# *HOLLINGTON v. HEWTHORN* IN CANADA

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It is now nearly fifteen years since the English Court of Appeal, in *Hollington v. Hewthorn*,[1] purported to re-establish, as a basic evidentiary principle, that a previous conviction is no proof whatsoever of the facts adjudicated upon when these same facts come in question in a subsequent civil action against the former accused. This article is an attempt to assess the current position in Canada of this decision, and to show that the principle enunciated therein is of dubious origin, resting on foundations as weak in law as in logical and social desirability.

While this subject is well treated in the leading textbooks, and while it has received exhaustive attention elsewhere, notably by Cowen and Carter in their Essays in the Law of Evidence,[2] the proposition that a finding of fact that can hang a man is of no value in determining his liability to pay a few thousand dollars is so startling that it can easily bear re-examination. In addition, Canadian courts, whether from disinclination or otherwise, have given the problem very much less consideration than it deserves, and subsequent Canadian judicial acceptance of the *Hollington* rule, especially in recent years, has brought us very close indeed to a point from which it will be impossible to retreat other than by legislative enactment. It is surely, then, not unreasonable that we should consider very carefully that which is now poised on the verge of legal dogma.

In considering this problem we shall attempt first to counter the arguments advanced in favour of the exclusionary rule, notably by Goddard L.J. (now L.C.J.) in *Hollington v. Hewthorn*; secondly, to present the Canadian reaction to the problem, both before and after the *Hollington* decision; and, lastly, to advance the more cogent of the many arguments in favour of the admission of such evidence.

## I

What then were the reasons given by the Court of Appeal in *Hollington v. Hewthorn* for the exclusion of conviction evidence? The major reason given is that the conviction is no more than opinion evidence. Dean Wright argues that since the opinion "rule" itself has been immune from neither criticism nor exception, it should not now be invoked as justification for another rule, the effect of which is to exclude relevant evidence.[3] Indeed, the opinion

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[1] *Hollington v. F. Hewthorn and Co. Ltd. et al.*, [1943] 1 K.B. 587, [1943] 2 All E.R. 35.

[2] Cowen and Carter, Essays in the Law of Evidence. (1st ed., 1956).

[3] C. A. Wright, (1943), 21 Can. Bar Rev. 653 at p. 658. Wigmore, without elaboration, has stated that the opinion rule is not "intrinsically applicable" in this context; presumably because judgments in a criminal case are generally treated as findings of fact. Wigmore, A Treatise on the Anglo-American System of Evidence, (3rd ed., 1940), s. 1671a.

rule has been so reduced by exceptions, both common law and statutory, that it has been laid down in the *Model Code of Evidence* that, subject to a few exceptions, all opinion evidence is admissible.[4] To the extent that the *Model Code* approximates the actual position in modern Canadian law the invocation of the opinion "rule" is a very dubious justification for the exclusion of conviction evidence from a subsequent civil proceeding. Yet, having arrived at the conclusion that a conviction was mere opinion, Goddard L.J., speaking for the Court of Appeal, thought it unreasonable that "more weight ought to be given to a conviction or a decree *nisi* than to any other judgment." However, the law does give special weight to convictions: by the Evidence Acts,[5] for instance, it is provided that a witness may be questioned as to whether he has been previously convicted, and, if he deny the fact, it may be proven. And, as Dr. Goodhart states:

> . . . if a conviction does not tend to prove anything except that the person has been convicted then it is difficult to justify the admission of such a question, much less to explain the direct encouragement given to it by statute.[6]

Indeed, so patent is the weakness of the argument that conviction evidence should be excluded as "opinion", that we can say with Dean Wright:

> To state that a civilized community is willing to see a man hanged on such a finding of fact but to treat such finding as a mere opinion in a subsequent case involving a matter of dollars and cents, is a reflection on the administration of justice, as well as an offence to common sense.[7]

A second reason given by Goddard L.J. for the exclusion of conviction evidence was that it is hearsay. Phipson regards this reason as invalid on the ground that if this were the only objection, then the convicting judge could be called to testify at the civil trial.[8] The proponents of the *Hollington* decision have never given the slightest indication that they would allow this.

II

In *Hollington* v. *Hewthorn*, the trial judge had taken refuge in the maxim that *res inter alios acta alteri nocere non debet.*[9] However, in the Court of Appeal, Goddard L.J. deprecated reliance on the maxim. His Lordship said:

> It is difficult for a layman to understand why it is that if A prosecutes B, say, for doing him grevious bodily harm, and subsequently brings an action against him for damages for assault, this doctrine should apply so that he cannot use the conviction as proof that B did assault him. The "*alios*" can only be the crown who, in the case of what is commonly called a private prosecution, is no more than the nominal prosecutor. It is for this reason that we have stressed the question of relevancy.[10]

As Cowen and Carter have pointed out, it is not only to the layman that this rule of exclusion does not commend itself of comprehension.[11] However

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[4] American Law Institute, Model Code of Evidence, 1942, rule 401.

[5] The Canada Evidence Act, R.S.C., 1952, c. 307, s. 12: The Alberta Evidence Act, R.S.A. 1942 c. 106, s. 25.

[6] Goodhart, (1943), 59 L.Q.R. 299 at p. 301.

[7] Wright, *loc. cit., supra.*

[8] Phipson's Manual of Evidence, (7th ed., Burrows, 1950), at p. 177.

[9] *Supra*, footnote 1, at p. 596

[10] *Ibid.*, at p. 596.

[11] *Supra*, footnote 2, at p. 173

there is an even better reason that the one given by Goddard L.J. why the maxim is an unsound justification for exclusion, and that is that the maxim has reference only to the law of estoppel (conclusiveness) and is wholly irrelevant to the question of admissibility (evidentiary effect).[12] Yet it might be noted that even if we allow the maxim to operate in this area of admissibility, to which it most emphatically does not belong, there are many cases such as *Hollington* v. *Hewthorn* itself in which the maxim, by its very definition, has no application, there being quite simply no *alteri nocere*, since the litigant against whom the conviction is tendered is himself the convicted person. Nevertheless, there are cases in which conviction evidence is tendered where there are *alteri nocere*. Thus, it was said in *Shaw* v. *Glen Falls Insurance Co.*,[13] where, in an action between A and B, evidence of the conviction of C was tendered as proof of the facts therein recited against B, that the admission of the conviction would work a hardship against B, since he was not a party to the action between the Crown and C. This hardship is said to lie in the fact that:

> It would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous; and therefore . . . the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers.[14]

From this quotation it is apparent that even an attempt to sustain the maxim on the ground of hardship is not possible without resort to the language of estoppel. It might also be pointed out that the so-called "hardship" complained of in the above passage may be eliminated in the subsequent civil proceedings because the conviction is entered only as presumptive evidence, which may be rebutted. Furthermore, hardship is relative. There is just as much, if not more, hardship in excluding such evidence (as is indicated by the *Hollington* case itself), as in declaring it admissible. If courts are desirous of employing Latin maxims, then the maxim *omnia praesumuntur rite esse acta* is surely to be preferred.[15] This latter maxim would raise the presumption that all convictions are right, and, as such, offer at least some evidence of the facts on which they are necessarily based.

## III

In some subsequent decisions, the courts have been content to rely on *Hollington* v. *Hewthorn* without looking at the state of the law in England prior to that decision. However, some of the critics of the *Hollington* case have made such an inquiry, and their inquiry has led them to doubt Lord Goddard's statement that he founded his decision on authority.[16] Now, it is true that

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[12] *Ibid.*, at p. 182. See also Goodhart, (1926), 42 L.Q.R. 144 at p. 145.

[13] 1938 1 D.L.R. 502.

[14] Duchess of Kingston's case, (1776), 2 Sm. L. C., 13th ed. 644, per De Grey C. J. Phipson has chosen to dismiss this hardship argument thus: "This, however, though a legitimate ground for refusing conclusiveness to such judgment, seems no satisfactory reason for denying them admissibility, since it is to be remembered that the objection of *res inter alios acta* will not suffice to exclude other and less solemn acts of strangers if relevant to the issue." Phipson, Evidence, 8th ed., at p. 420.

[15] See *In the Estate of Crippen*, [1911] P. 108. See also Goodhart, *op. cit.*, *supra*, footnote 12.

[16] See *Cowen and Carter*, *supra*, footnote 2, at pp. 173-185, and at p. 191; see also Coutts (1955), 18 Mod. Law Rev., 231-238, and Goodhart, *op. cit.*, *supra*, footnote 6.

Goddard L.J. could cite many cases in which evidence of criminal convictions was rejected.[17] But, as Coutts has noted after an exhaustive analysis of the preceding authority, the reasons for the rejection of such evidence in these cases have no application today.[18] His opinion is based on three factors. Firstly, the question of conclusiveness or estoppel has been hopelessly confused with the question of admissibility. Secondly:

> Many of the earlier decisions appear to depend upon a consideration of the relative standing of the different types of courts involved. Thus, an ecclesiastical court could be bound by a conviction of felony, though, after initial support had been given to this rule of conclusiveness, the ecclesiastical courts modified it to one of admissibility, and the matrimonial courts eventually refused even to admit such evidence.[19]

Thirdly, many of the cases were founded upon rules of evidence which are no longer with us. One of these rules was the interest-disqualification rule which prevented a party giving evidence in his own behalf. Thus, where a conviction had been obtained by a party's evidence, such conviction could not be admitted as evidence in a subsequent civil proceeding because this would amount to a circumvention of the interest-disqualification rule.

After disposing of the old cases rejecting such evidence, Coutts then goes on to discuss the considerable body of judicial authority in favour of the admission of this evidence. This authority comes to the fore after the Evidence Act of 1843, which abolished the interest-disqualification rule.[20] However, it must be admitted that even after that date there are still cases disallowing or disapproving of conviction evidence. In *March* v. *March*,[21] for instance, a conviction for bigamy was barred without reasons. In *Castrique* v. *Imrie*[22] Blackburn J. went so far as to state, without reasons or authority, that:

> A judgment in an English Court is not conclusive as to anything but the point decided and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive but is not even admissible in an action on the bill, though the conviction must have proceeded on the footing that the bill was forged.[23]

It is interesting to note that this oft-quoted dictum was delivered in a case concerned exclusively with estoppel and with the conclusiveness of a foreign judgment. Again, in *Leyman* v. *Latimer*,[24] Bramwell L.J. gave the following reasons for his disapproval of conviction evidence:

> The conviction is not proof of the crime. It is *res inter alios acta* . . . The cases are rare, I am happy to say, in which there has been a wrongful conviction, but such cases have been.

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[17] *R.* v. *Warden of the Fleet*, (1699), 12 Mod. 377, at p. 339 (no reasons given). *Hillyard* v. *Grantham* (unrep.), referred to in *Brownsword* v. *Edwards*, (1751), 2 Ves. Sen. 243, at p. 246, and where the judgment of the ecclesiastical court was not admitted in subsequent proceedings in another court. Other cases are *Gibson* v. *McCarty*, (1736), Cas. t. Hard. 311, 312; *Green* v. *New River*, (1792), 4 T.R. 589, *Smith* v. *Rummens*, (1807), 1 Camp. 9, at p. 11 (interest), *R.* v. *Whiting*, (1698), 1 Salkeld 283 (interest), *Richard Blakemore and Thomas Booker* v. *The Glamorganshire Canal Co.*, (1835), 2 Cr. M. and R. 133 (obiter).

[18] Coutts, *op. cit.*, *supra*, footnote 16, at p. 225.

[19] *Ibid.*, *loc. cit.*

[20] Cowen and Carter, *op. cit.*, *supra*, footnote 2 at p. 178.

[21] (1858), 28 L. J. (P. & M.) 30.

[22] *Castrique* v. *Imrie and Tomlinson*, (1870), L. R. 4 H. L. 414.

[23] *Ibid.*, at 434.

[24] (1878), 47 L.J.Q.B. 470.

and the convicted person has been pardoned. It is right, therefore, where you charge a man, not with having been convicted of felony, but with having been a felon, that you should prove the charge which you actually make.[25]

As the argument of *res inter alios acta* has already been dealt with, it is only necessary to add that the "wrongful conviction argument is merely one of the reasons why we should not regard a conviction as conclusive."[26] One final case after 1843 in which conviction evidence was not admitted is *Yates* v. *Kyffin-Taylor*,[27] where, once again, the exclusion was based on the benign, if elementary, Latin of *res inter alios acta*.

## IV

It is now necessary to discuss some of the cases prior to *Hollington* v. *Hewthorn* which favoured the admissibility of conviction evidence. The cases prior to 1843 were few. After that year cases began to emerge, the most important being *Hill* v. *Clifford*[28]. This case, as Cowen and Carter have pointed out, was not brought to the attention of the Court in the *Hollington* case, and has been virtually forgotten.[29] In this case a judicial record, much less than a criminal conviction, was admitted by the English Court of Appeal. The General Medical Council, under the authority of the Act which gave it birth, made an order striking the Cliffords from the dental register on the ground that they had been guilty of unprofessional conduct. Prior to the order, the plaintiff had entered into a partnership agreement with the Cliffords, whereby it was provided that the agreement could be terminated if any of the partners were guilty of unprofessional conduct. An action was commenced to decide the validity of an attempt to determine the firm on the basis of the Council's ruling, and in this action the question of the admissibility of the Council's order was raised. Although it was argued that the order was *res inter alios acta*, and *Castrique* v. *Imrie*, *Leyman* v. *Latimer*, and *Yates* v. *Kyffin-Taylor* were cited to the courts, nevertheless, the Court of Appeal allowed the order in as *prima facie* evidence of the misconduct. Because of this case, Cowen and Carter has suggested, on the principle of *Young* v. *Bristol Aeroplane Co. Ltd.*[30], that the Court of Appeal and the inferior courts in England are placed at their election in deciding which of the two directly conflicting decisions should prevail.[31] In two other Court of Appeal decisions, convictions were admitted as proof of commission of the crime by the person convicted, but in both of these cases no argument was addressed to the court on the question

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[25] *Ibid.*, at pp.470-471.

[26] Moreover, it is submitted, the very fact that there are few wrongful convictions is a strong argument in favour of the worth of such evidence as proof of the facts on which it is based.

[27] 1899 W.N.141. This was a judgment in the Court of Chancery of the County Palatine of Lancaster.

[28] [1907] 2 Ch. 236; affirmed on another ground [1908] A.C. 12. Earlier cases favouring the admissibility of such evidence include *Mossam* v. *Ivy*, (1684), 10 St. Tr. 555, at p. 627, *Boyle* v. *Boyle*, (1688) 3 Mod. 164, Comb. 72, *Sir George Bromley's case*, (1793), *Wilkinson* v. *Gordon* (1824), 2 Addams 152, at p. 160.

[29] Cowen and Carter, *supra*, footnote 2, at p. 191.

[30] 1944 1 K.B. 718.

[31] Cowen and Carter, *op. cit.*, *supra*, footnote 2, at p. 191.

of admissibility.[32] Then there is the famous case of *Re Crippen*,[33] in which the whole question of the admissibility of conviction evidence was canvassed by Evans P. In this case a conviction for murder was tendered as evidence that Crippen had murdered his wife. Sir Samuel Evans P. discarded the pre-1843 cases as being decided on the basis of the interest-disqualification rule, and allowed the conviction as *prima facie* proof that Crippen was the murderer of his wife, using the maxim *omnia praesumuntur rite esse acta* as a justification for the admission of conviction evidence. The learned judge concluded that the maxim *res inter alios acta* had no application to the facts before him because there were no "*alteri nocere*", the conviction being tendered against Crippen's executrix, who stood in the same position as the deceased felon and was thus a party to the criminal proceedings. Subsequently, *Re Crippen* was followed in England in *Mash* v. *Darley*,[34] *Partington* v. *Partington and Atkinson*,[35] *O'Toole* v. *O'Toole*,[36] and *Little* v. *Little*.[37] Before concluding the discussion of the law in England prior to the *Hollington* case, mention of *Harvey* v. *R.*[38] should be made. This case was cited in *Hollington* v. *Hewthorn*, but as it was decided by the Privy Council it was not binding on the Court of Appeal. In the *Harvey* case an order of a Master in Lunacy in England reciting that the defendant was, in the opinion of the Master, a person of unsound mind though not so found by inquisition, and authorizing his wife to defend the action, was admitted as *prima facie* evidence of the mental incompetence of the defendant. In coming to this conclusion the Judicial Committee said:

> Mr. Haldane was bold enough to contend that the orders in Lunacy were not admissible in evidence in these proceedings at all . . . . The orders . . . cannot be rejected as inadmissible, or as no evidence of the truth of those facts recited in them which are essential to their validity. They are admissible as *prima facie* evidence.[39]

Having thus reviewed the judicial authority prior to *Hollington* v. *Hewthorn*, there remains to be considered a case which was almost contemporaneous therewith. The case of *General Medical Council* v. *Spackman*[40] may be urged as some authority against the *Hollington* case, although not without diffidence. Spackman, a registered medical practitioner, was found guilty of adultery in divorce proceedings in the Matrimonial Court. With this judicial record in hand, proceedings were instituted before the General Medical Council to decide whether Spackman's name should be stricken from the register. Spackman sought to introduce fresh evidence which had not been given at the divorce proceedings, but the Council refused to hear this evidence and ordered Spackman's name removed from the register. The King's Bench Division held that there had been no violation of natural justice. However, Singleton J. dissented.

[32]*Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, and *In the Estate of Hall, Hall* v. *Knight and Baxter*, [1914] P. 1.

[33]*Supra*, footnote 15, at p. 108.

[34][1914] 1 K.B. 1

[35][1925] P. 34.

[36](1926), 42 T. L. R. 245.

[37][1927] P. 224.

[38][1901] A. C. 601 (P.C.).

[39]*Ibid.*, at p. 611

[40][1943] A. C. 627.

referring, significantly, to *Partington* v. *Partington*,[41] on the ground that a previous conviction or judicial record was admissible as *prima facie* but not as conclusive evidence, and accordingly, as the General Medical Council had treated the divorce decree as conclusive, there had been a denial of natural justice. Both the Court of Appeal and the House of Lords supported the dissenting judgment of Singleton J. Although the Council is not an ordinary court and is therefore not bound to apply the ordinary rules of evidence, it was not entitled to regard the civil judgment as conclusive. From this case, it may not be overly optimistic to suggest that at least the spirit of the House of Lords' judgment is in favour of the admissibility of previous judicial records. Certainly, if any of their Lordships were much averse to the use of such records in ordinary courts, dicta to that effect would in all likelihood have appeared.[42]

## V

In Canada, recent decisions on this point have been content to follow *Hollington* v. *Hewthorn* and have almost entirely disregarded Canadian jurisprudence on the subject. A good example is *Manuel v. Manuel*,[43] where a conviction for rape was held inadmissable in subsequent divorce proceedings brought by the wife of the convicted rapist, and where the only case cited in favour of the admission of conviction evidence was *Lauritson v. Lauritson*,[44] a decision of first instance. It is most unfortunate that counsel in the *Manuel* case did not present a more impressive array of Canadian cases. As a part of this array he might have cited *Thompson v. Thompson*,[45] where a court of first instance even admitted a civil judgment, a divorce decree, as *prima facie* proof of the facts upon which the judgment was based in a subsequent proceeding between parties not the same. Another interesting case is that of *Re Noble*,[46] based on facts almost identical to those in *Re Crippen*, and where, in a well reasoned judgment, the Saskatchewan Surrogate Court chose to follow the *Crippen* decision. By far the most unusual case in this area, however, is *Re Emele*,[47]

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[41] *Supra*, footnote 35.

[42] Cowen and Carter, *supra*, footnote 2, rely strongly on the *Spackman* case as authority for their contention that conviction evidence is logically probative. The authors conclude that if Goddard L. J. defined "relevancy" as meaning probative worth when he said at p. 596 of the Hollington case, [1943] 1 K.B., that "it is relevancy that lies at the root of the objection to the admissibility of the evidence," then they "emphatically disagree." See also in this connection C. A. Wright, *op. cit., supra* footnote 3, at p. 657.

[43] (1956), 1 D.L.R. (2nd) 429.

[44] (1932), 41 O.W.N. 274.

[45] *Thompson v. Thompson and Sager*, [1948] O.W.N. 344. See, however, *Lingor v. Lingor*, [1955] 1 D.L.R. 719, and *Stevenson v. Stevenson*, (1956), 19 W.W.R. 90.

[46] *In Re Noble Estate*, [1927] 1 W.W.R. 938.

[47] [1941] 4 D.L.R. 197. This case is also interesting because one of the arguments of Goddard L. J. in the *Hollington* case was that if convictions were let in it should follow logically that acquittals should be treated similarly. But an acquittal ascertains no fact. Moreover, an acquittal may simply result from a failure of the prosecution to prove the doing of the crime beyond a reasonable doubt, which is very different from saying that the accused did not commit the crime. Bearing these reasons in mind, it would seem that acquittals should not be admitted as evidence of any kind, and even the strong policy argument, relied on in the *Emele* case, that to civilly retry the claimant for murder, with the possibility of finding her guilty thereof, would be detrimental to the interests of justice, is no adequate justification for admitting acquittals. Certainly, it is monstrous to suggest that the acquittal should be regarded as conclusive. In regard to this question, see also Coutts, *op .cit., supra*, footnote 16, at p. 240, and Goodhart, *op. cit., supra*, footnote 6, at p. 301.

which may well be the only case of its kind anywhere. Here, the court not only equated acquittals with convictions for purposes of admissibility, but regarded an acquittal for murder as conclusive. In coming to this decision the court relied on *Re Crippen*, *In Re Hall*,[48] and *Lundy* v. *Lundy*.[49] Then there is the Ontario Court of Appeal decision in *Deckert* v. *Prudential Insurance Co.*[50] in which a conviction for murder was allowed in evidence as a defence to an action on an insurance policy. The most important case of this series, however, is that of *Lundy v. Lundy*,[51] in which the issue before the Supreme Court of Canada was whether a devisee who had been convicted of manslaughter in the death of the testator could benefit by his will. A certificate of the conviction of the devisee for the manslaughter of the testator was introduced in evidence in chief. Dean Wright has suggested that:

> Apparently, the criminal conviction was the only evidence received, for the Ontario Court of Appeal felt this insufficient to disentitle the devisee but the Supreme Court of Canada ruled otherwise.[52]

Nor, it is submitted, can it be said that subsequent Supreme Court of Canada decisions have done violence to the *Lundy* case. However, *La Fonciere Compagnie D'Assurance de France* v. *Perras et al.*[53] is often cited as having that effect. In this last case, the question involved was one of liability under an insurance policy. The company, in answer to a claim for indemnity, raised the defence of public policy, alleging that the accident complained of occurred while the driver of the insured motor vehicle was committing a criminal offence. In affirming the judgments both of the Superior Court and of the Quebec Court of King's Bench, the Supreme Court of Canada dismissed the appeal of the insurance company, not by denying the argument of public policy, although it is clear that it disapproved of reliance on this defence, but by finding firstly that the criminal conviction did not constitute *res judicata* and secondly that there was no evidence that the driver had been more than negligent, or, in other words, that he had committed a criminal offence.[54] While it is true that Rinfret J. speaking for the majority of the Court stated that:

> As long as . . . [the conviction] cannot constitute *res judicata*, it is impossible to see what other object the appellant could have in view in asking for production of the certificate of judgment in the criminal matter; and on the other hand it is easy to forsee the disadvantages in the production of a document of this nature, for example in a trial by jury, where the mere fact of the conviction could have an influence on the verdict that it should not have.[55]

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[48] *Supra*, footnote 32

[49] (1895), 24 S.C.R 650, reversing 21 O.A.R. 560, which had in turn reversed 24 O.R. 132. Nor can it be said that, in the *Lundy* case, the Supreme Court of Canada failed to consider the question of the admissibility of the conviction. This is so, it is submitted, because the trial judge said: "It was suggested, and I apprehend rightly, that on the subject of the crime, only the indictment and conviction should be looked at, the conviction, like any other judgment being, while it stands, evidence of uncontrollable [*sic*] verity." The Ontario Court of Appeal thought that the evidence (the conviction) was insufficient. The Supreme Court of Canada regarded the evidence (the conviction) as adequate proof, although not binding or conclusive.

[50] [1943] 3 D.L.R. 747.

[51] *Supra*, footnote 49.

[52] Wright, *op. cit.*, *supra*, footnote 3, at p. 651.

[53] [1943] 2 D.L.R. 129.

[54] *Ibid.*, at pp. 130-139.

[55] *Ibid.*, at p. 135.

it seems clear that this is merely a dictum, for, according to Davis J., in his separate judgment, "the facts were developed fully at the trial of the action."[56] It is significant that Rinfret J. stated that the evidence of the crime must be very clear, the policy of the courts being to keep the defence of public policy within very strict limits, and that he concluded his judgment in these words.

> Where appellants failed in the present case is in having it established that [the driver] . . . was guilty of the offence provided for in the Criminal Code. According to the two Courts which had to examine the evidence, we have here simply a case of negligence likely to involve civil consequences, or of 'the mere omission to take certain precautions without there having been excess speed;' and a careful reading of the record does not permit me to set aside the judgment of the two Courts from which this appeal is taken upon this essential question of fact.[57]

As Davis J. pointed out, the conviction, if not conclusive via estoppel, could operate only presumptively, and, since the facts in question were all before the Court anyway, the presumption would obviously be of no effect.[58] While the dictum remains, it should be remembered that the Court's previous decision in *Lundy v. Lundy*[59] was not brought to its attention in the instant case. Even excluding the *Lundy* case from consideration, to argue that this complex and important question has been forever settled by these few words of Mr. Justic Rinfret's, quoted above is, with respect, to extend the doctrine of *stare decisis* outrageousiy, and beyond all proper limits. Further, it is submitted that the decision of *Continental Casualty Co. of Canada v. Yorke*[60] also leaves *Lundy v. Lundy* unshaken, because, in the former case, the Suprene Court of Canada was dealing only with the admissibility of a previous civil judgment in a subsequent proceeding between parties not the same.[61]

## VI

Having concluded our review of the authorities, there now remain to be considered some of the extra-judicial and policy recommendations in favour of the admissibility of conviction evidence. First and foremost, there is the indisputable fact that this evidence is logically probative,[62] and, as the Model Code advocates, logically probative evidence should always be admitted unless positively excluded by some exclusionary rule. Two of the most outstanding

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[56] *Supra*, footnote 53, at p. 137.

[57] *Supra*, footnote 53, at p. 137.

[58] Davis J. did not find it necessary to decide whether a conviction was admissible or not; he merely raised the problem, and cited *Hollington v Hewthorn* in this connection.

[59] *Supra*, footnote 49.

[60] [1930] 1 D.L.R. 609. The problem raised here as to the use of previous civil judgments is much the same as the problem that we are dealing with in this article. Of course, the weight which could be accorded to a civil judgment would be less than that given to a criminal one, because of the different standards of proof. Also, different policy considerations are applicable, as are seen by visualizing concrete instances. It should be noted in passing that this problem has instanced even greater confusion between estoppel and admissibility than has our own. All in all, the Supreme Court of Canada gave far less attention to this related, although distinct, problem than it deserved.

[61] Thus it is unduly pessimistic of Cowen and Carter, *op. cit., supra*, footnote 2 at p. 197, to observe that: "Canadian cases have hardened against admissibility, and the Supreme Court decision in the *La Foncière* case is quite definite on this point." This is not the case.

[62] *See supra*, footnote 42.

texts on the law of evidence, Phipson and Wigmore,[63] have and still oppose the exclusion of conviction evidence. Wigmore, for instance, thought it "unreasonable and impractical to ignore the evidential use of a judgment in another preceeding, involving the same fact as the present case."[64] Elsewhere in the United States, due to the many jurisdictions, there are many conflicting viewpoints, and the decisions vary from conclusiveness to inadmissibility. The trend, however, is towards admissibility of convictions as at least some proof of the facts they assert and are necessarily based upon,[65] and, as a result of this trend, the position taken by the Model Code[66] is steadily becoming more and more representative of the law in the United States. In England, the Royal Commission on Marriage and Divorce (1951-1955) has suggested that:

> Proof of a conviction . . . for bigamy or for rape or other sexual offence should be used as *prima facie* evidence in matrimonial proceedings in any court of the commission of the act or acts of which the offender has been found guilty.[67]

Suggestions for legislative reform have been heeded in many American jurisdictions, and even within the Commonwealth one legislature at least has reacted against judicial adoption of the *Hollington* rule.[68]

There are also sound policy considerations favouring admissibility which courts, looking only to judicial authority, often tend to ignore. While this attitude of the courts is inevitable in that it reflects the age-old struggle of courts towards an automatic certainty that denies the empiricism that gave it birth, and while it is in many ways even desirable, it cannot conceal the fact that, in adopting cases without rationalization or analysis, they are, in the last analysis, adopting the policy considerations of another court, and, it may be, of another era. It is only by constant examination and evaluation that these considerations can be assigned to their true place by the test of present day conditions. In any event, when all judicial authority has been considered, and a court finds itself in a position neither of being bound by *stare decisis* nor of being persuaded by existing authority, then, in arriving at its decision, it is surely wise to take into account all the policy elements that are inevitably involved

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[63] Phipson, *loc cit., supra* footnote 8, and Wigmore, *op. cit., supra*, footnote 3, at p. 686, and vol. iv, sec. 1346a.

[64] Wigmore, *op. cit., supra*, footnote 3, at p. 686.

[65] For evidence of this trend see 50 Col. L.R. 502, *supra*, footnote 63, and *supra* footnote 2, at pp. 192-195.

[66] American Law Institute, Model Code of Evidence, 1942, rule 521: "Evidence of a subsisting judgment adjudging a person guilty of a crime or misdemeanour is admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment."

[67] Royal Commission on Marriage and Divorce (1951-1955) art. 931 (b), at p. 245. The Commission went even further and proposed that a finding of adultery in matrimonial proceedings should be *prima facie* evidence of the adultery in subsequent proceedings between parties not the same.

[68] In South Australia. There, the courts had distinguished their own prior decisions in their eagerness to follow the *Hollington* case. The legislature countered with a statute which allowed the use of conviction evidence. It is interesting to note that a conviction by a court other than the High Court is only to be admitted if exceptional circumstances warrant it. The weakness of a magistrate's conviction is an argument often stressed by proponents of the Hollington rule, but, in South Australia, at least, this argument is now unavailing. The sections of this act are laid out and commented upon in Cowen and Carter, *supra*, footnote 2, at p. 200. See also (1953), 69 L.Q.R. 150

in a question of this nature. These considerations are well set out by Dean Wright, who concludes that the exclusion of conviction evidence is a sad reflection on the judicial administration.[69] It need only be noted that the exclusion of conviction evidence puts litigants to unnecessary expense and difficulty in proving, if indeed they can prove (as the conviction may well be the only evidence by then available), the facts recited in the certificate of conviction, and the facts upon which such conviction must necessarily proceed.

As our survey has indicated, the fate of *Hollington* v. *Hewthorn* is still undecided: it will not, however, long remain so. It is the submission of this writer that the exclusion of this logically relevant and cogent evidence, far from being in the "interests of justice",[70] can only result in the "complete denial of justice."[71]

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[69] Wright, *loc. cit.*, footnote 3.

[70] Per Goddard L.J. in the *Hollington case*, *supra*, footnote 1, at p 602.

[71] Wright. *op. cit.*, *supra*, footnote 3, at p. 661.