commission that it would be undesirable to allow interrogatories to prove adultery [20] and further proposed that questions put to any party or witness at the hearing should be confined to the adultery charged specifically in the pleadings. [21] The Denning Committee accordingly recommended as follows:

> We recommend that Section 198 [of the Judicature Act, 1925] should be repealed but interrogatories should not be permitted to prove adultery, nor should questions be allowed to be put to any party or witness at the hearing as to any adultery other than that charged specifically in the case. Discovery should be permitted as to adultery charged if the Court thinks fit. These points should be dealt with by Rules of Court. [22]

IV. Report of The Royal Commission on Marriage and Divorce (England), 1951-1955

The Royal Commission on Marriage and Divorce, which sat in England under the chairmanship of Lord Morton of Henryton in 1951-1955, reviewed the recommendations of the Gorell Commission and of the Denning Committee and concluded that it is no longer necessary to protect the parties or witnesses in matrimonial proceedings from being questioned about their adultery. [23]

The Commission stated that "the conduct of the spouses is very material to the trial of the issues between them" and "that the conduct of witnesses may be relevant insofar as it relates to credit." [24]

The Commission further observed that the statutory privilege has had only a limited application in England since desertion and cruelty were

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[18] Committee on Procedure on Matrimonial Causes, Final Report, Cmd. 7024, para. 72 (1947).

[19] *Id.*

[20] *Id.* para. 73.

[21] *Id.* paras. 73-74.

[22] *Id.* para. 74.

[23] Royal Commission on Marriage and Divorce, Report, Cmd. 9678, paras. 933-35 (1956).

[24] *Id.* para. 935.

admitted as grounds for divorce in 1937 and questions tending to show adultery are admissible where matrimonial proceedings are instituted in consequence of these offences. [25] The Commission stated that the absence of any statutory privilege in such proceedings has caused no difficulty and concluded that the courts could be relied upon to prevent any abuse if the protection afforded by the statutory privilege were removed. [26] The Commission accordingly recommended that the statutory provisions conferring the privilege should be repealed. [27]

V. Conclusions and Recommendations

Section 10 of the Ontario Evidence Act [28] provides:

> The parties to a proceeding instituted in consequence of adultery and the husbands and wives of such parties are competent to give evidence in such proceeding; provided that no witness in any such proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery.

The above section corresponds to section 43(2) of the English Matrimonial Causes Act, 1965, which re-enacts with minor modifications the terms of section 3 of the English Evidence Further Amendment Act, 1869. [29]

The privilege which the statute incorporates is regarded as part of the general privilege against self-crimination "[being] based on the theory that adultery is punishable, and that no person therefore is bound to answer any question tending to prove himself guilty of it." [30] This theory was tenable in England as late as the eighteenth century since the ecclesiastical courts had jurisdiction to impose criminal sanctions on proof of adultery. [31] The theory became obsolete, however, during the nineteenth century and, as one writer observes, "it is perhaps surprising that the privilege was included in the [Evidence Further Amendment] Act of 1869, and even more surprising that it was retained in the Judicature Act, [Eng.], 1925." [32]

It has been suggested that the justification for retaining the privilege lies in the gravity of a charge of adultery, [33] but this explanation cannot be supported since the scope of the privilege is confined to proceedings

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[25] As to the extended grounds for divorce in Canada, *see* Divorce Act, Can. Stat. 1968 c. 24, § 3 & 4.

[26] *Supra* note 24.

[27] *Id.*

[28] Ont. Rev. Stat. c. 125 (1960).

[29] 32 & 33 Vict., c. 68 (1869).

[30] Redfern v. Redfern, [1891] P. 139, 60 L.J.P. 9 (per Lindley, L.J.). *See* text accompanying notes 1 & 11 *supra.*

[31] Cowen, *Adultery And The Privilege Against Self-Crimination*, 65 L.Q.R. 373 (1949).

[32] *Id.* at 374. *See* Matrimonial Causes Act 1965, § 43(2).

[33] *See* Redfern v. Redfern, *supra* note 1.

"instituted in consequence of adultery" [34] and "adultery is equally serious, whatever the context in which it is disclosed." [35]

It is difficult to refute the conclusion expressed by Professor Zelman Cowen that "[t]he truth seems to be that it is virtually impossible to produce a rational justification for the existence of the privilege." [36]

In the light of the foregoing analysis, it is concluded that the general admissibility of questions tending to show adultery would greatly assist the courts in determining issues between the parties and that no logical basis can be found to justify retention of the statutory privilege in Ontario. In the words of Wigmore, "[t]he investigation of truth and the enforcement of testimonial duty demand the restriction.... of these privileges [and] [t]hey should be recognized only within the narrowest limits required by principle." [37] It is accordingly recommended that section 10 of the Ontario Evidence Act should be repealed. In the alternative, it is recommended that a proviso should be added to section 10 corresponding to that set out in section 42 of the Nova Scotia Evidence Act [38] which empowers the presiding judge to permit questions tending to show adultery. [39]

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[34] *See supra* note 6.

[35] *Supra* note 32, at 375.

[36] *See id.* at 375.

[37] 8 J. WIGMORE, EVIDENCE 67 (3d ed. 1940).

[38] N.S. REV. STAT. c. 88 (1954).

[39] For a recent endorsement of the opinion that the privilege should be abolished, *see* LAW REFORM COMMITTEE, SIXTEENTH REPORT, PRIVILEGE IN CIVIL PROCEEDINGS, CMND. 3472, paras. 12 & 45 (1967).