Canada. Parl. Senate. Special Comm.on Canada Evidence Act. Special Committees on Bill W. 1925.

Canada. Parl. Senate. Special Comm.on Canada Evidence Act.

The Senate of Canada

SPECIAL COMMITTEES

ON

BILL W.—An Act to amend The Canada Evidence Act as regards the evidence of persons charged with offences.

and

BILL 27—An Act to amend The Canada Evidence Act.

SESSION OF 1925

OPINIONS FROM JUDGES AND OTHERS ON THE PROPOSED LEGISLATION

OTTAWA
F. A. ACLAND
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1926

SPECIAL COMMITTEES

CONTENTS

4th Session, 14th Parliament, 15-16 George V, 1925

THE SENATE OF CANADA

BILL W.

An Act to amend The Canada Evidence Act as regards the evidence of persons charged with offences

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Subsection five of section four of *The Canada Evidence Act*, chapter one hundred and forty-five of *The Revised Statutes, 1906*, is hereby repealed and the following is substituted therefor:—

Comment upon failure to testify.

"(5) The failure of the person charged, or of the wife or husband of such person, to testify, may be made the subject of comment by the judge but not by counsel for the prosecution."

2. Section twelve of the said Act is hereby repealed and the following is substituted therefor:—

Questioning witness as to previous conviction of any offence.

"**12.** (1) Any witness, other than a person charged with an offence and called as a witness in pursuance of this Act, may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction."

NOTE: The changes made are shown by the words underlined in the text of the Bill and in the original enactments printed opposite thereto.

1. Under the English Criminal Law failure to testify by a person charged with an offence or by a wife or husband of such person, may be commented upon by the judge, but not by counsel for the prosecution.

Under subsection five of section four of *The Canada Evidence Act*, such failure may not be commented upon either by the judge or by counsel for the prosecution.

The amendment changes subsection (5) so as to adopt the English provision.

The existing subsection (5) reads as follows:—

(5) The failure of the person charged, or the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution."

2. As section twelve of *The Canada Evidence Act* now stands, any witness, including a person charged with an offence who gives evidence on his own behalf, may be questioned as to whether he has been previously convicted of an offence. The object of the proposed amendment is to adopt the English law and to except such person.

The existing section twelve reads as follows:—

"**12.** A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

2. The conviction may be proved by producing,—

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and,

(b) proof of identity."

Subsection 2 becomes in the Bill subsection (3).

Questioning accused person who gives evidence on his own behalf.

"(2) A person charged with an offence 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 a 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 advocate asked questions of the witnesses for the prosecution with a view to establish 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

(iii) he has given evidence against any other person charged with the same offence;

and when, under the provisions of paragraphs (i), (ii) and (iii) of this subsection, he has been asked any such question and either denies the fact or refuses to answer, the opposite party may prove the fact.

Proof of conviction.

"(3) Any such conviction may be proved by producing,—

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and,

(b) proof of identity."

(2) Subsection (2) provides for the exception made in subsection (1). It is new and is taken *verbatim* from the English *Criminal Evidence Act, 1898,* 61-62 Vict., c. 36, except the words "with an offence," which are those used in *The Canada Evidence Act,* and the other words underlined, which are added to make the application of subsection (3) clear.

(3) This is the present subsection (2) now made to follow the proposed new subsection (2) so as to apply in both cases. The only change is the substitution of the words underlined for the word "The".

4th Session, 14th Parliament, 15-16 George V, 1925

THE HOUSE OF COMMONS OF CANADA

BILL 27.

An Act to amend the Canada Evidence Act

R.S., c. 145.

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Answers to incriminating questions.

1. Subsection two of section five of the *Canada Evidence Act*, Revised Statutes of Canada, 1906, chapter one hundred and forty-five, is amended by striking out the words "in the giving of such evidence" at the end thereof.

EXPLANATORY NOTE

Subsection 2 of section 5 is as follows:—

"2. If with respect to any question a witness objects to answer upon the ground that his answer 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 person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

The purpose of the amendment is to enable the Crown on a prosecution for perjury to use against the accused any evidence given by him in any other proceeding.

EXTRACT *from the Minutes of Proceedings of the Senate of Canada, Thursday, April 30, 1925*

"Pursuant to the Order of the Day, the Bill (W), intituled: 'An Act to amend The Canada Evidence Act as regards the evidence of persons charged with offences,' was read the second time, and

On Motion of the Honourable Mr. McMeans, it was

Referred to a Special Committee of the Senate composed of the Honourable Messieurs: Barnard, Beaubien, Belcourt, Dandurand, Girroir, Haydon, Lynch-Staunton, Pardee, Ross (Middleton), Tanner, Willoughby and the mover."

EXTRACT *from the Minutes of Proceedings of the Senate of Canada, Thursday, June 11, 1925*

"Pursuant to the Order of the Day—

The Honourable Mr. Dandurand moved the third reading of the Bill (27), intituled: 'An Act to amend the Canada Evidence Act.'

In amendment, the Honourable Mr. Planta moved that the said Bill be not now read a third time, but that it be referred to a Special Committee of the Senate composed of the Honourable Messieurs: Barnard, Beaubien, Belcourt, Dandurand, Girroir, Haydon, Lynch-Staunton, McMeans, Pardee, Ross (Middleton), Tanner and Willoughby.

The said amendment was then adopted and ordered accordingly."

EXTRACT *from the Minutes of the Special Committees on Bill W, An Act to amend The Canada Evidence Act as regards the evidence of persons charged with offences, and Bill 27, An Act to amend the Canada Evidence Act.*

"THURSDAY, May 7, 1925.

Resolved: That the Provincial Attorneys General, the Chief Justices of the Courts in each province, and the Judges administering criminal law, be asked to furnish their opinion on the legislation proposed by the Bill, and that pending these reports, no further action be taken at this Session with respect to the Bill."

CHIEF JUSTICE'S CHAMBERS, SUPREME COURT

OTTAWA, December 27, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees of the Senate,
Ottawa.

SIR,—I have deferred answering your letter of the 25th of September last in order to give full consideration to the two Bills on which my opinion was asked.

Bill W

I fear that the proposed amendment will, in the particular case for which it was sought to provide a remedy, defeat the purpose of the section which it is proposed to amend. The object of s.s. 2 of sec. 5 of The Canada Evidence Act is to remove any inducement to a witness not to tell the truth in the evidence he is then giving through fear that if he should do so he may thereby furnish material to establish his former criminality. It is said that as the section stands it often prevents successful prosecution for perjury formerly committed by the witness of which his truthful testimony presently to be given would afford proof. But if the evidence so to be given could be used for the purpose of such a prosecution this very fact would afford the strongest inducement to the witness, in order to avoid incriminating himself, to persist in the perjury already committed.

Bill 27

The principle of the Bill which the amendments project seems to me commendable. They bring our law into conformity with the English law in the particulars dealt with.

Section 1. The trial judge may be trusted to exercise sound discretion in commenting or refusing to comment on the failure of the accused to testify. Would not the purpose of section 1 be met, however, by merely striking out of the present s.s. 5 of s. 4 the words " the judge or by counsel for "?

Section 2 removes an embarrassment which must often prove to be destructive of all benefit to the accused from the liberty given him of testifying on his own behalf. A man innocent of the crime for which he is on trial, but with a criminal past, finds himself, under the present law, in a worse position than formerly when he was not allowed to testify. He cannot take the risk of that criminal past being placed before the jury. I would, however, alter paragraph (ii), of the proposed s.s. 2 of s. 12, by substituting for the words " the witnesses for the prosecution," the words " any other witness." The defence may adduce " character evidence " before placing the accused in the box.

I remain, Sir,
Faithfully yours,
(Signed) FRANK A. ANGLIN.

JUDGE'S CHAMBERS, PRESCOTT AND RUSSELL,
L'ORIGINAL, ONT., July 21, 1925.

A. H. HINDS, Esq.,
Chief Clerk Senate Committees,
Ottawa.

DEAR SIR,—In reply to your communication respecting draft Bill 27 introduced by the Minister of Justice, and Bill W, introduced by the Hon. Mr. McMeans, I beg to say that both Bills meet with my hearty approval in every respect.

I have no suggestions to make.

I have the honour to be, etc.,
(Signed) COLIN J. O'BRIAN.

JUDGE'S CHAMBERS, PICTON, ONT., July 6, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa, Ont.

DEAR SIR,—

Re Bill W to amend the Canada Evidence Act

Section (1). I am not in favour of allowing the judge to comment on the prisoner's failure to give evidence. I remember a couple of occasions when I was in practice when I would not permit my client to give evidence—not because he was guilty—but because his nervousness under cross-examination would make him appear guilty. I can imagine other reasons of a like nature which would prevent the prisoner giving evidence. These reasons, would, almost necessarily, be unknown to the trial judge.

It therefore seems to me that the chance of the judge's doing an injustice by his comment would be too great and would more than balance any chance of advancing the ends of justice thereby.

Section (2). I approve of the proposed amendment.

Re Bill 27, An Act to amend the Canada Evidence Act

The theory of the law has always been that when a person is forced to give evidence he is excused or saved from all the evil consequences to himself of the giving of such evidence except the penalty for untruthfulness in the giving. This seems to be a logical and right position and in my opinion should not be departed from. I can see that the amended section could be very much abused.

Yours faithfully,
(Signed) EVAN H. McLEAN.

JUDGE'S CHAMBERS, BELLEVILLE, ONT., July 3, 1925.

A. H. HINDS,
Chief Clerk of Committees,
The Senate.

DEAR SIR,—Replying to yours of 29th June *re* Bill "W" and Bill 27. Section one of Bill "W" I think is good. I doubt the wisdom of section two. Bill 27 appears advisable.

Yours truly,
(Signed) G. E. DEROCHE.
J.

JUDGE'S CHAMBERS, HAMILTON, ONT., July 22, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate, Ottawa, Ont.

SIR,—Replying to your favour of the 29th June respecting Bill "W" and Bill 27 and intimating that the Special Committee desires to obtain my views

NOTE: The changes made are shown by the words underlined in the text of the Bill and in the original enactments printed opposite thereto.

1. Under the English Criminal Law failure to testify by a person charged with an offence or by a wife or husband of such person, may be commented upon by the judge, but not by counsel for the prosecution.

Under subsection five of section four of *The Canada Evidence Act*, such failure may not be commented upon either by the judge or by counsel for the prosecution.

The amendment changes subsection (5) so as to adopt the English provision.

The existing subsection (5) reads as follows:—

(5) The failure of the person charged, or the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution."

2. As section twelve of *The Canada Evidence Act* now stands, any witness, including a person charged with an offence who gives evidence on his own behalf, may be questioned as to whether he has been previously convicted of an offence. The object of the proposed amendment is to adopt the English law and to except such person.

The existing section twelve reads as follows:—

"**12.** A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

2. The conviction may be proved by producing,—

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and,

(b) proof of identity."

Subsection 2 becomes in the Bill subsection (3).

Questioning accused person who gives evidence on his own behalf.

"(2) A person charged with an offence 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 a 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 advocate asked questions of the witnesses for the prosecution with a view to establish 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

(iii) he has given evidence against any other person charged with the same offence;

and when, under the provisions of paragraphs (i), (ii) and (iii) of this subsection, he has been asked any such question and either denies the fact or refuses to answer, the opposite party may prove the fact.

Proof of conviction.

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(2) Subsection (2) provides for the exception made in subsection (1). It is new and is taken *verbatim* from the English *Criminal Evidence Act, 1898*, 61-62 Vict., c. 36, except the words "with an offence," which are those used in *The Canada Evidence Act*, and the other words underlined, which are added to make the application of subsection (3) clear.

(3) This is the present subsection (2) now made to follow the proposed new subsection (2) so as to apply in both cases. The only change is the substitution of the words underlined for the word "The".

4th Session, 14th Parliament, 15-16 George V, 1925

THE HOUSE OF COMMONS OF CANADA

BILL 27.

An Act to amend the Canada Evidence Act

R.S., c. 145.

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Answers to incriminating questions.

1. Subsection two of section five of the *Canada Evidence Act*, Revised Statutes of Canada, 1906, chapter one hundred and forty-five, is amended by striking out the words "in the giving of such evidence" at the end thereof.

EXPLANATORY NOTE

Subsection 2 of section 5 is as follows:—

"2. If with respect to any question a witness objects to answer upon the ground that his answer 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 person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

The purpose of the amendment is to enable the Crown on a prosecution for perjury to use against the accused any evidence given by him in any other proceeding.

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"Pursuant to the Order of the Day, the Bill (W), intituled: 'An Act to amend The Canada Evidence Act as regards the evidence of persons charged with offences,' was read the second time, and

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Referred to a Special Committee of the Senate composed of the Honourable Messieurs: Barnard, Beaubien, Belcourt, Dandurand, Girroir, Haydon, Lynch-Staunton, Pardee, Ross (Middleton), Tanner, Willoughby and the mover."

EXTRACT *from the Minutes of Proceedings of the Senate of Canada, Thursday, June 11, 1925*

"Pursuant to the Order of the Day—

The Honourable Mr. Dandurand moved the third reading of the Bill (27), intituled: 'An Act to amend the Canada Evidence Act.'

In amendment, the Honourable Mr. Planta moved that the said Bill be not now read a third time, but that it be referred to a Special Committee of the Senate composed of the Honourable Messieurs: Barnard, Beaubien, Belcourt, Dandurand, Girroir, Haydon, Lynch-Staunton, McMeans, Pardee, Ross (Middleton), Tanner and Willoughby.

The said amendment was then adopted and ordered accordingly."

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"THURSDAY, May 7, 1925.

Resolved: That the Provincial Attorneys General, the Chief Justices of the Courts in each province, and the Judges administering criminal law, be asked to furnish their opinion on the legislation proposed by the Bill, and that pending these reports, no further action be taken at this Session with respect to the Bill."

CHIEF JUSTICE'S CHAMBERS, SUPREME COURT

OTTAWA, December 27, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees of the Senate,
Ottawa.

SIR,—I have deferred answering your letter of the 25th of September last in order to give full consideration to the two Bills on which my opinion was asked.

Bill W

I fear that the proposed amendment will, in the particular case for which it was sought to provide a remedy, defeat the purpose of the section which it is proposed to amend. The object of s.s. 2 of sec. 5 of The Canada Evidence Act is to remove any inducement to a witness not to tell the truth in the evidence he is then giving through fear that if he should do so he may thereby furnish material to establish his former criminality. It is said that as the section stands it often prevents successful prosecution for perjury formerly committed by the witness of which his truthful testimony presently to be given would afford proof. But if the evidence so to be given could be used for the purpose of such a prosecution this very fact would afford the strongest inducement to the witness, in order to avoid incriminating himself, to persist in the perjury already committed.

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The principle of the Bill which the amendments project seems to me commendable. They bring our law into conformity with the English law in the particulars dealt with.

Section 1. The trial judge may be trusted to exercise sound discretion in commenting or refusing to comment on the failure of the accused to testify. Would not the purpose of section 1 be met, however, by merely striking out of the present s.s. 5 of s. 4 the words "the judge or by counsel for"?

Section 2 removes an embarrassment which must often prove to be destructive of all benefit to the accused from the liberty given him of testifying on his own behalf. A man innocent of the crime for which he is on trial, but with a criminal past, finds himself, under the present law, in a worse position than formerly when he was not allowed to testify. He cannot take the risk of that criminal past being placed before the jury. I would, however, alter paragraph (ii), of the proposed s.s. 2 of s. 12, by substituting for the words "the witnesses for the prosecution," the words "any other witness." The defence may adduce "character evidence" before placing the accused in the box.

I remain, Sir,
Faithfully yours,
(Signed) FRANK A. ANGLIN.

JUDGE'S CHAMBERS, PRESCOTT AND RUSSELL,
L'ORIGINAL, ONT., July 21, 1925.

A. H. HINDS, Esq.,
Chief Clerk Senate Committees,
Ottawa.

DEAR SIR,—In reply to your communication respecting draft Bill 27 introduced by the Minister of Justice, and Bill W, introduced by the Hon. Mr. McMeans, I beg to say that both Bills meet with my hearty approval in every respect.

I have no suggestions to make.

I have the honour to be, etc.,
(Signed) COLIN J. O'BRIAN.

JUDGE'S CHAMBERS, PICTON, ONT., July 6, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa, Ont.

DEAR SIR,—

Re Bill W to amend the Canada Evidence Act

Section (1). I am not in favour of allowing the judge to comment on the prisoner's failure to give evidence. I remember a couple of occasions when I was in practice when I would not permit my client to give evidence—not because he was guilty—but because his nervousness under cross-examination would make him appear guilty. I can imagine other reasons of a like nature which would prevent the prisoner giving evidence. These reasons, would, almost necessarily, be unknown to the trial judge.

It therefore seems to me that the chance of the judge's doing an injustice by his comment would be too great and would more than balance any chance of advancing the ends of justice thereby.

Section (2). I approve of the proposed amendment.

Re Bill 27, An Act to amend the Canada Evidence Act

The theory of the law has always been that when a person is forced to give evidence he is excused or saved from all the evil consequences to himself of the giving of such evidence except the penalty for untruthfulness in the giving. This seems to be a logical and right position and in my opinion should not be departed from. I can see that the amended section could be very much abused.

Yours faithfully,
(Signed) EVAN H. McLEAN.

JUDGE'S CHAMBERS, BELLEVILLE, ONT., July 3, 1925.

A. H. HINDS,
Chief Clerk of Committees,
The Senate.

DEAR SIR,—Replying to yours of 29th June *re* Bill "W" and Bill 27. Section one of Bill "W" I think is good. I doubt the wisdom of section two. Bill 27 appears advisable.

Yours truly,
(Signed) G. E. DEROCHE.
J.

JUDGE'S CHAMBERS, HAMILTON, ONT., July 22, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate, Ottawa, Ont.

SIR,—Replying to your favour of the 29th June respecting Bill "W" and Bill 27 and intimating that the Special Committee desires to obtain my views

The other amendment, however, does not approve itself to my judgment. My experience in over twenty years on the Bench, has satisfied me that these supposed safeguards for persons charged with crime seldom benefit an innocent man but frequently prevent a guilty person from being convicted and therefore are not in the interests of justice. I see no reason why an accused person if he elects to become a witness should be treated otherwise than any other witness, it being left to the judge, of course, to indicate to the Jury, when there is one, what is the exact bearing such evidence has on the case.

Yours truly,

(Signed) HORACE HARVEY,
C.J.A.

DISTRICT COURT,

CALGARY, July 20, 1925.

SIR,—

Re Bill W, An Act to amend the Canada Evidence Act as regards the evidence of persons charged with offences, and Bill 27, An Act to amend the Canada Evidence Act.

I have the honour to acknowledge your letter of the 29th June, enclosing copies of the above Bills, which has not been acknowledged earlier owing to vacation.

After considering the Bills in question, they appear to me to contain amendments which will be found very convenient and desirable in practice.

Your obedient servant,

(Signed) W. ROLAND WINTER.
J.D.C.

A. H. HINDS,
Chief Clerk of Committees,
Ottawa.

DISTRICT COURT,

EDMONTON, September 16, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa, Canada.

DEAR SIR,—Your letter of the 29th June has remained unanswered as I felt some diffidence in advancing my views on this very important question.

However I do not wish to be guilty of any act of discourtesy, and I therefore wish to state my views in order that I may not be taken to be lacking or remiss.

My conviction for some years past is that the law as it now stands as to the admissibility of evidence in criminal matters is unfair. Especially do I think that an accused person, taking the stand in his own behalf, should not be com-

pelled to answer any question as to former convictions until the question of his guilt on the charge for which he is being tried is determined and that all such evidence should be excluded until after the verdict. I feel very strongly too on the matter of a judge conferring with the police officers and others as to the criminal record or reputation of a person who is awaiting sentence and am strongly of opinion that all such matters should be brought up in open court and in the presence of the accused, just in the same way that any other evidence must be given. As to persons who are mere witnesses it seems to me a different rule could be applied. In the case of accused persons, I do not see how it could fail in many cases, if not in most cases, to subconsciously prejudice the Court to have evidence as to previous convictions put in evidence before verdict.

As to the other proposed changes as set out in Bills 27 and "W," enclosed in your letter, I can see no ground for criticism.

Yours sincerely,
(Signed) J. L. CRAWFORD.

DISTRICT COURT

EDMONTON, December 26, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada,
Ottawa.

DEAR SIR:

Re Bill W, and Bill 27, Acts to Amend the Canada Evidence Act

In reply to your request for my views on the above proposed Bills I may say that I do not think that the Bills should be passed. I find that the present law is working out well and have heard no complaints whatever against it.

I am,
Yours truly
(Signed) H. C. TAYLOR,
Judge, District Court, Edmonton.

ATTORNEY GENERAL, PROVINCE OF BRITISH COLUMBIA

VICTORIA, August 1, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees of the Senate,
Ottawa.

DEAR SIR,—

Re *Bill W, and Act to amend the Canada Evidence Act as regards the evidence of persons charged with offences*

I have given this Bill careful consideration and have consulted various prosecuting counsel as well as several criminal lawyers in the matter, and as regards section 2 of the Bill, containing a proposed amendment to section 12 of the Canada Evidence Act, opinion as a unit in this province is in opposition to the proposed amendment. Personally I share in this opinion. I do not see

why an accused who voluntarily goes into the witness box should not in order to test his credibility be asked as to previous convictions.

As to section 1 of the Bill, containing a proposed amendment to section 4 (5) of the Act, opinion is more divided, but the majority of those I have consulted is unfavourable to this amendment. Personally I share this opinion also. I do not see that the fact that a prisoner refrains from going into the box should be made the subject of comment by either court or counsel.

I herewith forward you letters received from prosecuting counsel in the city of Vancouver.

I have the honour to be, sir,

Your obedient servant,

(Signed) WM. D. CARTER,
Deputy Attorney General.

922 STANDARD BANK BUILDING,

VANCOUVER, B.C., July 25, 1925.

W. D. CARTER, Esq., K.C.,
Deputy Attorney General,
Victoria, B.C.

DEAR MR. CARTER,—I have your letter of the 24th instant, with regard to the proposed amendments to the "Canada Evidence Act". I would favour the first amendment, that is the provision allowing the judge to comment to the jury on the fact that the accused has not gone into the witness box. Personally, I do not see why there should be any objection to Crown counsel commenting on the point. The jury know perfectly well that the accused has not given evidence and no doubt comment on it themselves in discussing the case before arriving at their verdict, and if they are entitled to do so, and they cannot be prevented from doing so, then I think it is only right that the judge should be allowed to comment on the fact so as to put it to the jury in the proper light.

I would not favour the proposed amendment to section 12. This simply means that any witness other than the accused person can be cross-examined upon his previous record. It seems to me that if anyone should be cross-examined on his previous record it is the person who stands accused of a crime and who goes into the witness box in his own defence.

Yours truly,

(Signed) H. S. WOOD,
Crown Prosecutor.

McKAY & ORR,
BARRISTERS &C.,
VANCOUVER, B.C., July 25, 1925.

W. D. CARTER, Esq., K.C.,
Deputy Attorney General,
Victoria, B.C.

DEAR MR. CARTER,—I acknowledge receipt of your letter of yesterday enclosing the proposed Bill to amend The Canada Evidence Act as regards

the evidence of prisoners charged with offences. I am not in favour of either of the proposed amendments. As to number (1) I think this is a safeguard for the accused the way the existing law stands and it should not be changed. If the judge comments on the fact that the prisoner or his wife does not testify the jury is very apt to convict on that fact alone. Neither am I in favour of number (2). If a prisoner goes into the box I do not see why the fact that he has convictions against him should not be brought out for the purpose of showing that his evidence is not to be relied on.

Yours very truly,

(Signed) W. M. McKAY,
City Prosecutor.

THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA

KAMLOOPS, B.C., July 7, 1925.

The Chief Clerk of Committees of the Senate,
Ottawa.

DEAR SIR,—

Re Canada Evidence Act

Replying to your circular letter of the 29th ult. I beg to say that I entirely agree with the justice and propriety of section 1 of Hon. Mr. McMeans' proposed Bill to amend the Canada Evidence Act, which seeks to repeal subsection 5 of section 4, cap. 145, R.S.C., 1906, and substitute clause in lieu thereof.

Comment should be allowed by the judge but not by the counsel.

I, however, disapprove of section 2 in his proposed Bill which seeks to repeal section 12 of the said Act and to substitute another clause in harmony with the English Evidence Act. *I think our present section is much to be preferred to the English section,* it having been followed for many years in Canada, and having worked out the ends of justice very satisfactorily. Such changes should not be hurriedly made in my opinion. Our section is a distinct aid to justice under the wise and equitable control of our judges. Our Crown prosecutors also comport themselves as fair gentlemen, and do not overstrain this present section. Where a professional crook enters the witness box it is quite in the ends of justice that he should be questioned as our section permits.

Yours faithfully,

(Signed) JOHN DONALD SWANSON,
County Court Judge.

GRAND FORKS, July 8, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate, Ottawa.

SIR,—I have your letter of the 29th ultimo enclosing proposed amendments *re* Bill W and Bill 27.

I am in favour of amendment to section 12 of the Canada Evidence Act but not in favour of the amendment allowing the judge to comment as proposed.

I am emphatically in favour of the amendment proposed by Bill 27.

I have the honour to be, sir,

Your obedient servant,

(Signed) J. A. BROWN.

GOVERNMENT OF THE PROVINCE OF SASKATCHEWAN,

DEPARTMENT OF THE ATTORNEY GENERAL,

REGINA, July 23, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa.

SIR,—I have the honour to acknowledge the receipt of your letter of the 29th ultimo, addressed to the Honourable Attorney General, which has been referred to me for answer, relative to two proposed Bills to amend the Canada Evidence Act.

In regard to Bill 27, it would appear that this Bill had its origin in the suggestion of this department as a result of Rex. v. Kruschkovski, (1925) 1 W.W.R. 426. The facts in that case were that two persons were killed in a row at or following a wedding feast. As a result of the coroner's inquest, two persons were charged with murder, upon the preliminary hearing in such case, and at the coroner's inquest, as a result of which such charge was laid, Kruschkovski swore to a certain state of facts. When it got to trial he swore to a different state of facts, and that he had sworn falsely in testifying at the coroner's inquest and preliminary hearing. He was subsequently charged with perjury as to what he swore at the coroner's inquest and preliminary hearing, and the evidence given by him at the trial was put in as proof of the falsity of the statements made by him at the coroner's inquest and preliminary hearing. No objection to the admission of this evidence was raised by his counsel, of whom there were two, and he was thereupon convicted of perjury. On an appeal taken it was contended that the evidence given by him at the trial was improperly admitted, because it had been given under the protection of the Canada Evidence Act, and this objection was held good and the accused freed. It was thought justice had not been done, because the accused, Kruschkovski, was an admitted perjurer, and, while, in the opinion of counsel for the Crown, the perjury that he really committed was at the trial, as a result of which the two persons accused were liberated, and no person was punished for the death of the two men killed, yet the perjury, so far as his admission was concerned, was upon the coroner's inquest and preliminary hearing, and it seemed strange that the accused should go unpunished. There could be very many cases arise of the same character as the Kruschkovski case, and at the present time there is under consideration a case where a witness on a civil action swore to a certain state of facts, and has since sworn that what he did swear on the first occasion was false. If he was given the benefit of the Canada Evidence Act as it now stands, in connection with the evidence so given by him on the second occasion, such evidence cannot be used against him, and it would be difficult to convict him of perjury. I am of the opinion that the proposed amendment is a good one, and that it will not work any injustice against any person but will assist in convicting persons who, on their own admission, commit perjury.

In reference to section 1 of Bill W, I have no very decided opinion on this. Theoretically, it may be all right in that the judge is supposed to be exercising a judicial function, and following the matter along very closely as between the Crown and the prisoner, and will make no comment on the failure of the accused to testify, unless the circumstances warrant it. Under the present practice, indirect comment is made by both counsel for the Crown and by the presiding judge at times when it is drawn to the attention of the jury that the evidence given for the prosecution has not been contradicted. Such statement is within the law. Of course, some of the Judges, at times, may place a matter fully as strongly against the accused as counsel for the Crown. I have had no experience in connection with the point in question, and have not given it a great deal of consideration, and cannot be of any material assistance. The cases on the English Act may afford some light on the matter.

In regard to section 2 of Bill W, I am opposed to the proposed change, and am of the opinion that, if the accused is called, he should be liable to be cross-examined as to former convictions, and I think the present state of the law as to this is very salutary, and that it would be a great mistake to make the change. If any person is to be protected from cross-examination as to convictions, it should be a witness other than the accused, unless such witness is, apparently, an accomplice of the accused, because at times a witness, who has no connection with the case in question is unnecessarily cross-examined as to some conviction of his which has no bearing on the case whatsoever. It seems to me that the proposed amendment would be a mistake. The English Act should not be followed merely because of the English enactment, but there should be good compelling reasons for the suggested change being made.

I have the honour to be, sir,

Your obedient servant,

(Signed) M. DINGWALL,

Acting Deputy Attorney General.

DISTRICT COURT, SASKATCHEWAN

THE COURT HOUSE,

REGINA, SASK., September 17, 1925.

SIR,—I regret that absence on vacation has delayed my reply to your favour of the 29th June last, respecting Bill W, and Bill 27 amending The Canada Evidence Act.

I would now say respecting Bill 27, that the object of the original section undoubtedly is to secure truthful evidence, and to gain that evidence the section assured the witness of freedom from any prosecution providing that only he be truthful on that explicit occasion. The amendment proposed weakens the strength of the inducement hitherto held out, and therefore to that extent defeats the object of the section, which is to get the truth on that particular occasion. Under the proposed amendment the witness if he is truthful, may expose himself to prosecution for perjury committed on some other occasion. If he is astute and not fond of adventure and not too burdened with principle as we may assume, he may think it safer to withhold the truth and adhere to the lie that he formerly told and thus defeat the entire purpose of the section. I do not see why any exceptions should be made to the general principle that if the witness gives truthful testimony he is protected in so doing and cannot get into trouble thereby; and that the only way in which he can get into trouble is by swearing falsely in the particular case at point.

Respecting Bill W, British precedents are generally good to follow and one would not wish to raise very much objection. On the merits, however, the changes proposed do not appeal to me.

As to the matter of comment the accused originally was not permitted to testify. It was felt that this was not fair to him or in the interest of justice. It was, therefore, made possible for him to testify, but the old fundamental principle that he would not be required to incriminate himself was carefully observed, because it was provided that if he testify it would be entirely his own voluntary act. Further to secure that it would be his own voluntary act and to leave him perfectly free to testify or not as he might see fit, it was provided that his failure to testify should not be a matter of comment before the jury. The amendment proposed is an infringement upon that principle. Perhaps not so serious as permitting counsel to comment, and yet possibly even more serious. It is a privilege that might be used wisely and well by some judges and abused by others. I do not see why there should be any departure from the principle that the act of the prisoner if he testifies is to be entirely voluntary, and that no pressure of any kind is to be placed upon him which might induce him to decide one way or another. Unless we are to depart from fundamental principles, the accused should not be placed where he must run the risk of incriminating himself, or subject himself to adverse comment by any one before his case goes to the jury.

Respecting section 2 of the Bill, I would say that the accused is not bound to testify, but if he decides to enter the box and become a witness, it seems to me, that he should do so under the same terms as any other witness. Surely it is no less vital to test out the accused as a witness by reference to his past record, than it is to test out other witnesses. One would think that it is even a little more vital to so test out the accused. Apart from that I am not in favour of complicating our rules and statutes with more confusing exceptions and sub-exceptions than are necessary. It seems to me that a broad adherence to general principle is more desirable. In the present case it is proposed to make the accused an exception to the general rule respecting witnesses, and immediately that is done three sub-exceptions are grafted on as cases in which he reverts back to the original rule. All this is confusing and difficult to keep track of, and increases the difficulties of barristers who may not be constantly in the criminal court, and of judges who are not too frequently administering the criminal law. Such rules may even go by the board at times, because of failure to remember all the fine discriminations or to correctly apply the refinements to the particular testimony in hand. I would say that if the accused becomes a witness, he should become subject to the usual rules, and that there is no need that the proposed variations should be made in his favour.

In compliance with your request I have expressed hastily my opinion and if it should be of any service I should be very glad.

Sincerely yours,

(Signed) J. W. HANNON,
J.D.C.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada,
Ottawa, Ont.

I quite approve of the contents of this letter written by His Honour Judge Hannon.

(Signed) J. T. BROWN,
C.J.K.B.

REGINA, Sept. 18, 1925.

Moosomin, Sask., September 8, 1925.

A. H. Hinds, Esq.,
Chief Clerk of Committees,
The Senate, Ottawa.

Dear Sir,—I have charge as District Court Judge of not only Moosomin Judicial District to which I was originally appointed, but also for a good many years of the judicial district of Melville. I have before me, directed to me at Melville, your letter of the 29th June last with copies of Bill W (introduced in the Senate) and Bill 27 (introduced in the House of Commons) being Bills to amend the law with regard to evidence at the trial of persons charged with criminal offences.

I am not sure whether I answered a similar letter sent to me at Moosomin, or whether I got such a letter then, but in case I have not already replied, I wish to say, that in my opinion and from my experience as a judge of nearly eighteen years, not to speak of earlier experience as an advocate, that I think the proposed amendment in both Bills good, and are in the interest of better administration of justice in such cases.

I therefore express my approval of both Bills more especially Bill W, I presume it is not necessary to go into any reason for the opinion here.

Yours very truly,

(Signed) A. GRAY FARRELL.

District Court, Saskatchewan,

Wynyard, Sask., August 5, 1925.

A. H. Hinds, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa.

Sir,—*Re* Bill W, An Act to amend the Canada Evidence Act and Bill 27, An Act to amend the Canada Evidence Act.

In reply to your circular letter dated the 29th June last, I have the honour to state that I am entirely in favour of the change proposed by Bill 27, but that Bill W does not greatly appeal to me.

I have the honour to be, sir,

Your obedient servant,

(Signed) C. H. BELL,
D.C.J.

Arcola, Sask., August 6, 1925.

A. H. Hinds, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa.

Sir,—

Re Bill W, An Act to amend The Canada Evidence Act as regards the evidence of persons charged with offences; and re Bill 27, An Act to amend The Canada Evidence Act.

I have the honour in compliance with the request of the Special Committee of the Senate, communicated by your letter of 29th June, 1925, to enclose my opinion on each of the amendments proposed by the above Bills.

The other amendment, however, does not approve itself to my judgment. My experience in over twenty years on the Bench, has satisfied me that these supposed safeguards for persons charged with crime seldom benefit an innocent man but frequently prevent a guilty person from being convicted and therefore are not in the interests of justice. I see no reason why an accused person if he elects to become a witness should be treated otherwise than any other witness, it being left to the judge, of course, to indicate to the Jury, when there is one, what is the exact bearing such evidence has on the case.

Yours truly,

(Signed) HORACE HARVEY,
C.J.A.

DISTRICT COURT,

CALGARY, July 20, 1925.

SIR,—

Re Bill W, An Act to amend the Canada Evidence Act as regards the evidence of persons charged with offences, and Bill 27, An Act to amend the Canada Evidence Act.

I have the honour to acknowledge your letter of the 29th June, enclosing copies of the above Bills, which has not been acknowledged earlier owing to vacation.

After considering the Bills in question, they appear to me to contain amendments which will be found very convenient and desirable in practice.

Your obedient servant,

(Signed) W. ROLAND WINTER.
J.D.C.

A. H. HINDS,
Chief Clerk of Committees,
Ottawa.

DISTRICT COURT,

EDMONTON, September 16, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa, Canada.

DEAR SIR,—Your letter of the 29th June has remained unanswered as I felt some diffidence in advancing my views on this very important question.

However I do not wish to be guilty of any act of discourtesy, and I therefore wish to state my views in order that I may not be taken to be lacking or remiss.

My conviction for some years past is that the law as it now stands as to the admissibility of evidence in criminal matters is unfair. Especially do I think that an accused person, taking the stand in his own behalf, should not be com-

pelled to answer any question as to former convictions until the question of his guilt on the charge for which he is being tried is determined and that all such evidence should be excluded until after the verdict. I feel very strongly too on the matter of a judge conferring with the police officers and others as to the criminal record or reputation of a person who is awaiting sentence and am strongly of opinion that all such matters should be brought up in open court and in the presence of the accused, just in the same way that any other evidence must be given. As to persons who are mere witnesses it seems to me a different rule could be applied. In the case of accused persons, I do not see how it could fail in many cases, if not in most cases, to subconsciously prejudice the Court to have evidence as to previous convictions put in evidence before verdict.

As to the other proposed changes as set out in Bills 27 and "W," enclosed in your letter, I can see no ground for criticism.

Yours sincerely,
(Signed) J. L. CRAWFORD.

DISTRICT COURT

EDMONTON, December 26, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada,
Ottawa.

DEAR SIR:

Re Bill W, and Bill 27, Acts to Amend the Canada Evidence Act

In reply to your request for my views on the above proposed Bills I may say that I do not think that the Bills should be passed. I find that the present law is working out well and have heard no complaints whatever against it.

I am,
Yours truly
(Signed) H. C. TAYLOR,
Judge, District Court, Edmonton.

ATTORNEY GENERAL, PROVINCE OF BRITISH COLUMBIA

VICTORIA, August 1, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees of the Senate,
Ottawa.

DEAR SIR,—

Re *Bill W, and Act to amend the Canada Evidence Act as regards the evidence of persons charged with offences*

I have given this Bill careful consideration and have consulted various prosecuting counsel as well as several criminal lawyers in the matter, and as regards section 2 of the Bill, containing a proposed amendment to section 12 of the Canada Evidence Act, opinion as a unit in this province is in opposition to the proposed amendment. Personally I share in this opinion. I do not see

why an accused who voluntarily goes into the witness box should not in order to test his credibility be asked as to previous convictions.

As to section 1 of the Bill, containing a proposed amendment to section 4 (5) of the Act, opinion is more divided, but the majority of those I have consulted is unfavourable to this amendment. Personally I share this opinion also. I do not see that the fact that a prisoner refrains from going into the box should be made the subject of comment by either court or counsel.

I herewith forward you letters received from prosecuting counsel in the city of Vancouver.

I have the honour to be, sir,

Your obedient servant,

(Signed) WM. D. CARTER,
Deputy Attorney General.

922 STANDARD BANK BUILDING,

VANCOUVER, B.C., July 25, 1925.

W. D. CARTER, Esq., K.C.,
Deputy Attorney General,
Victoria, B.C.

DEAR MR. CARTER,—I have your letter of the 24th instant, with regard to the proposed amendments to the "Canada Evidence Act". I would favour the first amendment, that is the provision allowing the judge to comment to the jury on the fact that the accused has not gone into the witness box. Personally, I do not see why there should be any objection to Crown counsel commenting on the point. The jury know perfectly well that the accused has not given evidence and no doubt comment on it themselves in discussing the case before arriving at their verdict, and if they are entitled to do so, and they cannot be prevented from doing so, then I think it is only right that the judge should be allowed to comment on the fact so as to put it to the jury in the proper light.

I would not favour the proposed amendment to section 12. This simply means that any witness other than the accused person can be cross-examined upon his previous record. It seems to me that if anyone should be cross-examined on his previous record it is the person who stands accused of a crime and who goes into the witness box in his own defence.

Yours truly,

(Signed) H. S. WOOD,
Crown Prosecutor.

McKAY & ORR,
BARRISTERS &C.,
VANCOUVER, B.C., July 25, 1925.

W. D. CARTER, Esq., K.C.,
Deputy Attorney General,
Victoria, B.C.

DEAR MR. CARTER,—I acknowledge receipt of your letter of yesterday enclosing the proposed Bill to amend The Canada Evidence Act as regards

the evidence of prisoners charged with offences. I am not in favour of either of the proposed amendments. As to number (1) I think this is a safeguard for the accused the way the existing law stands and it should not be changed. If the judge comments on the fact that the prisoner or his wife does not testify the jury is very apt to convict on that fact alone. Neither am I in favour of number (2). If a prisoner goes into the box I do not see why the fact that he has convictions against him should not be brought out for the purpose of showing that his evidence is not to be relied on.

Yours very truly,

(Signed) W. M. McKAY,
City Prosecutor.

THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA

KAMLOOPS, B.C., July 7, 1925.

The Chief Clerk of Committees of the Senate,
Ottawa.

DEAR SIR,—

Re Canada Evidence Act

Replying to your circular letter of the 29th ult. I beg to say that I entirely agree with the justice and propriety of section 1 of Hon. Mr. McMeans' proposed Bill to amend the Canada Evidence Act, which seeks to repeal subsection 5 of section 4, cap. 145, R.S.C., 1906, and substitute clause in lieu thereof.

Comment should be allowed by the judge but not by the counsel.

I, however, disapprove of section 2 in his proposed Bill which seeks to repeal section 12 of the said Act and to substitute another clause in harmony with the English Evidence Act. *I think our present section is much to be preferred to the English section,* it having been followed for many years in Canada, and having worked out the ends of justice very satisfactorily. Such changes should not be hurriedly made in my opinion. Our section is a distinct aid to justice under the wise and equitable control of our judges. Our Crown prosecutors also comport themselves as fair gentlemen, and do not overstrain this present section. Where a professional crook enters the witness box it is quite in the ends of justice that he should be questioned as our section permits.

Yours faithfully,

(Signed) JOHN DONALD SWANSON,
County Court Judge.

GRAND FORKS, July 8, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate, Ottawa.

SIR,—I have your letter of the 29th ultimo enclosing proposed amendments *re* Bill W and Bill 27.

I am in favour of amendment to section 12 of the Canada Evidence Act but not in favour of the amendment allowing the judge to comment as proposed.

I am emphatically in favour of the amendment proposed by Bill 27.

I have the honour to be, sir,
Your obedient servant,
(Signed) J. A. BROWN.

GOVERNMENT OF THE PROVINCE OF SASKATCHEWAN,
DEPARTMENT OF THE ATTORNEY GENERAL,
REGINA, July 23, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa.

SIR,—I have the honour to acknowledge the receipt of your letter of the 29th ultimo, addressed to the Honourable Attorney General, which has been referred to me for answer, relative to two proposed Bills to amend the Canada Evidence Act.

In regard to Bill 27, it would appear that this Bill had its origin in the suggestion of this department as a result of Rex. v. Kruschkovski, (1925) 1 W.W.R. 426. The facts in that case were that two persons were killed in a row at or following a wedding feast. As a result of the coroner's inquest, two persons were charged with murder, upon the preliminary hearing in such case, and at the coroner's inquest, as a result of which such charge was laid, Kruschkovski swore to a certain state of facts. When it got to trial he swore to a different state of facts, and that he had sworn falsely in testifying at the coroner's inquest and preliminary hearing. He was subsequently charged with perjury as to what he swore at the coroner's inquest and preliminary hearing, and the evidence given by him at the trial was put in as proof of the falsity of the statements made by him at the coroner's inquest and preliminary hearing. No objection to the admission of this evidence was raised by his counsel, of whom there were two, and he was thereupon convicted of perjury. On an appeal taken it was contended that the evidence given by him at the trial was improperly admitted, because it had been given under the protection of the Canada Evidence Act, and this objection was held good and the accused freed. It was thought justice had not been done, because the accused, Kruschkovski, was an admitted perjurer, and, while, in the opinion of counsel for the Crown, the perjury that he really committed was at the trial, as a result of which the two persons accused were liberated, and no person was punished for the death of the two men killed, yet the perjury, so far as his admission was concerned, was upon the coroner's inquest and preliminary hearing, and it seemed strange that the accused should go unpunished. There could be very many cases arise of the same character as the Kruschkovski case, and at the present time there is under consideration a case where a witness on a civil action swore to a certain state of facts, and has since sworn that what he did swear on the first occasion was false. If he was given the benefit of the Canada Evidence Act as it now stands, in connection with the evidence so given by him on the second occasion, such evidence cannot be used against him, and it would be difficult to convict him of perjury. I am of the opinion that the proposed amendment is a good one, and that it will not work any injustice against any person but will assist in convicting persons who, on their own admission, commit perjury.

In reference to section 1 of Bill W, I have no very decided opinion on this. Theoretically, it may be all right in that the judge is supposed to be exercising a judicial function, and following the matter along very closely as between the Crown and the prisoner, and will make no comment on the failure of the accused to testify, unless the circumstances warrant it. Under the present practice, indirect comment is made by both counsel for the Crown and by the presiding judge at times when it is drawn to the attention of the jury that the evidence given for the prosecution has not been contradicted. Such statement is within the law. Of course, some of the Judges, at times, may place a matter fully as strongly against the accused as counsel for the Crown. I have had no experience in connection with the point in question, and have not given it a great deal of consideration, and cannot be of any material assistance. The cases on the English Act may afford some light on the matter.

In regard to section 2 of Bill W, I am opposed to the proposed change, and am of the opinion that, if the accused is called, he should be liable to be cross-examined as to former convictions, and I think the present state of the law as to this is very salutary, and that it would be a great mistake to make the change. If any person is to be protected from cross-examination as to convictions, it should be a witness other than the accused, unless such witness is, apparently, an accomplice of the accused, because at times a witness, who has no connection with the case in question is unnecessarily cross-examined as to some conviction of his which has no bearing on the case whatsoever. It seems to me that the proposed amendment would be a mistake. The English Act should not be followed merely because of the English enactment, but there should be good compelling reasons for the suggested change being made.

I have the honour to be, sir,

Your obedient servant,

(Signed) M. DINGWALL,

Acting Deputy Attorney General.

DISTRICT COURT, SASKATCHEWAN

THE COURT HOUSE,

REGINA, SASK., September 17, 1925.

SIR,—I regret that absence on vacation has delayed my reply to your favour of the 29th June last, respecting Bill W, and Bill 27 amending The Canada Evidence Act.

I would now say respecting Bill 27, that the object of the original section undoubtedly is to secure truthful evidence, and to gain that evidence the section assured the witness of freedom from any prosecution providing that only he be truthful on that explicit occasion. The amendment proposed weakens the strength of the inducement hitherto held out, and therefore to that extent defeats the object of the section, which is to get the truth on that particular occasion. Under the proposed amendment the witness if he is truthful, may expose himself to prosecution for perjury committed on some other occasion. If he is astute and not fond of adventure and not too burdened with principle as we may assume, he may think it safer to withhold the truth and adhere to the lie that he formerly told and thus defeat the entire purpose of the section. I do not see why any exceptions should be made to the general principle that if the witness gives truthful testimony he is protected in so doing and cannot get into trouble thereby; and that the only way in which he can get into trouble is by swearing falsely in the particular case at point.

Respecting Bill W, British precedents are generally good to follow and one would not wish to raise very much objection. On the merits, however, the changes proposed do not appeal to me.

As to the matter of comment the accused originally was not permitted to testify. It was felt that this was not fair to him or in the interest of justice. It was, therefore, made possible for him to testify, but the old fundamental principle that he would not be required to incriminate himself was carefully observed, because it was provided that if he testify it would be entirely his own voluntary act. Further to secure that it would be his own voluntary act and to leave him perfectly free to testify or not as he might see fit, it was provided that his failure to testify should not be a matter of comment before the jury. The amendment proposed is an infringement upon that principle. Perhaps not so serious as permitting counsel to comment, and yet possibly even more serious. It is a privilege that might be used wisely and well by some judges and abused by others. I do not see why there should be any departure from the principle that the act of the prisoner if he testifies is to be entirely voluntary, and that no pressure of any kind is to be placed upon him which might induce him to decide one way or another. Unless we are to depart from fundamental principles, the accused should not be placed where he must run the risk of incriminating himself, or subject himself to adverse comment by any one before his case goes to the jury.

Respecting section 2 of the Bill, I would say that the accused is not bound to testify, but if he decides to enter the box and become a witness, it seems to me, that he should do so under the same terms as any other witness. Surely it is no less vital to test out the accused as a witness by reference to his past record, than it is to test out other witnesses. One would think that it is even a little more vital to so test out the accused. Apart from that I am not in favour of complicating our rules and statutes with more confusing exceptions and sub-exceptions than are necessary. It seems to me that a broad adherence to general principle is more desirable. In the present case it is proposed to make the accused an exception to the general rule respecting witnesses, and immediately that is done three sub-exceptions are grafted on as cases in which he reverts back to the original rule. All this is confusing and difficult to keep track of, and increases the difficulties of barristers who may not be constantly in the criminal court, and of judges who are not too frequently administering the criminal law. Such rules may even go by the board at times, because of failure to remember all the fine discriminations or to correctly apply the refinements to the particular testimony in hand. I would say that if the accused becomes a witness, he should become subject to the usual rules, and that there is no need that the proposed variations should be made in his favour.

In compliance with your request I have expressed hastily my opinion and if it should be of any service I should be very glad.

Sincerely yours,

(Signed) J. W. HANNON,
J.D.C.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada,
Ottawa, Ont.

I quite approve of the contents of this letter written by His Honour Judge Hannon.

(Signed) J. T. BROWN,
C.J.K.B.

REGINA, Sept. 18, 1925.

MOOSOMIN, SASK., September 8, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate, Ottawa.

DEAR SIR,—I have charge as District Court Judge of not only Moosomin Judicial District to which I was originally appointed, but also for a good many years of the judicial district of Melville. I have before me, directed to me at Melville, your letter of the 29th June last with copies of Bill W (introduced in the Senate) and Bill 27 (introduced in the House of Commons) being Bills to amend the law with regard to evidence at the trial of persons charged with criminal offences.

I am not sure whether I answered a similar letter sent to me at Moosomin, or whether I got such a letter then, but in case I have not already replied, I wish to say, that in my opinion and from my experience as a judge of nearly eighteen years, not to speak of earlier experience as an advocate, that I think the proposed amendment in both Bills good, and are in the interest of better administration of justice in such cases.

I therefore express my approval of both Bills more especially Bill W, I presume it is not necessary to go into any reason for the opinion here.

Yours very truly,

(Signed) A. GRAY FARRELL.

DISTRICT COURT, SASKATCHEWAN,

WYNYARD, SASK., August 5, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa.

SIR,—*Re* Bill W, An Act to amend the Canada Evidence Act and Bill 27, An Act to amend the Canada Evidence Act.

In reply to your circular letter dated the 29th June last, I have the honour to state that I am entirely in favour of the change proposed by Bill 27, but that Bill W does not greatly appeal to me.

I have the honour to be, sir,

Your obedient servant,

(Signed) C. H. BELL,
D.C.J.

ARCOLA, SASK., August 6, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa.

SIR,—

Re Bill W, An Act to amend The Canada Evidence Act as regards the evidence of persons charged with offences; and re Bill 27, An Act to amend The Canada Evidence Act.

I have the honour in compliance with the request of the Special Committee of the Senate, communicated by your letter of 29th June, 1925, to enclose my opinion on each of the amendments proposed by the above Bills.

Bill W

As to the proposed amendment to subsection 5 of section 4 of The Canada Evidence Act, I am not satisfied that the proposed amendment is in the interests of justice. It might become subversive of truth, humanity and confidence in the marital relation: Of truth because of fear that silence on her part might be put to a jury as evidence of her husband's guilt, would drive a truthful woman to lie openly to save him. Of humanity, because the reason for the present law is a humane one, namely that an accused person should not run the risk of conviction merely because he was not able to give evidence under oath, as was the case before the amendment of 56 Victoria. It makes the accused or the wife or husband of the accused a competent witness on behalf of the accused. The proposed change would soon practically make the person charged, wife or husband, compellable witnesses. The Amendment as drafted uses the word "may" but in practice I fear that many judges and a great many more police magistrates would soon construe the word as "shall". The principle of the criminal law is that the Crown shall make out a case against the accused beyond the reasonable doubt of a reasonable man. The result of the proposed amendment would be that silence of the accused, wife or husband, would become evidence for the Crown. It would be contrary to decency and confidence in the marriage relation that a man or woman should be convicted because of silence of husband or wife. As the Act originally stood, there was a difference of judicial opinion as to whether the wife was a compellable witness for the Crown. This difference of opinion was emphasized in the case of Gosselin v. The King, 33 S.C.R., 255. Three of five judges of the Supreme Court of Canada held the wife to be a compellable witness against her husband and in that case the husband was convicted of murder and sentenced to death partly on the evidence of the wife compelled by the Crown to testify and who slightly contradicted the husband as to what took place during the marital relation. The remarks of Girouard and Mills, JJ. have, I think, bearing on this proposed amendment. The result was that the law was amended as it now is in order to rectify conditions which are so clearly shown by the judgment of Mr. Justice Mills to be abhorrent to the British sense of justice. I see no reason why similarly detestable conditions should be introduced. There are many reasons besides guilt of the accused which may deter counsel from putting him in the witness box. There are many more reasons why the accused or his counsel should be reluctant to place the wife in the witness box on his behalf. It is repugnant to one's sense of justice that her failure to testify should become evidence for the Crown.

As to the proposed amendment of section 12 of The Canada Evidence Act, I have no objection to raise. It is as sound in principle as the preceding proposal is defective, and I unhesitatingly indorse it.

Bill 27

As to the proposed amendment of subsection 2 of section 5 of The Canada Evidence Act, I am unable to regard the proposal with favour. For the law as it stands there is reason. The depositions of a witness can always be used against him on prosecution for perjury in giving the evidence disclosed by the depositions and there is no sound principle whereby the depositions should be excluded on a prosecution for perjury in giving the evidence simply because incriminating answers are contained therein. It is otherwise upon a prosecution for perjury committed at another time and place. On principle there is no sound distinction between a charge of perjury otherwise than in giving such evidence, and a charge of murder, theft or other crime; for instance, if a witness be asked "Did John Smith tell you that he intended to break into the house of Jones?", the answer "Yes" could not be used in evidence against the witness on a charge of being accessory to the burglary. Or if a witness were asked "Did you have a

conversation with Smith"? "Did he admit to you that he intended to rob the bank?", "Did you actually drive him in your car to the bank?" and the witness answers "Yes", this answer could not be used against the witness in a prosecution for murder. Smith having actually killed the teller of the bank in the course of the robbery; provided, of course, that the witness had first objected to answer on the ground that the evidence might incriminate him; but by the proposed amendment, if a witness be asked "Did you on the 24th June, 1925, before Andrews and Booth, justices of the peace, at Markinch, say so and so?" and the witness answers "Yes" and he is then asked "In view of what you now tell us, is that true?" and he answers "No", these answers are to be used against him in a prosecution for perjury committed before Andrews and Booth, Justices, notwithstanding the objection of the witness that his speaking the truth might incriminate him.

I can find no distinction in principle between perjury otherwise than in giving such evidence, and charges of murder, rape, arson or theft. The general principle of the law, as I understand it, is that a man shall not be compelled to convict himself. If Parliament wishes to subvert this principle, it is within its power but I cannot advise an amendment which is an initial effort to do so.

I am further of the opinion that the protection given by the present law is beneficial to the elucidation of truth and contributes to justice.

I have the honour to be, sir,

Your obedient servant,

(Signed) REGINALD RIMMER,
Judge of the District Court,
Judicial District of Arcola, Sask.

DISTRICT COURT, SASKATCHEWAN,

YORKTON, SASK., July 9, 1925.

Chief Clerk of Committees,
Senate of Canada, Ottawa, Canada.

SIR,—

Re Bill "W" Canada Evidence Act

I have the honour to acknowledge receipt of yours of the 29th June, with reference to this matter, and in reply would say that from your communication I judge that the Senate Committee desires the views of judges as to the effect of the present enactments in criminal matters.

During the period in which I have been judge of this district very few criminal matters have come before me, and I have tried no case in which any one of the questions referred to were in question, and therefore, I am not in a position to give any opinion on the matter as a result of judicial experience, and while I have my personal views, derived from a considerable period of practice in Criminal law, yet I do not imagine that the Senate desires personal views in matters of this kind.

I have the honour to be, sir,

Yours, etc.,

(Signed) ALEXANDER ROSS,
J.D.C.

DISTRICT COURT, SASKATCHEWAN,

KINDERSLEY, SASK., July 17, 1925.

SIR,—I duly received your letter of June 29th enclosing a copy of Bill W, and Bill 27, containing proposed amendments to The Canada Evidence Act, and requesting my opinion on the proposed amendments.

I have read and considered the proposed amendments, and I do not see the necessity for the changes proposed.

I have the honour to be, sir,

Your obedient servant,

(Signed) J. O. BALDWIN,
Judge of the District Court.

Mr. A. H. HINDS,
Chief Clerk of Committees of
The Senate of Canada, Ottawa, Canada.

YUKON TERRITORIAL COURT,

DAWSON, July 17, 1925.

A. H. HINDS, Esq.,
Chief Clerk of Committees,
The Senate of Canada, Ottawa.

SIR,—

Re Bill W, An Act to amend the Canada Evidence Act as regards the evidence of persons charged with offences, and Bill 27, An Act to amend the Canada Evidence Act.

Your favour of the 29th ultimo enclosing copies of the above Bills, with the request that I, among others, give my views in regard to the proposed amendments, was duly received.

In Bill No. 27, I am in favour of the amendment suggested in subsection 2 of section 5, and of the opinion that such amendment would serve a good purpose.

In Bill W, I am not in favour of the amendment to subsection 5 of section 4 of the Canada Evidence Act, as I do not think it wise to give latitude to a judge to comment on the fact that the person charged, or the wife or husband of such person, has failed to testify, when such persons are given the privilege to refuse to so testify.

Such discretion, no doubt, would be properly exercised by many judges in case they decided to make the matter a subject of comment. In other cases the discretion might not be so wisely exercised, and personally I am of the opinion that the wiser course to pursue would be to allow the section to remain as it is at present.

I have the honour to be, sir,

Your obedient servant,

(Signed) C. D. MACAULEY,
Judge of the Territorial Court, Yukon Territory.

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