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NEW SOUTH WALES
LAW REFORM COMMISSION

REPORT
on
THE RULE AGAINST HEARSAY

L.R.C. 29

1978



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LAW REFORM COMMISSION

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THE RULE AGAINST HEARSAY

L.R.C. 29

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PREFACE

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

Chairman: The Honourable Mr Justice J. H. Wootten

Deputy Chairman: Mr R. D. Conacher

Mr J. H. P. Disney

Mr D. Gressier

His Honour Judge T. J. Martin, Q.C.

Mr J. M. Bennett is Executive Member of the Commission.

The Honourable Mr Justice C. L. D. Meares was Chairman of the Commission during part of the time that work was done in relation to this Report.

Professor J. D. Heydon was a Commissioner from 11 August 1975 until 31 January 1978, and thereafter acted as consultant to the Commission. He was responsible in the first instance for the preparation of the drafts of the Working Paper and of this Report.

The offices of the Commission are in the Goodsell Building, 8-12 Chifley Square, Sydney. But letters to the Commission should be addressed to its Secretary, Box 6 G.P.O., Sydney 2001.

This is the twenty-ninth Report of the Commission on a reference from the Attorney General. Its short citation is L.R.C. 29.

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**LAW REFORM COMMISSION
NEW SOUTH WALES**

To the Honourable F. J. Walker, LL.M., M.P.,
Attorney General for New South Wales,
Sydney.

REPORT

ON

THE RULE AGAINST HEARSAY

PART I.—INTRODUCTION

1.1 PRELIMINARY

1.1.1 Reference. We have a reference—

“To review the law of evidence in both civil and criminal cases.”

1.1.2 The ideal of the law of evidence. The law of evidence is in constant use. It is basic to the proper administration of justice. Yet in our view much of it is complicated, obscure, irrational, and sometimes unjust in operation. Parts of it are only made tolerable by being ignored, deliberately or inadvertently, by the parties and the courts, particularly in civil cases. Those concerned with the administration of justice—whether practitioners, witnesses, parties, observers, or the wider public—will not have respect for our system of trial unless the rules of evidence are rational and just. We think that the ideal to which the law of evidence should move in all areas, unless good cause to the contrary is clearly shown, is to admit such material as an intelligent layman carefully making important decisions in his own affairs would regard as worth taking into account, subject to restrictions demanded by the need to preserve a substantially oral adversary system of trial¹ (where such a system is used) and to dispose of litigation expeditiously. The law falls well short of this ideal.

1.1.3 Codification. The English Law Reform Committee has stated that:

“the ultimate aim of any review of the law of evidence should be to produce a statutory code. But that will take a very long time and we do not think that all reform should wait upon its completion. There are, we think, branches of the law of evidence which are sufficiently self-contained to warrant separate consideration and to form the subject of interim reports and, we hope, of interim legislation pending the enactment of a comprehensive code.”²

¹ See below, para. 8.12.1.

² 13th Report (1966), para. 4. In the view of the Scottish Law Commission: “the law of evidence [is] . . . most easily susceptible of codification, . . . a code would be of the highest practical value”. Draft Scottish Code, p. 1.

Apart from stating the whole law of evidence comprehensively in a relatively small compass, a code should provide means to cover unforeseen situations and to develop the law for changing circumstances in a way in which the present largely judge-made rules of evidence, constricted by *stare decisis* considerations, have been unable to do. Not all parts of the law of evidence are in the same state of development, and not all are equally fit for statutory statement. But we consider that codification of certain branches of the law would produce benefits.

1.1.4 Hearsay. One self-contained branch of the law of evidence is the admissibility of hearsay statements in business records. We have already reported to the Attorney General on this matter,³ which is now regulated by Part IIC of the Evidence Act, 1898, inserted in 1976. It in turn forms part of another self-contained and very important branch—the rule against hearsay and its numerous common law and statutory exceptions. This forms the subject of the present Report, together with relevant aspects of two other bodies of law. One is the “rule against narrative” or “rule against self-corroboration”, prohibiting, subject to a handful of exceptions, the admission of the prior consistent out-of-court statements of a witness. The other comprises the rules as to a witness’s previous inconsistent statements. We recommend some reforms of this body of law,⁴ and the statement of most of it in statutory form.⁵ We are considering other problems in the law of evidence on which Working Papers will be issued shortly, including those relating to Character, Similar Fact Evidence, the Course of the Trial, Corroboration, Oaths and Unsworn Evidence, the Competence and Compellability of Witnesses, and Improperly Obtained Evidence.

1.1.5 Abbreviations. We adopt certain abbreviations in order to save space and avoid the repetition of conditional clauses such as “if our proposals are enacted”. In this report, unless a contrary intention appears:

“Bill” means the draft Bill set out in Appendix A to this Report.

The “new Act” means an Act which enacts the Bill.

“Working Paper” means the Working Paper on *The Rule Against Hearsay* which we published in June 1976.

1.1.6 Working Paper. The Working Paper was distributed to more than 350 persons and organizations in New South Wales and elsewhere. We received written comments on it from the persons and organizations listed in Appendix Q, para. 1, to this Report. We also organized meetings attended by the persons listed in Appendix Q, para. 2, at which discussion of the proposals in the Working Paper took place. We are grateful to those persons and organizations who assisted us in these ways.

³ L.R.C. 17.

⁴ A summary appears at para. 1.1.8.

⁵ We make no recommendations for the law of admissions and confessions in criminal cases: see s. 69 of the Bill and para. 3.6.1. See also ss. 70–72, 87 and 103.

1.1.7 Hearsay reform. Wigmore said that the rule against hearsay was a "most characteristic rule of the Anglo-American law of evidence—a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure".⁶ This is one lesson of the master with which it is very difficult to agree. The more typical modern view is Wisdom J.'s: "The rule is not an ancient principle of English law recognized at Runnymede. And . . . gone is its odour of sanctity."⁷ The rules against hearsay and against proof of a witness's prior statements, though in some degree rationally based, are notoriously defective, "the most complex and confused area of the law of evidence",⁸ "absurdly technical",⁹ liable to lead courts into doctrinal error, unjust in excluding reliable evidence, likely to cause inconvenience and expense in the preparation and hearing of cases, and disruptive of the giving of testimony. The law is often internally contradictory: ". . . a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists."¹⁰ The law requires much space to state; in the ominous words of Viscount Colville of Culross, "Hearsay is a subject upon which, if one knew it well enough, one could speak possibly for ever."¹¹ In short, the law is not, as it stands, fit for codification. But the bulk of it is capable of being codified, either after its defective parts have been substantially reformed, or concurrently with such reform. In England the rule in civil cases has been radically changed by the Civil Evidence Acts of 1968 and 1972, and similar changes were recommended for criminal cases in the 11th Report of the Criminal Law Revision Committee. The rule has undergone a measure of reform recently in some Australian States, and in the Australian Capital Territory;¹² and there have been proposals for more reform. Within the last forty years four separate codes of varying degrees of radicalism have been recommended and partly put into effect in the United States: the American Law Institute's Model Code of Evidence (1942), the Uniform State Laws Commissioners' Uniform Rules of Evidence (1953), which some jurisdictions adopted, the California Code of Evidence 1965 (substantially based on the Uniform Rules) and the Federal Rules of Evidence, approved by Congress in early 1975. The Scottish Law Commission have formulated tentative reform proposals.¹³ The Ghana Evidence Decree, 1975, contains many changes to the hearsay rule. There is considerable discussion of reform in Canada, and the Law Reform Commission of Canada has proposed a Code which includes substantial changes in the hearsay rule.¹⁴ The New Zealand

⁶ Para. 1364.

⁷ *Dallas County v. Commercial Union Assurance Co. Ltd* 286 F. 2d 388, at p. 391, n. 1 (1961).

⁸ Ghana Commentary (1975), p. 90.

⁹ *Myers v. Director of Public Prosecutions* [1965] A.C. 1001, at p. 1019, *per* Lord Reid.

¹⁰ Morgan and Maguire (1937), p. 921.

¹¹ 338 H.L. Deb. 1671 (1973).

¹² See Evidence Ordinance 1971 (A.C.T.), ss. 21–45; Evidence (Documents) Act 1971 (Vic.); Evidence Act 1929 (S.A.), ss. 45–45b and 59a–59c; Evidence Act 1910 (Tas.), ss. 81A–81Q; Evidence Act 1977 (Qld), ss. 92–103, and see Appendix B.

¹³ Draft Scottish Code, ch. 1.

¹⁴ Draft Canada Code (1975), ss. 27–31.

Torts and General Law Reform Committee has recommended a measure of change.¹⁵

1.1.8 Our recommendations summarized. Many of the recommendations to be discussed in this Report are therefore not wholly original, though some are. For reasons given below, we do not recommend merely the enactment of further piecemeal exceptions to the hearsay rule; nor do we recommend the total abolition of the rule.¹⁶ We recommend that the law relating to out-of-court statements be made statutory on the following general basis. First, we recommend that first-hand oral hearsay statements should be admissible as of right in all cases where the maker is not available or is compellable but refuses to be sworn, or has not been identified or found, or testifies.¹⁷ Secondly, first-hand oral hearsay statements should be admissible as of right in civil, but not criminal, cases, where the maker is outside New South Wales, or where, being competent but not compellable, he refuses to be sworn; or where it is unreasonable, having regard to the relations between the declarant and any party, to expect the party tendering the statement to call the maker as his witness; or where undue delay, expense or inconvenience would be caused by calling the maker as a witness, or by seeking to identify or find him; or where the maker cannot reasonably be expected to have a useful recollection of the matter dealt with in the statement.¹⁸ Thirdly, certain documentary hearsay statements, whether first-hand or not, should be admissible in the same way as first-hand oral hearsay statements. This recommendation applies to two kinds of "documentary hearsay" statements.

1. The first kind includes:

- (a) a hearsay statement made in a document;
- (b) a document reproducing, extracting or summarizing the original documentary hearsay statement; and
- (c) a document which is a member of a series of documents of which the first member is a document of the kind described in (b), and each later member of which is a reproduction, extract or summary of the preceding member.

2. The second kind includes:

- (a) a document recording a hearsay statement which was made orally;
- (b) a document reproducing, extracting or summarizing the document described in (a); and
- (c) a document which is a member of a series of documents of which the first member is a document of the kind described in (b), and each later member of which is a reproduction, extract or summary of the preceding member.

¹⁵ Torts and General Law Reform Committee (1967). The reforming statutes and proposals mentioned in this paragraph are more fully discussed in Appendix B.

¹⁶ Below, paras 1.3.1–1.3.18.

¹⁷ See Bill, ss. 62 (2) and 73, and paras 2.4.3–2.4.4 and 4.1.11.

¹⁸ See Bill, ss. 62 (3) and 73, and paras 2.4.5–2.4.13 and 4.1.11.

The first kind might be called “pure” documentary hearsay; in the chain between the maker of the statement and the document tendered in evidence there is no oral link. The second kind might be called “impure” documentary hearsay: in the chain between the maker of the statement and the document tendered in evidence there is one oral link, namely the statement made by the maker. The court should have a discretion to exclude documentary statements falling within either of these categories which are proofs of evidence.¹⁹ Thirdly, the court should have a discretion to admit reliable evidence which is not otherwise admissible or which it is not reasonably practicable to tender under any other provision.²⁰ Fourthly, we recommend the retention of certain existing common law exceptions in a modified form.²¹ Fifthly, we recommend adding to the existing sections in the Evidence Act, which already permit the reception of business records, provisions for the reception of published compilations; statements made on goods in the course of their manufacture, packaging or distribution; statements displayed in the course of business on land, and on or in buildings or vehicles (as against a person carrying on the business); and postal and like marks.²² Sixthly, we recommend that certain kinds of hearsay statements made by an expert on which he has relied in forming his opinion be admissible.²³ Finally, we recommend that certain statements admissible for some purpose other than to prove the truth of the matters asserted in it should be admissible for that purpose as well.²⁴

We recommend also a number of provisions which would regulate the reception of the evidence made admissible by the new Act. We summarize the principal provisions of this kind here. First, we recommend a section indicating a number of factors relevant to weight.²⁵ Secondly, we recommend a section permitting the reception of material to prove facts relevant to admissibility under the new Act whether that material is admissible under the laws of evidence or not.²⁶ Thirdly, we recommend that the court should have a discretion to reject evidence which is of slight weight; or would unduly prolong the proceeding, or operate unfairly against a party, or mislead the jury; or would abuse the process of the court; or cause unfair surprise.²⁷ Fourthly, the common law discretion in criminal proceedings to reject evidence which would operate unfairly against the defendant is preserved.²⁸

We turn now to the considerations which cause us to make these recommendations.²⁹

¹⁹ See Bill, s. 75, and paras 4.3.1–4.3.8.

²⁰ See Bill, s. 74, and paras 4.2.1–4.2.10.

²¹ See Bill, ss. 78–9, 85 and 87–8, and paras 4.6.1–4.7.23, 4.13.1–4.13.6 and 4.15.1–4.16.9.

²² See Bill, ss. 80–2 and 90, and paras 4.8.1–4.10.1 and 4.18.1–4.18.2.

²³ See Bill, ss. 83–4, and paras 4.11.1–4.12.4.

²⁴ See Bill, s. 77, and paras 4.5.1–4.5.6.

²⁵ See Bill, s. 95, and paras 6.2.1–6.2.12.

²⁶ See Bill, s. 97 (5), and para. 6.4.5.

²⁷ See Bill, s. 100, and para. 6.7.1.

²⁸ See Bill, s. 103, and para. 6.10.1.

²⁹ Below, paras 1.2.1–1.2.38.

1.2 THE NATURE AND PURPOSE OF THE HEARSAY RULE AND THE RULE AGAINST NARRATIVE

1.2.1 Formulation. There are few authoritative judicial formulations of the hearsay rule.¹ Perhaps the best-known is that contained in the advice of the Privy Council in *Subramaniam v. Public Prosecutor*:²

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.”

The hearsay rule, so formulated, is sometimes confused with the other rules we propose to consider, namely those which generally prevent proof of a witness's own prior out-of-court statements. But no practical consequence appears to follow from this confusion³ for two reasons. One is that such statements will normally be excluded by the rules against the proof of prior consistent and inconsistent statements. The other is that even if those statements fall within an exception to those rules at common law they are normally only admitted as going to credibility, and not as evidence of the truth of the facts which they assert.

¹ Non-judicial sources provide a variety of definitions. A representative selection includes:

“Express or implied assertions of persons other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted.” (Cross (1967), p. 387.)

“[A] statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated.” (Cross (1974), p. 6.)

“Oral or written statements made by persons who are not parties and who are not called as witnesses are inadmissible to prove the truth of the matters stated.” (Phipson (1970), para. 632.)

“Former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them . . .” (Phipson (1976), para. 625.)

(a) The fact that a statement was made by a person not called as a witness, and

(b) the fact that a statement is contained or recorded in any book, document or record whatever, proof of which is not admissible on other grounds,

are respectively deemed to be irrelevant to the truth of the matter stated . . .” (Stephen (1893), Art. 14.)

“Evidence of a statement which is made otherwise than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible.” (Uniform Rules (1953), r. 63.)

² [1956] 1 W.L.R. 965, at p. 970, *per* Mr L. M. D. de Silva.

³ See generally, Cross (1956), pp. 100–1; Cross (1974), pp. 6–7.

1.2.2 Purposes of the hearsay rule. What are the purposes of the hearsay rule? One group of reasons is that an assertion of a fact in a hearsay statement when put to the court originates from the perceptions of a person not under oath,⁴ not subject to cross-examination and not confronting the party his statement injures. To abandon the hearsay rule entirely might jeopardize our oral system of trial—the system of hearing what witnesses say in court in answer to questions, rather than reading what they have said elsewhere. In the words of Chancellor Kent:

“A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.”⁵

The maker of a hearsay statement may have deliberately lied, or may have defective powers of observation, memory and expression. His weaknesses in these respects cannot be noticed during examination-in-chief and tested by cross-examination; his demeanour while testifying cannot be observed. “Whoever has attended to the examination, the cross-examination, and the re-examination of witnesses . . . has observed what a very different shape their story appears to take in each of these stages.”⁶

A similar view is that:

“In most cases before juries the combination of the questions ‘Did he say it?’ and ‘If so, was it true?’ reduce the weight of the evidence so far that its admission is neither valuable nor wise. (There are other questions, of course, like: ‘To whom was he talking?’ ‘In what tone of voice was it said?’ and even ‘Who said it?’ . . .)”⁷

Some further points have been made by the Ghana Law Reform Commission:⁸

“testifying in the witness box, before the judge, and knowing that perjury will be punished, a witness may well be influenced to consider his statements more carefully than he would in casual conversation out of court. People also seem more inclined to make light, ill-considered and perhaps untrue statements when they are able to talk behind a person’s back. When forced to make their statement to a person’s face in public they are likely to treat the statement with more care and reflection.”

⁴ In *R. v. Bradden and Speake* (1684) 9 How.St.Tr. 1127, at p. 1189, Sir George Jeffries C.J. said of a woman whose out-of-court statements were repeated to him: “Why, if that woman were here herself, and would not swear it, we could not hear it; how then can her saying be an evidence before us? I wonder to hear any man that wears a gown, to make a doubt of it.”

⁵ *Coleman v. Southwick* 9 John. 50 (1812), as quoted by Wigmore, para. 1362.

⁶ *Berkeley Peerage Case* (1811) 4 Camp. 401, at p. 405; 171 E.R. 128, at p. 130, per Bayley J.

⁷ Griew (1965), pp. 95–6.

⁸ Ghana Commentary (1975), p. 91.

1.2.3 Absence of oath. There is force in some of these arguments. However, the want of an oath must be discounted as an important consideration in modern conditions, though it was intelligible, and indeed sensible, in an age when compurgation was not a distant memory.⁹ As we remarked in our Report on Evidence (Business Records):¹⁰

“It may be doubted that it is the religious sanction of the oath which induces most witnesses to tell the truth. We think that, in general, witnesses tell the truth from a recognition of a duty to do so and a sense of honesty and because of a fear that if they do not, an untruth may be exposed by conflict with other evidence or by cross-examination.”

The fear of consequential prosecution for perjury tends to deter serious deliberate lying. The rarity of prosecutions for perjury is not an indicator of truth in the witness box. Recognition of a duty to tell the truth in serious matters operates in many extra-curial situations in which the absence of an oath cannot be regarded as significantly affecting reliability. Furthermore, the objection based on the absence of an oath is undermined by the rule that even if a statement not made in the instant proceedings was made on oath in earlier proceedings it is hearsay.

“Examinations upon oath . . . are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them, and where each has an opportunity of cross-examining the witness; otherwise it is *res inter alios acta*, and not to be received.”¹¹

⁹ Compurgation was a procedure used in medieval times in *trover* and *account*, but principally in debt *sur contract*. A defendant against whom debt *sur contract* was brought could choose between trial by jury on the one hand and “compurgation” or “wager of law” on the other. The latter procedure required the defendant to appear in court on an appointed day, to swear on the Bible that the allegations in his pleadings were true, and to produce eleven “oath helpers” or “compurgators” who swore on the Bible that the defendant’s oath was good. “To a lawyer of the twentieth century, trial by wager of law seems slightly ridiculous; . . . modern man, however religiously minded, does not believe in hell in the straightforward and vivid way in which men believed in it in the age of faith. But even today . . . it would be difficult to collect eleven perjurers in order to resist an action for breach of contract; in the fifteenth century it must have been more difficult, and the evidence shows that in a very considerable proportion of cases defendants opted for trial by jury.” (Simpson (1975), pp. 138–9.) Jury trial took on a recognizably modern form by the end of the seventeenth century. By this date debt *sur contract* had lost substantial ground to *assumpsit*, where compurgation was impossible, as a result of *Slade’s Case* (1602) 4 Rep. 91a; 76 E.R. 1072. Compurgation therefore also declined after 1602, though formally it survived until its abolition in 1833 by 3 and 4 Will. IV, c. 42, s. 13. But the legal background against which the hearsay rule developed is that in which wager of law was a fundamental and accepted institution until at least 1602, and a well remembered one thereafter. This helps to explain the stress on the defects of unsworn evidence in the old cases. On compurgation, see Holdsworth (1956), pp. 305–8; Simpson (1975), pp. 137–40, 219–20, 297–8, and 559.

¹⁰ L.R.C. 17, para. 18.

¹¹ *R. v. Eriswell (Inhabitants)* (1790) 3 Term Rep. 707, at p. 722; 100 E.R. 815, at p. 823, *per* Lord Kenyon C.J.; see also *R. v. Paine* (1696) 5 Mod. 163, at p. 165; 87 E.R. 584, at p. 585.

1.2.4 Absence of cross-examination. The other objections depend essentially on the absence of cross-examination. This facility is sometimes important. But a lack of opportunity to cross-examine does not justify a universal rule of exclusion, nor even the present rule of exclusion with its many exceptions. There is some evidence at present excluded as hearsay which could safely be admitted because the circumstances make it likely that it is more reliable than direct evidence subject to cross-examination.

- (a) X and Y witness a hit and run accident; X tells Y the number of the car responsible; Y is shortsighted and can only say it is a green car. X dies before trial. Y's evidence that the car is green is admissible; but he cannot repeat X's statement of the number.¹²
- (b) A car's log book is not admissible evidence of the engine number; it would seem not to be a trade or business record within s. 14CD of the Evidence Act, 1898, admissible under s. 14CE, nor is it within the public documents exception at common law.¹³
- (c) A statement on goods as to their place of origin or manufacture is inadmissible.¹⁴
- (d) A deceased employee's statement of the cause of his injury shortly after it occurs is inadmissible unless it is within the narrow *res gestae* exception.¹⁵
- (e) A witness's statement of his own age or place of birth is hearsay because he is relying on what others (usually his parents) have told him; but there is normally no reason for them to lie or be mistaken, and they are most likely to know the truth.¹⁶
- (f) The confession by a deceased attesting witness that he altered the deed the execution of which he purported to attest is inadmissible.¹⁷
- (g) Statements by a woman allegedly aborted by the accused that she intended to procure her own miscarriage and, on a later occasion, that she had done so, have been held inadmissible.¹⁸

¹² *Grew v. Cubitt* [1951] 2 T.L.R. 305; *Jones v. Metcalfe* [1967] 3 All E.R. 205; *R. v. McLean* (1967) 52 Cr. App. Rep. 80. Cf. *R. v. O'Linn* 1960 (1) S.A. 545, holding that X can refresh his memory from a note taken by Y provided Y swears he wrote down the number dictated by X.

¹³ *R. v. Sealby* [1965] 1 All E.R. 701.

¹⁴ *Patel v. Customs Comptroller* [1966] A.C. 356.

¹⁵ *Poriotis v. Australian Iron and Steel Co. Ltd* (1963) 63 S.R. (N.S.W.) 991.

¹⁶ *R. v. Erith (Inhabitants)* (1807) 8 East 539; 103 E.R. 450; *R. v. Day* (1841) 9 C. & P. 722; 173 E.R. 1026; *R. v. Rishworth (Inhabitants)* (1842) 2 Q.B. 476; 114 E.R. 476; *R. v. Young* [1923] S.A.S.R. 35; *Carlton and United Breweries Ltd v. Cassin* [1956] V.L.R. 186, at p. 193.

¹⁷ *Stobart v. Dryden* (1836) 1 M. & W. 615; 150 E.R. 581.

¹⁸ *R. v. Thomson* [1912] 3 Q.B. 19.

In none of these cases will there generally be any real risk of lying or accidental error by the maker of the statement; and if there is, it will usually be less than exists in respect of plainly admissible evidence, or at least it will be no greater. In practice the superiority of evidence given in court may be exaggerated; among other factors, there is the risk of witnesses being drilled in a story deliberately or accidentally. Further, the objection to the admission of hearsay evidence based on lack of the power to cross-examine disappears if there is no likelihood of benefit in a particular case from the procedure of cross-examination. This may occur where a witness's prior statement was made when his recollection was much better than it is at the trial, or where the summoning of a witness for examination is likely to cause delay or expense which outweighs any likely benefit. In short, our procedures for trial may properly cease to be oral either when oral evidence serves no purpose or when it is impossible for it to be given, and the substitute for oral evidence has some weight. Indeed, it should be remembered that at present in many circumstances hearsay evidence is admitted if neither party objects; this is very common in civil cases but occurs in criminal too.¹⁹ Further, in some circumstances in Supreme Court proceedings other than the trial of proceedings on statement of claim hearsay evidence may be admitted.²⁰ In some circumstances in District Court proceedings other than the trial in an action hearsay evidence may be admitted.²¹ This undermines the objections based on want of cross-examination and a number of others we shall now examine.

1.2.5 Best evidence rule. A second reason given for the exclusion of hearsay is that it is not the best evidence. But if the maker of the statement is dead or otherwise unavailable, a hearsay report of his statement is the best evidence available and on this reasoning ought to be admitted. Even if the maker is available, his out-of-court statement made soon after an event may be much more valuable than his testimony in court years later; apart from its lack of staleness, it is much less likely to be affected by interest, by the heat of litigation, or by the fact that the legal advisers of the side calling him may have repeatedly interviewed him

¹⁹ A doubt has been raised whether hearsay evidence not objected to is properly admissible: Harrison (1955), p. 58. The opposite view is perhaps desirable, if only to prevent a huge jump in the number of wrong decisions on the hearsay rule and the number of possible appeals based on it. See *McGregor-Lowndes v. Collector of Customs (Q.)* (1968) 11 F.L.R. 349. See below, para. 4.17.1.

²⁰ Supreme Court Rules, P. 36, r. 4, provides:

- (1) Subject to subrule (4), subrules (2) and (3) apply where undue delay or hardship would otherwise be caused.
- (2) Where a statement on information and belief is made by a deponent in an affidavit, or by a witness being examined orally, and the deponent or witness gives the source and ground of the information, the statement shall not be inadmissible on the ground that it is hearsay.
- (3) Where a deponent swears in an affidavit, or a witness being examined orally states, that a document is a copy of an original, the document shall not be inadmissible as evidence of the contents of the original on the ground that the original is not produced.
- (4) This rule does not apply to evidence on an issue at a trial.

²¹ District Court Rules, P. 28, r. 5: this rule is to the like effect as Supreme Court Rules, P. 36, r. 4.

and consciously or unconsciously forced him into a particular story of which he has no actual memory. The best should not be the enemy of the good; the unavoidable absence of the best conceivable evidence should not be a reason for excluding the best available evidence. To do so amounts almost to a failure to attempt to ascertain the true facts. Evidence may be absent for many good reasons, including impossibility, and the need to husband time and money. The public interest demands efficient despatch of court business so that the purposes of substantive rules of law may be made effective and disputes brought to an end without imposing great sacrifices on public and parties in the search for evidence which satisfies old and crude tests of reliability. Statutory tribunals are often authorized to transact their affairs without being bound by the hearsay rule or indeed any other rule of evidence;²² the ordinary courts could safely go some distance towards this.²³

“The truth . . . is that hearsay evidence, ranging as it does from mere third-hand rumours to sworn affidavits of credible observers, has as wide a scale of reliability, from the highest to the lowest, as we find in testimonial or circumstantial evidence generally, depending as they all do upon the frailties of perception, memory, and veracity of men and women. Indeed, it is the failure of the courts to adjust the rules of admissibility more flexibly and realistically to these variations in the reliability of hearsay that . . . constitutes one of the pressing needs for liberalization of evidence law.”²⁴

1.2.6 The dangers of repetition. A third reason for the exclusion of hearsay evidence is that it carries a danger of inaccuracy through repetition. If A tells the court what B told him C did or said, there are at least two sources of possible error: B may have misunderstood what C did or said, and A may have misheard B. As Lord Brampton said: “If you want . . . to say what Smith said, you cannot say it, but must call Smith himself, and probably he will swear he never said anything of the sort.”²⁵ This argument has strength for oral hearsay, but not for all written hearsay. It has no application to pure documentary hearsay, i.e., where the original statement was made in a document;^{25A} and its strength for oral hearsay depends on the number of links in the chain of communication. The danger may not be very great at all in first-hand hearsay, for the witness can be cross-examined to ensure that he has not embroidered the maker’s statement and that the conditions of hearing and understanding what was said were satisfactory. It is also noteworthy that the risk of inaccuracy through repetition is ignored when statements are admitted to prove the fact that they were made rather than to prove the truth of what they assert; such statements are outside the hearsay rule.

²² E.g., Consumer Claims Tribunals Act, 1974, s. 31 (4). See para. 8.13.1.

²³ *R. v. Deputy Industrial Injuries Commissioner, ex p. Moore* [1965] 1 Q.B. 456; Davis (1950).

²⁴ McCormick (1954), para. 224.

²⁵ Harris (1904), p. 70.

^{25A} See above, para. 1.1.8, for an explanation of the two kinds of documentary hearsay to which our recommendations relate.

1.2.7 Jury incapacity. A fourth reason for the exclusion of hearsay evidence is a fear that juries will be incapable of evaluating the weight of hearsay statements.

"In Scotland,²⁶ and most of the Continental States, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds."²⁷

But is this so? "Anybody with common sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can."²⁸ Modern juries are better educated than those of the seventeenth and eighteenth centuries, when the hearsay rule was created; they are perhaps more likely to be able to weigh accurately different kinds of evidence.²⁹ They seem less prone to violent prejudice. Certainly they generally receive calmer, more helpful and more detailed judicial advice: difficult problems of weight can be dealt with as they arise by explicit directions given by the judge in his general power to comment on the facts. Indeed, even at present juries have to evaluate the weight of the large amount of hearsay evidence admitted without objection, by mistake, by agreement or under exceptions; some of this evidence is hearsay on hearsay. They must also evaluate several kinds of material which differ both in kind and weight—unsworn statements, evidence of character, presumptions, circumstantial evidence, real evidence and so on. They must also perform far harder tasks—they must consider convictions as going to credibility but not guilt; they must consider prior statements as going to credibility but not the issue; they may use an admission against its maker but not a co-party; they must not draw inferences against an accused who is silent during police interrogation or at the trial, or against a party who claims a privilege not to answer questions. If they hear inadmissible evidence they must put it out of their minds. In our view a tribunal which is expected to perform

²⁶ In Scotland hearsay is admissible if the declarant is dead, permanently insane or (in civil cases) a prisoner of war. See Walker and Walker (1964), p. 394. There are other exceptions, similar to those at common law, such as admissions, *res gestae* statements, pedigree declarations: *ibid.*, ch. 4 and pp. 396–401. In continental systems there is generally no strict rule of exclusion, though extreme forms of hearsay are unlikely to be admitted or at least given weight. See Hammelmann (1951), p. 67.

²⁷ *Berkeley Peerage Case* (1811) 4 Camp. 401, at p. 415; 171 E.R. 128, at p. 135, *per* Mansfield C.J. Historically, this was not the reason for the hearsay rule; it came to be cited as an explanation in the early nineteenth century, particularly in *Wright v. Doe d. Tatham* (1838) 5 Cl. & Fin. 670; 7 E.R. 559. An American writer has put the matter more sardonically: "Our law requires that all matters for the consideration of the jury shall be, as it were, pre-digested food for mental invalids, and so it strains this food through the most highly developed rules of evidence." (Boston (1912), p. 1, quoted by Frank (1950), p. 144.)

²⁸ 11th Report (1972), para. 247.

²⁹ On the other hand, one may doubt whether modern education is particularly helpful in weighing hearsay; and the property qualifications of former times doubtless helped ensure the presence of some hard-headed men in the jury box.

these tasks,³⁰ and which is a strongly-defended element of our system,³¹ will understand that statements which have not been tested by cross-examination may have their drawbacks. The law should more accurately reflect Cockburn C. J.'s dictum: "People were formerly frightened out of their wits about admitting evidence lest juries should go wrong. In modern times we admit the evidence and discuss its weight."³² We disagree with the view that judicial directions as to the weight of hearsay evidence might not be understood by the jury and would give undesirable scope for appeals based on some slip of wording. The fact that such appeals would generally fail would tend to reduce their incidence. Further, as we remarked in our Report on Evidence (Business Records):

"In private and business life most important decisions are based, at least partly, on hearsay information. Juries are as well equipped by experience to assess hearsay evidence as they are to assess direct evidence given by oral testimony. And, of course, all the common law exceptions and the statutory exceptions, including section 14CB of the Evidence Act (enacted in 1966 to provide for the admissibility of statements in business records in criminal proceedings), proceed upon the basis that juries are able to assess hearsay evidence. As far as we are aware, New South Wales is the only jurisdiction of the many which have adopted the provisions of the English Evidence Act 1938, as is done by Part IIA of the Evidence Act (enacted in 1954), to have restricted its operation to proceedings without a jury. This restriction is now generally thought to be unjustified."³³

1.2.8 Superfluous evidence. A fifth reason for the exclusion of hearsay evidence is sometimes said to be that to relax the hearsay rule would cause the courts to be swamped with evidence, some of it raising collateral issues which might protract the trial, on particular points. The fear is that the parties will tend to call hearsay evidence as well as direct evidence; the jury will be confused and proceedings unduly lengthened. We discount this fear. The danger contemplated will be reduced, because, for some parties, expense will tend to ensure that only the most convincing evidence is called on any particular point. Further, while hearsay evidence which raises collateral issues may tend to lengthen the trial, it may equally be so convincing as to shorten it or otherwise simplify the task of the trier of fact. It is also unrealistic to suppose that weak and unconvincing evidence will be called if strong evidence is available, for the presence of unconvincing evidence will tend to taint and weaken the effect of otherwise convincing evidence. In our view direct evidence will be called in preference to hearsay wherever this is likely to convince the trier of fact, and wherever failure to do so is likely to cause judicial comment, or jury inference, that this may have been because the direct evidence, had it

³⁰ In fact, we doubt whether juries do achieve these feats, which vary from the near impossible to the completely impossible, but we think they can achieve the much easier feat of sensibly weighing hearsay.

³¹ Frank (1950), pp. 143-4.

³² *R. v. Birmingham Overseers* (1861) 1 B. & S. 763, at p. 767; 121 E.R. 897, at p. 899.

³³ L.R.C. 17, para. 19. See also McCormick (1954), para. 301: "Our daily life is guided and directed in largest part by hearsay information, and survival of existence and protection of possessions depends upon skill in gauging the probable truthfulness of hearsay."

been called, would have been unfavourable. In any event our recommendations do not open the door to hearsay evidence generally; they permit the reception of hearsay only where there is some good reason for receiving it.

1.2.9 Exclusion of a witness's prior statements and the risk of manufacture.

It is said that the previous consistent statements of witnesses should not be admitted because they add nothing to the witness's sworn testimony, because they may be concocted to give weight to that testimony by accumulating numerous self-serving statements, and because, though repeated on oath, they were not made under oath and were not subject to cross-examination at the time they were made. The admission of previous inconsistent statements is said to carry a like risk of manufacture. The Minnesota Supreme Court has said:

"The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others . . ."³⁴

That is, the merits of cross-examination are that the witness's assertions in chief may be qualified and his credibility challenged; and this is bound to impress the observer, because the cross-examination occurs immediately after examination-in-chief, and a successful cross-examination causes the destruction of the witness's testimony to be more striking because the witness destroys his story himself. This risk of manufacture is also offered as an objection to reform of the hearsay rule, particularly in criminal cases where the defendant may have much more to lose than the parties to civil cases. False confessions, or other false statements by third parties in favour of the accused, would, it is said, become more common, and would be uncheckable because of the engineered unavailability of their makers. If the maker was unidentified, it would be impossible to challenge his credibility, e.g., by adducing his criminal record. "The presumption . . . is . . . that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."³⁵ But though the rule against prior statements induces a higher sense of relevance in the mind of the witness and excludes some evidence of slight value, it has unfortunate effects. A statement made near the time of the events to which it relates may be much more reliable than testimony based on hazy recollection. The witness can swear either that what he said formerly was true, or that he has good reasons for believing that what he said formerly was likely to be true; he can be cross-examined

³⁴ *State v. Saporen* 285 N.W. 898, at p. 901 (1939), per Stone J. Morgan comments: "Why does falsehood harden any more quickly or unyieldingly than truth? What has become of the idea that truth is eternal and, though crushed to earth, will rise again? Isn't the opportunity for reconsideration and for baneful influence by others even more likely to colour the later testimony than the prior statement?" (Morgan (1948), p. 193.)

³⁵ *R. v. Hardy* (1794) 24 How.St.Tr. 199, at pp. 1093-4, per Eyre C.J.; see also *Jones v. South-Eastern and Chatham Railway Company's Managing Committee* (1917) 87 L.J.K.B. 775, at p. 778; *R. v. Roberts* [1942] 1 All E.R. 187, at p. 191.

as to his reasons and capacity for making either assertion. In the words of Learned Hand J.: "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court."³⁶ So far as witnesses are concerned, the risk of fabrication of self-serving statements is great only for party-witnesses or witnesses whose interests are closely tied up with those of a party; the risk will be obvious to the jury as a matter of common sense. So far as non-witnesses are concerned, this danger is much stronger for second-hand hearsay than for first-hand. The availability for cross-examination of the person who is said to have heard the statement is some safeguard against manufacture; the credibility of the excuse offered for the absence of the maker is another; and the risk of some lying ought not to be used as a reason for excluding a much greater quantity of reliable first-hand hearsay evidence.

"It is impossible to perceive any rule of evidence which is not subject to abuse or tampering. A rule should not be repealed simply because a horrible example may be conjured; and new proposals should not be turned down for assigned reasons which would apply as well to the old as to the new."³⁷

We do not understand why the normal rule that the risk of bias or manufacture goes only to weight, not admissibility, should not apply here. The greater risk of manufacture where multiple oral hearsay is concerned is one reason why we propose to preserve the general rule of exclusion in respect of it. However, in many circumstances there may be good reasons for suspecting that the out-of-court statement is the true one, and the trier of fact should be allowed to consider this possibility (as well as the possibility that the sworn statement, made after cautious reflection, is correct, and the further possibility that the witness is too unreliable for any of his statements to have weight).

1.2.10 Ease of application. A commentator put to us the view that any reform of the hearsay rule would have undesirable consequences in practice. The present law, it was said, is well understood by practitioners, and is not difficult to apply in practice. Further, the present law produces consistency of approach as between practitioners and courts, higher and lower courts, and individual courts of each level of the judicial system. The present law, being to a large extent strict in its operation, "is consistent with the principle of depersonalising the administration of the law by restricting the degree to which personal views and idiosyncrasies influence decisions". We disagree with these views. Our own experience, as well as information from practitioners and judges, is to the effect that the hearsay rule is imperfectly understood by many practitioners and courts and only made workable by being ignored in some circumstances.^{37A} There is not a perfect consistency of approach because some apply the hearsay rule correctly and some do not, some apply it strictly and some do not.

³⁶ *Di Carlo v. United States* 6 F. 2d 364, at p. 368 (1925).

³⁷ Blackmar (1970), p. 43.

^{37A} And see Phipson (1976), para. 625.

1.2.11 Confrontation of accused by his accusers. A commentator cited as one principal advantage of the hearsay rule that it compelled a man's accusers to confront him openly. On the other hand, it also prevents justice being administered when a man's accusers are unavoidably absent, e.g., through death. As we explain below, our proposals are more limited in criminal cases than civil. We think too that the prosecution would very rarely be able to meet the standard of proof required of it if its case depended solely or significantly on hearsay evidence. In short we think the advantage suggested is outweighed by other considerations, and the dangers which flow from our reforms are met by the safeguards we propose.³⁸

1.2.12 Risk of surprise. Finally, it is said that the extensive admission of hearsay evidence would make our system of trials unworkable because it would lead to either side being unfairly surprised by the other's evidence. Our civil trials are adversary in character; the court has no duty to make independent investigation of the facts, but relies in finding the facts solely on the evidence which the parties choose to put before it. The reception of this evidence normally occurs during a continuous and relatively short oral hearing. Though, where there are pleadings, the parties must by their pleadings give each other notice of the facts they hope to prove, they have no general duty to indicate what evidence will be adduced to prove those facts. However, it is possible normally to anticipate what witnesses an opponent will call and to prepare adequately for an attack on their testimony by cross-examination and for the tendering of other evidence to meet it. It would be less easy to anticipate what hearsay evidence might be adduced. Even though such evidence might in fact be rebuttable had notice of it been given, the relatively speedy and unitary nature of the trial may cause injustice by preventing such rebuttal being made. For example, if the plaintiff alleges X made a contract with Y, the defendant could anticipate that the plaintiff may call X or Y or any agent of either used in the transaction. But if hearsay is admissible there is a whole unknown army of employees, agents and other persons who might be called to say that they heard X or Y tell them of the contract. (Paradoxically, this argument suggests that the hearsay rule could be reformed more extensively in criminal trials on indictment than in other cases, for the accused tried on indictment receives notice of the prosecution evidence adduced in committal proceedings; the prosecution should also notify the accused of any other evidence which it proposes to adduce.³⁹ Yet normally opposition to hearsay reform is strongest so far as criminal cases are concerned.) One answer to these objections is to question the major premise. Does the line between foreseeable and unforeseeable evidence really coincide substantially with that between non-hearsay and hearsay evidence? If it does, the unfairness could be removed by some form of pre-trial procedure such as the notice procedure under the Civil Evidence Act 1968 (U.K.). Such procedures are expensive and may be cumbrous; we shall discuss them in detail below.⁴⁰ Another alternative is adjournment. In many cases a vigorous use of the discretion to award

³⁸ See below, paras 8.5.1–8.5.6.

³⁹ Watson & Purnell (1971), para. 1106.

⁴⁰ Paras 6.12.2–6.12.10.

costs against a party who has unfairly failed to notify his opponent of unforeseeable evidence may be the simplest device for overcoming the problem. We propose, in s. 100 (1) (d) of the Bill, that the court should have a discretion to reject out-of-court statements tendered where "the evidence would unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered".⁴¹

1.2.13 Reform by judicial benevolence. It is sometimes said that radical reform of the hearsay rule is unnecessary, because so far as the rule excludes unreliable evidence it is beneficial, and its tendency to exclude reliable evidence is diminished, at least in civil cases tried without jury, by the reluctance of judges to uphold objections to admissibility of reliable evidence which seem unduly technical or pettifogging. This beneficent refusal to apply inconvenient rules of law does not extend to jury cases, however. Further, it is undesirable that admissibility of evidence should depend on the whim or persuasive powers of particular judges or the tact of particular counsel. This suspension of the rules does not prevent the wasting of expense in preparation for the hearing, for careful legal advisers must assume the rules will be applied strictly.

1.2.14 Disadvantages of the hearsay rule: general. There are some notable disadvantages that flow from the wide exclusion of hearsay statements and from the rules against proof of a witness's prior statements. As we noted earlier,⁴² the law in New South Wales is unjust in often excluding the oral hearsay statements of a person who is unavailable, particularly since much of this evidence is convincing. It is also unjust in that hearsay evidence which, while far from convincing, may be sufficient to raise a reasonable doubt in the jury's mind in criminal cases is excluded in such a way as to make miscarriages of justice possible. The leading example is *Sparks v. R.* in the Privy Council.⁴³ Sparks was a white man charged in Bermuda with indecently assaulting a three year old girl. The girl told her mother within an hour and a half of the alleged assault that "it was a coloured boy". This was held to be inadmissible. The appeal would have failed were it not for the fact that the judge had wrongly admitted an involuntary confession. The statement was not part of the *res gestae*; and though there is a discretion to exclude unfairly prejudicial evidence, there is no discretion to admit possibly reliable evidence. The reliability of the excluded evidence could be challenged on many scores—it was evidence of identification, at night, by a very young child, suffering the shock of an assault, in a society where the child no doubt often heard coloured boys being automatically blamed for what went wrong. But a conviction reached without considering this evidence is plainly unsatisfactory. It might well have raised a reasonable doubt. Indeed, sometimes the hearsay rule will exclude compelling evidence. If X confesses to committing a crime single handed, and X and Y are jointly tried, Y cannot compel X to testify, and X's statement

⁴¹ See below, para. 6.7.1.

⁴² Para. 1.2.4.

⁴³ [1964] A.C. 964; a similar case is *R. v. Townsend* [1965] Crim.L.R. 367, excluding a statement by a homicide victim exculpating the accused.

is inadmissible at the instance of Y. In practice there might be no prosecution, or the jury might be told they could consider X's statement in considering the case against Y,⁴⁴ but should the accused's position depend on prosecution discretions and a judicial blind eye being turned to the strict rules? The general effect of the hearsay rule is that cases will be decided without taking into account all the available evidence, imperfect though some of it may be. Though it may be unrealistic to expect trials to be perfect instruments for the discovery of truth, any significant divergence between the facts on which legal determinations are based and the facts laymen would rely on in the serious matters of their lives will tend to bring our system into contempt unless good cause is shown for the divergence.

1.2.15 Increased costs. The need to call direct rather than hearsay evidence can greatly add to the cost of proving particular facts. It may cost a lot to identify the maker of the statement and then transport him to and maintain him during the trial. He may be put to great expense and inconvenience and so may his employers, customers, or other persons with whom he deals. In some instances where the maker's out-of-court statement is no less weighty than his evidence in court, to call him will waste costs. Admittedly where his credibility is hotly contested, or where his testimony may be weightier than his out-of-court statement, he will be called by one side or the other and the hearsay rule cannot be regarded as a cause of increased costs.

1.2.16 Disturbance of natural flow of testimony. The rule against narrative—against proof of prior consistent statements—tends to confuse witnesses by preventing them telling their story in the way in which persons of normal, or even very good, education habitually describe events they have witnessed. It stops the witness saying "I saw the car come along on the wrong side of the road and hit the pedestrian; then I said to my wife 'He was on the wrong side of the road'." The same is true of the hearsay rule: strictly applied, it prevents testimony being given in a natural flow. It stops the witness saying "I saw the car hit the pedestrian on the wrong side of the road and my wife said to me: 'It was on the wrong side of the road'." Witnesses are upset by this fragmentation of the evidence; and the jury is likely to be distracted and bewildered by it even if some of the missing fragments are later filled in by direct evidence from other parties to the conversation. There is much to be said for permitting a witness to tell his story in his own words without interruption. As one of our commentators remarked to us:

"The advantage of adducing evidence in this fashion is that it accords with our every day manner of communication and acquisition of knowledge. Under our present system witnesses are confused by a system of giving evidence which to them is quite unnatural. They are forever being stopped and told 'you can't say that' and when the confusion thereby created is added to the strangeness of their surroundings are unable to do themselves justice."

⁴⁴ See Williams (1963), pp. 209-10 and cases there cited. X's statement might be admissible under s 74 of the Bill.

1.2.17 Complication of the exceptions. Wigmore valiantly attempted to show that the exceptions to the hearsay rule rest on the factors of necessity and reliability. The evidence admitted is necessary, and it is supported by some guarantee of reliability.⁴⁵ But his attempt must be regarded as a failure. The ill-coordinated complication and technicality of the hearsay rule and its exceptions is very striking. In this connection we strongly concur with the English Criminal Law Revision Committee that:

"Simplicity is specially important for the law of evidence. It is important for the court, because a point of evidence frequently arises suddenly and without warning during a hearing and has to be disposed of without there being a proper opportunity to consult authorities. Moreover it is the duty of the court to raise any question of admissibility if no party does so. Simplicity is more important still for the jury, in the sense that the judge should be able to direct them in a way which they can understand—and accept as reasonable—on how they should regard a piece of evidence. The present law requires judges to direct juries to achieve certain mental feats which some judges think impossible for any lawyers to achieve."⁴⁶

The exceptions were in part developed to avoid "most crying and intolerable injustice".⁴⁷ But some of them are simply survivals of older rules antedating the hearsay rule, and, in the nature of the common law process, no opportunity was ever presented for their review and reconstitution on consistent principles by an authoritative appellate court.

"The exceptions were struck off in the heat of trial as improvisations intended to be played by ear, but they fail of that purpose because the classes are grown so many and the boundaries so meandering that no one can carry any large part of this hearsay-exception-learning in his head. Moreover, the values of hearsay declarations or writings, and the need for them, in particular situations, cannot with any degree of realism be thus minutely ticketed in advance . . . Much worthless evidence will fit the categories, much that is vitally needed will be left out."⁴⁸

In short, they are "utterly irrational".⁴⁹ We now turn to particular exceptions.

1.2.18 Declarations depending on death and contemporaneity. The admissibility of all hearsay matter which depends on the declarant's death rather than his unavailability for some other good reason appears unduly limited. This criticism applies to declarations against interest, declarations in the course of duty, declarations as to public or general rights, pedigree declarations and statements by testators about the contents of their wills. Further, the requirement of contemporaneity which exists in connection with *res gestae* statements and declarations in the course of duty leads to difficult problems of degree.

⁴⁵ Paras 1420–3.

⁴⁶ 11th Report (1972), para. 25. And see Nokes (1967), p. 334.

⁴⁷ *Sugden v. Lord St Leonards* (1876) L.R. 1 P.D. 154, at p. 240, *per* Sir George Jessel M.R.

⁴⁸ McCormick (1954), para. 300.

⁴⁹ Hoffmann (1970), p. 111. On this issue, and on many matters of hearsay reform, much may be learned by perusing Harding (1971).

1.2.19 Declarations against interest: penal interest. Although the exception produces desirable results in many cases, the rules governing it are riddled with complicated anomalies. Thus a declaration against proprietary or pecuniary interest is admissible, but not one exposing the declarant to criminal liability. This ancient rule has recently been approved by the South Australian Court of Criminal Appeal.⁵⁰ Wigmore attacked:

“this barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice. Those who watched . . . with self-righteous indignation the course of . . . Dreyfus’ trial should remember that, if that trial had occurred in our own courts, the spectacle would have been no less shameful if we . . . had refused to admit what the French court never for a moment hesitated to admit—the authenticated confession of the absconded Major Esterhazy . . .”⁵¹

The irrationality of excluding statements against penal interest was classically expressed in a dissenting judgment by Holmes J. in a case involving a confession by a dead person of a murder for which the accused was tried:

“no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man . . .; and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight.”⁵²

1.2.20 Declarations against interest: social interests. A declaration of a fact which might subject the declarant to hatred, ridicule, contempt or social ostracism is not a declaration against interest; yet a consciousness of such a consequence is often likely to be a much more powerful guarantee of truth than a consciousness of a risk that money or property will be lost. Conversely, there is a danger in admitting a statement partly against interest without considering that many other factors may make it substantially self-serving. The rules governing the exception do not allow for this.

⁵⁰ See generally *The Sussex Peerage Case* (1844) 11 Cl. & Fin. 85; 8 E.R. 1034; *In re Van Beelen* (1974) 9 S.A.S.R. 163; Jefferson (1944).

⁵¹ Para. 1477.

⁵² *Donnelly v. United States* 288 U.S. 243, at p. 278 (1913); the Supreme Court of California in banc has agreed with Traynor J. in repudiating the traditional rule and not limiting admissibility to unavailability: *People v. Spriggs* 389 P. 2d 377 (1964). Cf. *In re Van Beelen* (1974) 9 S.A.S.R. 163. The confessions of unavailable third parties are admissible under s. 73 of the Bill: see para. 4.1.43.

1.2.21 Declarations against interest: fictions. There is unreality surrounding the interest requirement in declarations against interest. Any allegation of a contract executory in favour of the declarant, however remote that contract is from the declarant's mind, however onerous it is on him, and however unlikely any benefits to be gained from it are to produce an untruth, prevents admission. Thus a promise to marry a woman whom the declarant acknowledges to be bearing his child is not against interest.

"The suggestion that it is against interest because the performance of the promise might lead to a pecuniary burthen is invalidated by the fact, especially important in the case of a working-class marriage, that the wife is in her sphere as much and often more the prop of the household than the husband, and in many cases is its breadwinner . . . [A] statement of a contract is not itself a statement against interest . . ."⁵³

Similarly, where a will left property to a trustee "to be expended as I have directed", a statement by the trustee of the directions given was held inadmissible because "having regard to the terms of the will, [he] never could have had any pecuniary or proprietary interest in the testatrix's residuary estate".⁵⁴ A further complication is that declarations against interest, unlike declarations in the course of duty, can be received as evidence of collateral facts, and do not require contemporaneity as a condition precedent to admissibility. Declarations against interest are said to derive their reliability from the unlikelihood of a man uttering false statements which damage his interests; their admissibility therefore ought to depend, and does depend, on whether the declarant realises his interest is affected by what he says.⁵⁵ But in many cases this requirement can only be regarded as being satisfied by a fiction. This is particularly so where a layman would consider his statement self-serving. One example is a statement made by a deceased creditor that he had received payments of interest on a debt tendered to show the existence of the debt.⁵⁶ Another is an assertion by a declarant in possession of a qualified title. The latter is only held to be against interest by virtue of the following reasoning, which may be thought technical to a degree. There is a rule that possession is prima facie evidence of ownership; since a possessor is prima facie owner, any claim of less than full ownership is against interest.⁵⁷ Further, the rule that possession is prima facie evidence of ownership means that the law admits a statement by a possessor that another is owner, no matter how temporary, casual or derivative the

⁵³ E.g., *Ward v. H. S. Pitt & Co.* [1913] 2 K.B. 130, at p. 140, *per* Hamilton L.J.; reversed in the House of Lords on another ground *sub nom. Lloyd v. Powell Duffryn Steam Coal Co. Ltd* [1914] A.C. 733. Hamilton L.J. cited *R. v. Inhabitants of Worth* (1843) 4 Q.B. 132; 114 E.R. 847.

⁵⁴ *Re Gardner's Will Trusts* [1936] 3 All E.R. 938, at p. 941, *per* Bennett J. Perhaps the statement should have been let in on the ground that it was an admission by a predecessor in title of the plaintiff, who was executor of the will of the trustee.

⁵⁵ *Ward v. H. S. Pitt & Co.* [1913] 2 K.B. 130.

⁵⁶ *Taylor v. Witham* (1876) 3 Ch.D. 605.

⁵⁷ See *Peaceable d. Uncle v. Watson* (1811) 4 Taunt. 16; 128 E.R. 232; *R. v. Birmingham Overseers* (1861) 1 B. & S. 763; 121 E.R. 897; *R. v. Exeter Guardians* (1869) L.R. 4 Q.B. 341; *Re Adams* [1922] P. 240.

possession, e.g., that of a timber feller.⁵⁸ "Surely the law never appeared decked with a more luxurious pair of ears."⁵⁹ We agree with the criticisms of Jefferson:

"By applying a rule-of-thumb test as to when a statement is against pecuniary or proprietary interest, and devising ingenious theories of interest, courts have admitted statements which the declarants could not conceivably have believed against their interests. In a suit on an insurance policy brought by the beneficiary, a creditor of the insured, who claimed that the insured permitted him to take out the policy to protect and indemnify himself against any loss of his claims against the insured, statements by the insured that he himself had not made, or authorized any one to make, applications for insurance of any kind, were received as declarations against interest without showing that the insured knew that any such policy of insurance on his life was outstanding or had ever seen or heard about the provisions thereof . . .⁶⁰ To support [*Gery v. Redman*⁶¹], we are required to believe that the life tenant of inclosed land was aware of a presumption that open pieces of wasteland by the side of the highway belong to the owner of the adjoining inclosed land between which and the highway the pieces lie; and this in spite of the fact that the life tenant came into possession of his estate two years after the wasteland itself had been inclosed and was in possession of another."⁶²

The results of the rule that possession is prima facie evidence of ownership contrast oddly with the rule that a tenant's declarations are inadmissible because he cannot derogate from his landlord's title:⁶³ a tenant is in a better position to know the facts than most possessors.

"The inexpediency of allowing tenants to litigate against titles which they have, by implication, agreed to accept as good, has nothing to do with the desirability of using the evidence of a deceased tenant, in a litigation to which he is not a party and on a matter as to which he has knowledge and has made a trustworthy statement."⁶⁴⁻⁷

Finally, the rule that declarations against interest must be presently, not merely contingently, against interest is irrational, because a declaration contingently against interest may be much more likely to be true if that interest is important.

1.2.22 Declarations against interest: uncertainties. There is considerable doubt on questions such as whether acknowledgements of tortious liability are within the exception, whether the declarant must have personal

⁵⁸ *Doe d. Stansbury v. Arkwright* (1833) 5 C. & P. 575; 172 E.R. 1105.

⁵⁹ Tregarthen (1915), p. 105, as quoted by Cross (1974), p. 43.

⁶⁰ *Chandler v. Mutual Life & Industrial Association of Georgia* 61 S.E. 1036 (1908).

⁶¹ (1875) 1 Q.B.D. 161.

⁶² Jefferson (1944), pp. 18-19.

⁶³ *Papendick v. Bridgwater* (1855) 5 E. & B. 166; 119 E.R. 443.

⁶⁴⁻⁷ Wigmore, para. 1473.

knowledge of the facts stated,⁶⁸ and whether he must lack a motive to misrepresent the facts declared.⁶⁹

1.2.23 Declarations in the course of duty. The admissibility of declarations in the course of duty is trammelled by the specific nature of the duty—to do what is recorded and also to record it—which must be owed to a third party, not to the declarant himself, and which must relate to his own acts, not those of third parties. It leads to such odd results as the exclusion of the statement of a dying policeman about the identity of his assailant made to three other policemen of the same rank.⁷⁰ The requirement that the declarant must have no motive to misrepresent the facts is a strange requirement for admissibility:⁷¹ normally such factors go only to weight.

1.2.24 Pedigree declarations. The rule that pedigree declarations are only admissible if made by blood relations or their spouses, but not relations in law, old family servants, or intimate family friends, is hard to defend.

1.2.25 Public documents. It is strange that public documents are inadmissible unless they are open to public inspection and unless they were made with intent that they should be so open: the official duty of their maker to take care is a sufficient guarantee of reliability, and, in the case of some public documents, the very slight chance that public documents open to inspection will in fact ever be inspected, or inspected by persons likely to detect faults in them, cannot be a serious incentive to tell the truth over and above that flowing from the official duty of the declarant to take care.

1.2.26 Dying declarations. Dying declarations are only admissible at trials for the murder or manslaughter of the declarant and not on any other criminal charge nor in civil cases.⁷² Weight is placed on the likelihood that such declarations are made sincere by the imminence of death, but the circumstances which cause the necessary expectation of death may also cause such weakened faculties as to make the declarations unreliable. There remains unresolved the problem of whether declarations of persons who are not practising Christian believers or have no similar belief in a future life are admissible.⁷³ One perverse limitation on the admissibility of a dying declaration is that the declarant must be the person whose death is the subject of the charge, and the declaration must

⁶⁸ See Baker (1950), pp. 67–70, and 73–5.

⁶⁹ Jefferson (1944), pp. 52–7.

⁷⁰ *R. v. O'Mealley* [1952] V.L.R. 499.

⁷¹ *The Henry Coxon* (1878) 3 P.D. 156.

⁷² *Fagan v. City of Newark* 188 A. 2d 427 (1963).

⁷³ Cf. *R. v. Madobi* (1963) 6 F.L.R. 1 with *R. v. Kuruwaru* (1900) 10 Q.L.J. 139; *R. v. Kiparli-Ikarum* [1967–8] P. & N.G.L.R. 119; *R. v. Peagui Ambimp* (1972) 47 A.L.J. 93; see generally Brazil (1960), p. 195 and Hoffmann (1970), pp. 121–4.

concern only the facts leading up to and causing the death. The limitation to murder and manslaughter is odd because it is important that other breaches of the law be redressed, and because the knowledge of impending death is as likely to produce a true declaration in the case of any fact as it is in the case of a declaration as to murder or manslaughter.

1.2.27 Testamentary declarations. Post testamentary declarations by testators of the contents of their wills are admissible, but not those concerning execution. The reason given is that a man cannot by his own assertion show that he fulfilled the conditions necessary to exercise the power to make a will.⁷⁴ But from the point of view of reliability a hearsay assertion "I signed the will in the presence of two witnesses" seems just as likely to be true or false as a hearsay assertion "I left my property to my wife".

1.2.28 Res gestae. It has been notoriously difficult for the courts to formulate with any precision the exceptions under this rubric. Further, there is considerable doubt whether *res gestae* evidence is admissible as original evidence or as an exception to the hearsay rule; as evidence that a statement was made or as evidence of the truth of the facts asserted in the statement.⁷⁵ It is not easy to see why some of the *res gestae* exceptions stopped where they did. There is authority for the view that statements of present intention are admissible evidence that the declarant had that intention, and (subject to the presumption of continuance and the circumstances of the case) that he carried out his intention.⁷⁶ Some have regarded these authorities as revolutionary, for "if the state of mind which we call intention, proved in the standard manner by declarations of the person entertaining the intention, is considered material to an effort to prove the occurrence of the intended act, so likewise is the state of mind which we call memory, similarly proved, to be considered material to an effort to prove a past fact".⁷⁷ And "if hearsay declarations are admissible to prove past acts of the speaker, it would seem logically necessary to admit them in order to prove past facts of his observation".⁷⁸ The merits of these arguments have never been considered by the courts, but they leave these *res gestae* exceptions in a confused state.

"Why is it that on an issue whether A went to Boston on Tuesday, [the] cases could admit his words on Monday, 'I am going to Boston tomorrow', and yet would undoubtedly exclude his statement on Wednesday, 'I have the pleasantest memories of my trip to Boston yesterday.'? In both cases the existence of the mental state is relevant, and in one respect the first is weaker since an honest intention may not be carried out."⁷⁹

⁷⁴ *Sugden v. Lord St Leonards* (1876) L.R. 1 P.D. 154, at p. 227.

⁷⁵ E.g., *Adelaide Chemical & Fertiliser Co. Ltd v. Carlyle* (1940) 64 C.L.R. 515.

⁷⁶ *R. v. Buckley* (1873) 13 Cox C.C. 293; *Mutual Life Insurance Co. v. Hillmon* 145 U.S. 285 (1892). Cf. *R. v. Pook* (1871) 13 Cox C.C. 172; *R. v. Wainwright* (1875) 13 Cox C.C. 171; *R. v. Thomson* [1912] 3 K.B. 19.

⁷⁷ Maguire (1925), p. 711; see also Seligman (1912), p. 146.

⁷⁸ Seligman (1912), p. 157.

⁷⁹ Chafee (1924), p. 519. See also Hutchins and Slesinger (1929), p. 283.

1.2.29 Hearsay exceptions and weight. Morgan has reviewed the hearsay exceptions from the point of view of weight:⁸⁰

"look first at those situations wherein A's . . . conduct is offered to show an external event or condition which produced in A the state of mind of which such . . . conduct is evidence. That external event may be an act or other behaviour of A or of some third person, X. Since no assertion is intended, there is no danger of conscious falsehood. The chief perils lie in unconscious self-deception of A as to his perception and memory. If the external event is A's own behaviour, these perils are reduced to a minimum. Compare these circumstances with, for instance, those surrounding a dying declaration. Is A's flight for the sole purpose of escape when offered to show his guilt as subject to error as the dying statement of the victim of a homicide when offered for the truth of the statement? Again, is A as likely to be mistaken as is a blood relative whose declaration concerning the date or place of birth of his kinsman is received under the pedigree exception? Indeed, even where the external event is the behaviour of X, the danger seems to the nonlegal mind far less than in many of the recognized exceptions. If Baron Parke's classic examples be accepted,⁸¹ then the fact that an underwriter has paid a substantial sum to the beneficiary of a policy upon the life of Y cannot be received to show that Y is dead, but an unsworn, uncross-examined statement by an obstetrician, made in October, that he has been paid £1 6s. for delivering Mrs. Fowden's child on the 22d of the previous April is admissible to prove that the child was born on April 22d.⁸² Likewise, the fact that a person has paid £1000 for Mr. Marsden's demonstration of the solution of a mathematical problem is no evidence of Mr. Marsden's capacity to solve it; but a mere receipt by a carpenter that he has been paid a small amount for making repairs by a mortgagee is evidence that the mortgagee caused the repairs to be made;⁸³ and the statement of an occupant of realty, now deceased, that he has paid £5 10s. for a quarter's rent in advance is evidence not only that he did not own the realty but that he had actually paid the rent.⁸⁴ No court seems to have any difficulty in receiving proof of the signature of a deceased attesting witness to a will as evidence that the testator executed the will in the presence of the witness; but if an expert subjects a patient to the Wasserman test and thereafter assigns him to a nonvenereal ward, these facts cannot be received as evidence that the patient's physical reaction to the injection was favourable . . .⁸⁵

If A tells W that A owes Q \$5000 on a fire insurance policy covering Q's house, W after A's death may so testify in support of the proposition that Q's house burned, though neither A nor any of his

⁸⁰ Morgan (1935), pp. 1150-1, 1153-4.

⁸¹ In *Wright v. Doe d. Tatham* (1837) 7 Ad. & El. 313; 112 E.R. 488; see below, paras 1.4.5-1.4.6.

⁸² *Higham v. Ridgway* (1808) 10 East 109; 103 E.R. 717.

⁸³ *R. v. Lower Heyford (Inhabitants)* (1840) 2 Smith's Leading Cases (7th ed., 1876) 333.

⁸⁴ *R. v. Exeter Guardians* (1869) L.R. 4 Q.B. 341.

⁸⁵ *People v. Bush* 133 N.E. 201 (1921).

privies is a party to the action. If then W has seen A pay Q \$5000 in satisfaction of Q's claim that Q's house burned, what justification can there be for refusing to receive W's testimony of this transaction?"

In another place Morgan remarked:⁸⁶

"If actual trustworthiness, rather than the ability of the trier to evaluate, were the test of admissibility, the comparative treatment by the courts of . . . reputation would be too ridiculous for serious comment. As it is, it is none too easy to refrain from sarcasm."

We agree with these criticisms.

1.2.30 Basis of the exceptions: *res gestae*. The basis of some of the hearsay exceptions may be doubted. The rule that statements made under the pressure of excitement at some dramatic event are admissible as part of the *res gestae*⁸⁷ is an odd one; for though excitement may reduce the chance of lying it increases the chance of errors in observation.⁸⁸ A statement made later by the declarant after making allowances for errors on the spur of the moment may be much more reliable, but it is inadmissible at common law.

1.2.31 Basis of the exceptions: dying declarations. Dying declarations are admissible because it is thought that no-one wishes to die with a lie on his lips.⁸⁹ But in fact some may lie because they wish to revenge themselves on their enemies.⁹⁰

1.2.32 Basis of the exceptions: declarations against interest. In *Ward v. H. S. Pitt & Co.* Hamilton L. J. said:

"The ground [of admissibility] is that it is very unlikely that a man would say falsely something as to which he knows the truth, if his statement tends to his own pecuniary disadvantage. As a reason this seems sordid and unconvincing. Men lie for so many reasons and some for no reason at all; and some tell the truth without thinking or even in spite of thinking about their pockets, but it is too late to question this piece of eighteenth century philosophy."⁹¹

Our proposals will greatly extend admissibility and overcome this objection.

⁸⁶ Morgan (1927), p. 715, n.l.

⁸⁷ *Ratten v. R.* [1972] A.C. 378.

⁸⁸ See Hutchins and Slesinger (1928), p. 432.

⁸⁹ *R. v. Woodcock* (1789) 1 Leach 500; 168 E.R. 352.

⁹⁰ This is apparently very common in India and Pakistan; and see *State v. Eddon* 36 P. 139, at p. 142 (1894).

⁹¹ [1913] 2 K.B. 130, at p. 138.

1.2.33 Statutory exceptions. The enactment of our business records proposals⁹² in the Evidence (Amendment) Act, 1976, has overcome some of the anomalies that formerly existed as between ss. 14B and 14C of the Evidence Act and s. 14CB. However, we may note the continuing problems arising under s. 14B of authentication, copies, interest, continuous record, anticipation of proceedings and duty to record, which are exhaustively discussed in the books.⁹³ Of almost all these qualifications, as well as of those existing at common law, one may say, in Wigmore's words, that the qualifications place:

"the rules of evidence on a par with the rule of chess that a king may move one square only, or the rule of bridge that the card played must follow the suit led—rules, that is, which justify their existence because they add complexity, and therefore interest, to the game. If a trial upon evidence is a game, such limitations have a place in the law of evidence; if it is the employment of rational and practical methods in the discovery of truth, such limitations should be discarded without scruple."⁹⁴

1.2.34 Refreshing memory. The law in the hearsay area also tends to be brought into contempt because of the technical and almost fictitious distinction which results in a document otherwise inadmissible becoming admissible because a witness has refreshed his memory from a document if the opponent uses it in cross-examination in certain circumstances, even though the witness does not remember the facts asserted. There is a further problem with refreshing memory. "What happens often in practice is that the witness pretends to refresh his memory by looking at the document, but in fact reads portions of it to himself and then looks away from the written word and repeats what he has read."⁹⁵ Indeed, if a document is used to refresh memory without being made evidence in the case, we have the curious result that though it is not evidence it is presumed by the law to be more likely to be true than false, otherwise it would not refresh the witness's memory correctly.

1.2.35 Problems of jury direction. The rule against hearsay and the rules concerning a witness's prior statements necessitate difficult jury directions. An admission made by one party is not evidence against another.^{95A} Complaints and previous consistent statements admitted to rebut charges of afterthought are admissible to enhance the witness's credibility, but not to prove the truth of what is asserted. Previous inconsistent statements other than admissions are received to diminish the witness's credibility but not to prove the truth of what is asserted. Documents used to refresh memory are not generally evidence. The task the jury is thus asked to perform is similar to that which in a similar

⁹² L.R.C. 17.

⁹³ Cross-Gobbo (1970), ch. 20; and see below, paras 1.3.10–1.3.15.

⁹⁴ Para. 1503.

⁹⁵ Campbell (1967), p. 71.

^{95A} We do not recommend any change in this rule; the difficulty of directing juries is here outweighed by other advantages in the rule: see s. 87.

hearsay context was found too hard for them by Cardozo J. in *Shepard v. United States*, where the Supreme Court held inadmissible the statement of a woman "My husband has poisoned me" offered not as evidence that the husband was her killer but to rebut the defence of suicide.

"It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds."⁹⁶

1.2.36 Evasive devices. The law has further been brought into contempt by improper but understandable devices which attempt to dress up hearsay evidence as non-hearsay in the same way as privileged evidence is sometimes presented as unprivileged.

"[One] consists in not asking what was said in a conversation or written in a document but in asking what the conversation or document was about; it is apparently thought that what would be objectionable if fully exposed is permissible if decently veiled . . . The other device is to ask by means of 'Yes' or 'No' questions what was done. (Just answer 'Yes' or 'No': Did you go to see counsel? Do not tell us what he said but as a result of it did you do something? What did you do?) This device is commonly defended on the ground that counsel is asking only about what was done and not about what was said. But in truth what was done is relevant only because from it there can be inferred something about what was said."⁹⁷

These devices have been disapproved from time to time but are still used.

"Another 'customary device' . . . is a question prefaced by, 'Is it within your knowledge that . . .'. This form of question may be designed to elicit an answer based on what the witness has heard from someone else, but it avoids making it all too apparent that the witness's answer is based on information of such origins."⁹⁸

1.2.37 Witnesses' prior statements: anomalies. Previous inconsistent statements are admissible in cross-examination to destroy the probative value of the witness's testimony by showing him not to be worthy of credit; they are admissible in examination-in-chief against hostile witnesses. Previous consistent statements are admissible in re-examination to rebut suggestions of recent fabrication of evidence and in chief to show the consistency of a witness who alleges he or she is the victim of a sexual offence. Statements made by the accused on arrest⁹⁹

⁹⁶ 290 U.S. 96, at p. 104 (1933).

⁹⁷ *Gliniski v. McIver* [1962] A.C. 726, at pp. 780-1, per Lord Devlin. See also *R. v. Saunders* [1899] 1 Q.B. 490; cf. *R. v. Wilkins* (1849) 4 Cox C.C. 92.

⁹⁸ Strachan (1971), p. 657.

⁹⁹ *R. v. Wallwork* (1958) 42 Cr.App.Rep. 153, at p. 160.

or made by the accused found in possession of recently stolen goods¹⁰⁰ or statements of previous identification¹⁰¹ are also admissible. It is not easy to explain why all these exceptions, each with their particular rules, and just these, exist. Another oddity is that previous inconsistent statements are generally admissible to discredit a witness, while previous consistent statements are not generally admissible to support him. This is particularly strange when both rules are applied to one witness,¹⁰² because the two sets of statements are often made under the same conditions, and a doctrine which permits the destruction of credibility but not its enhancement has an air of unfairness. We may also note that many of the common law hearsay exceptions permit the jury to find facts on the basis of much less reliable statements than the prior statements of witnesses, e.g., some dying declarations and some instances of reputation evidence. Abolition of the general rule against prior statements would also afford a party more protection against a turncoat witness.¹⁰³ The rule against proof of prior inconsistent statements has a further drawback. If a witness is impeached by proof of a prior inconsistent statement and in consequence not believed, the position—technically, at least—is that the trier of fact may have no evidence on the point in issue. He has no sworn evidence he can believe from the witness, and he cannot use the prior statement as evidence of the truth of what it asserts. The issue will then be decided not on evidence but on the burden of proof, which may be no guide at all to the truth.

1.2.38 Conclusion as to exceptions. In short, we agree with Morgan that “the present law as to hearsay is a conglomeration of inconsistencies due to the application of competing theories haphazardly applied . . . [No] amount of discourse about the frailties of jurors or the virtues of cross-examination can give them the appearance of rationality”.¹⁰⁴

1.3 GENERAL PROPOSALS

1.3.1 Possible creation of further common law exceptions. What should be done about the hearsay rule? One possibility is to retain the common law rule and leave it to the courts to add to the long list of common law exceptions as the need arises. The Australian courts have certainly displayed some willingness to create new exceptions deliberately, as for

¹⁰⁰ Gooderson (1968), pp. 70–71.

¹⁰¹ *R. v. Fannon* (1922) 22 S.R. (N.S.W.) 427, at p. 430; cf. *Gill v. State* 108 S.W. 2d 785 (1937).

¹⁰² E.g., *Jones v. South-Eastern and Chatham Railway Company's Managing Committee* (1917) 87 L.J.K.B. 775.

¹⁰³ At present a party can only cross-examine and discredit his own witness if that witness is hostile—“adverse” within the Evidence Act, s. 53. “A hostile witness is one who is not desirous of telling the truth at the instance of the party calling him” (Cross (1974), p. 220); but it is not easy to have a witness declared hostile.

¹⁰⁴ Introduction to Model Code (1942), pp. 46–7.

some records,¹ and sometimes perhaps less consciously as where a policeman narrates an interpreter's translation.² The same is true of the Supreme Court of Canada,³ and the New Zealand courts.⁴ But the House of Lords has held by a majority that reform of the hearsay rule is better left to the legislature. Lord Reid said: "The only satisfactory resolution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate."⁵ The rather uncertain possibility of gradual judicial reform should not stand in the way of some statutory modification.

1.3.2 Possible creation of further statutory exceptions. A second possibility is the creation of piecemeal statutory exceptions to the hearsay rule as occasion demands. Thus the decision in *Myers v. Director of Public Prosecutions*⁶ was speedily reversed by statute in England⁷ and New South Wales⁸. Although this is easy to achieve and preserves continuity with the common law, it does increase complication in that it produces a lengthy list of overlapping and often irrational exceptions. The American Uniform Rules, for example, list thirty-one. This technique also leaves the courts incapable of generating new exceptions through some general principle of trustworthiness.

1.3.3 Possible abolition of the hearsay rule. A third possibility is the complete abolition of the hearsay rule. Evidence would not then be rejected simply because it was hearsay, though other relevant exclusionary rules would continue to apply. We have given the most serious consideration to this possibility, which was strongly urged on us by some of those whom we consulted, including a number of very experienced judges for whose opinions we have great respect. It is certainly not a course to be dismissed out of hand, and although in the event we have decided against recommending it at this stage, we do foresee the possibility that it will be reconsidered in the future, perhaps after the courts and the profession have become accustomed to handling and evaluating the wider

¹ *Potts v. Miller* (1940) 64 C.L.R. 282, at pp. 292, 302-4; *R. v. Seifert* (1956) 73 W.N. (N.S.W.) 358; cf. *Commission for Motor Transport v. Collier-Moat Ltd* (1959) 60 S.R. (N.S.W.) 238.

² *Gaio v. R.* (1960) 104 C.L.R. 419; see also *R. v. Mutche* 1946 A.D. 874; *R. v. Kores* (1970) 15 C.R.N.S. 108.

³ *Ares v. Venner* (1971) 14 D.L.R. (3d) 4 (business records).

⁴ *Smith v. Police* [1969] N.Z.L.R. 856 (witness's statement of his own age); *Jorgensen v. News Media (Auckland) Ltd* [1969] N.Z.L.R. 961 (abolition of rule in *Hollington v. F. Hewthorn & Co. Ltd* [1943] K.B. 587). Haslam J. warmly advocated the creation of new exceptions, particularly as regards expert witnesses, in *Transport Ministry v. Garry* [1973] 1 N.Z.L.R. 120, at p. 123, as the best way of preserving the hearsay rule against "the impious hands of the would-be reformer".

⁵ [1965] A.C. 1001, at p. 1022. See also *Steele v. Mirror Newspapers Ltd* [1974] 2 N.S.W.L.R. 348, at p. 370. Cf. *R. v. Halpin* [1975] 2 All E.R. 1124: see below, para. 4.13.2, n.5.

⁶ [1965] A.C. 1001.

⁷ Criminal Evidence Act 1965 (U.K.).

⁸ Evidence Act, 1898, s. 14CB, inserted by Evidence (Amendment) Act, 1966. See now Part IIC of the Evidence Act, admitting certain business records.

range of hearsay evidence which will be admissible under our present proposals. For that reason we have placed on record later in this Report the substance of several draft Bills which we considered.⁹ Those who have favoured abolition stressed the artificiality of excluding hearsay evidence, and the interruption and confusion suffered by witnesses as a result. Everyone is accustomed to having hearsay information when making day-to-day decisions, some of great importance, in his private or business affairs, and everyone is accustomed to assessing the reliability of such information. Why cannot judges and jurors be trusted to consider and evaluate such evidence in the courtroom, just as they do outside it? No doubt there are risks that they may sometimes err, but is the risk really any greater than the risk of error in evaluating other conflicting evidence? Is the risk sufficiently serious to justify excluding much valuable evidence—sometimes indeed the only available evidence on an important issue? Is it sufficiently serious to justify the bewilderment of witnesses and the disenchantment of litigants which sometimes result? The suggestions that the courts might be flooded with evidence of little value, and that the system of trial on direct oral evidence would be threatened, were rejected as groundless. No sensible litigant, and certainly no competent advocate, would call weak evidence if stronger evidence were available, or expose his case to ridicule by multiplying valueless hearsay repetitions of a statement.

We have much sympathy with the basic criticisms of the hearsay rule on which this argument is founded. It is because we accept them in the main that we recommend a fundamental restructuring of the law which allows a great increase in the admissibility of hearsay evidence and provides a rational basis for distinguishing between what is and what is not admissible. Most of the unsatisfactory features of the present law will thereby be eliminated or mitigated. But we do not go so far as recommending abolition of the present rules without substitution of other rules. Our caution is motivated as much by the fear that such a drastic reform would be ineffective in practice, as by concern about the risks traditionally urged in opposition to hearsay evidence. Courts are characteristically conservative—an observation which is not necessarily a criticism. Attempts at wide-ranging reform which leave the courts without precise directions may only result in old rules and practices reappearing in a new guise. If the law gave no guidance on when hearsay evidence should be received or acted on, judges and magistrates who are conditioned to reject or scorn it would probably develop new rules and practices to protect the courts against an apprehended flood of valueless evidence, and to guard against undue weight being given to it. If the admissibility of hearsay evidence were left to the discretion of the courts, many old rules and attitudes might well surface as guides to the exercise of the discretion. If there were no discretion to reject, the arguments would be transferred to issues either of relevance or of weight, and again the apparently simple reform might turn out in practice not to be as sweeping or as practicable as had been anticipated. Moreover, our attempts to devise a workable abolition statute, to which we have referred, suggest that outright abolition is not the simple matter it may appear on the surface, and that in practice it might not turn out to be substantially less complex than our present proposals.

⁹ See below, paras 8.10.1–8.10.2.

In addition, we do not think it right to discount totally the traditional arguments against hearsay, to which we have referred.¹⁰ It is true that Continental systems of law manage without a law of evidence as we know it, but to a substantial degree this reflects the great difference in the role of the judge in those jurisdictions, which do not have our adversary system. To adopt the Continental system of trial would be a major revolution in the administration of justice, and in dealing with the law of evidence we have assumed, and taken into account the requirements of, the adversary system. That system requires that the law should give the parties a substantial measure of guidance as to what evidence will be acceptable in the court. We have also taken into account the value which our system places on direct oral evidence in the face of the court, and on its testing by cross-examination. We have also borne in mind that across the whole range of the administration of justice there is a considerable variation in the competence and experience of both advocates and triers of fact. We have remembered also that those who will have to administer our recommendations have little experience of using hearsay in the trial process, where decision making is subject to many considerations, pressures and limitations which do not normally apply in making decisions outside a courtroom. For these reasons we have, although initially attracted by the suggestion, decided not to recommend complete abolition of the hearsay rule.

1.3.4 Partial abolition and new exceptions. The fourth possibility is that which we propose: an abolition of the common law rule against hearsay, a restatement of it as a law prohibiting the reception of out-of-court statements except under statute, and an attempt at a rationally based and greatly expanded scheme of statutory exceptions. The result, for practical purposes, may be regarded as a substantial destruction of present restrictions on admissibility so far as they are obstructive and difficult to defend. Oral first-hand hearsay would be admissible where the maker is not reasonably available; it would also be admissible if the maker is called. Second-hand or more remote hearsay would be admissible if it were entirely documentary, if it were one document in a documentary chain recording a first-hand oral hearsay statement,^{10A} if it formed part of a business or computer record, and in other instances. Certain common law exceptions would be modified and preserved (admissions in civil cases, statements in authoritative published works, personal and family reputation, public documents). There would be two general inclusionary discretions: one to admit reliable hearsay evidence not falling under any other hearsay exception; the other to admit evidence in favour of an accused which raised a reasonable doubt of his guilt. The present statutory business records exceptions, enacted in 1976 as ss. 14CD-14CV of the Evidence Act, are retained in substantially the same form in the Bill. The substantive sections providing for admissibility (ss. 14CE-14CH) appear as ss. 91-4 of the Bill. But there are several other provisions ancillary to the sections providing for admissibility; they concern matters like the weight of evidence, the credibility of the maker

¹⁰ Paras 1.2.2-1.2.13.

^{10A} For an explanation of the admissibility of "pure" and "impure" multiple documentary hearsay under our recommendations, see above, para. 1.1.8.

of a statement in a business record, the production and authentication of documents, and the discretion to reject evidence on various grounds. We think that these provisions should be generalized to apply to hearsay generally, and they are to be found with appropriate changes in Division 5 of the Bill.^{10B}

1.3.5 Nature of the proposals. It is perhaps no more than a semantic question whether these proposals could be characterised, like the present law or the Uniform Rules, as turning on a general prohibition with specific exceptions, or rather as being a general permission with qualifications. In our view they amount to a substantial dismantling and remoulding of the traditional law on rational lines, and because of the much greater admissibility of first-hand oral hearsay and the inclusionary discretions, they avoid the general tendency of rules which take the form of prohibitions with specific exceptions to exclude reliable items of evidence which fail to fit the precise terms of the haphazard exceptions existing in the present law.

1.3.6 Advantages and disadvantages. In most of the new areas of admissibility we propose it is true that the court is deprived of the benefits to be gained from the procedure of oral examination-in-chief of witnesses, the testing of the answers by cross-examination, and the correction of misleading impressions by re-examination. (The court still has these benefits where the prior statements of a witness are proved.) If a witness is unavailable, want of cross-examination is unfortunate, but it is a price that must be paid for the acceptance of what may in fact be the only available evidence. The same is true with regard to reliable multiple hearsay, commercial publications, and statements on goods. Moreover, in some cases these procedures are superfluous, e.g., where the expense and delay of calling the witness are disproportionate to the value of the procedure.

1.3.7 Oral multiple hearsay. We do not propose the general admission of oral second-hand and more remote hearsay. No doubt such evidence is sometimes reliable; we have provided for the admission of it in the court's discretion and for special listed exceptions, principally to do with reputation (s. 79) and admissions based on belief rather than knowledge (s. 87 (3) (a)). The business records sections of the Evidence Act enable the admission of multiple documentary hearsay: see the Evidence Act, ss. 14CD-14CH and Division 4 of our proposed Part VI. But we oppose the general admission of oral second-hand hearsay because its probative value is usually small, and because the general admission of second-hand hearsay is a radically different step from admitting first-hand hearsay. If A tells the court what B said, then even though B cannot be cross-examined as to his means of knowledge and reliability, A can be cross-examined *both* about his own reliability *and* about his view of B's reliability.

^{10B} See below, paras 6.2.1-6.13.1.

Though this is inferior to a cross-examination of B, it gives some assurance that B's reliability can be tested. But if A tells the court what B told him C said, there is not even this indirect check on C's reliability. The line between first and second-hand oral hearsay often corresponds with a line between evidence the reliability of which can, in some degree, be checked, on one hand, and evidence which is little more than rumour, on the other. On balance, we think this is an appropriate line to draw. So far as we propose to admit second-hand documentary hearsay which is "pure" in the sense that the original statement was made in a document and an unbroken chain of documents flows from it, the risk of mishearing is met by the documentary nature of the evidence. And in many cases of documentary hearsay, whether pure or impure, there is often some element of duty or knowledge or strong reliance by others or similar indicator of accuracy.^{10c}

1.3.8 General nature of recommendations evaluated. We do not claim that our recommendations provide an ideal or permanent solution to the problems involved. Like any proposals in this field, they have to strike a balance between a number of conflicting considerations, including the degree of change which can effectively be introduced in one step. There would be little point in introducing changes which were logically impeccable and theoretically admirable, if they would not work satisfactorily in practice because of the difficulty of making too abrupt changes in procedures which are necessarily administered by people who have, over a long period, built up their habits, attitudes and expectations on a quite different basis. Thus, as already explained, we have rejected the total abolition of the hearsay rule as inappropriate at the present time. Our proposals distinguish between evidence which is very often quite reliable—first-hand oral and documentary hearsay, pure documentary hearsay, and documentary hearsay reporting an oral statement which has no oral element after the initial statement^{10d}—and evidence which is generally not reliable—second-hand oral hearsay and documentary hearsay outside the above categories. For the most part they do not allow the use of a hearsay statement without calling the maker of the original statement, unless there is some good reason for not calling him. Our system is partly discretionary; to have hearsay entirely discretionary would, we believe, at the present stage produce too much uncertainty and make it hard to prepare cases confidently, but we think that the discretions we propose do not have these drawbacks to an unreasonable degree. A general discretion available equally at all levels of the judicial hierarchy, however, would be too uncertain a basis in the short run. Some will say that we have been too much influenced by reservations about the general competence of practitioners, judicial officers and juries. But there is much to be said for proceeding by stages. Our proposals are a substantial movement to complete admissibility. If experience of our proposals in action suggests that the dangers anticipated from complete abolition of the hearsay rule are unlikely, or have passed with time and new training and experience, it will be proper

^{10c} The distinction between pure and impure documentary hearsay, so far as relevant to our recommendations, is explained above, para. 1.1.8.

^{10d} See note 10b.

to extend admissibility more widely. Professional habits die hard, but the operation of our proposals will not call for too sudden an adaptation on the part of courts and practitioners. Experience with a liberalized hearsay rule will accustom the profession sufficiently to the use of hearsay to permit further liberalization in the future.

1.3.9 Rejected tests. There are other lines than the one we have drawn which might have been adopted to distinguish instances of admissible hearsay from inadmissible hearsay. Hearsay might be admitted freely in all civil cases but not criminal; or in all non-jury proceedings but not jury trials; or in some courts but not others. A structure of discretions to admit or reject evidence varying with the nature of the proceeding or the tribunal might be devised. Other possible combinations might be figured. Our recommendations do not follow any of these lines because we think it is desirable to keep the law of evidence to a large extent the same in all courts and in all proceedings. Admittedly, some of our proposals for admissibility in criminal proceedings are less extensive than in civil;¹¹ but we think in general that the law of evidence should not become unduly fragmented, and we think that choice of jury trial should not depend on questions of admissibility.

1.3.10 Comparison with Evidence Act, 1898, s. 14B: abolition of continuous record requirement. The Evidence Act, 1898, s. 14B, makes admissible, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made in a document tending to establish the fact. There are two main conditions of admissibility. First, the maker must have personal knowledge (or, where the document is part of a continuous record, he must have made the statement in the performance of a duty to record information supplied by a person who had or might reasonably be supposed to have it). Secondly, the maker of the statement must be called as a witness, or it must be shown that he is dead, unfit, outside the jurisdiction, or incapable of being found, or that undue expense or delay would be caused.

The detail of certain consequences of our present proposals concerning documentary hearsay and of our earlier proposals respecting business records, which are now Part IIC of the Evidence Act, should be noted. The need for a continuous record, the task of defining which has caused so much difficulty under s. 14B of the Evidence Act,¹² will be abandoned; the continuous record requirement was presumably imposed because an entry in a continuous record would be harder to fabricate, but this ought to go only to weight, not to admissibility. It does not exist under Part IIC of the Evidence Act.

¹¹ Below, paras 2.4.5–2.4.13 and 8.5.1–8.5.6.

¹² E.g., *Ioannou v. Demetriou* [1952] A.C. 84; *Simpson v. Lever* [1962] 3 All E.R. 870; *Berjak (Victoria) Pty Ltd v. Peerless Processing Co. Pty Ltd* [1963] V.R. 515; *Newton v. Pieper* [1968] 1 N.S.W.R. 42.

1.3.11 Comparison with Evidence Act, 1898, s. 14B: abolition of duty requirement. Further, the requirement of s. 14B of the Evidence Act that written hearsay statements must have been made in the performance of a duty to record information will cease to exist. It was abandoned in criminal proceedings by s. 14CB of the Evidence Act, 1898, and has been completely abandoned for business records by Part IIC of the Evidence Act. Such a requirement raises problems about the kind of duty; may it be contractual, statutory, professional, social or moral? It causes difficulties in respect of non-employees such as doctors not in partnership.¹³ Business records are normally compiled under a duty; the same is true of published compilations,¹⁴ statements placed on goods or their labels and containers in the course of their manufacture, packaging or distribution,¹⁵ and statements displayed in the course of business on land or vehicles.¹⁶ But we consider that many statements not made under a duty are also reliable and should be acted on. Further, many records could not be described as having been made under a duty to record information where the recorder was simply a photocopy machine operator or a typist; and the person who gave the document to be copied or typed may not always be said to have given information to the operator or typist.¹⁷

1.3.12 Comparison with Evidence Act, 1898, s. 14B: abolition of personal knowledge requirement. Our business records proposals abandoned the requirement of s. 14B (1) (i) (b) that the maker of a hearsay statement who does not have personal knowledge of its contents must have made the statement in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge.¹⁸ Modern business records are not made by one with personal knowledge, or by one who made the record after being told information by one who had it.

“The operative stamps the serial number of the car upon the engine; the inspector inspects it and makes his own note which is handed to the office; from that the appropriate record is entered in the books or on the card and the inspector’s note destroyed. The recording may, indeed, be done mechanically.”¹⁹

The same result follows from our proposed provisions respecting evidence of reputation,²⁰ admissions,²¹ published compilations,²² statements on goods,²³ and statements on land.²⁴ Other oral hearsay statements are

¹³ See *Mills v. Mills* (1920) 36 T.L.R. 772.

¹⁴ See Bill, Part VI, s. 80, and paras 4.8.1–4.8.5.

¹⁵ See Bill, Part VI, s. 81, and para. 4.9.1.

¹⁶ See Bill, Part VI, s. 82, and para. 4.10.1.

¹⁷ *Barkway v. South Wales Transport Co. Ltd* [1949] 1 K.B. 54; [1948] 2 All E.R. 460.

¹⁸ See Part IIC of the Evidence Act, and our Bill, Part VI, Division 4.

¹⁹ 13th Report (1966), para. 16.

²⁰ See Bill, Part VI, s. 79.

²¹ See Bill, Part VI, s. 87.

²² See Bill, Part VI, s. 80.

²³ See Bill, Part VI, s. 81.

²⁴ See Bill, Part VI, s. 82.

only admissible if they are first-hand and other documentary statements only if they are part of a chain of documents going back to a declarant with personal knowledge,^{24A} apart from those admitted under the court's discretion in all cases to admit reliable evidence, and those admitted under the court's discretion in criminal cases to admit in favour of the accused evidence which tends to support the acquittal of the accused person.²⁵

1.3.13 Comparison with Evidence Act, 1898, s. 14B: abolition of formal requirement. Our business records proposals, as enacted in Part IIC of the Evidence Act, did not adopt the inconvenient requirement of the Evidence Act, 1898, s. 14B (4), that a hearsay documentary statement made by a person is inadmissible unless the document was written by him, or signed, initialled or otherwise recognized by him in writing as one for the accuracy of which he vouches. In our present proposals we abandon it completely, as did s. 14CB of the Evidence Act, 1898.

1.3.14 Comparison with Evidence Act, 1898, s. 14B: abolition of test of interest. Consistently with Part IIC of the Evidence Act, 1898, we propose the exclusion of any requirement that the maker of the statement should not be "interested". There have been judicial differences of opinion on the meaning of the phrase, which has led to much litigation; the more recent trend is to require a substantial material interest rather than any slight risk of bias, which may reflect growing judicial willingness to admit hearsay under the Evidence Act, 1898, s. 14B.²⁶ It is strange that possible bias should go to admissibility rather than weight in this instance but nowhere else in the law of evidence. The abolition of this requirement has been recommended several times²⁷ and has occurred in some jurisdictions;²⁸ in others the requirement has not been adopted.²⁹

1.3.15 Comparison with Evidence Act, 1898, s. 14B: miscellaneous changes. The Evidence Act, 1898, s. 14B, did not provide for the credibility of the maker of a hearsay statement to be challenged.³⁰ We propose that express provision should be made permitting challenge.³¹ The exceptions depending on the declarant's death will be replaced by a general exception in favour of declarations by a dead person, and the irrational restrictions on them will be removed. The *res gestae* exceptions will be abolished as serving no useful independent purpose if the other proposals are adopted.

^{24A} See above, para. 1.1.8.

²⁵ See Bill, Part VI, s. 74.

²⁶ Cf. *Plomien Fuel Economiser Co. Ltd v. National Marketing Co.* [1941] Ch. 248 and *Bearmans Ltd v. Metropolitan Police District Receiver* [1961] 1 All E.R. 384.

²⁷ English Committee on Supreme Court Practice and Procedure (1953), para. 274; 13th Report (1966), para. 18.

²⁸ Civil Evidence Act 1968 (U.K.), ss. 2, 4 and 5; Evidence Act 1910 (Tas.), s. 81B-81I; cf. Evidence Act 1958 (Vic.), s. 55 (4).

²⁹ Evidence and Discovery Act 1867-1967 (Qld), s. 42B (see now Evidence Act 1977 (Qld), s. 92); Evidence Act 1906-76 (W.A.), s. 79c; Evidence Ordinance 1971 (A.C.T.), s. 32.

³⁰ But cf. *Patmay v. Paltie* (1960) 78 W.N. (N.S.W.) 3.

³¹ See Bill, s. 96.

1.3.16 The role of discretions. An essential element in our recommendations is the existence of various kinds of judicial discretion. The three most important are the discretion to admit reliable statements (s. 74 (1)), the discretion to admit statements in favour of an accused person which tend to support his acquittal (s. 74 (2)), and the discretion to exclude statements on the ground that their weight is slight, or that they will unduly prolong the proceeding, or that they will operate unfairly, or that they will mislead the jury (s. 100). The standard general objection to this kind of reform is that it depends too heavily on the exercise of judicial discretions.³² The question whether judicial discretions should be granted by statute is a question both recurrent and vexing. One objection is that a problem is given to judges with, perhaps, no guidance for its solution.³³ This problem can be met, or at all events eased, by seeing that guidance is given by the statute, either expressly or by reference to the general scope and purpose of the statute and the evil which it sets out to remedy. Another objection is that the grant of a discretion leads to unpredictability: how can a party prepare for trial if the admission of what he proposes to tender as evidence depends on a future discretionary decision? To this second objection there are two answers. In the first place, it should be possible, in proper cases, for the discretion to be exercised in sufficient time before the trial to enable other proof to be sought in case the matter tendered is rejected. In the second place, we are by no means satisfied that rules of admissibility not subject to discretion would necessarily give a more predictable result. Our proposals are general ones and call for general expression in legislation. General words in legislation must be interpreted and applied to the facts. There is, of course, a difference between, on the one hand, this process of interpretation and application and, on the other hand, the exercise of a judicial discretion: they are distinct mental processes. But one may concede that difference, yet doubt that the outcome of one process will be more predictable, in the eye of a litigant, than the outcome of the other. The discretion will be exercised by a lawyer by reference to values such as justice and fairness, values which are shared by those who conduct litigation. Experience in the ways in which such values are applied may be a more certain guide to prediction of judicial decision than is an opinion

³² The following discretions—some wholly new, some already existing by statute and some based on the common law—are given to the court in the Bill: to reject statements unaccompanied by other statements qualifying or explaining them (s. 68: see para. 3.5.1); to admit statements of a person to be called as a witness on terms and conditions (s. 73 (8): see paras 4.1.24–4.1.27); to admit certain statements made after the accused person is charged (s. 73 (9): see paras 4.1.28–4.1.29); to admit reliable evidence or evidence tending to support acquittal (s. 74: see paras 4.2.1–4.2.10); to reject proofs of evidence (s. 75: see paras 4.3.1–4.3.8); to admit formal admissions by disable persons (s. 86 (5): see para. 4.14.6); to permit withdrawal of formal admissions (s. 86 (6): see para. 4.14.7); to refuse to act on formal admissions (s. 86 (7): see para. 4.14.8); to reject out-of-court statements not objected to (s. 89: see para. 4.17.1); to require documents related to business and other records to be produced (ss. 92 (3), and 94 (2): see paras 5.2.1 and 6.1); to admit evidence going to the credibility of a person not called as a witness which could not have been admitted had he been called (s. 96: see para. 6.3.4); to reject evidence of slight weight or utility (s. 100 (1): see para. 6.7.1); to withhold statements in documents from the jury during its deliberations (s. 101: see para. 6.8.1); and to reject evidence which would operate unfairly against the defendant in a criminal legal proceeding (s. 103: see para. 6.10.1).

³³ Wells J. (1971).

³⁴ Wells J. (1971), p. 563.

formed on a question of statutory interpretation. The law of evidence is a part of the adjectival law: some would say that it is part of the law of court procedure. It takes no great acquaintance with the history of court procedure to remember, and deplore, the technicality of court procedures early in the nineteenth century. In the main, the rules of procedure in those days were, on the surface at least, mandatory matters of law, not subject to judicial discretions. The changes since then have introduced judicial discretions at practically every stage of litigation. We do not believe that the conduct of litigation has become less predictable: we are sure that the outcome of litigation has become more just.

1.3.17 Risk of manufacture or destruction of evidence. A second general objection to our proposals is that to make the unavailability of the maker an automatic ground of hearsay admissibility is to encourage perjury. In the words of Wells J.:

"Those who have had anything to do with the news behind the news in the criminal court are as well aware as I am that there is unavailability and unavailability. It may be perfectly true that the original maker of a statement is visiting an aged aunt in the heart of South America: it may be true that his absence from this country and indeed from the world, has been artificially induced or prolonged. One's powers of invention become so much easier to exercise if they are unrestricted by the ready availability of an original source. Collection and preservation of evidence will be deeply and extensively affected by any relaxation of the hearsay rule."³³

Our answer is that unavailability must be proved as a fact; and that unconvincing testimony as to unavailability will not be believed and the hearsay evidence will not be admitted. The objection depends on an assumption that the court's normal capacity to detect perjury is suspended in this particular instance.

1.3.18 Necessity for jury warnings. A third general objection to our proposals is that hearsay evidence should not be admitted without being accompanied by some warning of the kind used in connection with accomplices and children and in sexual cases, namely that it may be unsafe to act on the evidence unless it is corroborated; at least there should be a reminder that hearsay statements are made by men who do not face a prosecution for perjury if they lie,³⁴ or that the truth of such statements has not been tested by cross-examination.³⁵ In our view the problem is best left to judges in individual cases to solve in accordance with their general power to direct the jury as to the weight of the evidence before them. Some believe that the mandatory corroboration warnings have not always had happy results, and that discretionary warnings work better. In any event, we consider that normally juries will be able to estimate the weight of and possible dangers of hearsay evidence as they do in daily affairs of importance.

³³ Wells J. (1971), p. 563.

³⁴ *Ibid.*

³⁵ Criminal Law and Penal Methods Reform Committee of South Australia (1975), para. 33.

1.4 THE SCOPE OF THE HEARSAY RULE

1.4.1 The scope of the hearsay rule. There are certain fundamental questions about the scope of the hearsay rule to be considered before we explain the details of our proposals.

1.4.2 Original evidence. We refer again to the description of the hearsay rule given in the advice of the Privy Council in *Subramaniam v. Public Prosecutor*:¹

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.”

In that case the Privy Council advised that the trial judge ought to have admitted evidence of threats illegally made by Malayan terrorists to the accused, who had raised a defence of duress to a charge of unlawful possession of firearms. The statements were “original” evidence, not hearsay; they were admissible not in order to show that they were true, but that they were made; the issue was not what the terrorists actually intended but what effect the statements, seriously meant or not, had on the accused’s mind. There are many familiar examples of original evidence:² statements which amount to the commission of a tort, which create or terminate a contract, or which effect a gift (“operative words”); statements to a party which provide a motive for conduct; eccentric statements to prove insanity; statements in matrimonial quarrels to show the relationship of the parties rather than the truth of what is said.³

1.4.3 Questionable decisions on original evidence. One common error in applying the hearsay rule is to classify hearsay statements, tendered as evidence of the truth of the facts asserted, as original evidence. Thus in *R. v. Rice*⁴ a used air ticket made out in Rice’s name was held evidence that a man called Rice had travelled on a certain flight. On one view of the case, the ticket would seem to contain the booking clerk’s report of what someone else said to him when booking the ticket, and to be tendered to prove the truth of what was said.⁵ Statements made by persons not called as witnesses who said they were agents of the accused

¹ [1956] 1 W.L.R. 965, at p. 970, *per* Mr L.M.D. de Silva; see above, para. 1.2.1.

² See Cross (1974), pp. 410–5.

³ *Wilson v. R.* (1970) 123 C.L.R. 334.

⁴ *R. v. Rice* [1963] 1 Q.B. 857.

⁵ See Cross (1974), p. 405. If the decision is technically wrong, it constitutes an excellent example of how the hearsay rule, correctly applied, would exclude highly reliable evidence. Cf. *Kenny v. Hornberg* (No. 2) (1963) 37 A.L.J.R. 162; *Re Gardner*; *Ex parte R. J. Gardner Pty Ltd* (1967) 13 F.L.R. 345; *R. v. Clune* (No. 1) [1975] V.R. 723.

have been received under the admissions exception; but the assertion that they were in fact agents came only from them and was tendered as evidence of its truth.⁶⁻⁸ There are cases in which a police officer's testimony as to what an interpreter told him the accused said in a language unknown to the officer has been admitted where the interpreter, who could not remember what had been said and had no written notes from which to refresh his memory, swore only to the accuracy of his interpreting.⁹ Yet the police officer is narrating to the court statements by the interpreter as evidence of their truth which neither the interpreter nor the police officer can endorse. (If the interpreter could remember what was said, the accused's confession, on being narrated to the court by the interpreter, would be admissible as an exception to the hearsay rule so far as it operates between accused and interpreter. The present problem concerns the application of the hearsay rule as between interpreter and police officer.)¹⁰

1.4.4 Impact of our proposals. These decisions have the merit of admitting reliable evidence, but on the view put in the preceding paragraph they appear to rest on a misunderstanding of the hearsay rule. It is doubtful whether a statutory reformulation of the hearsay rule can entirely prevent the recurrence of this kind of error any more effectively than a careful reading of the principal authorities which have avoided

⁶⁻⁸ *Edwards v. Brookes (Milk), Ltd* [1963] 1 W.L.R. 795; cf. *Chappell v. A. Ross & Sons Pty Ltd* [1969] V.R. 376.

⁹ *Gaio v. R.* (1960) 104 C.L.R. 419.

¹⁰ There are some cases in which the facts might have raised the issue under discussion, but in which the courts did not have to deal with it because they classified the statements tendered as not being hearsay on another ground. The cases concerned "implied assertions"—an expression which is confusing and inapt but has come close to becoming a term of art. It refers to statements and conduct not intended by the speaker or actor to assert a particular fact, but from which his belief in that fact can be inferred. (See below, paras 1.4.5–1.4.10.) Thus in *McGregor v. Stokes* [1952] V.L.R. 347, police who answered phone calls at premises suspected of being used for unlawful betting were allowed to tell the court what the callers said. One view is that "implied assertions" are within the hearsay rule; if so, the statements of the callers would have been hearsay. The conclusion that the premises were used for betting would depend on the callers assuming, and "impliedly asserting", that the premises were so used. That is, the conclusion would depend on what the callers said being tendered as evidence of the truth of their underlying belief. But the court did not take this view. It acted on the view, with which we agree, that "implied assertions" are outside the hearsay rule: see below, para. 1.4.11. Had it taken the other view, a question would have arisen as to whether the evidence was original or hearsay. Another example is *Ratten v. R.* [1972] A.C. 378, where the Privy Council upheld the reception, as not being hearsay, of a telephonist's evidence that a hysterical female voice said "Get me the police please" in a call from the accused's house about the time the accused's wife was shot by the accused's gun. There was no-one in the house but the accused, his wife, and their small children. The accused's defence was that the gun went off by accident and that he was the caller. The words were said to be only "facts" or "acts" showing the caller to be afraid and were not tendered as evidence of the truth of some proposition implicit in them. If "implied assertions" are within the hearsay rule, this statement should have been held within it. But the Privy Council denied that there was any hearsay element in the evidence, and we agree. If, however, implied assertions are within the hearsay rule, an issue as to whether the statement was original or hearsay would have arisen.

it.¹¹⁻¹³ Therefore we do not propose to attempt a definition of the hearsay rule to overcome this problem. However the error will be less important, and there will be less temptation to make it, because our recommendations will provide avenues for the admission of most statements of this character, notwithstanding that their hearsay character is recognized.

1.4.5 "Implied assertions". The other major difficulty concerning the scope of the hearsay rule is whether "implied assertions" fall within the hearsay rule at all. "Implied assertions" are of two kinds—those implied from statements not intended to assert a particular fact, and those implied from conduct not intended to assert a particular fact. Examples of the first kind of implied assertion include a witness saying he heard Brown (who is not testifying at the trial) cry "Hello, Smith!" as evidence of Smith's presence in a particular place; a witness saying that he heard one workman say to another "What, no helmet?" as evidence that the second workman was not wearing a helmet; and a policeman testifying that he repeatedly heard telephone callers attempting to make bets as evidence of their belief that they were speaking to a betting house. These are "implied assertions" because the callers were not intending to assert their belief that Smith was present, that a helmet was absent, or that the house was used for betting; they were intending to greet Smith, to learn why there was no helmet, or to make bets. Examples of the second kind of "implied assertion" include a witness testifying that he saw a doctor (who is not a witness) supervising the placing of a patient in a mortuary van as evidence of the patient's death; a witness testifying that he observed one person treat another in an affectionate, or violent, or jeering, or paternal way as evidence that the first is married to, or hates, or considers mad, or regards as his child, the second; a witness testifying that an experienced sea-captain, after inspecting a ship, embarked on it with all his family as evidence of the captain's belief in its seaworthiness; flight, or a lie, or interference with witnesses, or the destruction of real evidence, or silence in the face of an accusation, as evidence of a consciousness of guilt or liability. It is plain that the hearsay rule extends to conduct intended to be assertive, such as nods, head shaking, signs and other gestures.¹⁴ It is also plain that the hearsay rule does not extend to conduct which is not assertive at all, e.g., the leaving of fingerprints or footprints; but the authorities differ on whether the two kinds of "implied assertion" not intended to be assertive which are illustrated above are within the rule.¹⁵ Admittedly the matter has not always required extensive discussion, because in many instances the evidence, even if it could be regarded as falling within the hearsay rule, is plainly admissible as a hearsay exception; thus lies or silence may be admissions.

¹¹⁻¹³ *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R. 965; *R. v. Wong Ah Wong* (1957) 57 S.R. (N.S.W.) 582; *R. v. Attard* (1959) 43 Cr.App.Rep. 90; *Myers v. Director of Public Prosecutions* [1965] A.C. 1001; *Jones v. Metcalfe* [1967] 1 W.L.R. 1286. See also *Gulf, C. & S. F. Ry. Co. v. Ginn* 116 S.W. 2d 693 (1938).

¹⁴ *Chandrasekara v. R.* [1937] A.C. 220.

¹⁵ General reference should be made to Cross (1956); Cross (1969); Finman (1962); McCormick (1930); Maguire (1961); Maguire (1947), pp. 11-23; Morgan (1935); Morgan (1956), pp. 149-62; Morgan (1948); Seligman (1912), pp. 148-53; Strahorn (1937); Weinberg (1973).

1.4.6 "Implied assertions" as hearsay. Five views have been taken as to the status of "implied assertions". One is that all "implied assertions", whether implied from words or other conduct, are hearsay and inadmissible unless they fall within an existing exception. The principal authority for this view is the decision of the Court of Exchequer Chamber, particularly the judgment of Parke B., in *Wright v. Doe d. Tatham*, holding that three letters written to the testator showing that the writer treated him as sane were inadmissible on the issue of his capacity.¹⁶ The indecision which characterizes this entire topic is illustrated, however, by the fact that one year earlier Parke B. said that the signature of the attesting witness on a deed was admissible evidence of its due execution because this fact showed that what the witness would ordinarily do only on seeing execution had been done.¹⁷ A further source of confusion is that in *Wright v. Doe d. Tatham* much conduct grounding an inference of the testator's insanity was received without objection by the court, e.g., treatment with disrespect by his steward; treatment as a child by his menial servants and residents of his village; the fact that he was called "Silly Jack" and "Silly Marsden" by neighbours; the fact that boys had shouted at him "There goes crazy Marsden", thrown dirt at him, and persuaded a passerby to see him home. There are traditional arguments of principle in favour of this view. An "implied assertion" is just as likely as an express one to be unreliable because of a defect in its maker's powers of perception, memory and expression. The letter writers in *Wright v. Doe d. Tatham* may not have recognized the testator's insanity, may not have remembered it, may have been confused about whom they were writing to, or may have been attempting to improve the testator's mental health by treating him as normal. But "implied assertions" are much more likely to be free from the risk of deliberate lying than express: "People do not say 'Hello X' in order to deceive passersby into thinking that X is there, and doctors do not place bodies in mortuary vans unless they have good reason to believe the bodies to be corpses."¹⁸

1.4.7 "Implied assertions": need for new hearsay exceptions. The second view is that though all "implied assertions" are hearsay and inadmissible unless they fall within existing exceptions, new exceptions ought to be created in instances where reliable evidence would otherwise be excluded. Many "implied assertions", if made by a party, already fall

¹⁶ (1837) 7 Ad. & El. 313; 112 E.R. 488, approved by the House of Lords (1838) 4 Bing.N.C. 489; 132 E.R. 877. See also *Backhouse v. Jones* (1839) 6 Bing.N.C. 65; 133 E.R. 26; *Gresham Hotel Co. (Ltd) v. Manning* (1867) Ir.R. 1 C.L. 125; *Teper v. R.* [1952] A.C. 480; *Marshall v. Watt* [1953] Tas.S.R. 1, at p. 7, per Gibson J. and the American decisions *Owensby v. State* 2 S. 764 (1887); *Thompson v. Manhattan Ry. Co.* 42 N.Y.S. 896 (1896); *Re Hine* 37 A. 384 (1897); *People v. Bush* 133 N.E. 201 (1921); *Griffith v. Thrall* 29 N.E. 2d 345 (1940); *State v. Di Vicenti* 93 S. 2d 677 (1957); see further *S. v. Van Niekerk* 1964 (1) S.A. 729; Baker (1950), p. 6. This is the Scottish Law Commission's view: Draft Scottish Code, pp. 13-14.

¹⁷ *Stobart v. Dryden* (1836) 1 M. & W. 615; 150 E.R. 581; cf. *Whitelocke v. Musgrove* (1833) 1 Cr. & M. 511; 149 E.R. 502. Cross (1974), p. 408, suggests that Parke B.'s complete view was that implied assertions not raising side issues are admissible: but this does not correspond with Parke B.'s language in *Wright v. Doe d. Tatham* (1837) 7 Ad. & El. 313; 112 E.R. 488.

¹⁸ Cross (1974), pp. 406-7

within the admissions exception (e.g., lies, flight, destruction of evidence, interference with witnesses, silence).¹⁹ Treatment of a person as a blood relation may fall within the pedigree declarations exception to the hearsay rule. Statements accompanying some event may be admissible under one of the *res gestae* exceptions.²⁰ Morgan has advocated the recognition of new exceptions dependent on such factors as whether the propositions inferred from the actor's behaviour are within his knowledge and that behaviour is to his disadvantage; or whether the actor has deliberately and carefully based an important decision on the proposition he is impliedly asserting.²¹ The scope for judicial development of such exceptions appears to be limited in our law since *Myers v. Director of Public Prosecutions*.²² But one of our commentators considered that all the cases could be reconciled by a principle underlying such exceptions and that they already existed at common law.

"Implied assertions need to be subjected to some control. They have certain features in common with express out-of-court statements and so the hearsay rule seems the appropriate rule to rely on in the control of implied assertions.

. . . But though express and implied out-of-court assertions share certain objectionable features, particularly with regard to the possibility that the assertion was mistaken, implied assertions do not generally suffer from a likelihood that the assertor was lying. On the other hand the message conveyed by an implied assertion is more likely to be open to doubt than that conveyed by an express assertion. It follows from this that though there may be need to control the admissibility of implied assertions, the method of control does not have to be the same as that for express assertions.

. . . My own view is that the common law recognized [these] propositions . . . and that most of the conflicting cases on implied assertions can be reconciled by a principle based on those propositions, though I have to concede that that principle has not been articulated. That principle is that implied assertions which appear to the judge to be reasonably reliable are admissible . . .

. . . Statements implied by conduct should be treated in the same way as those implied in other statements. The possibility of mistake, the unlikelihood of deliberate lying and the difficulty of interpretation are features which may be shared by both types of implied statement."

In our view the case law is too uncertain to permit the placing of confidence in the propositions put.

1.4.8 "Implied assertions": statements and conduct distinguished. A third view is that *statements* not intended to be assertive are hearsay, but *conduct* not intended to be assertive is not. Thus in *Davidson v. Quirke*²³ testimony that phone calls were repeatedly made to a gaming house was admitted as not being hearsay, while testimony as to the details of what

¹⁹ See *Holloway v. McFeeters* (1956) 94 C.L.R. 470, at pp. 476 and 482.

²⁰ E.g., *Ratten v. R.* [1972] A.C. 378.

²¹ Morgan (1935), pp. 1158-60.

²² [1965] A.C. 1001; cf. *R. v. Halpin* [1975] 2 All E.R. 1124.

²³ [1923] N.Z.L.R. 552; *Police v. Machirus* [1977] 1 N.Z.L.R. 288.

the callers said was admitted under the *res gestae* exception to the hearsay rule for statements accompanying and explaining the purpose of acts. Cross has supported this view on four grounds. First, "deeds generally speak louder than words";²⁴ but in our view reliability of a fact does not depend on whether it is inferred from a deed or from an utterance. Secondly, to include conduct within the scope of the hearsay rule would make it very extensive. Such a view has value in increasing the amount of reliable evidence admitted, but it is illogical: it would make a soldier's salute admissible evidence of the presence of an officer, but not a soldier's statement "Good afternoon, sir". Thirdly, in Cross's view those authorities which exclude conduct do so not because it is hearsay but because of the risk of a multiplicity of issues arising. This is a possible reason, but it is not the reason given in the cases. Fourthly, statements such as "Hello A" do imply an assumption of fact—the recognition, and hence the presence, of A.²⁵ The view that such statements are intended to be assertive perhaps involves a wider notion of intention to assert than is conventional; many forms of conduct could equally be regarded as intending to assert a fact. An experienced sea captain who embarks on a ship could be said to be recognizing its safety.²⁶ In sum, the suggested distinction between statements and conduct does not convince us.

1.4.9 "Implied assertions" outside the hearsay rule. A fourth view is that no "implied assertion" is hearsay. Thus the conduct of hotel customers has been admitted as evidence of the badness of beer served them;²⁷ a promise to marry a pregnant woman has been admitted as evidence of the man's belief that he was the father;²⁸ absence of complaint of cold by railway passengers has been admitted as evidence of a normal temperature.²⁹ American and other modern codes tend to adopt this view, partly because the actor's veracity is not usually in question so that cross-examination can be dispensed with;³⁰ and partly because conduct which amounts to reliance in serious matters on the accuracy of the actor's perception is a guarantee that the perception was carefully made.³¹ But some have found it irrational to distinguish "express assertions" from "implied"; apart from the risk of deliberate lying, the dangers of

²⁴ Cross (1969), pp. 12–13; California Law Revision Commission, Vol. 7, Comment, Evidence Code, s. 1200.

²⁵ Cross (1974), p. 430.

²⁶ This view has in effect been adopted in the 11th Report (1972). Clause 1 (3) of the draft Bill provides: "a protest, greeting, or other verbal utterance may be treated as stating any fact which the utterance implies". The assumption is that it would otherwise be inadmissible hearsay; and that conduct is admissible because it is not hearsay. See also *State v. Tolisano* 70 A. 2d 118 (1949).

²⁷ *Manchester Brewery Co. Ltd v. Coombs* [1901] 2 Ch. 608.

²⁸ *Lloyd v. Powell Duffryn Steam Coal Co. Ltd* [1914] A.C. 733. See also *Nash v. Railways Commissioner* (1963) 63 S.R. (N.S.W.) 357.

²⁹ *Silver v. New York Cent. R. Co.* 105 N.E. 2d 923 (1952). See *Goodale v. Murray* 289 N.W. 450 (1940).

³⁰ Model Code (1942), r. 501 (1); Uniform Rules (1953), r. 62 (1); California Code (1965), s. 225; Federal Rules (1975), r. 801 (a); Ghana Decree (1975), s. 116; draft Canada Code (1975), cl. 27 (2) (b).

³¹ Falknor (1954), p. 46.

unreliability seem equally great or small in each case; in each case the court must face the dangers of the declarant's defective powers of observation, memory, and narration without the benefit of seeing his performance under cross-examination. It is difficult to see why the American Advisory Committee on Federal Rules of Evidence should say that "these dangers are minimal in the absence of an intent to assert".³² And the absence of the risk of deliberate lying depends on the non-intentional nature of the assertion; but it is often difficult to be sure whether an assertion is intended or not. If X writes a letter to his relative Y of the kind one would write to a sane man, is this conduct assuming but not asserting Y's sanity, or is it conduct intended to assert to Y a belief by X in Y's sanity so that X may ingratiate himself with Y and benefit from his will, or so that Y's recovery may be promoted by X? As Bosanquet J. remarked in *Wright v. Doe d. Tatham*:

"Language of affection, of respect, of rational or amusing information, may be addressed from the best of motives to persons in a state of considerable imbecility, or labouring under the strangest delusions. The habitual treatment of deranged persons as rational is one mode of promoting their recovery."³³

It is also necessary to know the declarant's competence to judge and his means of knowledge, which cross-examination may reveal; the inferences to be drawn from conduct and other implied assertions may be much more uncertain than those to be drawn from express assertions; there may be problems if the declarant has mixed motives. As for the guarantee of accuracy of perception to be found in the declarant's conduct in relying on the perception, this argument has some force as far as it goes; but many forms of conduct do not in fact exhibit a reliance which may have serious results for the actor, e.g., children taunting a lunatic.

1.4.10 "Implied assertions" about the declarant's own behaviour. A fifth and final view is that statements not intended to be assertive are inadmissible hearsay unless the assertion impliedly made is about something the declarant himself has done or not done, e.g., his marriage,³⁴ the execution of his will,³⁵ the fathering by him of a child.³⁶

"When an implied assertion is about the maker's own conduct the chance of error is very small. One is unlikely to be mistaken about whether one has married, made a will or had intercourse with the mother of an illegitimate child. On the other hand, one could easily be mistaken about whether someone else was sane."³⁷

These statements are sometimes referred to as part of the *res gestae*, but this does not mean they have to satisfy the rules for admitting express assertions under the *res gestae* exceptions to the hearsay rule.

³² Note on Federal Rules (1975), r. 801 (a).

³³ (1837) 7 Ad. & El. 313, at p. 381; 112 E.R. 488, at p. 514.

³⁴ *Dysart Peerage Case* (1881) 6 App.Cas. 489, at p. 502.

³⁵ *Kuntz v. Swart* 1924 A.D. 618; *R. v. Foreman* (No. 1) 1952 (1) S.A. 423; *R. v. Basson* 1965 (1) S.A. 697.

³⁶ *Aylesford Peerage Case* (1885) 11 App.Cas. 1; *Lloyd v. Powell Duffryn Steam Co. Ltd* [1914] A.C. 733.

³⁷ Hoffman (1970), p. 98.

1.4.11 Our proposal. How should these doubts about the scope of the hearsay rule be met in a statute seeking to reform the law extensively? We begin by explaining our recommendation before going on to consider alternatives. Section 65 of the Bill provides that out-of-court statements shall only be admissible by statute. Section 60 (1) defines "out-of-court statement" to mean, in relation to a "trial, hearing or other occasion for the reception of evidence by a court in a legal proceeding", a statement made otherwise than in testimony to the court on that occasion. By force of s. 60 (5) (e), "testimony" includes evidence in an affidavit or deposition, including that taken before a commissioner or a magistrate in committal proceedings. Section 60 (1) also defines statement narrowly: "'Statement' means any assertion (whether made in words or otherwise) of a matter of fact, whether addressed to a person or not." "Statement" thus primarily means "intended assertion".³⁸ Hence the draft Bill proceeds on the basis that the fourth view of the status of "implied assertions" described above,³⁹ namely that they are outside the hearsay rule, is the correct one. It is the view taken by the modern English and Australian authorities.⁴⁰ The Bill does not propose to alter the law as so understood, because on balance the Commission takes the view that evidence supplied by "implied assertions" should be available to the courts. This approach has the merit that it is unnecessary to ask in respect of a mass of circumstantial evidence capable of analysis as "implied assertions" whether there is some statutory exception which permits its admission. In future the important question will be not whether an "implied assertion" is hearsay, for the abolition of the common law rule against hearsay will mean that that rule can no longer restrict the reception of "implied assertions", whether or not it ever did. The important question in future will instead be whether the "implied assertion" falls within the definition of "statement". If so, it will be inadmissible unless it falls within one of the gateways of admissibility provided by the Bill. But we do not think the standard instances of "implied assertions" do fall within the definition of "statement" in s. 60 (1).

³⁸ Cf. Cross (1974), p. 430.

³⁹ Above, para. 1.4.9.

⁴⁰ Above, nn. 27-8, and *Ratten v. R.* [1972] A.C. 378, discussed in n. 1).

**PART II.—NOTES ON BILL: PART VI, DIVISION 1.—
PRELIMINARY—ss. 60–63**

2.1 GENERAL

2.1.1. Recommended Bill. We recommend the enactment of a Bill in the terms of the draft in Appendix A. We have framed the Bill on the law as we understand it to be on 1 January 1978. The Bill would insert a new Part VI into the Evidence Act. It has two components. It comprises proposals made in our Report on Evidence (Business Records)¹ and enacted in 1976 as ss. 14CD–14CV of the Evidence Act. It also comprises many new proposals. Our detailed comments on the new Part VI will concern only the latter; the former were explained in our earlier Report.

2.1.2 Nature of reforms in draft Bill. The Bill will operate to a large extent as a hearsay code. It reformulates and greatly expands the exceptions to the hearsay rule on a quite new basis. The new suggestions we advance are of two kinds. Within the first group are proposed exceptions to the hearsay rule which have no common law counterpart, or an unsatisfactory or under-developed counterpart. Among the principal examples are hearsay statements where the maker is called or there is justification for not calling him (s. 73); reliable hearsay statements or those which would justify an acquittal in criminal cases (s. 74); statements admitted other than as evidence of the facts asserted (s. 77). The other kind of reform proposed entails the modification—sometimes substantial—of an existing common law rule, which though in principle satisfactory requires such modification. One example is the group of exceptions relating to reputation (s. 79).

¹ L.R.C. 17.

2.2 SECTION 60: INTERPRETATION: PART VI

2.2.1 Definitions: business. The definition of “business” is important not only for the business records sections (ss. 91–3)¹ but also for the “negative hearsay” section (s. 94),² the sections relating to statements displayed in the course of business on land or vehicles (s. 82),³ and the section relating to postal and other marks (s. 90).⁴ The definition is based on the Evidence Act definition enacted in 1976 in s. 14CD (1). But three additions have been made to it. First, the word “administration”

¹ See below, paras 5.1.1–5.3.1.

² See below, paras 6.1.1–6.1.2.

³ See below, para. 4.10.1.

⁴ See below, paras 4.18.1–4.18.2.

has been added to paragraph (a). This has been inserted to cover the activities of agencies which are neither governmental nor commercial in character: see subparagraph (a) (ii) and paragraph (b). Secondly, subparagraph (a) (ii), referring to international organizations, is new. The subparagraph covers both intergovernmental organizations, such as the United Nations or the organs of the European Economic Community, and other international organizations, such as LAWASIA or the International Cricket Conference. Thirdly, paragraph (b), relating to public administration, has been abbreviated, but the omitted words are considerably expanded in a separate definition of "public administration".⁵ In that definition, the words referring to administration carried on by any of the "administrative organs or units" of, "or of any part of, the Commonwealth, or a State government, or country" are new; so is paragraph (b), referring to "general or local or other purposes". One purpose of these changes is to ensure that local government is caught within business. There are unreported decisions on s. 14CD (1) holding the records of municipal councils, e.g., as to the condition of a building, to be outside the business records exception. There is also evidence that counsel are in doubt on the point. One argument for the view that local government is not within "business" is that some minds conceive of government as having three tiers, Commonwealth, State and local, and s. 14 CD (1) mentions only the first two. A contrary argument is that s. 14CD (1) states that "'business' includes— . . . public administration . . . of . . . a state . . . carried on in New South Wales . . ." Local government is plainly part of the public administration of the state. Further, local government is an "undertaking". These points also apply to the question whether the administration of public services by statutory corporations such as Telecom is caught. However, to avoid doubt, the definition has been changed.

2.2.2 Definitions: civil legal proceeding. "Civil legal proceeding" is defined to mean a legal proceeding which is not a criminal legal proceeding. Though throughout the Bill criminal and civil legal proceedings are contrasted, it is not necessarily the case by the light of nature that every legal proceeding is either civil or criminal; hence the definition.

2.2.3 Definitions: declarant. We choose this word in preference to "the maker of the statement" because in many of the places where it is used it seems less clumsy. Paragraph (b) is inserted to deal with the problem of statements made by or on behalf of a corporation, e.g., a statement in an instrument under the seal of the corporation. Since the corporation cannot be called as a witness, and since there cannot be justification or want of justification for not calling the corporation, any check on the veracity of out-of-court statements by a corporation must be directed primarily to the person who caused it to be made by the corporation or joined in causing it to be made.

⁵ Apart from considerations of drafting style, "public administration" is separately defined because the public documents section (s. 85) relies on the notion: see para. 4.13.1.

2.2.4 Definitions: derived. This corresponds with the definition in s. 14CD (1) of the Evidence Act. It is relevant to the business records sections (ss. 91-3).

2.2.5 Definitions: document. This corresponds with the definition in s. 14CD (1) of the Evidence Act.

2.2.6 Definitions: enactment. Section 60 (1) provides: "‘enactment’ includes any provision of this or any other Act or Imperial Act". We are aware that to some readers this will go without saying. The Interpretation Act, 1897, s. 11, provides: "Every section of an Act shall have effect as a substantive enactment without introductory words." The definition of enactment is inserted into s. 60 (1) to put the matter beyond doubt. Since rules and regulations made under particular Acts derive their force from a provision of those Acts, "enactment" includes rules and regulations. The reference to "Imperial Act" is made because some Imperial Acts retain force in New South Wales; some of these can be amended by the New South Wales Parliament and some cannot; we think the effect of Imperial Acts in force should be saved.

2.2.7 Definitions: fact. "Fact" is defined to include "opinion". This is done in order to put it beyond doubt that "opinion" is included.

2.2.8 Definitions: out-of-court statement. This definition is important in avoiding disputes about the scope of the Bill. Its operation has been discussed earlier.⁶

2.2.9 Definitions: party. "Party" is defined to include any person adducing evidence, or entitled or permitted to adduce evidence, in a legal proceeding. We think the definition may prove useful in legal proceedings outside the ordinary run of civil and criminal litigation.

2.2.10 Definitions: public administration. This has been discussed earlier.⁷

2.2.11 Definitions: qualified person. This is based on the definition in s. 14CD (1) of the Evidence Act, which was inserted in 1976 as part of the business records reforms. Subparagraphs (a) (ii) and (vi) are new. Subparagraph (a) (ii) is inserted because a suggestion has been made to us that the remainder of the definition is not apt to cover such persons as Under Secretaries, the heads of statutory corporations, Commissioners,

⁶ Above, para. 1.4.11.

⁷ Above, para. 2.2.1.

police officers and military officers (so far as public administration is concerned) and directors (so far as private corporations are concerned). Subparagraph (a) (vi) is inserted for caution, to cover the possibility of any of these persons falling outside subparagraph (a) (ii), and also to cover such persons as Ministers, who may be held not to have an office *in* their departments, but certainly have power to direct or control, or responsibility for, them.

2.2.12 Definitions: statement. This has already been discussed.⁸ It covers not only statements in words, but nods, signs and gestures, and even silence in some circumstances. It also covers utterances not directed to any listener or reader of whom the speaker is aware, but which are overhead or subsequently read. It does not include "implied assertions".

2.2.13 Section 60 (2): statements made in a document. This corresponds exactly with s. 14CD (2) of the Evidence Act.⁹

2.2.14 Section 60 (3): person concerned in the making of a statement. This corresponds substantially with s. 14CD (3) of the Evidence Act.

2.2.15 Section 60 (4): dealing with a statement. The notion of "dealing with a statement" appears in s. 95 (weight), s. 96 (credibility) and s. 102 (corroboration). It refers to one who makes an immediate or remote record or a record in the chain leading to a remote record.

2.2.16 Section 60 (5): affidavit evidence and evidence on commission. This subsection is designed to ensure that the operation of the Bill is not limited to proceedings in which oral testimony is given. Affidavit evidence, evidence taken on commission, and depositions are widely used,¹⁰ and s. 60 (5) ensures that where a hearsay statement is rendered admissible because its maker testifies, it should also be admissible if, by virtue of rules of court or Act of Parliament, the court may receive the maker's affidavit evidence or other evidence which is not oral testimony.

2.2.17 Section 60 (6): single statements and multiple statements. There is ambiguity in the word "statement". Partly because of its use in criminal proceedings to refer to an accused person's out-of-court admissions, which may be lengthy and appear in a written document, and to his unsworn evidence, it may mean not only single propositions refined down to their shortest and most basic units, but also to long

⁸ Above, paras 1.4.11 and 2.2.7.

⁹ See L.C.R. 17, Appendix B, paras 14-15.

¹⁰ See below, para. 8.7.5.

documents or involved propositions containing many separate but related assertions. Section 60 (6) provides that the primary meaning of statement should be an atomic one: the constituents of an utterance or piece of conduct should be considered as separate statements. This will help prevent irrelevant and otherwise inadmissible evidence from being admitted. It will ensure that the admissibility of one statement will not be affected by its making on the same occasion as an inadmissible statement.¹¹

2.2.18 Section 60 (7): jointly made statements. Section 60 (7) provides that where a statement is made by two or more persons, each person makes a separate statement for the purposes of this Part. On one view, where a statement has been made by two persons, one of whom is now dead and the other of whom is available to testify, it seems wrong that the statement should be capable of being tendered by a party unless that party calls the available witness. The court is most likely to approach the truth if it has before it both the out-of-court statement and the testimony; the duty to get the testimony before the court should fall on the party tendering the statement rather than any other party. We have not adopted this view. It compels the drawing of highly technical distinctions between a joint statement of two persons and separate statements by each person made almost simultaneously. It is commonplace in the practical conduct of trials for a party to be given great freedom to choose between the various ways he may prove his case. A party may at present tender any admissible hearsay evidence in preference to calling witnesses with first-hand knowledge. The adverse consequences, if any, will be borne by him: the force of his case may be diminished by his failure to call available evidence. The effect of s. 60 (7) is that if a statement is made by two persons, one of whom the tendering party has justification for not calling, the statement will be treated as separate statements and may be tendered without calling the available declarant. The opposite view would amount to a revived best evidence rule which would operate arbitrarily in the hearsay sector, but not in any other.

2.3 SECTION 61: IMMEDIATE AND REMOTE RECORD

2.3.1 Section 61: the language explained. An immediate record, in relation to a statement of a declarant, is a record of or taken from the statement, being a record made by the declarant or by a person who heard or otherwise perceived the declarant make the statement; and, where the statement is made in a document, it includes the document. Hence an immediate record involves first-hand hearsay except where the statement is made in a document. A remote record is of two kinds:

¹¹ Reference should also be made to s. 68 (para. 3.5.1.), which provides that where a statement is admissible under Part VI, so much of any other statement made by the declarant as qualifies or explains it or is otherwise so connected with it that it ought not to be used without the second statement, the second statement is admissible, and the court may reject the first statement unless the second is tendered. See also ss. 92 (3) and 94 (2).

The first is a record of a statement "taken from" an immediate record. The words "taken from" are defined in s. 61 (3),¹ but in essence this kind of remote record is a type of second-hand hearsay, except where the statement was made in a document. The second kind of remote record is a type of hearsay more remote than second-hand. It is a record which is the last member of an unbroken series of records stemming from an immediate record and running up to the record tendered in proof as a remote record.

2.3.2 Section 61 and multiple hearsay. Section 61, together with s. 73 (1) (c), adopts a new approach to the problem of multiple hearsay. In our view, while oral multiple hearsay is a highly dangerous form of evidence because of the danger of mishearing, exaggeration, unclear reporting, and general inaccuracy through repetition, entirely documentary multiple hearsay or first-hand oral hearsay followed by a chain of documents,^{1A} is less dangerous. The dangers of misreading or inaccurate expression are much less; the temptation to exaggerate is less because of the greater risk of detection. In our view, then, an oral hearsay statement should only be admissible if proved to the court by the declarant, or by one who heard it from him; or by a record made by the declarant or one who heard the statement from him, or by the last link in a chain of records stemming from such a record. The oral nature of our system of trial generally requires that the statement should be proved by the oral evidence of the maker or one who heard it made by the maker. However, an item of hearsay deriving exclusively from a record or a chain of records of an oral or written statement should in our view be admissible. Though the means of detecting error by cross-examination of the maker of the statement or one who perceived him making it may not exist, the risk of error is less than where multiple oral hearsay is in question; hence we think ss. 61 and 73 represent a reasonable place to draw the line between admissibility and inadmissibility.

2.3.3 Section 61, s. 73 (1) (c) and the English position. Our solution provides for wider admissibility than that which exists under s. 2 (3) of the Civil Evidence Act 1968 (U.K.) or that which was proposed by the English Criminal Law Revision Committee in the following respects.² The better view of the following case is that on agency principles, if B wrote down A's hearsay statement and A checked it, A would have

¹ Section 61 (3) provides that one documentary record is taken from another if it is a copy of, fair extract from, or fair summary of the statement in the first record.

^{1A} See the explanation of the operation of our proposals in relation to documentary hearsay given above, para. 1.1.8.

² 11th Report (1972), cl. 31 (5) and (6). It should be noted that the Committee thought that admissibility wider than that which they propose for documentary hearsay might be justified in an evidence code but were unwilling to extend the criminal law of evidence beyond the civil at that time. In civil cases the English law turns on s. 2 (3), which provides that statements made otherwise than in a document can only be proved by direct oral evidence of the person who made it or a person who heard or otherwise perceived it being made.

been the maker of a documentary statement for the purposes of s. 2 (3).³ To avoid doubt in cases where B wrote down the statement on A's instructions but A did not check it, cl. 31 (6) of the 11th Report (1972) was proposed for criminal proceedings. It states that the maker of the oral statement should in these circumstances be treated as having made it in a document whether or not he had signified his acceptance of the statement. But if C overhears A telling B that the number of a certain car was XYZ 100, and writes the number down, and A, B and C die, in England the only statement made is by A; it is oral, not documentary; and hence C's record is inadmissible. Under our s. 61 there is an "immediate record" of A's statement, and there is justification for not calling A and C within s. 62 (2) (a); so C's record is admissible. The same result would follow if C taperecorded the conversation without A's knowledge; and also if C wrote the number down some months later.^{3A} One justification is that if C, the hearer of the statement, had been available to testify, he could refresh his memory from the document, as he made it; it is not a large step to permit the document to be admitted when he cannot testify. A further justification is that the danger of errors arising through repetition is much less in the case of pure documentary hearsay, and less where the statement is made orally but thereafter a record is made of it and a member of a chain of records stemming from it is tendered. Admittedly there is a risk of manufacture, but if the maker of the document is disinterested the risk is so much less than that of accidental errors in transmitting oral statements that it should not in our view be a bar to admissibility. The chain must not however be broken by oral retailing of hearsay, as where B tells C orally what A said (orally or by letter) and C writes to D. In this event, in our view, if the court cannot hear the maker of the statement being cross-examined, and cannot hear B cross-examined as to his powers of expression and C cross-examined as to his powers of hearing and comprehension, the evidence should be inadmissible unless under a provision such as s. 74. This line is one which seems to us to be a practical one to draw.

2.3.4 Section 61 and s. 73 (1) (c): the English proposals further compared. There are two other aspects in which our proposals are wider than what was proposed in 1972 for criminal cases by the English Criminal Law Revision Committee. First, we do not think it necessary, as the English Criminal Law Revision Committee in its 11th Report does (cl. 31 (6)), to stipulate that any documentary record be made contemporaneously with the original statement.⁴ If the hearer of the statement can give oral evidence some time after hearing it, why is evidence derived from a documentary record made by him some time after hearing a statement to be inadmissible? In both cases the delay

³ Cross (1974), p. 426; 11th Report (1972), para. 255.

^{3A} If a statement is documentary, e.g., a letter from an accountant A to B, a creditor of the accountant's principal, saying that the principal owes \$x and that letter is lost, the admission of second-hand hearsay as to the debt is not restricted by ss. 61 and 73. A letter from C, an assignee of the debt, to D, saying that B had written C a letter saying that A said the debt was \$x could be admitted if the conditions of ss. 61 and 73 were satisfied.

⁴ 11th Report (1972), paras 253-5.

should go only to weight. Secondly, we do not think it necessary to recommend, as the English Committee did, that the statement should have been recorded at the instance of its maker. At common law he can refresh his memory from a record without it having been so made. Indeed, the position adopted by the Criminal Law Revision Committee has been criticized by one of its members as illogical.⁵ If A tells B that he saw X board a train, and A is unavailable, B's evidence is admissible under their proposals and ours; if a letter of A's is tendered stating that he saw X board a train, and A is unavailable, the letter is admissible under their proposals and ours. If B writes that A told him that he saw X board a train, and A and B are both unavailable, why should the letter not be admissible? If an oral statement of what the perceiver of the event said is admissible, and a documentary statement by the perceiver is admissible, why not take the further step of permitting a documentary statement of what the perceiver of the event said? Such a statement is not admissible under the English proposals but is admissible under ours. It is impossible to cross-examine the declarant and the person who observed him make his statement, so that there is no check at all on the declarant's powers of perception and the like. But if there is a paucity of better evidence, why should the document be excluded? On the other hand, if better evidence is available the document may carry little weight.

2.3.5 Section 61 (3) and (4): record "taken from" statement or record.

Section 61 (3) provides that for the purposes of s. 61 (1) and (2) a record is taken from a statement or from another record if it is a copy, transcription or other fair reproduction of, or a fair extract or fair summary from, the statement or record. Section 61 (4) provides that "fair" means fair having regard to the purpose for which the statement is tendered. That is, different standards of "fairness" may apply depending on what the evidence is tendered to prove.

2.3.6 Section 61 and s. 73 (1) (c) and (2): proof of documentary statements.

These provisions permit a documentary statement otherwise satisfying the conditions of s. 73 to be proved in two ways. The first is where it is proved by the document or by admissible secondary evidence of it. The second is where it is impracticable to prove the statement by the document. In these circumstances the statement may be proved by an immediate record, or by admissible secondary evidence of an immediate or remote record. It should be noted that, under s. 73 (2) (a) and (b) in conjunction, where it is impracticable to prove the statement by the document, the party tendering it will sometimes have a choice between tendering secondary evidence, and tendering an immediate or remote record.

2.3.7 Section 61 and s. 73 (1) (c) and (3): proof of statements not in a document.

These provisions permit a statement made otherwise than in a document and otherwise satisfying the conditions of s. 73 to be proved in two ways. First, it may be proved by testimony of the

⁵ Williams (1973), p. 141.

declarant or of a person who heard, saw or otherwise perceived him make the statement. The second mode of proof arises where no person heard, saw or otherwise perceived the declarant make the statement, or a person who heard, saw or otherwise perceived him make the statement is called or to be called as a witness, or where there is justification for each such person not being called. In these circumstances the statement may be proved by an immediate or remote record of the statement, or admissible secondary evidence of an immediate or remote record. The effect of s. 73 (3) is that if one who observed the statement being made gives evidence, the first-hand or more remote hearsay of an immediate or remote record may be used to prove the statement. But if there is no justification for not calling any of the persons who observed the statement being made, and none of them testify, this mode of proof is not available. The purpose of s. 73 (3) is to ensure that, if possible, one who observed the statement being made gives evidence; this gives the court more opportunity to estimate its weight.

2.3.8 Section 61 and s. 73 (1) (c): proof of conditions of admissibility.

The conditions of admissibility imposed by these sections may be satisfied in several ways. There may be a record-keeper who can testify about such matters as the absence of oral links in a chain of records, or the likelihood that one record was "taken from" another. It may be that a witness can be called to testify that it was always B's practice, in summarising A's written statements for the benefit of C, to make a fair summary of them. Reliance might be placed on the proposed s. 97 (2).⁶ Section 97 (2) provides that any statement the admissibility of which under Part VI is in question, and any statement made by the same declarant on the same occasion, shall be admissible evidence of the fact asserted for the purpose of satisfying any requirement for admissibility of the statement. Finally, s. 97 (5) provides that in determining the existence of any fact relevant to the admissibility of a statement under Part VI the judge shall not be bound by any rule of evidence. In summary, then, the primary operation of s. 61 will be where photocopies and other copies are made. It will also be of use where there is a system (e.g., in a business) of making fair summaries of and extracts from documents or oral statements. Section 61 will tend to be of less use where multiple hearsay arises in less formal circumstances, for it will be difficult to show that the reproduction, extract or summary is "fair", when the original is not before the court. On the other hand, the requirements of s. 61 as to fairness will be capable of satisfaction where it can be shown there is a regular system of transcription, extraction or summary, and that the system was likely to have been followed in the case before the court. The conditions of s. 61 could also be satisfied by reliance on what the record says of itself and its history.

2.3.9 Section 61, s. 73 (1) (c) and s. 91. It should be noted that the difference between second-hand documentary hearsay admitted under s. 73 and that admitted as a business record under s. 14CE of the Evidence Act, 1898, which appears as s. 91 of the Bill, is that admission of the

⁶ See below, para. 6.4.2.

latter in civil cases depends only on the existence of a business record, not on calling or proving the unavailability of the declarant or calling or proving the unavailability of any person who heard, saw or otherwise perceived him making the statement.

2.3.10 Section 61, s. 73 (1) (c) and earlier proceedings. It should also be noted that ss. 61 and 73 (1) (c) will enable statements made in earlier proceedings to be admitted notwithstanding that they may be second-hand hearsay in later proceedings. (The admissibility of such statements was achieved in a more general way by ss. 2 (3) and 8 (3) (b) of the Civil Evidence Act 1968 (U.K.).) The statement may be proved orally by the declarant or anyone who heard it; or where none of these persons are called and there is justification for not calling them, it may be proved by production of a shorthand record, or a transcription of that record under s. 73 (1) (c)-(3).

2.3.11 Section 61 and s. 73 (1) (c): criticisms. Sir Alexander Turner, in the course of a vigorous attack on certain proposals for reform of the hearsay rule made by the New Zealand Torts and General Law Reform Committee, criticized their proposal to admit copies of documents containing hearsay statements.⁷

“It is one of the arguments for admission of documentary, as opposed to oral, hearsay that in the former case at least the text of the document proves that the statement alleged was actually made; all that is left in dispute is the assertion that what is contained in the document is a correct version of the facts. But this advantage goes overboard at once if unauthenticated copies are allowed to be produced, for the possibility of the inaccuracy—or indeed the faking—of the copy opens the door to the objection that there is no proof that what is now produced is the same as that which the original document declared.”

He then cited an example of a photocopy differing substantially from its original because some alterations in a particular kind of ink had not been effectively reproduced.⁸ This argument would lead to the exclusion of much reliable as well as some unreliable evidence. It applies to admissibility considerations which we think should go to weight; submissions on the latter question could be put to the court if any problem of serious unreliability arose.

⁷ Turner (1969), p. 217.

⁸ Such a photocopy is already admissible in New South Wales where the Evidence Act, 1898, s. 43C, is complied with.

2.4 SECTION 62: JUSTIFICATION FOR NOT CALLING PERSON AS A WITNESS

2.4.1 General. One of the central avenues of admissibility provided by the Bill is s. 73. It permits out-of-court statements to be received either if the declarant testifies or if there is justification for not calling him. Section 62 defines justification.

2.4.2 Section 62 (1): exhaustive definition. Section 62 (1) makes it plain that the section provides an exhaustive definition of justification. We considered the possibility of adding as a justification "any other circumstances which the court considers sufficient", but rejected it in view of the other justifications we recommend and the desirability of reducing uncertainty as to admissibility.

2.4.3 Section 62 (2): justifications in all legal proceedings. Section 62 (2), unlike s. 62 (3), concerns conditions which amount to justification for not calling a declarant in both civil and criminal proceedings; s. 62 (3) concerns only civil proceedings. Section 62 (2) (a) concerns death and physical or mental illness. This paragraph is self-explanatory. The court is not bound by rules of evidence so far as the establishment of this or any other matter relevant to admissibility is concerned: s. 97 (5). Section 62 (2) (a), when read with s. 60 (5) (d), includes unfitness to attend as a witness and unfitness to give evidence. A man who has just had a serious operation might be able to answer questions, but he is unfit to attend court as a witness. A mentally ill person is unfit to give evidence, but he may be perfectly fit to attend court. In this way all cases of unfitness are covered. Section 62 (2) (b) concerns the unusual case of a compellable witness who refuses to be sworn. His liability to punishment for contempt is small comfort to the party who wants to tender his evidence; hence his refusal to be sworn ought to be justification enabling his out-of-court statements to be admitted. Section 62 (2) (c)-(f) permit the admission of statements of unidentified persons, and of identified but untraced persons: they are self-explanatory. They are more liberally drafted than their equivalents in the Working Paper Bill. Thus s. 14D (5) (c) read: "all reasonable steps have been taken to identify him, but he cannot be identified". Section 62 (2) (c) requires merely "reasonable steps", and does not require that the declarant *cannot* be identified. Section 62 (2) (d) requires merely that it is not reasonably practicable to identify the declarant. Similarly, s. 14D (5) (d) read: "his identity being known, all reasonable steps have been taken to find him, but he cannot be found". Section 62 (2) (e) requires merely "reasonable steps", and does not require that he *cannot* be found. Section 62 (2) (f) requires merely that it is not reasonably practicable to find him. The reason for these changes was to avoid a restrictive interpretation of the kind which the courts have given the provisions requiring "due inquiry and search" for the car responsible

for an accident before the Nominal Defendant may be sued: Motor Vehicles (Third Party Insurance) Act, 1942, s. 30 (2) (a). Thus it has been held that there must be some inquiry and search even if the police investigating the accident consider that no fruitful inquiries are possible.¹

2.4.4 Section 62 (2) and unknown persons. The Criminal Law and Penal Methods Reform Committee of South Australia² have said that no "statement made by an unknown person should be admissible, except in so far as it may be admitted under present law as part of the *res gestae*". It might also be said in support of this view that the credibility of an unidentified maker of a statement cannot be challenged, and that the risk of manufactured evidence is increased. But, in our view, these risks are worth running for the sake of obtaining evidence which may well be reliable. A further argument against the view of the South Australian Committee is the uncertainty of the *res gestae* rules. The view of the South Australian Committee would also exclude large quantities of business records made admissible under our earlier business records proposals. Criticisms of the unreliability of such evidence should, in our view, go only to weight, not to admissibility. Though the hearsay evidence of an unidentified person may sometimes be too unreliable to admit, there are certainly instances of its exclusion at common law which seem unjust. In *R. v. Gibson*,³ where the accused was charged with unlawful wounding, the court excluded the statement of an unidentified woman bystander, "The person who threw the stone went in there", made while pointing to the accused's house; a statement exculpating the accused would have been equally inadmissible. It has also been suggested that the provision under consideration might injure the accused by permitting the admission for the prosecution of an anonymous letter falsely implicating the accused. One would think that the prosecution would be unlikely to adduce such evidence unless it appeared reliable, and, in most instances, the judge would exclude it under s. 100 on the ground that its weight was too slight to justify its admission, or under s. 103 on grounds of unfairness. However, we later recommend a provision preventing the admission of statements by persons who have refused to disclose or who have deliberately withheld or concealed their identity: s. 73 (10).⁴ We think the dangers feared by the South Australian Committee are fully met in these ways.

2.4.5 Section 62 (3): justifications in civil proceedings: general. Section 62 (3) provides for certain justifications in civil proceedings which are not available in criminal proceedings. We accept in general the desirability of maintaining the uniformity of the law of evidence in all proceedings so far as it is practicable to do so. However, in the

¹ *Ottoway v. Nominal Defendant* [1969] 1 N.S.W.R. 138; see now *Harrison v. Nominal Defendant* (1976) 50 A.L.J.R. 330.

² (1975), ch. 8, para. 3.3.

³ (1887) 18 Q.B.D. 537.

⁴ See below, para. 4.1.30.

defining of justification for not calling a witness, one has to strike a balance between conflicting considerations, e.g., between the undesirability of risking prejudice to a party from the evidence of a witness whom he cannot cross-examine and the undesirability of putting parties to unreasonable expense, or excluding useful evidence. We think it proper, in the contemporary context, to strike the balance at a different point in civil and criminal proceedings. Such distinctions have been traditional, the different standard of proof being a striking example, and have been justified by the particular tenderness of the law for the liberty of the subject. We share this attitude, and see other relevant factors as well. Despite the growth of legal aid, it is not generally available in summary or committal proceedings, and even in proceedings on indictment it makes little provision for investigation. Certainly the investigatory resources of the police and other law enforcement agencies, including their reciprocal arrangements with agencies outside the State, usually far outweigh those available to an accused. Still another factor is that we have not found (despite discussions with representatives of police, prosecutors and defenders) any marked desire for liberalisation of the law in criminal proceedings. The general attitude was that any widening of admissibility would be likely to be used more by the prosecution than the defence, and it was not pressed on us that the present state of the hearsay rule was in any marked degree responsible for the acquittal of guilty persons. In all the circumstances we have thought it right to proceed more cautiously in the criminal field. Against the risk that the failure to widen the exceptions might prevent the accused using important evidence, we have given the court a discretion in s. 74 (2) to prevent injustice.⁵⁻¹¹

2.4.6 Section 62 (3) (a): absence from New South Wales. Section 62 (3) (a) provides that justification for not calling a person exists where he is outside New South Wales and reasonable steps have been taken to procure his testimony, but it has not been so procured. The steps available to procure the attendance of a witness who refuses to attend voluntarily to give evidence include the issue of a subpoena or summons under s. 16 (1) of the Service and Execution of Process Act 1901 (Cth), and the issue of a warrant under s. 16 (2) of that Act.

2.4.7 Section 62 (3) (b): competent non-compellable witness refusing to be sworn. Section 62 (3) (b) provides that justification for not calling a person exists where that person is competent but not compellable and refuses to attend or be sworn. There are few examples of competent but non-compellable witnesses in civil cases; the major instance is diplomats. It seems right that a party in a civil case whose cause depends on the evidence of such a person should not fail because that person chooses not to testify if there is an out-of-court statement available. The Criminal Law and Penal Methods Reform Committee of South Australia¹² opposed the admission of hearsay statements made

⁵⁻¹¹ See below, paras 4.2.9-4.2.10.

¹² (1975), ch. 8, para. 3.3.

by persons who, though competent, or even compellable, refused to testify, on the ground that normally the party against whom evidence is tendered should have the right to cross-examine the source of that evidence if he is available. Here the law must balance, on the one hand, the importance of getting before the court as much evidence as possible, and, on the other hand, the importance of having the evidence before it tested as thoroughly as possible. In our view, the claims of admissibility should prevail over the objection based on want of cross-examination: the jury will probably realize, and be told by counsel and the judge, that evidence which is not cross-examined may be less weighty for that. The paragraph is not applied to criminal proceedings because spouses are generally not compellable, and if their out-of-court statements were substantially admissible the policies, such as they are, underlying the non-compellability rules might be too easily undermined.¹³

2.4.8 Section 62 (3) (c): unreasonable to call the witness. Section 62 (3) (c) provides that justification for not calling a person exists where, having regard to the relations at any time between the person (whether or not he is a party) and any party, it is unreasonable to expect the party tendering the statement to call the person. This is designed to meet in part the difficulties imposed by the present law on a party who would be required to call a witness "out of the hostile camp" in order that he might tender an out-of-court statement of that witness. One of these difficulties is the inability of the party calling the witness to cross-examine him. Another is that the opposing party is able to put leading questions to the witness and otherwise exercise the powers of a cross-examiner; this presents grave difficulties to the party calling the witness. It is true that the first difficulty can be removed by having the witness declared hostile, but this is very difficult to achieve. Section 73 would make the prior statement automatically admissible, but the party calling the witness may have difficulty in proving his case because the witness's testimony may be preferred to the earlier statement. The effect of s. 62 (3) (c) will be to place the burden of calling the witness on an opponent of the party tendering the statement. It may be noted that the relations mentioned in the paragraph may exist between the person and *any* party: they may be good relations between the person and the opponent of the party tendering the evidence, or bad relations between the person and the party. Those relations may exist at any time: they may be ancient or recent.^{13A}

2.4.9 Section 62 (3) (d): undue delay, expense or inconvenience. Section 62 (3) (d) provides that justification for not calling a person exists where undue delay, expense or inconvenience would be caused by calling him as a witness, or by seeking to identify or find him. The latter words may be compared with s. 62 (2) (c)-(f); those paragraphs apply where a man has not been identified or found, or where it is not reasonably practicable to identify or find him. Section 62 (3) (d) applies

¹³ See below, paras 4.1.18-4.1.22.

^{13A} For the relation between s. 62 (3) (c) and the present *res gestae* rules, see para. 8.6.1.

where it would cause undue delay, expense or inconvenience even to seek to identify or find him. Section 62 (3) (d) is not a fundamentally new proposal. In spirit it is similar to, though it extends further than, the Supreme Court Act, 1970, s. 82 (1), which provides:

“The Court may at any stage of the proceedings—

- (a) dispense with the rules of evidence for proving any matter which is not bona fide in dispute, also with such rules as might cause expense and delay arising from any commission to take evidence or arising otherwise . . .”¹⁴

A number of comments may be made on s. 62 (3) (d). First, it gives the court wide discretionary power to dispense with the calling of witnesses, for, subject to s. 62 (4),¹⁵ the factors to be balanced against the expense, delay or inconvenience are left unrestricted by the use of the word “undue”. Secondly, the remarks of the English Law Reform Committee on an equivalent, though differently worded, provision in the Evidence Act 1938 (U.K.), s. 1 (2) (s. 14B (2) of the existing Evidence Act, 1898) should be noted.¹⁶

“In practice little use is made of this power. We are informed that it is very rare for an interlocutory application to be made for this purpose. It is not easy for a Master in the interlocutory stages of an action to decide how important or how controversial any particular fact is or what other means of proving it are available. Successful opposition to such an application carries no penalties in costs and it is not invariably regarded as good tactics in litigation to smooth the way for the other side. Unless, however, the application is made before the hearing, the party desiring to rely upon the statement has no certainty that he will be allowed to do so by the judge and he may thus be left with a fatal gap in his evidence. In the result we think that the discretionary power in the Act has in practice been used mainly to fill minor gaps in evidence which have occurred through inadvertence in the preparation of the case for trial.”

The Committee recommended a system of pre-trial notices and counter-notices which we have not recommended.¹⁷ Despite their view, we think the discretion is worth retaining, *inter alia*, for just those cases mentioned—minor gaps in the evidence. Other areas of utility would include facts which are unlikely to be seriously disputed and facts which are satisfactorily proved by hearsay evidence the reliability of which cannot be seriously challenged. Thirdly, various kinds of inconvenience may be relevant under the paragraph. There may be inconvenience to the parties—e.g., persons who must be deprived of the use of property until the arrival of non-hearsay evidence from abroad. There may be extreme inconvenience to witnesses called from their employment or profession to prove some fact which can be proved much more easily by a reliable out-of-court statement.

¹⁴ See also Evidence Act, 1898, s. 14CG (2) (b) (vi).

¹⁵ See below, para. 2.4.14.

¹⁶ 11th Report (1972), para. 23.

¹⁷ Below, paras 6.12.2–6.12.10.

2.4.10 Section 62 (3) (d): evidence of opinion surveys. One possible use of this provision will be in relation to evidence obtained by opinion polls. There has been doubt in America whether such evidence is admissible at common law.¹⁸ There is an antecedent question whether the kind of statement is a hearsay statement at all. The statements are often not offered as evidence of the truth of the facts asserted, but arguably the declarant is making an "implied assertion" that he sincerely believes what he said, and that "implied assertion" is offered as evidence of its truth. It may be that the evidence, if hearsay, could come in at common law through the *res gestae* exception under which a declarant's statement of his present state of mind is admissible, but this is an unsatisfactory exception and it is not always acted on. Further, it will not always be appropriate, as where the question concerns the declarant's past state of mind. This is pre-eminently a situation where the cost and delay of calling a large number of witnesses—for example, in trade mark and passing off cases, to testify as to what they take a word to mean, or who they think makes a product—outweighs the advantage of calling them, and where the pollster may expeditiously state the results of his inquiries. Another instance is where usage in a trade is proved by inquiry of persons engaged in the trade. Often multiple hearsay will be involved in large polls, and s. 74 will be of service in that kind of instance. There is of course often much scope for challenging the relevance of poll evidence. There is also scope for challenging the reliability of poll evidence—the sample used, the skill of the witnesses, the appropriateness of the questions. It may be excluded on those grounds under s. 100. Poll evidence may also have its accuracy challenged by questions as to whether some persons who were polled deny the fact which the evidence is tendered to support. Section 62 (5) will permit their statements to be admitted even though they are not called.¹⁹

2.4.11 Section 62 (3) (d): unknown persons. Section 62 (3) (d) will also prove useful where it is necessary to prove that a person does not exist, or is not known of in a particular locality, and a witness testifies that despite repeated inquiries he could learn nothing of the subject of his inquiries. At common law, this is technically hearsay: the witness is repeating the statements of many declarants that they know nothing of the subject of his inquiries.²⁰

2.4.12 Section 62 (3) (d): written statements. In England there is a provision for proof of facts by written statement alone (the Criminal Justice Act 1967 (U.K.), s. 9). That legislation was recommended in the 9th Report of the Criminal Law Revision Committee. The Report stated:

"In our opinion it would be a great advantage if evidence which was unlikely to be disputed could be given by means of a written statement by the person who under the present law has to be called

¹⁸ E.g., Anon. (1953); Sorenson and Sorenson (1953); Zeisel (1960). But see *Customglass Boats Ltd. v. Salthouse Brothers Ltd.* [1976] 1 N.Z.L.R. 36.

¹⁹ See below, para. 2.4.15.

²⁰ See Anon. (1933); Wigmore, para. 667 (7); McCormick (1954), para. 228, nn. 30-1.

to give the evidence orally. This would obviously save a great deal of time and money. It would be especially desirable in the case of professional persons such as doctors, who at present may have to give up time, to travel long distances and perhaps alter appointments, in order to give evidence about which there is no dispute. In a prosecution for causing death by dangerous driving a whole succession of witnesses through whose hands the victim may have passed, including ambulance men, nurses and doctors, as well as the relative who identified the victim and the policeman in whose presence he did so, may have to be called in order, in the words of a judge, 'To prove what everybody knows already that the victim has died as a result of multiple injuries of the kind consistent with being hit by a Jaguar driving at the rate of 90 m.p.h.'. Sometimes several witnesses, including policemen, have to be called to prove that some object taken from the scene of a crime is the same object as was examined at a forensic science laboratory and is produced in court. Again on a charge of burglary a householder may have to be called to prove that his house was broken into and property stolen from it when the accused has no intention of denying that this happened but only that he was the burglar; and on a charge of receiving stolen property the theft must be proved even though the accused merely disputes the receipt or his knowledge that the property was stolen. . . . In cases of the kinds mentioned [above] it seems to us that, provided that the accused does not wish to question the person who can give the evidence, there is no reason why that person's evidence should not be given by means of a written statement. Where the evidence is important, it is no doubt easier for the jury or the magistrates to follow it and to assess its value when they see and hear the witness; but this is unnecessary in the case of evidence of the kinds mentioned above, and juries in particular are less likely to be wearied and distracted from the main issues if formal or uncontroversial evidence is read out than if it is given by a succession of witnesses."²¹

We do not think legislation of this kind is necessary, for statements of the kind referred to may be admitted in civil cases under s. 62 (3) (d); and we provide for formal admissions to be made in all cases in respect of the facts to which the statements relate.²² Further, the English scheme depends on notice of the intention to rely on the written statement being given to opponents; it becomes admissible if they do not serve a counter-notice. The English Criminal Law Revision Committee remarked:²³

"We are satisfied that it is right to provide that the other parties should have to serve notice if they object to the statement's being tendered and that admissibility should not depend on their saying positively that they agree to this; for the other parties would often not take the trouble to reply to a notice of a proposal to tender a statement or might delay replying until the last moment, in which case most of the advantage of the procedure would be lost. But

²¹ 9th Report (1966), paras 7 and 8.

²² See s. 86 and paras 4.14.1-4.14.11.

²³ Para. 11.

we had considerable discussion on the question of time limits concerning the giving of a notice of intention to tender a written statement and the giving of a counter-notice objecting to its being tendered. We decided that the party objecting should have to serve a counter-notice to this effect within seven days of being served with notice of intention to tender the statement. No time limit would be laid down for the giving of a notice to tender the statement. It would be for the party proposing to do so to give his notice in good time in order to get the co-operation of the other parties; if he left this till within a week of the trial, the other party could serve a counter-notice just before the trial. The provision will have the advantage that, once seven days have passed since the notice of intention to tender the statement was given, the party who has given it will know that the maker of the statement will not be required to attend. It is also clearly desirable to enable the parties to agree to a statement's being tendered notwithstanding that the party proposing to tender it has failed to give the notice or failed to give it in time for the other parties to object by counter-notice. This is provided for by the proviso to clause 1 (2). The proviso will also have the effect that if the maker of the statement is anxious to go abroad, for example, after making it, the other parties will be able to agree immediately notice has been given, and without waiting for the seven days to expire, that the statement may be tendered at the trial."

We later give reasons for not incorporating such notice procedures, which are central to the Civil Evidence Act 1968 (U.K.), in our proposed statute.²⁴ It would plainly be prudent for one seeking to have a written statement admitted under s. 62 (3) (d) to give prior notice to opponents, even in the absence of any requirement imposed by rules of court to do so. If he did not do so, he would run the risk of it being excluded under s. 100 (1) (d).

2.4.13 Section 62 (3) (e): want of memory. Section 62 (3) (e) provides that justification for not calling a person exists when he cannot reasonably be expected to have a useful recollection of the matter dealt with in the statement. The court would be more likely to act under this paragraph when the issue is minor and the weight of the person's evidence likely to be slight; in short, s. 62 (4) (a) is particularly likely to be relevant here.

2.4.14 Section 62 (4): factors relevant to s. 62 (2)-(3). Section 62 (4) provides that in deciding whether s. 62 (2) (c)-(f) or 3 (a), (c), (d) or (e) are satisfied, the court shall have regard to all relevant circumstances, but particularly to:

- (a) the nature and importance of the statement and of the question on which it is tendered;
- (b) the resources available to the parties; and
- (c) in a criminal legal proceeding, the standard of proof to be met by the prosecution.

²⁴ Below, paras 6.12.2-6.12.10.

(Plainly s. 62 (4) (c) can only apply to s. 62 (2), since s. 62 (3) does not concern criminal proceedings.) Why does s. 62 (4) apply to some paragraphs of s. 62 (2)–(3) and not others? The kind of balancing contemplated is plainly inappropriate to s. 62 (2) (a): either a person is dead or not; either he is too ill to attend as a witness or give evidence or not. It is also inappropriate to s. 62 (2) (b) and s. 62 (3) (b): there is no doubt about when the conditions of those paragraphs are satisfied. But s. 62 (2) (c)–(f) and s. 62 (3) (a), (c) and (e) depend on reasonableness, and many matters must be balanced in determining that. Similarly, s. 62 (3) (d) depends on “undue” delay.

2.4.15 Section 62 (5): statements of several declarants. Section 62 (5) provides that where statements of several declarants are obtained for the purpose of establishing some matter of fact (e.g., by means of an opinion poll or survey), a party elicits from a witness evidence of one of the statements, and the witness is asked by an adverse party to give evidence of another of the statements, then the adverse party has justification for not calling the maker of the second statement, provided the court considers that the first statement would be misleading without the second or that the admission of the first statement without the second would be unfair to the adverse party. “Adverse party” is defined in s. 62 (5) (b) to mean a party adverse in interest to the party tendering the first statement in relation to any question on which the statement is relevant. This definition takes account of the fact that on some issues one party may be adverse to another and on other issues not. One instance where s. 62 (5) will be useful is a passing off action in which the plaintiff is attempting to show that his goods have gained a certain reputation. If he tenders forty statements under s. 62 (3) (d) of persons who say that they associate his goods with a certain trade name, but does not tender forty statements which he has received to the contrary, it would be unfair if the defendant were not able to reveal this in cross-examination, not merely to shake the credibility of the plaintiff’s declarants, but also to show that the contrary of what they say is the case. It is true that if s. 62 (5) did not exist the defendant might be able to rely on s. 62 (3) (d); but this would make the proceedings more cumbersome, and if the defendant has been confronted suddenly with the plaintiff’s evidence he may not be in a position to satisfy the requirements of s. 62 (3) (d). Section 62 (5) will also be useful on issues of trade usage.

2.4.16 Section 62: non-application. It should be noted that s. 62 does not make the hearsay statements of the following declarants admissible, except if, in civil proceedings, one of the special categories of s. 62 (3) applies:

- (a) a witness in Victoria who finds it inconvenient to attend a trial in New South Wales;
- (b) a witness in the far west of New South Wales who finds it inconvenient to attend a trial in Sydney;
- (c) a witness in New South Wales who receives a subpoena to give evidence but does not obey it.

In the first two cases the witness must normally be served with a subpoena; in the last the trial would normally be adjourned or the witness called at a later stage. In these respects the oral nature of our trial is preserved. But if the witness does not respond to the subpoena and cannot be found when an attempt is made to arrest him, then s. 62 (2) (e) or (f), or s. 62 (3) (a), may apply.

2.4.17 Section 62: a different approach. The Federal Rules (1975), r. 804 (a), define "unavailability" artificially to include privilege; refusal to testify when compellable (see s. 62 (2) (b)); lack of memory (s. 62 (3) (e)). We think ours is a more realistic and less artificial technique. We leave to the general law of privilege the problem of statements made out of court in respect of which privilege would be claimed if a witness were asked to make them in court. An out-of-court statement incriminating the declarant would be admissible; an out-of-court statement the subject of Crown privilege would not. Section 66 preserves the general law of evidence.

2.4.18 Section 62: a possible limitation. Some hearsay statutes provide that a statement by an unavailable declarant is not admissible where the party tendering the statement is responsible for the declarant's unavailability.²⁵ We do not favour such a limitation. If it were to be applied seriously it would lead to extensive collateral inquiries. Some out-of-court statements by declarants made unable to attend may well be true and it is undesirable to exclude these. In some cases the fact that a person was responsible for the absence of a witness on whose evidence he sought to rely might make the evidence totally suspect; in others it might have little effect on its weight, e.g., if the evidence was not controversial and the party tendering the evidence had compelling reasons unconnected with the case for sending the witness away at the time of the hearing. In short, we think the objection should go to weight and that there are sufficient safeguards against the kind of abuse indicated. The facts relevant to weight are admissible under section 97 (4).

2.5 SECTION 63: PROVISIONS FOR ADMISSIBILITY CUMULATIVE

2.5.1 Section 63: general. In order to avoid doubt, based on an argument that a particular provision is intended to cover the entire field of admissibility in the area to which it relates, s. 63 provides that any provision of Part VI for admissibility of evidence operates in addition to and not in derogation from any other. Hence a piece of evidence which does not qualify for admission under one provision may, nevertheless, be admitted under another, unless it is of a kind which has been deliberately excluded in all circumstances.

²⁵ Evidence Act 1910 (Tas.), s. 81A (2) (b); Uniform Rules (1953), r. 62 (7); Federal Rules (1975), r. 804 (a); draft Canada Code (1975), cl. 29 (3).

PART III.—DIVISION 2.—ADMISSIBILITY GENERALLY

3.1 SECTION 64: ABOLITION OF COMMON LAW RULE AGAINST HEARSAY

3.1.1 Section 64: general. Section 64 provides that subject to Part VI, the rule against hearsay is abolished. The purpose of this section, in conjunction with the rest of Part VI, particularly s. 65, is to remove hearsay from the common law realm and to constitute the Bill as something approaching a hearsay code. The operation of the many existing statutes which contain hearsay exceptions is preserved; but Part VI will, by virtue of ss. 64 and 65, codify the hearsay rule and its general exceptions. There will be no common law of hearsay.¹ The particular statutory exceptions, existing and future, which are not within the Evidence Act, will remain where they are, but the main body and the general principles of the law will be in this Part of the Evidence Act, and to that extent the task of the inquirer will be very much shorter.²

¹ Except with respect to admissions and confessions in criminal proceedings, some aspects of admissions in civil proceedings, judicial notice, and some aspects of reputation: see ss. 66 (2), 69–71, 79 and 87, and paras. 3.3.2, 3.6.1–3.8.1, 4.7.7 and 4.15.4. See also s. 65 (2) and para. 3.2.2 for the preservation of the admissibility of evidence in certain kinds of proceeding, and s. 89 (2) and para. 4.17.1 for the preservation of the law and practice in relation to the admission in a criminal legal proceeding of an out-of-court statement where an objection is not made.

² It is indeed a question whether it is better to have all hearsay exceptions in a single code of evidence, or to have particular statutory exceptions in the legislation dealing with the specific subject matter to which they refer.

3.2 SECTION 65: ADMISSIBILITY OF OUT-OF-COURT STATEMENT

3.2.1 Section 65 (1): general. Section 65 (1) provides that where evidence of a fact is admissible, an out-of-court statement of the fact is admissible as evidence of the fact only if the statement is admissible under Part VI or any other enactment.¹ As explained above, the effect will be to make the law of hearsay statutory.²

3.2.2 Section 65 (2): saving of rules concerning special proceedings. Section 65 (2) provides that s. 65 (1) does not restrict the admissibility of out-of-court statements in certain special legal proceedings in which the statements are presently admissible despite the rules of law listed in s. 66 (1), the principal rule being the hearsay rule. In the Evidence Act, 1898, “legal proceeding” *prima facie* means “any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration”: s. 3 (1). The definition is intended to be extensive and would extend to (for example) the proceedings on an appeal to a stipendiary magistrate in petty sessions under the Firearms Act, 1973, s. 24. The definition expressly embraces an arbitration. By s. 4 of the Evidence Act, all the provisions of the Act *prima facie* apply to every legal proceeding. There are a good many legal proceedings (so defined)

¹ For the meaning of enactment, see s. 60 (1) and para. 2.2.6.

² Para. 3.1.1.

in which the rule against hearsay does not apply. In some cases the rule does not apply because excluded by express enactment, for example, the Coroners Act, 1960, s. 18, "a coroner . . . holding an inquest . . . shall not be bound to observe the rules of . . . evidence applicable to proceedings before a court of law . . ." In these cases ss. 64 and 65 (1) leave room for the express enactment to operate and there is no problem. But it is likely that there are other cases where the rule against hearsay does not apply, even though there is no express enactment excluding the rule. Perhaps the rule would not be applied in an appeal under s. 24 of the Firearms Act, 1973,³ in proceedings relating to the custody of children,⁴ in proceedings generally in the Supreme Court in its paternal jurisdiction in infancy matters, or in its old jurisdiction in lunacy or in proceedings under the Mental Health Act, 1958, ss. 12 (3), (9), 18, 38, 39. No doubt there may be other cases. In a sense, since all these proceedings depend on one enactment or another, it might be said to be a consequence of, or implication in, the enactment that the rule is not to apply and that therefore s. 65 does not exclude hearsay. But that would be a tenuous argument, especially as regards the paternal jurisdiction of the Supreme Court in infancy matters and that court's old jurisdiction in lunacy. It is for this reason that s. 65 (2) has been inserted. It would also meet the case of an arbitration where there is prior agreement that some form of hearsay will be admissible.

3.3 SECTION 66: RELATION OF THIS PART TO GENERAL LAW OF EVIDENCE

3.3.1 Section 66 (1): saving of general law of evidence. In substance s. 66 follows s. 14CE (3) of the Evidence Act, 1898. (Section 14CE (3) (a) has no parallel: its effect is achieved in a different way by s. 64.) It prevents certain stated exclusionary rules of common law from operating, but permits any other ground of inadmissibility its own force.¹ Section 66 (1) (d) is new. It provides that a statement admissible under Part VI is admissible notwithstanding that the statement deals with a matter of law, or a matter which is a matter for inference or conclusion by the court or jury on evidence, or a matter of opinion on which the declarant, if called as a witness, would not be permitted to give evidence. Section 66 (1) (d) is needed because this kind of evidence seems desirable to us, and should not be excluded, if otherwise admissible, merely because it deals incidentally with the matters listed. Further, s. 87 permits admissions to be received even though they contain statements of opinion which the declarant would not be permitted to give if he were testifying. It seems wrong that an otherwise admissible statement should be excluded merely because the declarant has included with it another statement qualifying or explaining it which he would not be permitted to testify about because it infringes the opinion evidence rules. The latter rules, if soundly based, can be made to operate satisfactorily in court, but a declarant out of court cannot be expected to comply with them.

³ *Kavanagh v. Chief Constable of Devon and Cornwall* [1974] Q.B. 624.

⁴ *R. v. R.* [1977] 1 W.L.R. 1256.

¹ See L.R.C. 17, Appendix B, paras 18-25.

3.3.2 Section 66 (2): preservation of secondary evidence rules. Section 66 (2) provides that Part VI does not restrict the admissibility of secondary evidence tendered in proof of the contents of a document. Section 66 (1) (a) makes it plain that the Part operates despite those rules so far as they are exclusionary; s. 66 (2) makes it plain that the Part does not affect the rules so far as they are inclusionary.

3.4 SECTION 67: INADMISSIBILITY OF OUT-OF-COURT STATEMENT NOT LIMITED TO EXAMINATION-IN-CHIEF

3.4.1 Section 67: general. Section 67 provides that an out-of-court statement which is inadmissible by virtue of s. 65 (1) is inadmissible whether tendered in chief, in cross-examination, in re-examination, or otherwise.¹ The purpose of s. 67 is to extirpate a common heresy to the effect that the rules of evidence do not apply in cross-examination. Section 67 is subject to s. 62 (5) and any other enactment because s. 62 (5) permits evidence to be received in cross-examination which might not be received in chief.²

3.5 SECTION 68: STATEMENT QUALIFYING OR EXPLAINING ANOTHER STATEMENT

3.5.1 Section 68: general. Section 68 applies where an out-of-court statement is admissible under Part VI and another statement has been made part or all of which qualifies or explains it, or is so connected with it that the first should not be used without the second. Section 68 has two aspects. First, it provides that the part of the second statement which qualifies or explains or is connected with the first is admissible. Secondly, it provides that the first statement may be rejected unless the second is tendered. The unfairness and tendency to mislead which s. 68 is aimed at is obvious.

3.6 SECTION 69: ADMISSION OR CONFESSION IN CRIMINAL LEGAL PROCEEDING

3.6.1 Section 69: general. Section 69 provides that Part VI does not affect the law or practice relating to admissions or confessions in a criminal legal proceeding (s. 89 (1)), save that where a statement that an accused person has made an admission or confession would be admissible if it were not an out-of-court statement, the provisions of this Part apply to the statement (s. 89 (2)). The effect is that the rules of voluntariness, the Crimes Act, 1900, s. 410, and the like are preserved;

¹ See, e.g., *Dudas v. Eagle Star Insurance Co.* (1965) 51 D.L.R. (2d) 526.

² See above, para. 2.4.15.

but that the Bill may be used to prove a confession which satisfies these rules of admissibility. The purpose of s. 69 (2) is similar to that of s. 87 (4). Extensive discussion of that body of law may be found in the Working Paper.¹ There has been further extensive discussion, both within the Commission and between the Commission and persons working in the criminal field, as judges, prosecutors, defenders and police. It was somewhat surprising that, despite the strong criticism of the existing law that as the Working Paper shows has been made from many quarters, we were not pressed by those engaged in administering the law to change it. Indeed a generally conservative attitude was expressed to us. Although we are far from satisfied that the present law does work satisfactorily in practice, the view to which we have come is that the present general reference on the law of evidence does not supply an appropriate context in which to review it. It is, of course, true that the law of confessions is part of the law of evidence and part of the law relating to the admissibility of out-of-court statements which we have sought to codify as far as possible. On the other hand, the law of confessions is not a mere consequence of, or development of, general principles of the law of evidence. It has a quite separate and different history and is closely bound up with the working of the whole criminal process. We have come to the conclusion that any review of the law of confessions should be made as part of a review of that whole process, so that there can be considered together the investigation of crimes, interrogation, arrest and the rights of persons held in custody, as well as the methods of presenting evidence in court. What should happen in relation to confessions may well depend on the striking of a balance, involving all the steps which we have listed, between the liberty of the subject and the interest of the community in suppressing crime. Our present proposals therefore simply preserve the existing law relating to admissions and confessions in a criminal legal proceeding, but this does not imply approval of the present state of the law.

¹ Working Paper, paras 3.15.3–3.20.8.

3.7 SECTION 70: ADMISSION BY ANSWER TO INTERROGATORY OR ON NOTICE TO ADMIT

3.7.1 Section 70: general. Section 70 provides that Part VI does not affect the law relating to an admission by answer to an interrogatory or on notice to admit facts or documents. The machinery for making answers to interrogatories is regulated by rules of court;¹ but the answers are receivable as admissions. Rules of court also provide for the admission of facts specified in a notice by one party which are not disputed by another, and for admissions as to documents specified in a notice.² There seems little point in interfering with the well-settled rules which govern those matters.

¹ E.g., Supreme Court Rules, Pt. 24.

² E.g., Supreme Court Rules, Pt. 18, rr. 2, 4 and 5.

3.8 SECTION 71: JUDICIAL NOTICE

3.8.1 Section 71: general. Section 71 provides that Part VI does not restrict the means by which the court may be informed of any matter of which it may take judicial notice. We explain below that there is a dispute about whether an exception to the hearsay rule exists when facts of which judicial notice is taken after inquiry are proved.¹ Though the better view is probably that facts of which judicial notice is taken are not facts proved by evidence, if the other view prevails it is important to ensure that the process of taking judicial notice is not restricted by hearsay reform, and this is the purpose of s. 71.

3.9 SECTION 72: EXISTING STATEMENT

3.9.1 Section 72: general. Section 72 preserves the admissibility of any statement which was made before the date of commencement of Part VI and which was admissible under the law in force immediately before that date. A party may have procured the making of a statement for use in possible later litigation. If that statement were admissible under the law at the time of its making, it would unjustly upset the party's reasonable expectations if the statement ceased to be admissible because of later changes in the law. Similarly, a party may be aware that he has evidence to prove his case under the present law; it would be wrong if he were put at a disadvantage by having to collect admissible evidence to meet possible changes in the law.

¹See below, para. 4.6.5.

**PART IV.—DIVISION 3.—OUT-OF-COURT STATEMENT
GENERALLY**

**4.1 SECTION 73: ADMISSIBILITY OF ORAL AND
DOCUMENTARY HEARSAY**

4.1.1 General effect. Section 73 would effect a fundamental change in the law.¹ The general effect of s. 73 is to make first-hand oral hearsay statements admissible either where there is some justification such as the maker's death for not calling him or where the maker is called as a witness; and to make admissible hearsay statements derived entirely from documents, or from documents recording a piece of first-hand oral hearsay, where there is some justification for not calling the maker of the statement and the maker of the initial document. The only common law equivalents are those exceptions which depend on the declarant's death, such as dying declarations, declarations against interest, declarations in the course of duty, declarations by testators about their wills, pedigree declarations, and declarations as to public and general rights. These are in various ways unsatisfactory,² and s. 73 and later sections (e.g., s. 79) go much further.

4.1.2 Relation to business records. In one fundamental respect s. 73 differs from the existing business records exceptions preserved in Division 4 of Part VI. Business records are automatically admissible, at least in civil cases, without any need to prove justification for not calling the maker and without the court having any general discretion in the matter. This is because of the impossibility in many proceedings of obtaining preliminary directions on the admissibility of evidence, because it is desirable as far as possible for parties to be clear in advance about what evidence will be admissible, and because of the general reliability of business records. However, in creating new general exceptions to the hearsay rule, we think it proper to provide that where the maker of the statement is not called as a witness, there must be some justification for not doing so if the statement is to be admitted; and, after listing some justifications, to provide further that in civil proceedings the court may receive the evidence if it thinks that to call the declarant would cause undue expense, delay or inconvenience: see s. 62 (3) (d).³ Thus we require some justification for the declarant not being called because this will ensure that in many cases the statement will be the best evidence; but we give the court what is, in effect, a discretionary power to waive this requirement because the testimony of the declarant may have trivial value in proportion to the trouble which calling him will cause.

¹ Legislation of this kind began with Massachusetts and Rhode Island legislation dating from 1898 providing that the hearsay declarations of deceased persons are admissible if made in good faith before the action begins and on the personal knowledge of the declarant. See Wigmore, para. 1576, nn. 11 and 12.

² Above, paras 1.2.17–1.2.32; below, paras 4.7.8–4.7.23.

³ See above, paras 2.4.9–2.4.12.

4.1.3 Purpose of the section. One purpose of s. 73, then, is to admit hearsay where it is the best evidence—to admit hearsay statements when their maker is unavailable or for some reason his direct testimony on a given point is not before the court. At common law a hearsay statement was sometimes admissible in narrow circumstances when the maker was unavailable through death. In our view, other grounds for the absence of non-hearsay evidence equally compel the admission of hearsay. We agree with the response of Learned Hand J. to critics of such a proposal:

“When a witness is not available at all or available only with a disproportionate expense of time, let us hear what he has said on the matter, just as we do in every other concern of life, even in affairs which may involve our lives or the safety of the state. You will perhaps, with the instinct of lawyers, recoil at what seems so far-reaching an innovation. I do not complain; I agree that it involves chances, but in answer I argue that, as the law now stands, the party who has only such proof is deprived of any chances at all. It would of course be undesirable to open the doors to hearsay evidence when better was available, but I ask you whether Baron Gilbert was not right in saying that men should use in their disputes the best means they can get to reach the truth?”⁴

A limited statutory precursor in New South Wales is to be found in s. 14B of the Evidence Act, 1898.

4.1.4 Section 73 (1): savings. The words “where evidence of a fact is admissible” have the effect of preserving rules of inadmissibility other than the hearsay rules. Thus a hearsay statement satisfying s. 73 but conflicting with the similar fact rule would not be admissible.

4.1.5 Section 73 (1) (a) (i): first-hand statements of fact. The paragraph also ensures that a statement of fact which is not an opinion may not be admitted under the section unless the declarant had personal knowledge of the fact. This prevents the admission of second-hand oral hearsay. Second-hand and more remote documentary hearsay, and first-hand oral hearsay followed by an unbroken chain of documents, is made admissible by s. 73 (1) (c), (2) and (3). It will be noted that the time at which the declarant must have personal knowledge is the time he makes the statement. It does not matter that he ceases to have personal knowledge by the time of the trial. Thus s. 73 permits the admission of out-of-court statements made by a declarant who had personal knowledge when he made them even though he has now forgotten. Two further points should be noted. First, it is not necessary to show that the declarant actually had personal knowledge; it is enough if he may be reasonably supposed to have had it. Subjective knowledge or the lack of it is so difficult to prove that it suffices for the declarant to be in a position to have personal knowledge. Secondly, the declarant may be in a position to have knowledge of the fact in

⁴ Learned Hand J. (1921–2), p. 99, quoted by McCormick (1954), para. 302.

full, or only to some extent. Thus if the question is whether Whiteacre has been continuously farmed for thirty years, and a statement by the owner of Blackacre, the adjoining property, is tendered to prove that Whiteacre has been farmed for thirty years, the statement is admissible even though the owner of Blackacre had been owner for only twenty years and is relying on someone else's statement for the ten years before he became owner. As we shall see, however, s. 73 (4) provides that the owner of Blackacre's statement is admissible only to the extent of his personal knowledge.⁵

4.1.6 Section 73 (1) (a) (ii): first-hand statements of opinion. A hearsay statement of opinion is admissible under s. 73 (1) (a) (ii) provided the declarant could give it, in full or to some extent, while testifying. That is, either he must be an expert speaking on a matter within the field on which he is an expert, or he must be expressing an opinion which any witness may express, e.g., as to identity or weather.⁶ It should be noted that where the declarant would only be permitted to give his opinion to some extent while testifying, s. 73 (5) makes his statement admissible only to that extent.⁷

4.1.7 Section 73 (1) (a): avoidance of a doubt. One advantage of the paragraph as drafted is that it avoids a doubt arising under the Civil Evidence Act 1968 (U.K.), s. 2 (1). Section 2 (1) renders certain statements admissible as evidence of "any fact of which direct oral evidence by [the maker] would be admissible". This may refer only to rules of admissibility preventing proof of particular facts. It may, on the other hand, refer to the competence of the maker. So far as it refers to the latter, it raises a problem in connection with hearsay statements tendered in proceedings which must occur after the death of the maker. These include probate cases, will construction summonses, claims by the maker's estate or his relatives in respect of an accident causing death, and testator's family maintenance proceedings in which extra-testamentary statements by a testator of his reason for disinheriting the applicant are tendered.⁸ Apart from not rendering admissible some statements which otherwise would be, this drafting may make inadmissible statements which at present fall within a common law exception, e.g., post-testamentary statements by testators about the contents of their wills. The English courts may work out some fiction or find some context⁹ which overcomes the problem, but it

⁵ See below, para. 4.1.16.

⁶ See Cross (1974), pp. 386-8.

⁷ See below, para. 4.1.17.

⁸ But see *Re Paulin* [1950] V.L.R. 462; on Sholl J.'s reasoning the statements might be received as admissions by the applicant if he fails to explain them in cross-examination.

⁹ One such context might be found in this way. Section 8 (2) (b) contemplates that the maker of a hearsay statement may have to give evidence if the statement is to be admitted unless he is dead, and it might be argued that this was intended by Parliament to be true of all such makers, not merely those whose death is not a prerequisite of the proceedings, so that "direct oral evidence" refers to competence at the time of the statement, not survival until the time of proceedings.

seems best to avoid it. Section 73 (1) (a) achieves this by ignoring the question of whether direct oral evidence could have been given, and requiring simply personal knowledge of the facts when the statement is made. A deceased testator's statement about the contents of his will would be admissible provided he has personal knowledge and notwithstanding that he cannot now give direct oral evidence.

4.1.8 Section 73 (1) (b): general. This paragraph requires that before a hearsay statement can be admitted, the declarant must be called as a witness, or there must be justification as defined in s. 62 for not calling him.

4.1.9 Section 73 (1) (b) (i): declarant called as witness. We think the out-of-court statement of a declarant should be admissible if the declarant testifies. The court then has the advantage both of his sworn evidence and of his out-of-court statement, which may be more reliable since it was made nearer the time of the condition or event spoken of. But there are some dangers springing from this automatic admission of prior statements, and a safeguard is given by s. 73 (8).¹⁰ And if the declarant does not in fact testify, s. 73 (7) provides that a statement admitted on the basis that he was to testify shall be excluded.¹¹

4.1.10 Section 73 (1) (b) (i): a consequence. One effect of this proposal to admit prior statements of witnesses is this. It may, in some circumstances, create an inducement to a properly advised accused person who testifies to give a full and early account of his view of the facts to the police or other relevant persons. If the accused person made statements to the police consistent with his defence at the trial, and also made similar statements to other persons, they may all be admitted under s. 73 and increase the chances of avoiding wrong convictions. This is a respect in which our proposals favour the innocent accused person who is willing to go into the witness box.

4.1.11 Section 73 (1) (b) (ii): justification. The operation of this subparagraph is discussed in connection with s. 62, which lists the permitted justifications for not calling a person as a witness.¹²

4.1.12 Section 73 (1) (c): proof of out-of-court statement. Section 73 (1) (c) imposes as a requirement for admissibility of statements tendered under s. 73 that they be proved in accordance with s. 73 (2) or (3). This paragraph is important in excluding second-hand and more remote oral hearsay and some remote documentary hearsay. Its operation has been partly explained in discussing s. 61,¹³ but can only be understood after reading s. 73 (2) and (3).

¹⁰ See below, paras 4.1.24–4.1.27.

¹¹ See below, para. 4.1.23.

¹² See above, paras 2.4.1–2.4.18.

¹³ See above, paras 2.3.1–2.3.11.

4.1.13 Section 73 (2): proof of out-of-court statement made in a document. Section 73 (2) provides that where a statement is made in a document, it may be proved in two ways. First, it may be proved by the document or by admissible secondary evidence of the document: s. 73 (2) (a). Secondly, if it is not practicable to prove the statement by the document, the statement may be proved by an immediate or remote record of the statement, or by admissible secondary evidence of an immediate or remote record: s. 73 (2) (b). Underlying s. 73 (2) is a desire to ensure the statement is proved by the best evidence—either the document in which it was made, or secondary evidence of it. Only if proof by the document is impracticable may an immediate or remote record be used.

4.1.14 Section 73 (3): proof of out-of-court statement not made in a document. Section 73 (3) provides that where a statement is made otherwise than in a document, it may be proved in two ways. First, it may be proved by testimony of the declarant or a person who heard, saw or otherwise perceived the declarant make the statement: s. 73 (3) (a). The second mode of proof depends on one of three conditions being satisfied: that there is no person who heard, saw or otherwise perceived the declarant make the statement (s. 73 (3) (b) (i)); that a person who heard, saw or otherwise perceived the declarant make the statement is called or is to be called as a witness in the legal proceeding (s. 73 (3) (b) (ii)); or that there is, as regards the declarant and each person who heard, saw or otherwise perceived him make the statement, justification for not calling him as a witness: s. 73 (3) (b) (iii). If one of these conditions is satisfied, the statement may be proved by an immediate or remote record of the statement, or admissible secondary evidence of it: s. 73 (3) (b). The purpose of s. 73 (3) is similar to that of s. 73 (2): to ensure that the best proof of the statement is given. Section 73 (3) ensures that if possible the declarant or one who observed the statement being made gives evidence, so that the court may have a further opportunity to estimate its weight.

4.1.15 Section 73 (2) and (3): uncertainty as to whether statement made in a document. How does s. 73 (2) and (3) meet a case where a statement is to be proved by an immediate or remote record and it is uncertain whether the statement was made in a document. Suppose Mary lives in London; her nephew John lives in Sydney; Mary is in the habit of writing letters to John and sometimes they speak to one another by telephone. The issue is whether uncle Dick has died. There is tendered a letter from John to his sister saying "I hear from aunt Mary that uncle Dick has died". The letter is either an immediate or a remote record of Mary's statement: immediate if Mary's statement was oral, remote if it was made in a document. If it is uncertain whether the statement was made in a document, the tendering party would have to satisfy both subsections (2) (b) and (3) (b) of s. 73. It seems wrong that a court should exclude the statement if the tendering party has satisfied the most onerous conditions applying to both oral and documentary statements.

4.1.16 Section 73 (4): statement of fact admissible to the extent of personal knowledge. Section 73 (4) applies where a declarant has personal knowledge of a fact other than an opinion, but only to some extent. There are three possibilities: the statement might be completely excluded; it might be admitted in full; it might be admitted as evidence of the facts asserted only to the extent that the declarant has personal knowledge or may reasonably be supposed to have it. Section 73 (4) adopts the third course. It may produce a more complicated jury direction, but it ensures that the statement is admissible while preventing its use for improper purposes.

4.1.17 Section 73 (5): statement of opinion admissible to extent that declarant might have given his opinion in testimony. Section 73 (5) applies where a declarant would, to some extent, be permitted to give the opinion he asserts in the out-of-court statement if he were testifying. There are again three possibilities: complete exclusion; complete admission; and admission of the statement as evidence of the matters on which the opinion is expressed to the extent that the declarant might have given his opinion while testifying. Section 73 (5), like s. 73 (4), adopts the third course, and the same advantages and disadvantages apply.¹⁴

4.1.18 Section 73 (6): statement by accused person's spouse. Section 73 (6) provides that in a criminal legal proceeding, a statement by a declarant who is, at the time the statement is tendered, the husband or wife of an accused person is not admissible by virtue of s. 73 on tender by the prosecution or another accused person, unless the declarant:

- (a) is compellable to give evidence for the party tendering the statement; or
- (b) gives evidence for any party.

This is a compromise between automatic admissibility and complete inadmissibility. It is a matter which has produced division in England.

4.1.19 Section 73 (6): the problem of the accused's spouse in England. The English Criminal Law Revision Committee proposed a clause (cl. 32 (2)) by which the prosecution would be prevented from proving an out-of-court statement by the accused's spouse unless the spouse were called as a prosecution witness, except where the spouse was called as a defence witness and the prosecution was proving a previous inconsistent statement under the equivalent of the Evidence Act, 1898, ss. 54-55. That is, the clause was intended to prevent reliance on the equivalent of our proposed s. 73 (1) (b) (i) to admit prior statements by a spouse not called by the prosecution; it does not prevent reliance on the equivalent of ss. 54-55. The clause would therefore not commonly be applied when the spouse is called for the defence, for the prosecution will normally only be interested in a spouse's out-of-court statements if they are inconsistent with the sworn testimony given.

¹⁴ See above, para. 4.1.16.

The clause would only exclude proof of a prior statement which favours the prosecution but which is not inconsistent with what the spouse said at the trial in testifying for the accused. However, the clause would have a greater effect in preventing proof of the prior statements of a spouse who does not testify at all. The prohibition on admitting such statements without the prosecution calling the spouse is designed to preserve the non-compellability of the spouse; it was felt that that rule should not be overthrown by a sidewind of hearsay reform.

4.1.20 The accused's spouse: the English views considered. The English Criminal Law Revision Committee proposal was opposed by a substantial minority of the Committee. The majority took an example of a police examination of the accused's wife, during which:¹⁵

"she may say something which might incriminate the accused, although she could not be compelled to give evidence about this in court, and which she might regret saying. The police might tell her, truly, that she could not be compelled to give evidence against her husband, but omit to tell her that her statement might be given in evidence. In this and similar cases the majority think it wrong that the statement should be admissible. But a substantial minority think that the statement should be admissible because the principle of non-compellability is only that the wife should not be compelled to testify against her husband and does not require that something which she may have said out of court should not be admissible."

We see some force in both views. Certainly it may be doubted whether, "splendid examination material"¹⁶ though cl. 32 (2) may be, it is worth the additional complication it will cause. Though it is intended to prevent the non-compellability rule being undermined, it is quite separate from it; it is concerned not with compulsion but with statements which a spouse freely made. In the same way, an accused is not compellable, but his confessions may be received. The non-compellability rule is intended to protect a loving spouse from having to make an agonizing choice between punishment for contempt and betrayal of the other spouse. The suggestion that the wife is under some vague compulsion from the police in the majority example does not persuade us that the choice involved is always made as pitiful as that which the non-compellability rule is seeking to avoid. Certainly a loving and cool-headed spouse might be expected to put up very substantial resistance to answering out-of-court questions. On the other hand, in support of the majority position, it must be conceded that many spouses are insufficiently cool-headed and well-advised to avoid incriminating their partners.

4.1.21 The accused's spouse: voluntary statements and compellability. There are similar arguments for and against the English Criminal Law Revision Committee's proposal, also embodied in cl. 32 (2), that where

¹⁵ 11th Report (1972), para. 245.

¹⁶ Williams (1973a), p. 84.

a wife does not give evidence her out-of-court statement will only be admissible if she is compellable. There is force in the words of one of the minority:

“According to the minority . . . [the wife’s non-compellability] is based simply on the unwillingness of the law to condemn the wife to prison for refusing to give evidence against her husband . . . However, the view of a bare majority . . . was that the real basis . . . is . . . the desire of the law to preserve the marriage bond, even between an alleged criminal and his or her spouse. Allowing the wife’s unguarded admissions to be given in evidence against her husband might lead to the breakdown of the marriage. This argument is difficult to reconcile with the fact that the Committee unanimously recommended that the wife should be a competent witness for the prosecution.¹⁷ Take two situations. (1) A wife goes over to the side of the prosecution, gives evidence against her husband and has him convicted. (2) A wife is loyal to her husband and refuses to give evidence; but the prosecution puts in an admission made by the wife in an unguarded moment and the husband is convicted. In which of these two cases is the marriage in greater peril? It is clear that the answer is, the first. If the object of the law is to preserve the marriage, even at the cost of criminals going free, then the wife ought not to be allowed to testify against her husband. But this would be carrying consideration for the criminal’s marriage beyond all reason.”¹⁸

Indeed, the majority proposal excludes the wife’s evidence even if the marriage has been terminated by her death. On the other hand, though, strictly speaking, the admission of a wife’s freely made out-of-court statements does not derogate from the non-compellability rule, often they are not in a true sense “freely made”; they are the product of police questioning.

4.1.22 Section 73 (6): our proposal. What should be done? There is something to be said for admitting as much evidence as possible, including the out-of-court statements of the accused’s spouse. There is also something to be said for not permitting the non-compellability of the accused’s spouse, whether it is a sound rule in general or not, to become an empty protection by a sidewind of hearsay reform. Thus we propose that statements of a spouse falling within s. 73 should be admissible against an accused:

- (a) in a proceeding in which he or she is compellable; or
- (b) if the spouse gives evidence for any party.

Statements admissible under the Evidence Act, 1898, ss. 53–5, remain admissible. Statements made by a dead or divorced spouse are not affected by s. 73 (6). It should be noted that statements of a spouse inconsistent with those admitted under s. 73 (6) are admissible: see s. 96.

¹⁷ This is already the case in New South Wales: Crimes Act, 1900, s. 407.

¹⁸ Williams (1973a), p. 83.

4.1.23 Section 73 (7): declarant not called. This is a safeguard to prevent abuse of s. 73 (1) (b) (i). Probably the same result could have been achieved by judicial construction of the statute; this subparagraph is inserted only *ex abundanti cautela*, and like several other provisions, might be omitted if and when the law of evidence is finally codified. The words "unless it is admissible on some other basis" deal, *inter alia*, with the possibility that the declarant suddenly dies between the time the statement is admitted and the time the declarant is to be called, in which case the statement would be admissible under s. 73 (1) (b) (ii) and s. 62 (2) (a).

4.1.24 Section 73 (8): preservation of oral trial. Section 73 (8) gives the court power to impose one or more of certain terms and conditions on the reception of prior statements by a witness. The court has power to stipulate that the declarant be called as a witness before his statement is admitted; this would overcome the problem met by s. 73 (7), and would ensure that he could be asked about it immediately, without any lapse of time during which the statement, before it is tested by cross-examination of the declarant, can do harm. The court also has power to stipulate that the declarant should testify to the best of his ability before the prior statement is admitted; or stipulate that the declarant complete any other specified part of his evidence before it is admitted. Finally, the court has power to stipulate that the declarant, if he has already testified, should testify further to such extent as the court may direct.

4.1.25 Section 73 (8): purpose. Some instances where a previous consistent statement might readily be admitted have been listed by Lord Maugham.

"I have had cases in which it was necessary to prove reports by engineers as to the value of ore deposits of various kinds in distant lands, or to prove circumstances connected with landing facilities on a distant island, or the value of plantations in various places, cases where the reports would have been of extreme value, if they could have been put in evidence . . . The engineer in many cases could be called but even then he could use his report only to refresh his memory, but not for any other purpose. If his memory was fairly good, and if the cross-examining counsel was fairly astute, the report would never come to the eye of the judge if it was in favour of the side on which the witness was called."¹⁹

Plainly the written report is substantially more reliable than the witness's memory. But, in our view, it is important to ensure that the parties do not undermine oral trials unduly by being given complete freedom to choose between proving their case by direct oral evidence or doing so by documentary or other hearsay, while on the other hand, permitting the admission of prior consistent statements which seem valuable. The

¹⁹ (1939), p. 481.

demeanour of the witness, observed near the time the statement is admitted, may sometimes be an advantage for the trier of fact. Section 73 (8) therefore makes the timing of the admission of previous statements by a witness in favour of the party calling him depend on what condition, if any, the judge imposes. One effect of s. 73 (8) is to qualify the automatic admission of prior consistent and inconsistent statements possible under the present Evidence Act, 1898, s. 14B.²⁰

4.1.26 Section 73 (8): time of admission. The English Law Reform Committee recommended,²¹ and the Civil Evidence Act 1968 (U.K.), s. 2 (2), enacted, that a previous statement, if admitted, should generally be admitted at the conclusion of evidence-in-chief and before cross-examination. We do not consider it necessary to make any special provision of this kind. We prefer to leave the matter to be settled by the court in its discretion under s. 73 (8).

4.1.27 Section 73 (8): proofs. Statements tendered under s. 73 which are witness's proofs prepared for the purpose of litigation may be excluded by the court if the declarant is called as a witness (see s. 75 (3)),²² and may be excluded in criminal proceedings even if there is justification for not calling him: see s. 75 (4).

4.1.28 Section 73 (9): statements made after charge. Section 73 (9) provides that unless the court gives leave to the contrary, a statement is not admissible in evidence in any criminal legal proceeding on the basis that there is justification within s. 62 (2) (b)–(f) for not calling the declarant if it was made after one of a group of events in relation to the investigation of an offence in question, i.e., any offence with which a person is charged in the proceeding, or a related offence, i.e., an offence arising wholly or partly out of the facts out of which an offence in question arises, whether with or without other facts. One relevant event is the charging of any person with an offence in question or a related offence. Another is where a police officer or like person informs any person that he might be prosecuted for an offence in question or a related offence. A third is where any person is arrested, or receives a summons issued against him, in respect of an offence in question or a related offence. There are good reasons for attempting as far as possible to make the law of evidence in criminal and civil cases the same. It makes the law briefer to state and easier to grasp; it reduces the risk, for example, of a man being found not liable for civil assault and yet being convicted on the same facts in criminal proceedings; the reason for having a particular rule of evidence in civil cases will usually also apply in criminal cases. Nonetheless there are special difficulties and dangers in criminal cases for which special provision is, in our view, required. Section 73 (9) is intended to avoid the dangers flowing from the possibility, for instance, that the charging of one suspect will prompt

²⁰ E.g., *Harvey v. Smith-Wood* [1964] 2 Q.B. 171. See also *Shepherd v. Shepherd* [1954] V.L.R. 514.

²¹ 13th Report (1966), para. 38.

²² See below, paras 4.3.5–4.3.6.

a friend to make a false statement exculpating him or other suspects, and then to disappear. The statement might be an alibi, a confession, a description of the offender different from the appearance of the suspect, or a report of another's confession. The risk of such manufacture already exists with non-hearsay evidence, e.g., the friend could swear a false alibi. An alternative possibility is that evidence may be manufactured against an accused person in this way. The risk increases with hearsay evidence, though to what extent is a matter of opinion: the constraints of the oath, of the fear of cross-examination, of the risk of a perjury charge, are removed. The English Criminal Law Revision Committee recommended that statements made after charging should be automatically inadmissible. They said: "It might well be too dangerous to allow such a statement to be given in evidence at all, even subject to the discretion of the court, because this might well encourage the defence to present such a statement in the hope that leave would be given."²³ We do not feel the force of this objection. Indeed, we oppose the proposal for three reasons. First, it will not really prevent manufactured evidence: if a declarant can be procured to lie, he can be procured to falsify the date on his statement. Secondly, it will be harsh on the accused: he may have no power or persuasive capacity to prevent his witnesses disappearing, particularly if his trial is delayed. Thirdly, the prosecution is made better off than the accused, for statements taken before the accused is charged are more likely to be those of prosecution witnesses than of witnesses for the accused. The possibilities of falsification are the same though no doubt for the accused the temptation is greater. Instead of a mandatory rule of exclusion, we therefore propose that such statements only be admissible with the leave of the court. The risk of prejudice from manufactured prosecution statements will be diminished, *inter alia*, by ss. 100 and 103. A mandatory rule of exclusion would produce risks of injustice where there was a *bona fide* case of, for example, a statement exculpating the accused followed by a change of heart and disappearance, perhaps owing to compulsion by the true offender.²⁴ No doubt some parties might too optimistically seek the court's leave; but any step which causes the judge's faith in the credibility of a party's witnesses and hearsay declarants to weaken, such as an ill-based application for leave to admit an unconvincing and untestable statement, is not likely to be taken, whether or not the judge is also trier of fact. The problem therefore largely contains its own remedy. The Committee also suggest²⁵ that there will be a temptation for a judge to give leave because a statement, even if unreliable, may be sufficient to raise a doubt in the jury's mind, and he may feel that however unconvincing he finds the statement it should be left to the jury. (A similar risk might doubtless be thought to exist with regard to s. 74 (2).²⁶) The answer is that however inconvenient the criminal standard of proof may be, it is usually regarded as fundamental to the health of our system. Further, there are degrees of unreliability, and the judge has an opportunity to comment to the jury on the reliability of the evidence.

²³ 11th Report (1972), para. 241. See also Criminal Law and Penal Methods Reform Committee of South Australia (1975), ch. 8, para. 35.

²⁴ See above, para. 1.2.19.

²⁵ Para. 242.

²⁶ See below, paras 4.2.9-4.2.10.

4.1.29 Section 73 (9): application. Section 73 (9) does not extend to a statement made by a declarant who died or is too ill to testify (s. 62 (2) (a)). The chance of these circumstances being deliberately caused by the party who wishes to rely on the statement is thought to be too low to make legislation appropriate. The chance of a declarant making a deliberately false statement and then fortuitously dying or becoming ill seems even lower.

4.1.30 Section 73 (10): deliberate hiding of identity. Section 73 (10) provides that s. 73 does not make admissible a statement by a person who has refused to disclose or who has deliberately withheld or concealed his identity. We do not think that an anonymous letter, for example, should be admissible under s. 73; though, if there are circumstances pointing to its reliability, it may be admitted under s. 74.²⁷

4.1.31 Section 73: effects against a nominal defendant in third party proceedings. Some incidental consequences of s. 73 are noted in this and the succeeding paragraphs. At common law, an admission made by a car driver was inadmissible against a nominal defendant in nominal defendant proceedings because the driver is not a party to these proceedings.²⁸ Such admissions may now be received under s. 73 if justification is proved.

4.1.32 Section 73: effect on refreshing memory. One aspect of our proposals embodied in s. 73 will have a desirable effect on the practice of "refreshing memory" from notes made by a person other than the witness.²⁹ This practice is permissible provided the notes were made at substantially the time the facts occurred and the witness checked the notes while the facts were fresh in his memory. A party could under our proposals prove the statement in notes in its own right by virtue of s. 73 without calling the maker of the notes if there is justification for not doing so; he could call the maker instead of proving the statement in notes if he wishes; he could prove the statement in notes as well as calling the maker. The practice of refreshing memory is fictitious when the recollection of the witness is not in fact revived by reading the notes. To the extent that the notes are admissible, the fiction is diminished.

4.1.33 Section 73: *Stobart v. Dryden*. Section 73 preserves the effect of *Stobart v. Dryden* on the issue whether the signature of the attesting witness to a will is admissible to prove due execution. Parke B. in that

²⁷ See also paras 4.2.1-4.2.8.

²⁸ *Nominal Defendant v. Hook* (1962) 113 C.L.R. 641.

²⁹ See Cross (1974), pp. 202-7.

case said³⁰ this was not “the proof of a declaration, but of a fact” and was not hearsay.³¹ Section 73 would permit the signature to be proved as a statement through conduct admissible on proof of the unavailability of the attesting witness. Cross once suggested recognition of a common law hearsay exception to permit admission of the signature,³² but s. 73 makes this unnecessary. The statement of the deceased witness in *Stobart v. Dryden* that he had altered the deed would also be admissible under s. 73; its inadmissibility at common law was sharply attacked by Wigmore, who characterized the decision as “an opinion whose fallacies are too radical to be worth refuting”.³³

4.1.34 Section 73: ancient documents. Section 73 also makes unimportant the dispute about whether the admissibility of ancient documents as evidence of ownership is outside the hearsay rule or operates as an exception to it.³⁴ If it is an exception at common law, s. 73 will cover it.³⁵

4.1.35 Section 73: recitals of lost deeds. Wigmore drew attention³⁶ to a common law rule sometimes treated as a hearsay exception by which a recital of one deed, now lost, in another, was evidence of the contents of the first.³⁷ This would fall within s. 73 if the maker of the first deed were unavailable and the chain were entirely documentary so as to satisfy s. 61.

4.1.36 Section 73: hearsay statements favouring the accused. Though under the present law hearsay statements in favour of an accused are not technically admissible, in practice they are often admitted without prosecution objection.³⁸ But admissibility should not depend on prosecution discretion in this way, and s. 73 affords one way in which they may be admitted. Section 74 affords others.

4.1.37 Section 73: self-serving hearsay statements by the accused. The present status of non-incriminating statements made by the accused to the police is curious.

“ . . . [A] statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made

³⁰ (1833) 1 M. & W. 615, at p. 624; 150 E.R. 581, at p. 584.

³¹ Cf. *Wright v. Doe d. Tatham* (1837) 7 Ad. & El. 313, at pp. 387–8; 112 E.R. 488, at p. 516.

³² Cross (1956), pp. 101–2.

³³ Paras 1033, n. 4.

³⁴ Phipson and Cross take the former view; Best and Taylor take the latter. See Phipson (1976), para. 338; Cross (1974), pp. 414–5; Best (1922), p. 422, n.q.; Taylor (1931), ch. 10.

³⁵ See *Malcolmson v. O’Dea* (1863) 10 H.L.C. 593; 11 E.R. 1155; *Blandy-enkins v. Dunraven* [1899] 2 Ch. 121.

³⁶ Para. 1573.

³⁷ *Ford v. Grey* (1704) 6 Mod. 44, at p. 45; 87 E.R. 807.

³⁸ Williams (1963), p. 210, n. 19.

voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial.”³⁹

Under our proposals such a statement would be admissible as evidence of the truth of the facts asserted under s. 73 if the accused testifies, but not so admissible otherwise unless the court invokes the general inclusionary discretion conferred by s. 74 (2), as it well might. This does not seem unjust. If the accused is not prepared to advance his story in sworn testimony, his previous statements should not be admitted unless the court thinks his statement tends to support his acquittal and cannot reasonably be tendered in another way, e.g., as a result of testifying.

4.1.38 Section 73: *res gestae*. We give reasons elsewhere for not making any express provision for the admissibility of first-hand *res gestae* statements, and we thus avoid a perplexing area of the common law, and an area which American codes have not found it easy to state in statutory language.⁴⁰ Many *res gestae* statements admissible at common law will be admissible under s. 73.

4.1.39 Section 73: absence of business records limitations. It should be noted that statements made or obtained for the purpose of, or in contemplation of, the proceedings are inadmissible if tendered solely as business records: Evidence Act, 1898, s. 14CF (1). In criminal proceedings statements made in connection with the proceedings or any investigation leading to it are inadmissible if tendered as business records: Evidence Act, 1898, s. 14CG (3). Our presently suggested s. 73 is not limited in either of these ways, although there are restrictions imposed by s. 75 on the admissibility of proofs of evidence. The distinction between s. 73 and the business records proposals arises because statements made for the purpose of a proceeding may unduly favour one side, and hence do not deserve the automatic admissibility conferred by the business records legislation. But under s. 73 admissibility is not automatic. If such statements become the best evidence because of the unavailability of the maker or for some similar reason, they deserve admission for what they are worth; they may be the only evidence on the point. And if the maker testifies, he may be cross-examined as to his veracity and bias.

³⁹ *R. v. Storey* (1968) 52 Cr.App.Rep. 334, at pp. 337-8, *per* Widgery L.J. The Court of Appeal may since have cast doubt on this statement: *R. v. Donaldson* (1977) 64 Cr.App.Rep. 59.

⁴⁰ See paras 8.6.1-8.6.5.

4.1.40 Section 73: evidence in prior proceedings. At common law testimony, whether given in earlier stages of the present proceedings, or in separate earlier proceedings, is admissible in criminal cases if given for or against the same accused and in relation to the same facts by a witness unable to attend the later proceedings through death or illness, provided the accused either called the declarant or had the right and opportunity to cross-examine the declarant and the questions in issue were substantially the same.⁴¹ A witness's testimony in earlier proceedings is also admissible in criminal proceedings if he is proved to have been kept out of the way by the accused.⁴² Like rules apply in civil cases: the evidence of a witness is admissible in later proceedings if the witness is dead,⁴³ mad,⁴⁴ too ill to travel, or outside the jurisdiction,⁴⁵ provided that the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant, that the issues are substantially the same, and that the proceedings are between the same parties or their privies.⁴⁶ The Supreme Court Rules, Part 36, r. 6, provide that depositions are only admissible when the opponent consents or the deponent is dead, non-compellable or unable to attend through infirmity. The Crimes Act, 1900, s. 409, provides for the admission of depositions taken in preliminary proceedings. These exceptions are swallowed up by s. 73. Reference should also be made to the Supreme Court Rules, Part 36. Part 36, r. 5 (1), permits evidence taken in proceedings to be used later in the proceedings; r. 5 (2) provides that r. 5 (1) does not enable the use in evidence on any issue at a trial (i.e., the trial of proceedings commenced by statement of claim) of evidence taken before the trial. Rule 7 (1) provides that a party may with the leave of the court read evidence taken or an affidavit filed in other proceedings. Rule 7 (2) provides that r. 7 (1) does not enable such evidence or affidavit to be read as evidence on any issue at a trial except in relation to the proof of particular facts. Section 73 does not affect these rules, but operates independently of them.

4.1.41 Section 73: earlier testimony: wider admissibility? Is admissibility wider than that under s. 73 desirable? An argument for wider admissibility might be put thus. The hearsay rule principally guards against the admission of statements the maker of which cannot be cross-examined. If evidence (other than the accused's unsworn statement) has been admitted, either there has been cross-examination or there was an opportunity for it; to permit the reception of evidence admitted in

⁴¹ *R. v. Hall* [1973] Q.B. 496; see also *R. v. Hogg* (1833) 6 C. & P. 176; 172 E.R. 1196; *R. v. Beeston* (1854) Dears. 405; 169 E.R. 782; Cross (1974), p. 495.

⁴² *R. v. Scaife* (1851) 17 Q.B. 238, at p. 243; 117 E.R. 1271, at p. 1273.

⁴³ *Mayor of Doncaster v. Day* (1810) 3 Taunt. 262; 128 E.R. 104; *Morgan v. Nicholl* (1866) L.R. 2 C.P. 117.

⁴⁴ *R. v. Eriswell (Inhabitants)* (1790) 3 Term Rep. 707; 100 E.R. 815.

⁴⁵ *Fry v. Wood* (1737) 1 Atk. 445; 26 E.R. 284.

⁴⁶ *Doe d. Foster v. Derby* (1834) 1 Ad. & El. 783, at pp. 785, 789-90; 110 E.R. 1406, at pp. 1407 and 1409; *Llanover v. Homfray* (1881) 19 Ch.D. 224.

any legal proceeding between parties to be admitted between those parties in all later stages of that proceeding therefore accords with the spirit of the hearsay rule. Statements by X in earlier stages of a proceeding in respect of which there could not be cross-examination by Y, who was not a party at that stage, should not, however, be admitted. Wigmore⁴⁷ argued that there should be no insistence on identity of parties; it should be enough if "the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has". But in our view the second party should not be detrimentally affected by any incompetence the first revealed in conducting his case except where the conditions of s. 73 apply. Statements are admissible under s. 73 if the maker is a witness or there is justification for not calling him. The principal respect in which the proposal under discussion is wider than s. 73 is that it would permit a party to tender favourable statements given in evidence by a witness in an earlier proceeding who has now become unwilling to repeat the favourable evidence. In our view, even in civil cases, one party should not be exempted from calling a witness whose evidence on a former occasion favoured him but who has now become unwilling to repeat the evidence. (If he were called and gave different evidence, the earlier statement could be proved under s. 73; even here it may be hard for the party favoured by his first testimony but not his second to have to call him.⁴⁸) We do not think the proposal under consideration should be adopted: we think s. 73 deals with the problem of earlier testimony adequately. A witness who has already told one story on oath is unlikely to tell a different one on oath later; and the fact that the first story was on oath may give it greater weight with the trier of fact. We see no reason to depart from the general scheme of s. 73, namely that a declarant must be a witness or there must be justification for not calling him before his previous statements are admissible.

4.1.42 Section 73: special problems of earlier testimony. The English Law Reform Committee took the view that the admission at a later stage of a proceeding of statements originally uttered by a witness in an earlier stage of the proceeding raised special problems, because the witness might subsequently have given conflicting answers during his testimony, or might have been disbelieved or contradicted by other evidence.⁴⁹ In our view no special provision need be made here. An answer which conflicts with a statement made at an earlier stage of proceedings and tendered at the present stage is equally admissible under s. 73. The fact that a witness was disbelieved in trial A should not preclude him being believed in trial B.

⁴⁷ Para. 1388.

⁴⁸ See Model Code (1942), r. 511; Uniform Rules (1953), r. 63 (3); California Code (1965), ss. 1290-2; Federal Rules (1975), r. 804 (b) (1).

⁴⁹ 13th Report (1966), para. 28.

4.1.43 Section 73: third party admissions. Section 73 would permit the reception of the out-of-court admission or confession of a person other than a party, which is presently inadmissible.⁵⁰ The merits of the common law have recently been strongly defended by the Full Court of the South Australian Supreme Court.⁵¹ In short, their arguments were that to admit confessions by third parties would increase the opportunities for untestable defences, and might operate against the accused; such confessions carry no stamp of reliability in the way that declarations against pecuniary or proprietary interest do.⁵²

"If the exception to the hearsay rule is extended so as to bestow, at common law, a testimonial operation upon an extra-judicial confession of crime, the exception will operate in a sphere of human conduct—the sphere of crime and criminal activity—in which, hitherto, it has operated only slightly. Declarations against pecuniary or proprietary interest find their way, *ex rerum natura*, into civil disputes with comparative frequency, but, it would seem, very rarely into a criminal cause or matter—indeed, in the South Australian jurisdiction not one of the Judges constituting this Court of Criminal Appeal has known of a case in the Criminal Court in which such a declaration has been so much as tendered in evidence. The mere knowledge that an extra-judicial confession of crime could, in favourable circumstances, be received to exculpate an alleged offender, would, however, be likely, in our opinion, to tempt the less scrupulous members of our community to undertake clandestine operations of self-help. All that would be required by a guilty accused person would be the services of two or three accomplices and a person, known to all, who had died after the date of the alleged offence and who, theoretically, could have committed it. The accomplices, when called as witnesses, could then simply attribute a 'confession' to the deceased man, and the confession could be given artistic verisimilitude by inserting in it evidence of esoteric knowledge that had, in fact, come from the best of all sources—the offender. If there were not at hand a deceased person into whose mouth the confession could conveniently be put, the unavailability of a living person could, no doubt, be arranged by any one of a number of irregular methods—direct or indirect. Where serious crime was alleged, the motive for making such arrangements would be strong.

. . . The extra-judicial confession of a stranger who does not appear in the witness box . . . has the merit, from a guilty accused's point of view, that the circumstances of its making would, more often than not, be largely beyond the natural purview of the

⁵⁰ In *In re Van Beelen* (1974) 9 S.A.S.R. 163 the law is exhaustively surveyed. Inroads were made on the exclusionary rule in some American jurisdictions by the extension of the declarations against interest exception from declarations against pecuniary or proprietary interest to declarations against penal interest. See *Blocker v. State* 114 S.W. 814 (1908); *Hines v. Commonwealth* 117 S.E. 843 (1923); *People v. Lettrick* 108 N.E. 2d 488 (1952); *People v. Spriggs* 389 P. 2d 377 (1964); *Chambers v. Mississippi* 410 U.S. 284 (1973). The law has also been extended to living persons in the United States. Further, the Supreme Court of Canada have said that declarations against penal interest may be received: *R. v. O'Brien* (1977) 76 D.L.R. (3d) 513.

⁵¹ *In re Van Beelen* (1974) 9 S.A.S.R. 163.

⁵² *Ibid.*, pp. 205–7, per Wells J.

principal case on which issue had been joined, and would be likely to raise questions that, except for the connection of the text of the confession with the *corpus delicti*, related to facts and events not likely to be canvassed by the main body of evidence. Perjurious or lying defences would thus become dangerously easy to fabricate, and correspondingly difficult to expose.

But the matter does not rest there. Declarations against pecuniary or proprietary interest are already received as evidence, not only of the precise fact that is against interest, but also of all connected facts—even though not against interest—that are necessary to explain, or are expressly referred to in, the declaration. Presumably a like operation would be claimed for declarations against penal interest. A moment's reflection, however, will bring the realization that such an operation could lead to some far from commendable results where the crime in question could have been, or was, committed by two or more persons. A rule in the form contended for would enable the prosecution to lead hearsay evidence against Y and Z of an extrajudicial confession made by X to the effect that X, Y and Z committed a crime as a joint enterprise, and, provided X was dead, or otherwise unavailable, such evidence would be admissible generally, and could lead to a conviction. It is difficult to see how it could be excluded through the exercise of a judicial discretion. No wonder, then, that the law lords who spoke in the *Sussex Peerage Case*⁵³ were horrified at the thought of such a result. The situation just posed would differ fundamentally from that in which an admissible dying declaration was made, because X would not necessarily have made his confession in a settled, hopeless expectation of death, and accordingly the declaration, save that it amounted to a confession, could not be said to embody any intrinsic guarantees of trustworthiness.

It accordingly becomes necessary to ask whether confessions of criminal conduct carry on their foreheads the stamp of reliability. Speaking generally, the dangers that such confessions may have been induced by motives other than a desire on the part of their makers to unburden themselves of the truth have been present to the minds of judges for centuries. British courts of law have accordingly built up an elaborate protective structure of rules designed to ensure that apparent confessions are excluded if there are real misgivings as to their voluntariness, or as to the fairness of the circumstances in which they came to be made. As far back as Parke B.'s day (see his judgment in *R. v. Baldry*)⁵⁴ doubts were being expressed as to whether courts had not become, in consequence, too tender to accused persons, but the ebb and flow of opinion and practice over the last two centuries has left trial judges today with a comprehensive and carefully administered set of principles by which all confessional material is tested and weighed before and after its reception in evidence; and those principles represent, for accused persons, a substantial safeguard against the unwitting use by a court of confessions that it would, in truth, be unfair and unsafe to use.

⁵³ (1844) 11 Cl. & F. 85; 8 E.R. 1034.

⁵⁴ (1852) 2 Den. 430; 169 E.R. 568.

But that safeguard cannot consistently be maintained unless it is open for the person alleged to have made the confession to bring before a court circumstances impugning the confession. Even where a confession has been admitted, unless it can be shown to be true in fact, a jury may well refuse to act on it, because jurors may take notice that an untrue confession may be made to protect a friend or relative, to gain publicity, or for many other oblique motives, and therefore be wholly unreliable. Where the original maker of the confession, however, is unavailable, the chances of exploring the truth become much less, and it is only when the facts alleged in the confession can be shown to be at variance with other facts proven aliunde, or in other very special circumstances, that the confession, if defective, can be refuted. As counsel pointed out in argument, a confession could well be elicited by means that, if examined by a Court, would unquestionably be deemed improper, but because the maker of the confession was not at hand to reveal those means it could be received in evidence, as a hearsay declaration, without objection.

Finally, it may be fairly claimed (although this, like the foregoing considerations, is not *per se* conclusive) that what is alleged to be against pecuniary or proprietary interest can be identified and assessed more accurately, and by tests more likely to be disengaged from emotional entanglements—and hence more reliably—than what is said to be against penal interest. It should not be overlooked that, in the realms of criminal conduct, *Les morts font toujours tort [sic]*. In short, confessions of crime are matters of public concern and, upon manifest grounds of policy, should be received and evaluated by the best methods reasonably available—if possible in open court—before given effect to according to their tenor.”

We accept that the reception of confessions by third parties carries risks. But we think more injustice may be caused by excluding them. The mere fact that a confession is admitted does not require that it be believed. It will not be believed unless it fits satisfactorily in with the other circumstances of the case. If the prosecution tendered such evidence, it would be likely to be excluded in the court's discretion. If declarations against pecuniary or proprietary interest have a strong reliability, declarations against penal interest must in many circumstances have greater reliability. To exclude such evidence increases the chance of convicting the innocent. This last point is apparently ignored by the court in its discussion of the reasoning in a leading American authority, *People v. Spriggs*.⁵⁵

“It is, in our opinion, and with all respect to the Court, artificial to justify the reception of the evidence as an exception to the hearsay rule on the ground that ‘since the conviction of a crime ordinarily entails economic loss, the traditional concept of a “pecuniary interest” could logically include one’s “penal interest”.’ Declarations against pecuniary or proprietary interest are receivable because the declarant’s realization that his declaration will operate, directly and immediately, against his pecuniary or proprietary interest offers some substantial guarantee of the declaration’s

⁵⁵ 389 P. 2d 377 (1964).

reliability. No doubt other indirect and mediate consequences will often ensue as well—no acknowledgment of liability will ever really be free of such consequences—but for the purposes of the evidentiary rule the law looks to the firm foundation provided by the direct and immediate results of the declaration which, whatever subsidiary thoughts or beliefs may be entertained, are reasonably certain to be in the forefront of the declarant's mind.

It may be, for example, that acknowledgment of a duty to account for a sum of money may be so explicit, and go so far, as to amount to a confession of embezzlement; but such an acknowledgment does not cease to be a declaration against pecuniary interest It does not follow, however, from the proposition, all A is B, that all B is A. Declarations against pecuniary interest amounting to a confession of criminal fraud, remain declarations against pecuniary interest; but as a matter of syllogistic logic, it cannot be concluded from that proposition that all confessions of crime are declarations against pecuniary interest. Where a person makes a declaration against penal interest, not directly concerned with his pecuniary or proprietary interests, what may reasonably be expected to be uppermost in his mind is that he is confessing to a crime. He may or may not have the imagination to consider, or the resolution to weigh, all the likely consequences of confessing to a crime, among which are often to be found, sooner or later, some impairment of the offender's assets; but it would, in our opinion, flout common sense and every day experience to suppose that the primary mental obstacle that is overcome when an offender is constrained by the force of circumstances to acknowledge his guilt is his awareness that his pecuniary or proprietary interests will somehow be affected by a confession."⁵⁶

In short, we think the dangers involved in admitting third party confessions are outweighed by the advantages.

4.1.44 Section 73: English law compared. The Civil Evidence Act 1968 (U.K.), s. 3 (1), enacted, and the Criminal Law Revision Committee recommended (cl. 33 (1)), that previous statements of witnesses should be automatically admissible as evidence of the truth of the facts they assert. There are some arguments against going so far, at least in the case of statements tendered by the party calling the witness. If an opponent wishes to prove a prior statement, it may be a prior inconsistent statement which is admissible under the present law as going to credibility. But if a party wishes to prove a prior statement of one of his witnesses, it may be either a prior consistent statement or a prior inconsistent statement. If it is the latter, the party will be seeking to admit it because his witness did not come up to proof and did not say what it was hoped he would say. A prior statement, it might be said, should only rarely be admissible in these circumstances; no doubt it deserves to be admitted if there is some reason to suppose the witness is deliberately lying in his sworn testimony, perhaps because of threats made or bribes offered, or where his earlier statement seems more

⁵⁶ (1974) 9 S.A.S.R. 163, at pp. 227-8, *per* Wells J.

reliable because it was near the events recounted or because the witness's powers have deteriorated through age or illness.⁵⁷ If, on the other hand, the witness's prior statement is consistent with his testimony it will in many instances be superfluous and hence of little value; though again if there are good reasons for thinking it to be more reliable than testimony at a trial years later it should be admitted. Previous consistent statements should also be allowed where to object would disturb the natural flow of the witness's testimony and upset his composure. "The car ran into us suddenly and I said to my wife: 'He was travelling too fast'." should not be an impermissible response. Another example where previous consistent statements should be allowed exists on the facts of *Gillie v. Posho Ltd.*⁵⁸ The issue was whether a contract was induced by an advertisement supposedly containing fraudulent misrepresentations. The offeror testified that the contract was made before publication of the advertisement. At common law the Privy Council was compelled to hold inadmissible a letter referring to the completed contract and written by a witness before the advertisement was published. Evidence of prior identification may be regarded as a prior consistent statement, or at least a prior statement, which ought to be readily admitted; an identification in court is generally much more unconvincing and inconclusive than one made earlier in less suggestive conditions. But we do not accept the force of any arguments that the admission of prior statements of a witness should depend in the first instance on judicial discretion. That carries the danger that the natural flow of a witness's testimony will be upset. The court does have power under s. 73 (8) to ensure, for example, that the witness gives all or part of his testimony before the statement is received: here the risk must be run, but the s. 73 (8) power does not affect admissibility.

4.2 SECTION 74: DISCRETIONARY ADMISSION OF RELIABLE STATEMENT

4.2.1 Section 74 (1): purpose. Section 74 (1) applies to out-of-court statements which are inadmissible or which it is not reasonable to expect a party to tender. It provides that the court may admit a statement if there are reasonable grounds for thinking it to be reliable. We have explained that in general our proposals apply only to permit the admission of first-hand oral hearsay, and to a particular kind of multiple documentary hearsay.¹ But sometimes hearsay outside these categories, and the other categories for which the Bill specifically provides, is reliable. Section 74 is intended to create a general exception, which might avoid the risk of any serious injustice. It is one answer to Cross's plea "for a residual exception as an umbrella under which there can be collected all those facts which, from their very nature, can only be established in a court of law if the hearsay rule is violated".² He preferred this to an attempt to cover in particular terms each actual and possible exception to the hearsay rule, however ill-recognized it may be in the books and in conventional thinking. We have adopted

⁵⁷ *Harvey v. Smith-Wood* [1964] 2 Q.B. 171.

⁵⁸ [1939] 2 All E.R. 196.

¹ Above, paras 2.3.1–2.3.10.

² Cross (1956), p. 115.

something of both courses. In our view, the residual exception should be used mainly as a matter of last resort, and any more particular exception which may be available and which the party tendering the evidence could reasonably have relied on should be relied on by him. The key notion underlying each specific exception is well-sanctioned either by considerations of principle, or by common sense considerations, or both. But not every case can be foreseen, and s. 74 (1) is intended for the occasional unforeseen piece of reliable hearsay not otherwise admissible. Indeed, much hearsay is in practice admitted because no party objects to its admission. It is important that this remain so.

"Who thinks of shouting hearsay when a witness testifies to the dimensions of some object in feet and inches, or to the time when he did an act or observed an event? Yet in the first of these two cases the testimony has value only from its relation to a measuring stick, tape or chain referring back through an unknown number of successive comparisons to a master unit of length deposited in the Bureau of Standards. The product of each comparison is an assertion by its maker or verifier, embodied in wood, steel, fabric or other appropriate material. And in the telling of time we refer to a watch or clock of which the manufacture and regulation carry back through various chronometric devices to the fundamental human arrangement at Greenwich . . . for gearing the hours, minutes and seconds of our lives to the celestial movements controlling the whole system—again a series of mechanical and optical assertions.

These few illustrations will start the reader's mind running round and about through a vast assortment of everyday hearsay commonly just as acceptable in court as in any home or place of business. Plainly the whole human scheme is acrawl with hearsay, and highly intolerant we should be of any legal technician who tried substantially to cut down the convenient operation of this huge undefined exception to the rule of exclusion."³

Further, s. 74 (1) may prove useful in connection with traditionally doubtful areas of admissibility at common law. There are many instances in which quite reliable evidence has been admitted although on proper analysis the evidence technically infringes the hearsay rule. Section 74 (1) can now be used to admit this evidence without there being any doubt on the matter. Examples of this kind of evidence include: testimony as to one's own age; testimony as to the age of an adopted child by its adopting parents; testimony as to another person's name or residence; an accused's statements made to an interpreter and reported to the court by a policeman relying on the interpreter's account. Finally, s. 74 (1) may be used as an avenue for developing new hearsay exceptions justified by considerations of trustworthiness.

³ Maguire (1947), pp. 129-30. Other examples include astronomical facts proved by almanacs, weight measurements made by using weighing machines, the telling of time by a sundial. Morgan deprecated attempts to overcome the hearsay nature of such facts "by a resort to the doctrine of judicial notice. Where a court receives an almanac as evidence of an astronomical fact, it is not taking judicial notice of the fact: it is admitting anonymous hearsay and taking judicial notice of the reliability of the almanac as a source of authentic information." Morgan (1935), p. 1145.

4.2.2 Section 74 (1): possible drawbacks. In proposing this clause we differ from the English Criminal Law Revision Committee. They found four serious difficulties in such a course.

“First, with the differences of opinion about the value of hearsay evidence there would be bound to be large differences in practice between different courts. Second, there would be an almost inevitable tendency to allow hearsay evidence freely for the defence while restricting it when offered on behalf of the prosecution, and the committee generally are opposed to making distinctions between the parties in this way. Third, it would make it much more difficult for the parties to prepare their case, because there would be no way of knowing in advance whether a court would allow a particular piece of hearsay evidence. Fourth, in summary trials the court would ordinarily have to hear the statement in order to decide whether to exercise the discretion to admit it.”⁴

In our view, these dangers are over-stated and are not peculiar to hearsay evidence. With regard to the first point, it is fairly generally agreed that second-hand oral hearsay is only exceptionally worth acting on; and the first point could also be made of identity evidence, confessions, and the inferences to be drawn from flight or silence. Yet these kinds of evidence are admissible, whatever their weight. We agree with the general view expressed in the second point that the rules of evidence should be the same for both parties, but the entire nature of the criminal trial under our system, including the importance attributed to not convicting the innocent, ensures that though the rules may be the same they will tend to be applied differently in some particular circumstances; nor do we regard this as being a bad thing, at least in moderation. Thirdly, it would be obvious that s. 74 (1) is intended as a provision of last resort and that a strong case would have to be made out for admission. In appropriate cases a ruling could be sought before the actual hearing (s. 104). A party who failed to notify the other party of his intention to tender evidence under the section and unfairly surprised him would run the risk of having the evidence rejected or of having to pay the costs of an adjournment (s. 100). Finally, there are many items of evidence which the court in a summary trial must hear before deciding for or against admission: confessions are only the most spectacular example.

4.2.3 Section 74 (1) and Federal Rules, r. 803 (24). Our proposal is similar to a provision in the Federal Rules admitting “a statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness” (r. 803 (24) and r. 804 (b) (5)). In commenting on this, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States remarked that the specific exceptions listed:

“are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system.

⁴ 11th Report (1972), para. 246

[Rule 803 (24) and r. 804 (b) (5)] do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness, within the spirit of the specifically stated exceptions."

We are even less confident that the wisdom and experience of the past are well reflected in the existing hearsay exceptions, and cannot be confident that our specific proposals will meet every case. We therefore suggest a like provision. We add that most of our commentators supported this proposal.

4.2.4 Section 74 (1) and American common law. As a matter of American common law a hearsay exception of this kind may be emerging. McCormick⁵ has pointed to:

"Decisions⁶ which seem to sanction the practice that when a statement does not fall within an existing exception it still may be admitted if the judge finds that there is a necessity for its use and that it was made under circumstances showing exceptional trustworthiness. These courageous judges have marked the way, and we may eventually see our hearsay canon restated in this fashion: a hearsay statement will be received if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances."

The leading example of the common law exception is *Dallas County v. Commercial Union Insurance Co.*⁷ In that case the issue was whether charred wood in a courthouse clock-tower which collapsed was the result of a recent lightning strike or a fire in the distant past. An account of a fire in the tower, then being constructed, appearing in a local newspaper in 1901 was admitted by the court.

⁵ McCormick (1956), p. 219.

⁶ *Hutchins v. Perry* 75 A. 650 (1910); *Goodale v. Murray* 289 N.W. 450 (1940); *Gagnon v. Pronovost* 92 A. 2d 904 (1952).

⁷ 286 F. 2d 288, at pp. 397-8 (1961). See also R.S.C. Ord. 38, r. 3 (2) (d), which provides that the court may before trial order that "evidence of any particular act may be given . . . in the case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of a specified newspaper which contains a statement of that fact."

This rule was proposed by the English Committee on Supreme Court Practice and Procedure (1953), para. 268.:

"In regard to matters of local or general public notoriety e.g. the date of a coronation or the declaration of war or the name of the Derby winner, it has been strongly urged that quite unnecessary costs and delays are sometimes occasioned because a reference to a current newspaper recording the event is, strictly, incompetent. The occasions are probably rare; but it is no doubt true that when they do occur the law is apt to appear as an ass. We think, therefore, that in this class of case an exception should be made . . . to the rule in regard to hearsay. In this class of case it seems to us that the Court should be empowered to make an order admitting any document as evidence of the alleged fact of local or general notoriety, without regard to any existing rules of evidence."

"Taking a common sense view of this case, it is inconceivable to us that a newspaper reporter in a small town would report there was a fire in the dome of the new courthouse—if there had been no fire. He is without motive to falsify, and a false report would have subjected the newspaper and him to embarrassment in the community. The usual dangers inherent in hearsay evidence, such as lack of memory, faulty narration, intent to influence the court proceedings, and plain lack of truthfulness are not present here. To our minds, the article published in the Selma Morning-Times on the day of the fire is more reliable, more trustworthy, more competent evidence than the testimony of a witness called to the stand fifty-eight years later.

We hold, that in matters of local interest, when the fact in question is of such a public nature it would be generally known throughout the community, and when the questioned fact occurred so long ago that the testimony of an eye-witness would probably be less trustworthy than a contemporary newspaper account, a federal court, acting under Rule 43 (a),⁸ may relax the exclusionary rules to the extent of admitting the newspaper article in evidence. We do not characterize this newspaper as a 'business record', nor as an 'ancient document', nor as any other readily identifiable and happily tagged species of hearsay exception. It is admissible because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearsay within reasonable bounds."

Another American example of evidence admitted because inherently reliable is *People v. Spriggs*⁹ where an admission by the accused's companion of possession of heroin was held admissible in favour of the accused even though the companion was not called as a witness and was not unavailable. The credibility of the statement was said to depend on its being against the declarant's interest, not on whether the declarant was cross-examined. In both these cases we agree with the views of the courts concerned that the evidence was sufficiently reliable to be admitted.

4.2.5 Section 74 (1) and Uniform Rules, r. 66. We do not favour multiple hearsay exceptions of the kind to be found in Uniform Rules (1953), r. 66:

"A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception."

⁸ Federal Rules of Civil Procedure, 28 U.S.C.A. Rule 43 (a) was held to be so vague "as to give broad latitude to a trial judge in his rulings on admissibility:" 286 F. 2d 388, at p. 394.

⁹ 389 P. 2d 377 (1964); not followed in *In re Van Beelen* (1974) 9 S.A.S.R. 163. For other examples, see *G. & C. Merriam Co. v. Syndicate Pub. Co.* 207 F. 515 (1913); *United States v. Barbati* 284 F. Supp. 409 (1968); *Hew v. Aruda* 462 P. 2d 476 (1969).

(See also Model Code (1942), r. 530; California Code (1965), s. 1201.) Sometimes statements which satisfy such a provision would also satisfy s. 74 (1). Let us consider an example.

“Charge: Murder of X. Defense: X committed suicide. Defendant’s offer of proof: a police officer to testify he took A to the morgue to identify a body; upon viewing the body A became hysterical and cried, ‘It’s X! He told me he was going to kill himself.’ Here we have—

- (a) A’s hearsay assertion that X made X’s statement, and
- (b) X’s hearsay statement declaring his suicidal intent.

Statement (a), however, is probably covered by the excited utterance exception (*res gestae*) and statement (b) is certainly covered by the declaration of present mental condition exception.”¹⁰

The statement would be admissible, if reliable, under s. 74 (1). We do not think it should be admitted unless sufficiently reliable to fall under that exception. In the cases of double hearsay which we admit—reputation, treatises, commercial lists, evidence of documentary hearsay under s. 73—there are some special circumstances suggesting reliability.

4.2.6 Section 74 (1): examples. A number of hypothetical examples of evidence which might be admitted under s. 74 (1) follow.

- (a) “A and B, aged sisters, are both lying ill when they hear that their acquaintance X has been arrested on a serious charge. A realizes that she saw X board a train at a place and time which were inconsistent with his guilt, and she tells this to B just before dying. B communicates it to C, the parson, just before she too dies. The information chimes exactly with X’s alibi defence at the trial.”¹¹
- (b) “A person dies of poisoning. D is proved to have bought such poison. A, the deceased’s housekeeper, wishes to prove that the deceased told her on the morning of the day when he died that he was going to tea to D’s Suppose A is dead and the prosecution wish to call B, whose veracity is unimpeachable, to say that A told B what the deceased had said.”¹²
- (c) P1 and P2 are shot by D. P1 recognizes D and tells P2 the identity of their assailant. P1 dies. P2 then tells W that P1 told him D fired the shots. P2 dies. W cannot testify as to what P2 said if this is offered as evidence of D’s guilt under s. 73 because P2 lacks personal knowledge of the fact asserted by P1 (s. 73 (1) (a)); but the evidence is as reliable as any identity evidence is likely to be in these circumstances.

¹⁰ California Law Revision Commission, Vol. 4, p. 577.

¹¹ Williams (1973b), p. 139.

¹² *Ibid.*, at p. 140.

4.2.7 Section 74 (1) (a): not reasonable to expect a party to tender. Section 74 (1) applies not only to inadmissible statements, but also to admissible statements which it is not reasonable to expect a party to tender except under s. 74 (1). The latter kind of statement may be illustrated by a statement admissible under s. 73 which an accused person finds difficulty in tendering under that section because, for example, he is in custody and cannot make inquiries which would enable him to identify or locate the declarant.

4.2.8 Section 74 (1) (b): circumstances going to reasonableness. Section 74 (1) (b) imposes as a condition of admissibility that there must be reasonable grounds for thinking the statement reliable. "Reasonableness" is to be determined "in the light of the circumstances in which it was made and other relevant circumstances". The reason for these words is that it is often difficult, though sometimes possible, to estimate the reliability of a piece of evidence standing by itself even if the circumstances of its origin are considered. More commonly, the reliability of one piece of evidence can only be determined by considering all the circumstances, particularly other items of evidence admitted.

4.2.9 Section 74 (2): purpose. The purpose of this provision is to cope with a problem suggested by the facts of *Sparks v. R.*¹³ A statement by a three year old girl that "A coloured boy did it" was held inadmissible at the trial of the accused, a white man. Under s. 73 (1) (a), the statement would be admissible because the girl had personal knowledge of the matter asserted, assuming there was justification for not calling her. But a statement by a witness relating what he heard another person, now unavailable, report the little girl as saying would not be admissible. Nor, on the assumed facts, would the little girl's statement necessarily fall within s. 74 (1): for reasons already explained, the circumstances might not be held to provide reasonable grounds for thinking it to be reliable.¹⁴ Even on the facts of *Sparks v. R.*, cl. 31 (1) of the English Criminal Law Committee's proposals would result in the exclusion of the statement; she could not give "direct oral evidence" of the facts asserted because of her youth. The Committee decided not to make a proposal to cover this problem.¹⁵ They opposed a proposal such as s. 74 (2) because in their view it is wrong that different rules of admissibility should apply to the prosecution from those which apply to the defence. In general, we agree with this point of view, but there is already a discretion to exclude evidence which would unfairly prejudice the accused. The importance of avoiding unjust convictions in our view justifies also an exception in favour of including evidence in the circumstances of *Sparks v. R.*, or in like circumstances which can be imagined if the facts of *Sparks v. R.* are varied as suggested above.

¹³ [1964] A.C. 964.

¹⁴ Above, para. 1.2.14.

¹⁵ 11th Report (1972), para. 250.

The English Committee pointed out that the problem is a very rare one, and they considered that the risk of injustice should be accepted. In legislation which purports to render the law of hearsay entirely statutory we do not think that problems of this kind should be left unresolved; whether or not the contingency is rare, it may have serious consequences when it does arise. Nor do we think it proper simply to make proposals for the special case of the young child; in our view, it is better to have a general provision to deal with unforeseen possibilities. One reason for preferring the wording suggested to some such formulation as "capable of raising a reasonable doubt" is the risk that the latter words may in future cease to refer to the standard of proof in criminal cases. That is to say, we are seeking to avoid running the risk that that construction of s. 74 (2) will become entangled in debates about the appropriate formula for use in directing juries.¹⁶ The words used are intended to indicate that the evidence may be admissible even if it must be considered with other evidence before an acquittal can be supported; that is, the evidence need not by itself be enough to support acquittal.

4.2.10 Section 74 (2): drafting. The wording of s. 74 (2) is self-explanatory for the most part. The language follows that of s. 74 (1), *mutatis mutandis*, and the reasons why it has been drafted as it has are similar.¹⁷

4.3 SECTION 75: PROOF OF EVIDENCE

4.3.1 Section 75: general. The purpose of s. 75 is to give the court power to refuse to admit proofs of evidence under s. 73 where the declarant is called as a witness, and to provide that in criminal proceedings a proof tendered on the basis that there is justification for not calling the declarant shall not be admitted unless the court finds special reason for doing so. Some prior out-of-court statements are weighty. On the other hand, sometimes such statements are made too rashly, or under the influence of shock or poor conditions of observation, so that statements at the subsequent trial made after careful reflection are more reliable. But often the earlier statement is much fresher than evidence given at a trial after a painful process of half-recollection and reconstruction of what has gone before. Such an advantage does not exist with a witness's proof of evidence. It often has limited probative value except to rebut accusations of inconsistency and afterthought made in cross-examination. The proof may itself have been made long after the events in issue; it may have been made in response to leading questions; it may even have been concocted. "[E]ven if the person taking the proof has not tried to get the witness to tell his story in the

¹⁶ Note the difficulty caused by some of Lord Goddard's decisions: *R. v. Kritz* [1950] 1 K.B. 82; *R. v. Summers* [1952] 1 All E.R. 1059; cf. *R. v. Hepworth* [1955] 2 Q.B. 600; *Thomas v. R.* (1960) 33 A.L.J.R. 413; *Dawson v. R.* (1961) 106 C.L.R. 1; *Green v. R.* (1972) 46 A.L.J.R. 545.

¹⁷ See above, paras 4.2.7–4.2.8.

way most favourable to the party in whose interest it is taken, it is obviously likely that it will come out in this way.”¹ We agree with the English Law Reform Committee:²

“Examination-in-chief by question and answer without leading questions on matters in dispute plays an important part in our system of eliciting the truth under the adversary system. As every judge and advocate knows, witnesses often fail to ‘come up to their proofs’ in examination-in-chief—and this is one of the commonest ways in which truth will out. A proof is not really the witness’s own narrative, but a summary by the proof-taker of the witness’s answers to questions put by him which may themselves have suggested the answers. Had different questions been asked, the resulting narrative might have been different. When the witness goes into the box to give his evidence in chief, often different questions are asked. When the evidence is about disputed facts, we do not think this process should be omitted.”

In our view the possibility that a proof of evidence could be introduced immediately after the witness was called, sworn and asked formal questions is a defect in the Evidence Act, 1898, s. 14B.³ But sometimes a proof will have value. The English Criminal Law Revision Committee’s 11th Report proposed that they be admissible by leave.⁴ We think that proofs should be admissible without leave in civil cases subject to the discretion to postpone admission under s. 73 (8) or to exclude under s. 100,⁵ but where the declarant is a witness, the court should have a discretion to reject it. And we think that proofs should not be admissible in criminal cases unless the court for special reason otherwise orders.

4.3.2 Section 75 (1): definition of proof. Section 75 (1) defines the kind of statements—the “proofs”—to which the section applies. The statement must be documentary, for the dangers with which we are concerned arise almost entirely when statements are tendered in this form. It must appear to the court that the statement was made at a time when a legal proceeding was actually contemplated or should reasonably have been contemplated by the declarant, or by a person by or on behalf of whom the statement was induced or obtained. The statement must be made for the purpose of indicating evidence which the declarant would be able to give in a legal proceeding. Several points are noteworthy. The legal proceeding contemplated need not be identical with that in which the statement is actually tendered. The

¹ 11th Report (1972), para. 239.

² 13th Report (1966), para. 32.

³ See e.g., *Hilton v. Lancashire Dynamo Nevelin, Ltd.* [1964] 2 All E.R. 769. This possibility would undermine the oral character of the trial, reduce the advantages of examining the witness’s demeanour while answering questions in chief, and increase the risk of the evidence not being acted on where this tactic was employed unwisely by an inexperienced practitioner.

⁴ Para. 239; cf. Criminal Law and Penal Methods Reform Committee of South Australia (1975), ch. 8, para. 3.5.

⁵ See above, paras 4.1.24–4.1.27, and below, para. 6.7.1.

test of contemplation may be either subjective or objective. The present s. 14B (3) of the Evidence Act, 1898, leaves it obscure whether proceedings must actually be anticipated, or whether it is enough that they ought to have been anticipated, though the better view is the latter.⁶ The former view is more rational, since the danger to be guarded against is the risk of subjective bias; the latter avoids difficulties of proof. For safety both possibilities are included. Finally, because the danger is that persons may be led into saying more than they really mean to, it is enough if the person who obtained a statement contemplated or should reasonably have contemplated proceedings. His questions may be more likely to produce false answers than the desire of the declarant to help a friend or injure an enemy.

4.3.3 Section 75 (1): scope. The phrase “a statement made for the purpose of indicating evidence which the declarant would be able to give in a legal proceeding” includes not only formal proofs prepared by lawyers but also statements taken by lay investigators.

4.3.4 Section 75 (2): purpose. Section 75 (2) provides that the purpose referred to in s. 75 (1)—the purpose of setting out evidence—includes not only the sole purpose but also a substantial purpose. Human behaviour scarcely ever has a single exclusive purpose, and there is a risk that s. 75 would be construed out of existence if a sole purpose as provided had to be proved.

4.3.5 Section 75 (3): declarant called as witness. Section 75 (3) gives the court power to refuse to admit a proof where the declarant is called as a witness, in addition to its powers under s. 73 (8) to admit the proof on terms and conditions.⁷ A proof may not add to the material before the court; it may have been learned off by heart, and if so, a kind of double-counting should not be allowed. Where the declarant is called the court has the benefit of his testimony and may assess the true character of the proof.

4.3.6 Section 75 (3): factors relevant to discretion. The judge may be expected to give leave to put in a proof of evidence readily where the witness has forgotten the events of which he spoke in the proof, perhaps because of the sudden onset of mental weakness through old age or because the trial occurs long after the facts in issue. Another instance might be where the declarant is thought not to have done himself justice as a witness, e.g., because he was incomprehensible,⁸ or suffered extreme nervousness in the atmosphere of the court, or because his memory suddenly failed.

⁶ *Jarman v. Lambert and Cooke Contractors Ltd.* [1951] 2 K.B. 937; cf. *Robinson v. Stern* [1939] 2 K.B. 260, at p. 268.

⁷ See above, paras 4.1.24–4.1.27.

⁸ E.g., *Morris v. Stratford-upon-Avon Rural District Council* [1973] 3 All E.R. 263.

4.3.7 Section 75 (4): proofs in criminal proceedings. Section 75 (4) provides that where in a criminal legal proceeding a proof is tendered on the basis that there is justification for not calling the declarant, it is inadmissible unless the court for special reason otherwise orders. Thus there is a discretion to admit, but one only to be exercised in favour of admission with great caution. Proofs obtained by the prosecution will normally be obtained by skilled interrogators who are accustomed to converting jumbled and half-coherent answers into passages of connected prose. Whether or not there is any ill-will involved, and the desire of the police for witnesses to come up to proof will help to ensure that there is not, the utterances of an uncertain and perhaps unreliable declarant may be converted into an impressive, confident and internally self-consistent document. If that declarant subsequently cannot testify, to admit the document may cause a miscarriage of justice.^{8A} This accounts for the narrowness of the inclusionary discretion. The reason why the inclusionary discretion exists at all is that there may be cases where the document is reliable or indeed necessary if justice is to be done. However, the danger is less if the declarant testifies. The problem will then be regulated by s. 75 (3), which grants a discretion to exclude, not a narrow discretion to include. The reason why it is easier for a proof in criminal proceedings to be admitted if the declarant testifies is that the fact he testifies will enable the court to compare the manner of speech and thought with that suggested by the document. It will permit the documents to be discounted if the declarant's powers are not accurately reflected in it.

4.3.8 Section 75 and business records. The difference between s. 75 of the Bill and s. 14CF (1) of the Evidence Act, 1898, should be noted. Section 14CF (1) would automatically exclude business records brought into being for the purposes of legal proceedings for the reasons explained in our Business Records Report.⁹ In essence our view was that such statements should only be admissible if justification were proved for not calling the maker. Section 75 permits such statements to be admitted provided there is justification for not calling the maker, except where the proceedings are criminal, in which case the narrow inclusionary discretion of s. 75 (4) operates.

4.4 SECTION 76: STATEMENT OF ONE ACCUSED PERSON: ADMISSIBILITY AGAINST ANOTHER

4.4.1 Section 76: general. Section 76 provides that where two or more persons are charged in a criminal legal proceeding and an out-of-court statement made by one of them is admitted under ss. 73 or 74, the statement is inadmissible in relation to any other person charged unless that other person tenders it or consents to its tender in relation to him.

^{8A} We considered the possibility of distinguishing between prosecution and defence statements. However, there are reasons of a different kind for sometimes being sceptical of statements of defence witnesses and we thought it best to subject the proofs of both sides to the same judicial scrutiny.

⁹ L.R.C. 17, Appendix B, paras 37-43.

4.4.2 Section 76 and an English proposal. The majority of the English Criminal Law Revision Committee recommended that the out-of-court statement of one co-accused person should be admissible against another.¹

"It often happens that, when A and B are charged jointly with an offence, A has made a statement implicating them both and B has made no statement; or again each may have made a statement seeking to throw the blame on the other. In the latter kind of case there may be much truth in both their statements, and their stories may be changed by the time of the trial. If there are discrepancies of this kind, it seems to the majority particularly desirable that the out-of-court statements should be admissible in evidence in order that they may be compared with the makers' evidence [sc. defences] at the trial. . . . [The provision] gets rid of the absurd situation which occurs under the present law that, when A has made a statement implicating himself and B, it is necessary to direct the jury that the statement is admissible in evidence against A but not against B. This is a subtlety which must be confusing to juries, and in reality they will inevitably take the statement into account against both accused. The minority are against this provision, because they consider that to admit the statement may be too prejudicial to the accused whom it implicates. This might be so in their opinion in a case, for example, where A was on any view deeply involved in the offence and is obviously a person whose statements cannot be relied on and, on the other hand, the other evidence against B is weak and he took at most a minor part in the offence. The majority consider that there is nothing so exceptional in this situation as to justify departing from the general principle that as much relevant evidence as possible should be before the court, and they think that courts should be relied on to ensure that the statement is given its proper weight."

One problem raised by the reasoning is that a statement made by co-accused A would become admissible against co-accused B without the latter having the opportunity to test the reliability of the former. The English Criminal Law Revision Committee sought to overcome this problem, which would otherwise have arisen under cl. 31 (2) of their Bill, by inserting a provision declaratory of the common law position that an accused who has pleaded guilty or been acquitted is a compellable witness (see cl. 4 (5)). We do not favour this solution, for the prosecution is not obliged to call such a person, and the defence might be hampered in having to call an unfavourable witness without any serious possibility of having him declared hostile (i.e., "adverse" for the purposes of the Evidence Act, 1898, s. 53). Further, this solution leaves untouched cases where the declarant has neither pleaded guilty nor been acquitted. Another solution to the problem would be to require that before the out-of-court statement of a co-accused can be admitted against another accused the declarant must testify. Thus an out-of-court statement by a co-accused declarant against whom proceedings have not yet ceased by virtue of a plea of guilty or verdict would have to testify before another co-accused could be prejudiced by his statement. The strength of that statement would be tested by cross-examination.

¹ 11th Report (1972), para. 251.

4.4.3 Section 76: justification. On balance, we do not find the reasoning of the English Criminal Law Revision Committee discussed in the previous paragraph convincing. Its main virtue is the avoidance of a difficult jury direction. But it assumes that an out-of-court statement by an accused person would be admissible without him testifying. This would permit the admission, on tender by the prosecution, of one co-accused person's wholly or partly self-serving statements, which might contain matter injurious to another co-accused person. A further argument against the English proposal is that such a statement implicating only co-accused B may be falsely attributed by the prosecution to co-accused A. It is not in A's interest to deny making the statement; B cannot affirm or deny whether the statement was made. Another argument is that accused persons, and more particularly guilty accused persons, are prone to lie and to attempt falsely to shift the blame when questioned by the police. An out-of-court statement of an accused person is only admissible under s. 73 (1) (b) (i) if he testifies; and it will not normally be admissible against a co-accused person (s. 76). Whether or not a warning by the judge that the statement is not admissible against a co-accused person will be effective is a matter on which opinions differ; the warning at least operates in favour of liberty, and may have beneficial effects when the evidence against the accused person in whose favour it is given is thin. Indeed, if the statement were the only material against the accused, the court would have a duty to acquit without letting the case go to the jury.

4.4.4 Tender by co-accused. The concluding words of the section, after "unless", make it clear that a statement of co-accused A will be admissible against co-accused B if B tenders the statement or consents to its tender in relation to him. There seems no point in giving B the protection of s. 76 if he has no objection to the evidence going in.

4.4.5 Section 76: a related problem. The problem met by s. 76 may arise elsewhere. Section 76 meets the case where two persons are charged and the statement of one is tendered. What about the case where two persons are implicated in events which may be the subject of a prosecution, one absconds, and the other is tried? What safeguard does the accused have against the use of the absconder's statement? Should the prosecution be better off when a suspect absconds than they are when he stands trial? We think it unwise to extend s. 76 to meet this case: it would have a wide and unpredictable operation if it were so extended. We think the problem is satisfactorily met in two ways. First, many of the statements of an absconder will have been made after a charge has been made or s. 73 (9) applies for some other reason, so that the court will have power to exclude the statement. Secondly, there are the general exclusionary powers of the court under ss. 100 and 103 in respect of evidence which is of slight weight or which operates unfairly. Thirdly, we recommend a provision that the same corroboration rules apply to this kind of evidence as would apply if testimony to that effect were given by the declarant: see s. 102.

4.5 SECTION 77: MULTIPLE ADMISSIBILITY

4.5.1 Section 77: purpose. Under the present law there are several instances where an out-of-court statement is admitted, not as evidence of the truth of the facts asserted or assumed, but to challenge or enhance a witness's credit. In each instance a difficult problem is posed for the trier of fact; we think the problem ought not be allowed to arise unless there is a compelling reason, and the purpose of s. 77 is to achieve this. We turn now to consider these problems. Although such statements would generally be admissible under s. 73, the provision is required because under the present law the statements to which it applies are automatically admissible, while s. 73 statements are liable to be excluded under s. 75.

4.5.2 Section 77: previous consistent statements. Under the present law, a witness may not be asked by his own counsel whether he has formerly made a statement consistent with his present testimony; nor may he or other witnesses refer to it or prove it. Two exceptions are complaints in sexual cases¹ and previous statements admitted to rebut the suggestion that a witness's testimony was a recent fabrication; the statements here are admissible not as evidence of the truth of the facts asserted but merely to enhance the witness's credibility by showing consistency. There is substantial difficulty in effectively directing a jury as to the distinction between statements which enhance credibility and those which are evidence of the truth of what they assert. (Previous consistent statements in documents which satisfy s. 14B of the existing Evidence Act, 1898, are admissible as evidence of the truth of what they assert; there may be other statements so admissible, e.g., statements by the accused at the time of being charged, even if entirely favourable to his case;² references to prior identifications by identity witnesses;³ and statements which are part of the *res gestae*.⁴)

4.5.3 Section 77: previous inconsistent statements. Previous inconsistent statements of a witness may not normally be proved by the party calling him. But a party may prove the previous inconsistent statements of a witness called by him if that witness turns out to be hostile, i.e., "adverse" within the Evidence Act, 1898, s. 53; and previous inconsistent statements may be put to witnesses during cross-examination under the Evidence Act, 1898, ss. 54–55. The inconsistent statements are normally admissible only to challenge credibility, not as evidence of the truth of the facts asserted.⁵ We agree with Learned Hand J.'s criticisms of the common law:⁶

¹ The law of complaints, apart from the rule that the complaint is only admissible to show the consistency of the victim and not as evidence of the truth of the facts asserted therein, perhaps requires reconsideration; we reserve this until our review of the non-hearsay parts of the law of evidence. In s. 77 (2) (a) we have not referred to "complaints in sexual cases," because there is some authority, which may ultimately prevail, permitting complaints of violence: Cross (1974), p. 214.

² See above, para. 4.1.37.

³ See below, para. 4.5.6.

⁴ E.g., *Milne v. Leisler* (1862) 7 H. & N. 786; 158 E.R. 686.

⁵ Some jurisdictions changed the common law rule by judicial development, e.g., Wisconsin: *Gelhaar v. United States* 163 N.W. 2d 609 (1969).

⁶ *Di Carlo v. United States* 6 F. 2d 364, at p. 368 (1925).

"The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court."

This kind of argument has been amplified by McCormick.⁷

"If the prior statement of the witness is contradictory of his present story on the stand, the opportunity for testing the veracity of the two stories by the two parties through cross-examination and re-examination is ideal. Too often the cross-examiner of a dubious witness is faced by a smooth, blank wall. The witness has been able throughout to present a narrative which may be false, yet is consistent with itself and offers no foothold for the climber who would look beyond. But the witness who has told one story aforesaid and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. It will go hard, but the two questioners will lay bare the sources of the change of face, in forgetfulness, carelessness, pity, terror or greed, and thus reveal which is the true story and which the false. It is hard to escape the view that evidence of a previous inconsistent statement, when the declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony.

Accordingly, if we look to the procedural guaranties of truth of the prior statement and of the present testimony of the same witness, we can only conclude that they stand approximately equal, since they both are subject to the same test of cross-examination, the main invention and reliance of the common law system of proof. But there is another factor which bears even more crucially upon the comparison, and may reasonably persuade us that prior statements are not merely of equal reliability with the witness's testimony, but are *superior* in trustworthiness. This is the obvious truth, which voluble readiness of witnesses tends to obscure, that memory hinges upon recency. The prior statement is always nearer and usually very much nearer to the event than is the testimony. The fresher the memory, the fuller and more accurate it is. The rule as to memoranda of past recollection, permitting their use only when made while the matter recorded is fresh in memory, is based precisely on this principle . . .

Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy. No, but the time-element plays an important

⁷ McCormick (1954), para. 39.

part, always favoring the earlier statement, in respect to all of these hazards. The greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences. *A priori*, the probability that the earlier statement has been so influenced is always less. All in all, in view of these considerations, and after reading hundreds of illustrative cases, the writer believes that as a class prior inconsistent statements, when they are so verified that their actual making is not in doubt, are more reliable as evidence of the facts than the later testimony of the same witnesses.

The rule against the use of prior statements substantively, then, is basically misguided, it is believed, in attempting to deny such statements the full probative effect to which they are reasonably entitled. But the attempt is in most cases ineffectual, and in the minority of cases where it is given practical effect, the incidence of the rule is harsh and haphazard. It is usually ineffectual because ordinarily the party who proves the prior statements will have some other 'substantive' first-hand testimony of like purport with the impeaching statements to support him on the issue, and will be submitted to the jury for their decision on the conflicting 'substantive' evidence. The only available sanction for our rule is an instruction that the jury must not consider the prior statements of the witness as substantive evidence on the main issue, but solely as bearing on the credibility of the witness. Such an instruction, as seems to be generally agreed, is a mere verbal ritual. The distinction is not one that most jurors would understand. If they could understand it, it seems doubtful that they would attempt to follow it. Trial judges seem to consider the instruction a futile gesture. If the prior statement and the present testimony are to be considered and compared, what is the purpose? The intuitive good sense of laymen and of lawyers seems to agree that the only rational purpose is not merely to weigh the credibility of the testimony, but to decide *which of the two stories is true*. To do this is ordinarily to decide the substantive issue.

The distinction between using a previous statement as evidence of its truth, and as evidence that the declarant in testifying differently is lying or mistaken, is surely a most artificial one. Unless the statement *may* be true, it does not have the effect of shaking the credibility of the testimony; and that it *may* be true is about all one means by accepting a statement as evidence of its truth. The notion that the judge and the jury may only say, 'We know not which story is true; we only say that the witness blows hot and cold, and hence is not to be believed in either,' demands a finical neutrality alien to the atmosphere of jury trial.

Moreover, as suggested above, the incidence of the rule that previous statements are not substantive is arbitrary and indiscriminate. In the first place, it is practically without effect where the impeaching party does not have the burden of producing evidence on the issue to which the statement relates. If the state's only witness to a material fact in a criminal case or the plaintiff's sole witness in a personal injury case is attacked by showing his previous statement

giving a different story of the alleged crime or collision, it is immaterial to the defendant whether the statement is substantive or merely impeaching. In either event, the jury can use it to cancel the effect of the witness's testimony. Thus, the impeaching statement, though not 'substantive', may be a sufficient basis for a verdict for the defendant, while in the reverse situation the state or a civil plaintiff could not go to the jury at all on the issue if the impeaching statement of the defendant's witness were all he had. The argument seems persuasive that if the previous statement and the circumstances surrounding its making are sufficiently probative to empower the jury to disbelieve the story of the witness on the stand, they should be sufficient to warrant the jury in believing the statement itself."

4.5.4 Section 77: other complications in the law as to inconsistent statements. The law is further complicated in the following ways. Previous inconsistent statements of party-witnesses which are admissions are received as evidence of the truth of the facts asserted, and so are previous inconsistent statements of witnesses being cross-examined which are admitted under the existing Evidence Act, 1898, s. 14B,⁸ the same result should follow for hostile witnesses. It is not settled whether s. 14B changed the law to permit previous inconsistent statements of witnesses who are unfavourable without being hostile to be proved, though since such a witness may be contradicted by direct oral evidence of a fact, a previous written statement asserting such a fact should be admissible as falling within the statutory words.⁹

4.5.5 Section 77 (1): effect. In all these cases in which a distinction must be drawn between admitting a statement as evidence of the facts it asserts, and admitting it for some other purpose, a difficult task is being set for both judge and jury. The judicial direction is hard to give; it is hard for the jury to keep the different aspects of the statement separate. The natural way of handling a statement admissible for any purpose is to treat it, where appropriate, as constituting evidence of the truth of what it asserts. But where the evidence is relevant, our proposal will make the task of judge and jury much simpler. It will also sweep away difficulties and doubts about such questions as what amounts to an inconsistency.¹⁰ We do not think our proposal entails any general risk of unfairness to any party, because the present law rests substantially on a fiction. It is not at all clear that the trier of fact can effectively draw the distinction demanded by the present law; our proposal therefore simply brings into the open what is presently done covertly. We are informed by a person with experience of an Indian Evidence Act jurisdiction that a like provision works well there. Section 77 (1) applies this reasoning to previous inconsistent statements proved by virtue of the Evidence Act, 1898, ss. 53-5.

⁸ *Burnell v. British Transport Commission* [1956] 1 Q.B. 187.

⁹ *Harvey v. Smith-Wood* [1963] 2 All E.R. 127; *Cartwright v. W. Richardson & Co. Ltd.* [1965] 1 All E.R. 742.

¹⁰ *Carbury v. Measures* (1904) 4 S.R. (N.S.W.) 569; Wigmore, para. 1040.

4.5.6 Section 77 (2): other cases of multiple admissibility. This operates to cover some cases not listed in s. 77 (1) where a statement is admissible otherwise than as evidence of the facts asserted. These are complaints; prior statements admitted to rebut an allegation that a witness's testimony has been recently fabricated; and prior statements by a witness identifying a person. It is not clear whether the last category is limited to criminal cases, and it is also unclear whether they are admissible at common law as evidence of the truth of what is asserted.¹¹ Section 77 (2) (c) is so drafted as to apply to civil cases if the law extends so far, and will not be necessary if the statements are admissible already as evidence of their truth.

4.6 SECTION 78: WORK OF AUTHORITY

4.6.1 Section 78: general. Section 78 and some other provisions¹ constitute an attempt to preserve and improve certain common law hearsay exceptions which are not covered by other provisions in the Bill and which therefore would be abolished by it without express preservation. The Civil Evidence Act 1968 (U.K.) instead took the course of simply preserving certain common law exceptions unchanged. Sir Stanley Burbury has aptly termed this "illusory codification".^{1A} Since it is unsatisfactory that a code should refer back directly to the common law, and since some of the exceptions we are dealing with are not satisfactory as presently formulated at common law, we think a full statement of the rules should be attempted. We have also deliberately chosen to expand admissibility.

4.6.2 Section 78: English law. The Civil Evidence Act 1968 (U.K.), s. 9 (1) and (2) (b) preserves: "Any rule of law . . . (b) whereby in any civil proceedings published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated therein." What is stated here (and in Cross²) as a single exception may in fact cover a number of exceptions, including one based on judicial notice and one on expert evidence.³ The relevant rules need some changes and ought not to be preserved as they stand.

4.6.3 Section 78: common law examples. In *Read v. Bishop of Lincoln*⁴ Lord Halsbury L.C. illustrated the exception thus:

"Where it is important to ascertain ancient facts of a public nature, the law does permit historical works to be referred to.

The House of Lords upon the impeachment of Warren Hastings . . . received in evidence . . . Cantemir's History of the Turkish Empire. In the case of St. Katherine's Hospital, Lord Hale

¹¹ See *R. v. Osbourne* [1973] Q.B. 678.

¹ E.g., ss. 79 (2)-(5), 80, 85 and 87.

^{1A} Tasmanian Law Reform Commission (1971), p. 15.

² Cross (1974), pp. 435-6.

³ Below, paras 4.11.1-4.12.4.

⁴ [1892] A.C. 644, at p. 653.

admitted Speed's Chronicles to be evidence of a particular point of history in Edward III's time, and Pemberton C.J. received the same evidence to prove the death of Isabel, queen dowager of Edward II, and said he knew not what better proof could be given."

Another famous example is the admission of a sixty-year-old report by Brunel on the soil in the bed of the Thames in *East London Ry. Co. v. Thames Conservators*.⁵

4.6.4 Section 78: common law limitations. The rule has numerous limitations. The facts asserted must be facts of a public nature; thus "a general history may be admitted to prove a matter relating to the kingdom at large, but cannot be received as proof of a private right or particular custom".⁶ Further, at least in the case of maps, it seems that the maker must have been acting under a public duty. In *Attorney-General v. Horner (No. 2)*⁷ Sir H. H. Cozens-Hardy M.R. said of some old maps tendered on the issue of whether certain public highways existed in 1682 that: "we have no information . . . as to whether the man who made any one of these maps had any special knowledge of the locality, or that he had any special duty to discharge in making these maps. He seems to have been a man who was publishing maps as a private adventurer." Similarly, a description of a church in the seventeenth century by a contemporary founded not on reputation but on what he himself saw was not admitted in *Fowke v. Berington*.⁸ "The statement was not made in the discharge of any special duty, and I am bound to hold on this authority that the statement being merely a statement by an individual of a particular fact and not purporting to be a statement of reputation is not admissible." The admission of Brunel's reports in the *Thames Conservators' Case* was distinguished: they were "made in performance of a special duty".⁹ The oddity of being prepared to admit a dead man's statement of what reputation says about a church, but not his statement of his own observations, needs little comment. It is similar to the irrational rule that statements of particular facts from which the existence of a custom can be inferred are inadmissible, while statements of the reputed existence of the custom are admissible.¹⁰ In our view the existence of a special duty, or a public duty, should go only to weight. The necessity for the admission of such evidence for what it is worth is often acute; for obvious reasons there is a sufficient guarantee of some reliability in the fact that the maker of the statement, by publishing it and offering it to public criticism, has some belief that its truth will be vindicated. These works are usually written for professionals; the writers are conscious of the risk of a loss of reputation for accuracy and they are conscious of the fact that others will examine accuracy carefully. The works are written without any foresight of litigation.

⁵ (1904) 90 L.T. 347.

⁶ *Evans v. Getting* (1834) 6 C. & P. 586, at p. 587 n.; 172 E.R. 1376 n., per Buller J.

⁷ [1913] 2 Ch. 140, at p. 154.

⁸ [1914] 2 Ch. 308, at p. 318.

⁹ At p. 319.

¹⁰ *Mercer v. Denne* [1905] 2 Ch. 538.

What is said in them may be much more valuable than what is said by expert or other witnesses specially selected because of the likelihood or hope that what they say will support one side's case. There is much public reliance on the accuracy of scientific texts, life and annuity tables, encyclopaedias, dictionaries, almanacs, tide-tables, and indeed mathematical, historical and scientific works and tables of all kinds.¹¹ In our view, then, there is no need for any duty to assert the facts, nor need they be of a public nature. There is also a tendency in the old cases to reject evidence simply because of possible interest in its maker, and this attitude ought not to survive the abolition of incompetency to testify on grounds of interest. Thus in *Evans v. Getting*¹² a history of Brecknockshire asserting the position of a certain county boundary was not admitted by Alderson B. because "The writer of that history probably had the same interest in enlarging the boundaries of the county as any other inhabitant of it. It is not like a general history of Wales." This tendency to use factors going to weight as a ground for rejection of specific material in general admissible is one which we seek as far as possible to avoid. In any event the point made by Alderson B. would appear to be unlikely in most cases to affect reliability substantially.

4.6.5 Section 78: facts judicially noticed. How should the problem be dealt with? The facts proved by reference to learned works are of four kinds. The first kind comprises facts of which a judge will take judicial notice; that is, facts which are either notorious or which are capable of speedy and accurate verification by reference to learned works. That is, the judge may not in fact have personal knowledge of the notorious fact, but he may look it up in a learned work. The facts may be historical, political, scientific, aesthetic; or they may relate to matters of custom, or of professional practice.¹³ The line between facts judicially noticed after inquiry and facts proved by evidence admitted under an exception to the hearsay rule is not easy to draw. It is unclear, for example, whether the admission of statements in historical and liturgical works in *Read v. Bishop of Lincoln*¹⁴ took place as an exception to the hearsay rule or after the taking of judicial notice. Some, indeed, deny that the line exists. The better view, however, is that facts of which judicial notice is taken are not facts proved by evidence.¹⁵ Cross says that a fact judicially noticed binds later judges.^{15A} The determination of the fact may be withdrawn from the jury even though the evidence does not point unequivocally to its existence; no evidence is admissible to rebut it after it has been judicially noticed. Since facts judicially noticed are not proved by evidence, they are not admitted as hearsay exceptions, and no special provision need be made in this Part for them.¹⁶

¹¹ See generally *Ruth v. Fenchal* 117 A. 2d 284, at pp. 294-7 (1955).

¹² (1834) 6 C. & P. 586; 172 E.R. 1376.

¹³ *Australian Communist Party v. Commonwealth* (1950) 83 C.L.R. 1, at p. 196.

¹⁴ [1893] A.C. 644.

¹⁵ *McQuaker v. Goddard* [1940] 1 K.B. 687, at p. 700; *Baldwin & Francis Ltd. v. Patents Appeal Tribunal* [1959] A.C. 663, at p. 691; c.f. *Duff Development Co. v. Government of Kelantan* [1924] A.C. 797, at p. 824.

^{15A} Cross (1974), p. 140.

¹⁶ If the view asserted is wrong, no problem arises, since the law as to taking judicial notice is preserved by s. 71; see para. 3.8.1.

4.6.6 Section 78: authoritative works. The second kind of fact proved by the use of learned works comprises those which the authors have some competence to assert, which are probably reliable, and which it is therefore convenient to admit despite the hearsay character of the evidence. We propose in s. 78 to deal with both this and the third kind of fact. The latter category comprises facts which are really opinions. These opinions could not be put forward by a witness unless he were shown to be an expert. The leading examples are opinions supported by reference to scientific and medical works, histories or dictionaries. Traditionally these are admitted without proof of expertise; the expertise of the authors is assumed. We have thought it desirable to make explicit provision for the admission of evidence derived from works of authority, whether they be of facts or opinions, without the court having to pay attention to technical questions of the declarant's expertise, provided the author has some authority. There exist similar, but narrower, provisions in other States. For example, the Evidence Act, 1929-76 (S.A.), s. 64, provides: "All courts may, in matters of public history, literature, science, or art, refer, for the purposes of evidence, to such published books, calendars, maps, or charts as such courts consider to be of authority on the subjects to which they respectively relate . . ."¹⁷ Further, the American Model Code (1942), r. 529, provides:

"A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject."¹⁸

In so far as the purpose of the requirement of an expert witness here is partly to guide the court in understanding the treatise, the requirement seems unnecessary; it may be assumed that a reasonable tribunal will not seek to act on what it does not understand, and will seek this aid only when it does not understand. Further, in deciding whether the work has authority, the court will consider the qualifications of the author and will not necessarily require evidence of expertise.

4.6.7 Section 78: treatises and s. 74. The fourth class of facts derived from learned works are those on which the authors could not be regarded as experts or authorities, but which nonetheless appear to have sufficient reliability for consideration by the trier of fact. We envisage that these would be admitted under s. 74 (1) if there are reasonable grounds for thinking them to be reliable.

4.6.8 Section 78: some drafting points. The reference to matters of learning, rather than to "like matters", as in the Working Paper,¹⁹ has been inserted to prevent a restrictive use of the *eiusdem generis* rule to

¹⁷ See also Evidence Act 1906-76 (W.A.), s. 72; Evidence Act 1910 (Tas.), s. 67.

¹⁸ See also Uniform Rules (1953), r. 63 (31); California Code (1965), s. 1341; Federal Rules (1975), r. 803 (18).

¹⁹ Section 14G.

exclude, for example, works of foreign law. The reference to matters of special study has been inserted to cover cases which might be excluded by the educational overtones of "learning"; collections of information by amateurs and the assembling of purely technical data would fall within "special study" more readily than within "learning". It should be noted that a work of authority admitted under s. 78 is admissible evidence only of any fact relating to the matters listed in the section, not to other matters.

4.6.9 Section 78 and "publication." Section 78 imposes no requirement that a work tendered under it be published. However, the test is whether the work is of authority, and this may depend on whether the work has been published. We think it wrong to recommend publication as a universal requirement for admissibility, because many works on local history or other matters which are obscure or of only limited interest may never be published, though they are quite accurate. In this respect s. 78 may be contrasted with s. 80.²⁰ Section 80 provides for the admission of statements in compilations published for use by persons engaged in an occupation or members of the public. Section 80 requires publication to ensure the likelihood of sufficient accuracy for the statement to be admissible; that function is performed in s. 78 by the requirement of authority.

4.7 SECTION 79: REPUTATION

4.7.1 Section 79: general. Section 79 deals with four common law rules—that if a cohabiting couple are reputed to be married this is evidence of a valid marriage, that reputation is admissible to prove pedigree, that reputation is admissible to prove public or general rights, and that reputation is admissible to prove a custom or usage. It preserves the present law on other kinds of evidence of reputation. In understanding this section it is important to see at the outset that it involves a distinction between two different kinds of second-hand hearsay.

4.7.2 Section 79: effect.

- (a) Section 73 permits the admission of the following first-hand hearsay statements, provided the conditions of the section are satisfied:

"I heard X say that he attended the marriage of H and W."

"I heard X say that Y is Z's legitimate son."

"I heard X say that A granted a public right of way over his land."

²⁰ Below, paras 4.8.1–4.8.5.

- (b) Section 79 permits proof of reputation to prove certain facts, and reputation usually involves multiple hearsay; hence it permits the admission of the following kinds of multiple hearsay:

"H and W are reputed to have married."

"Y is reputedly Z's legitimate son."

"There is reputedly a public right of way over A's land."

- (c) Since any statement admissible under s. 79 would be admissible under s. 73 if it were complied with in respect of P, the following kinds of second-hand hearsay are admissible:

"I heard P say H and W are reputedly married."

"I heard P say Y is reputedly Z's legitimate son."

"I heard P say there is reputedly a right of way over A's land."

- (d) But neither s. 73, nor s. 79, nor the two sections in combination, permit the following kinds of second-hand hearsay:

"I heard P say that X said that he (X) attended the marriage of H and W."

"I heard P say that X said that Y is Z's legitimate son."

"I heard P say that X said that A granted a public right of way over his land."

These latter statements could only be admissible if in each case P's assertion was an assertion of reputation that something existed, not simply an assertion that X said something existed.

4.7.3 Section 79: reputation and other second-hand hearsay contrasted.

The result is that there is a distinction between second-hand hearsay where the witness's source is reporting an assertion from an isolated person, and second-hand hearsay where the witness's source is reporting a reputation. The latter is admissible even though it involves more hearsay than the former. We do not regard this result as paradoxical or irrational. The fact is that statements of a man's reputation for doing particular acts may be more likely to be accurate than statements of the isolated acts themselves, though the inferences to be drawn from his proved reputation for doing an act, i.e., the likelihood that he has done it, are weaker than those to be drawn from proof of his having actually done it.

- (a) If we take the testimony: "I heard X say he attended the wedding of H and W", the court has to rely on the witness's testimony to hear and report X correctly and on X's capacity to observe, interpret and report what happened correctly. The court can test the former capacity, but not the latter. The testimony, however, is admissible under s. 73, partly on grounds of necessity, and partly because of the existence of some control over the chain of reporting by cross-examining the witness as to his capacity to hear and report X correctly.

- (b) If the testimony is: "I heard P say that X said he attended the marriage of H and W", it is inadmissible because P's capacity cannot be tested.
- (c) If the testimony is: "I heard P say H and W are reputedly married", the position is the same as (a), *so far as the fact of reputation is concerned*; it may be dangerous to infer from that reputation that H and W are married, but this problem is not exclusively to do with hearsay.

What is relevant to the hearsay rule is that the fact of reputation may be a conclusion drawn from many hearsay statements, but it may be relied on more confidently than a double hearsay statement of the truth of the fact reputed, because statements of reputation are more likely to have been repeated and checked. One cannot testify to reputation without having heard the fact reputed repeatedly asserted. Wigmore justified the common law view as follows:

"Where the subject matter is one in which all or many of the members of the community have an opportunity of acquiring information and have also an interest or motive to obtain such knowledge, there is likely to be such a constant, active, and intelligent discussion and comparison that the resulting opinion, if a definite opinion does result, is likely to be fairly trustworthy."¹

Similar points were made in respect of public and general rights by Lord Campbell² and can be made regarding reputation as to pedigree.

4.7.4 Section 79: safeguards. The result is that the section may in some cases involve a difficult distinction between multiple hearsay statements which are not expressions of reputation (because they involve reliance on rumours or on too small a number of individual opinions) and those which are. The difficulty is minimized by this fact: any multiple hearsay statement which the judge wrongly holds to be "reputation" but which he thinks is unreliable may in that event be excluded by him in his discretion under s. 100. Further, the jury may well disbelieve the evidence or regard it as not being sufficiently weighty.

4.7.5 Section 79 (1): preservation of general law of reputation. Section 79 (1) provides that subject to s. 79 (2) to (5), Part VI does not affect any rule of law permitting the reception of evidence of reputation. The principal body of law that will be preserved by s. 79 (1) is that which concerns the use of reputation to prove character (or disposition).³ At common law, in some circumstances a person's disposition is admissible, but only rarely is his reputation admissible.

¹ Para. 1610.

² Below, para. 4.7.19.

³ See Civil Evidence Act 1968 (U.K.), s. 9 (4). See also Model Code (1942), r. 526; Uniform Rules (1953), r. 63 (28); California Code (1965), s. 1324; Federal Rules (1975), r. 803 (21); draft Canada Code (1975), cl. 31 (i).

- (a) The reputation of an accused person is admissible in his favour but not against him, except to rebut his claim of good character,⁴ and as provided in the Crimes Act, 1900, ss. 413A–413B, which concerns both character evidence relevant to guilt and character evidence bearing on credibility as a witness. Section 413A permits proof of the accused person's disposition if he "throws away his shield", e.g., by attacking the prosecution in a way not permitted by s. 413A (4) or giving evidence against a jointly charged person (s. 413A (5)), or calling evidence of good character (s. 413B). In *R. v. Rowton*⁵ Cockburn C.J. said "The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried."
- (b) The reputation for veracity of a witness is admissible—in civil cases at common law, in criminal cases under the Crimes Act, 1900, s. 413.
- (c) The reputation of a complainant in a criminal case is inadmissible, save that the bad reputation for chastity of the prosecutrix in rape cases is admissible.⁶
- (d) It is doubtful whether or not the reputation of a party in any civil case is admissible to *prove disposition*; it may be admitted when it is one of the matters in issue, e.g., defamation cases. Whether evidence of disposition may be given is not a hearsay issue, and must be resolved as part of the general law of evidence. But the question whether reputation may be used to prove disposition is a hearsay issue.

4.7.6 Section 79 (1): the merits of reputation evidence summarized.

There are several arguments commonly put to justify the reception of reputation evidence to show character under the present law. Character is a topic of great interest and is the subject of frequent discussion. Character, as proved by reputation, is an objective fact, unlike evidence of opinion; and it causes fewer collateral issues to be raised than the proof of character by specific instances. On the other hand, reputation and real character—disposition—may not correspond. Reputation may vary sharply depending on the group of persons relied on to establish it. To depend on reputation, rather than specific instances of conduct, is to prefer bad evidence to good, first-hand evidence to gossipy multiple hearsay coloured by clannishness and prejudice.

4.7.7 Section 79 (1): our recommendation justified. However, whatever the merits or defects of the present law, we do not make any recommendation for change in this Report. It is true that evidence of

⁴ *R. v. Rowton* (1865) Le. & Ca. 520; 169 E.R. 1497.

⁵ (1865) Le. & Ca. 520, at p. 530; 169 E.R. 1497, at p. 1502.

⁶ *R. v. Clarke* (1817) 2 Stark. 241; 171 E.R. 633; *R. v. Bashir* [1969] 3 All E.R. 692.

reputation is hearsay evidence. But the principal instances of reputation used to prove character or disposition arise in circumstances which raise many other issues. We believe the power of the Crown to rebut an accused person's claim of good character, and ss. 413A-413B of the Crimes Act, should be left untouched in a hearsay Bill: the issues raised really concern the course of the trial and the extent to which the accused should be put at a disadvantage or given an advantage in consequence of his tactics at the trial. Similarly, the use of reputation to attack the credibility of a witness is a matter best dealt with when all issues of cross-examination and the conduct of trials are dealt with. The admissibility of the reputation of a complainant in sexual cases has been considered by another body; it seems proper to leave the subject to it, since the issue of reputation is inevitably bound up with many other questions of evidence, procedure and substantive law in sexual cases. For these reasons we recommend preservation of the general law of evidence as to reputation.

4.7.8 Section 79 (2): reputed marriage. This preserves the admissibility of hearsay evidence necessary to prove the basic facts of the common law presumption of validity of a marriage arising from cohabitation and repute. The section does not attempt to regulate the issue of what strength the presumption has, because there is no reason to give the presumption any strength greater than that which flows from the particular facts. At common law evidence of reputation to prove a marriage is not admissible in criminal cases for the prosecution but is for the defence.⁷⁻¹⁷ Thus in bigamy the rule is that the prosecution could not prove the accused's first marriage by reputation.¹⁸ But even in bigamy reputation may be used to prove a marriage which the accused claims the other party to his "first marriage" entered before the time of the "first marriage".¹⁹ These distinctions are in a sense irrational, but are justified by the interests of liberty on the one hand and the necessity for reputation evidence where it is admissible on the other.

4.7.9 Section 79 (3): pedigree declarations—general. At common law an exception to the hearsay rule existed by which "pedigree declarations" were admissible. The requirements were as follows. The declarant had to be dead. The declaration had to relate to a question of pedigree in the sense of genealogy or descent. It was not enough that it related merely to age.²⁰ The declarant had to be the blood relation, or the spouse of a blood relation, of the person whose pedigree was in issue; that is to say, "the tradition must be from persons having such a connection with the party, to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the

⁷⁻¹⁷ *R. v. Woodward* (1838) 8 C. & P. 561; 173 E.R. 618; *R. v. Umanski* [1961] V.R. 242.

¹⁸ *Catherwood v. Caslon* (1844) 13 M. & W. 261, at p. 265; 153 E.R. 108, at p. 110.

¹⁹ *R. v. Wilson* (1862) 3 F. & F. 119; 176 E.R. 53.

²⁰ *Haines v. Guthrie* (1884) 13 Q.B.D. 818.

truth, and that they could not be mistaken".²¹ The declaration had to be made before the dispute in which it was tendered had arisen. This exception would be largely swallowed up by s. 73. Thus, if the issue is P's legitimacy, at common law a witness may state that he heard P's mother assert that P was born before her marriage; this evidence would be admissible under s. 73 if there were justification for not calling the mother.²²

4.7.10 Section 79 (3): pedigree reputation. But the exception operates outside the area of first-hand hearsay, because it extends to reputation. A statement by an aged relative that P was reputed to have died in the West Indies unmarried is admissible at common law.²³ So far as such oral second-hand hearsay evidence admissible at common law under this exception is concerned, we consider it should continue to be admitted. The distinction between second-hand hearsay, which is inadmissible, and reputation, which, though it may be based on third or fourth-hand hearsay, is admissible, is justified by the considerations mentioned above.²⁴ There are of course dangers in pedigree declarations.

In Sir John Romilly M.R.'s words:

"It must always be borne in mind, in judging of evidence of this description, how extremely prone persons are to believe what they wish. And where persons are once persuaded of the truth of a particular fact, as that a particular person was the uncle of their father, it is every day's experience that their imagination is apt to supply the evidence of that which they believe to be true."²⁵

Lord Langdale M.R. had earlier pointed to like dangers:

"When a family reputation, or declarations of kindred made in a family, are the subject of evidence, and the reputation is of long standing, or the declarations are of old date, the memory as to the course of the reputation, or as to the persons who made the declarations can rarely be characterised by perfect accuracy. What is true may become blended with, and scarcely distinguishable from, something that is erroneous; the detection of error in any part of the statement necessarily throws doubt upon the whole statement, and yet all that is material to the case may be perfectly true; and if the whole be rejected as false because error in some part is proved, the greatest injustice may be done."²⁶

In our view the dangers under discussion are less acute where a reputation—much-discussed and therefore probably much-tested—is concerned than where a mere chain of hearsay, as weak as its weakest link, exists. The danger we fear in connection with the latter was expressed by Maguire thus:²⁷

²¹ *Whitelocke v. Baker* (1807) 13 Ves.Jun. 510, at p. 514; 33 E.R. 385, at p. 386, per Lord Eldon L.C.

²² *Goodright d. Stevens v. Moss* (1777) 2 Cowp. 591; 98 E.R. 1257; *In re Turner* (1885) 29 Ch.D. 985.

²³ *Doe v. Griffin* (1812) 15 East 293; 104 E.R. 855.

²⁴ Para. 4.7.3.

²⁵ *Crouch v. Hooper* (1852) 16 Beav. 182, at pp. 184–5; 51 E.R. 747, at p. 748.

²⁶ *Johnston v. Todd* (1843) 5 Beav. 597, at pp. 599–600; 49 E.R. 710, at p. 711.

²⁷ Maguire (1947), p. 135.

“Perfectly plainly family tradition carried along over a century or more involves a kind of relay of hearsay, or, to put it another way, hearsay mounted tottering on hearsay in a totem-pole formation. There is risk of cumulative deviation from actual fact in such superposition. The totem-pole may warp more and more out of true until it topples. For instance: Ancestor A, having absented himself for many years from his family, visits his brother B and tells the latter that A’s daughter married a missionary and went to Hawaii. B some years later informs his child C simply that A had a daughter in Hawaii. C, having a yearning for the romantic, says later still to *her* daughter O that old uncle A was a great traveller who married in Hawaii and had a daughter there. The tale proliferates until in the mind and mouth of R, a remote relative, it runs to the effect that A was a whaling captain, perhaps a bit of a pirate, who married or at least lived with a beautiful native belle in Hawaii and that many of his descendants are still living on the islands. Finally, after R’s death, a claimant of mixed blood from Honolulu uses evidence of the R version to establish a profitable relationship to the A family.”

But though oral second-hand hearsay not involving reputation is inadmissible under ss. 73 and 79 (3), it may be admitted under s. 74 if sufficiently reliable.

4.7.11 Section 79 (3): extensions of the common law exception. We have given thought to whether the common law exception should be widened. We consider that it should be widened in two respects. At common law the declaration must be made *ante litem motam*, before the dispute in which it is tendered arose. In our view this matter ought more properly to go to weight than to admissibility. As such, it is an obvious fact which any court is likely to consider. Secondly, at common law, the declarant must be a blood relation of the propositus or the spouse of such a relation. The declaration of a man as to the family of his daughter’s husband must be excluded; so must those of servants, no matter how long-serving or privy to family secrets; so must those of even close family friends, and of family solicitors, doctors and priests. The common law courts pointed to the undesirability of raising collateral issues as to the degree of intimacy between master and servant,²⁸ and the length of employment;²⁹ it is also said not to be “usual for a man to confer with his domestics on the situation of the various members of his family”.³⁰ In our view, again, these matters go to weight; admission of such evidence would not unduly lengthen the trial if the evidence was valuable, and often the admission of such evidence will be necessary for want of better. The proof of family relationship might often consume as much time as proving the means of knowledge of non-family members. The Civil Evidence Act, 1968 (U.K.), ss. 2 and 9 (3) (b), will achieve a similar result in civil proceedings in England.³¹ It should

²⁸ *Johnson v. Lawson* (1824) 2 Bing, 86, at p. 89; 130 E.R. 237, at p. 239, *per* Best C.J.

²⁹ *Ibid.*, at p. 92 and p. 240, *per* Burrough J.

³⁰ *Ibid.*, at p. 92 and p. 240, *per* Park J.

³¹ See Cross (1974), p. 439.

be noted that we abandon the common law rule that the declarant must be dead. If the statement reported is not one of reputation, then the statement can only be admitted under s. 73, and there will have to be proof of justification, which may be found in the declarant's death. If the statement is one of reputation, its maker must testify under ss. 73 (1) (b) (i) and 79, unless there is justification for not calling him (s. 73 (1) (b) (ii)).

4.7.12 Section 79 (3): preservation of common law rules. The words "facts relevant to a person's pedigree" are intended to preserve the common law rule that statements are admissible under this exception which state more than the facts of birth, death and paternity; they may also state such facts as places of birth and residence. In *Shields v. Boucher*³² Knight Bruce V.-C. said:

"Who generally is more likely to know whence a man or a family came than the man or the family? Does the emigrant, living or dying, forget his native soil? Is a woman less likely to state her country than her age with accuracy? . . . [N]or are there, perhaps, any recollections or traditions of the old more readily communicated, or more acceptable to an auditory of descendants, than the original seat of the family, its former residences and possessions, its migrations, its local and other distinctions of the past, its advancement or its decay. If such topics are not strictly genealogical, they are at least intimately connected with genealogy."

The assertion of such facts tends to assist in the accurate identification of the parties about whom the pedigree assertion is made with those who are the subjects of the litigation.

4.7.13 Section 79 (3): incidental pedigree issues. We believe a change should be made in New South Wales to the English common law rule that where questions of pedigree are not the main or the central issues in the case, pedigree declarations are inadmissible. "Where these questions [of birth, parentage, age or relationship] are merely incidental, and the judgment will simply establish a debt, or person's liability on a contract,³³ or his proper settlement as a pauper,³⁴ and things of that nature, the case is not one of pedigree."³⁵ This involves a difficult distinction and we agree with the majority of American courts in rejecting it. "A deceased father's entry in a family Bible is equally trustworthy or untrustworthy whether the issue subsequently arising happens to be framed upon a claim to an inheritance, a plea of infancy to a promissory note, or an application to appoint a guardian."³⁶ Section 79 (3) will apply in any legal proceeding, and the common law limitation will thereby cease.

³² (1847) 1 De G. & Sm. 40, at p. 53; 63 E.R. 962, at p. 968.

³³ *Haines v. Guthrie* (1884) 13 Q.B.D. 818 (infancy plea).

³⁴ *R. v. Erith (Inhabitants)* (1807) 8 East 539; 103 E.R. 450.

³⁵ *Eisenlord v. Clum* 27 N.E. 1024, at p. 1028 (1891), *per* Peckham J.

³⁶ Wigmore, para. 1503.

4.7.14 Section 79 (3): extent of reputation. Section 79 (3) is similar to North American codes in extending admissibility of reputation beyond declarations of family blood relations to others (including, e.g., intimates or members of the community generally).³⁷ Pedigree may be proved by "family or other reputation". This very general phrase is deliberate. As the Commentary to the 1971 Draft of the Proposed Federal Rules remarked in commenting on the equivalent (r. 803 (19)):

"The 'world' in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighbourhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation and social activity, in each of which a reputation may be generated."

4.7.15 Section 79 (3): criminal legal proceedings. Section 79 (3) does not make admissible evidence of reputation to prove pedigree against the accused in criminal legal proceedings, e.g., incest prosecutions or charges of marriage within the prohibited degrees. This qualification operates in favour of liberty.

4.7.16 Section 79 (4): reputed public and general rights. There is a common law exception to the hearsay rule by which the declaration of a deceased person concerning the reputed existence of a public or general right is admissible evidence of the existence of the right provided the declaration was made before the dispute arose and, in the case of statements relevant to general rights, provided the declarant had competent knowledge. This exception may often involve the admission of second-hand hearsay and to the extent that it does we think it should be preserved. But it is in a number of respects unsatisfactory, and we propose to abolish certain anomalies and difficulties raised by it.

4.7.17 Section 79 (4): public and general rights. "A public right is one affecting the entire population A general right is one that affects a class of persons such as the inhabitants of a particular district, the tenants of a manor, or the owners of certain plots of land."³⁸ This imprecise distinction had to be drawn for reasons which are explained below;³⁹ we propose abolition of the need for it. There are few English examples of cases about the admissibility of declarations concerning public or general rights, and even fewer Australian ones; but some may be listed. English examples include declarations as to a toll on a

³⁷ The draft Canada Code (1975), cl. 31 (j) provides for the admission of: "reputation among members of a person's family by blood, adoption or marriage, or among his associates, or in the community, concerning a fact of his personal or family history, such as birth, death or relationship" See also Model Code (1942), rr. 524 and 525 (c); Uniform Rules (1953), r. 63 (27) (c); California Code (1965), s. 1310-5; Federal Rules (1975), r. 803 (19).

³⁸ Cross (1974), p. 439.

³⁹ Para. 4.7.19.

public highway,⁴⁰ a right of ferry,⁴¹ a right to use a river bank as a public landing place,⁴² the boundary between counties,⁴³ rights of common,⁴⁴ and a right to use a public highway.⁴⁵ A recent Australian example of the admission of declarations as to a reputed general right is *Milurpum v. Nabalco Pty Ltd*,⁴⁶ where Blackburn J. admitted statements by aboriginal witnesses as to what their ancestors had told them about the ownership of land by a certain tribe; he treated these statements as statements of reputation on the question.

4.7.18 Section 79 (4): time of declaration. In what respects do we propose to change the law? First, we propose to abandon the common law requirement that the declaration be made before the dispute arose; nothing need be added to what we said about the same requirement for pedigree declarations.⁴⁷

4.7.19 Section 79 (4): competent knowledge of general rights. Secondly, we propose to abandon the need for the declarant to have competent knowledge of the reputed existence of general rights. This rule appears to serve no useful purpose and compels the drawing of the difficult distinction between public and general rights by which the former affect the entire population and the latter particular classes of persons.⁴⁸ The reasons for the existence of the exception at common law were classically stated by Lord Campbell C.J. Referring to cases involving public or general rights, he said:

"The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distinct intervals of time; because direct proof of their existence therefore ought not to be required; because in local matters, in which the community are interested, all persons living in the neighbourhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of mere private interest; for respecting these direct proof may be given, and no trustworthy reputation is likely to arise."⁴⁹

⁴⁰ *Brett v. Beales* (1830) 10 B. & C. 508; 109 E.R. 539.

⁴¹ *Pim v. Curell* (1840) 6 M. & W. 234; 151 E.R. 395.

⁴² *Drinkwater v. Porter* (1835) 7 C. & P. 181; 173 E.R. 80.

⁴³ *Brisco v. Lomax* (1838) 8 Ad. & El. 198; 112 E.R. 812; *Evans v. Rees* (1839) 10 Ad. & El. 151; 113 E.R. 58.

⁴⁴ *Evans v. Merthyr Tydfil U.D.C.* [1899] 1 Ch. 241.

⁴⁵ *R. v. Bliss* (1837) 7 Ad. & El. 550; 112 E.R. 577.

⁴⁶ (1971) 17 F.L.R. 141, at pp. 151-9.

⁴⁷ Above, para. 4.7.11.

⁴⁸ *Crease v. Barrett* (1835) 1 Cr.M. & R. 919; 149 E.R. 1353.

⁴⁹ *R. v. Bedfordshire (Inhabitants)* (1855) 4 E. & B. 535, at p. 542; 119 E.R. 196, at p. 198.

In our view, no distinction should be drawn between public and general rights because Lord Campbell's reasons apply with equal force to each kind. It is true that the *report* of a reputed general right by a person not connected with the area of enjoyment of the right may lack weight, but this ought to go only to weight; the sources on which the report relies may themselves be connected with the area of enjoyment of the right. We agree with Lord Campbell that reputation ought not to be evidence of private rights; the considerations which produce reliability in the case of public and general rights do not apply to private rights. In our view matters of status and pedigree are of more intense interest and a reliable tradition is more likely to be built up in respect of them than in respect of private rights generally.⁵⁰

4.7.20 Section 79 (4): facts from which rights are inferred—s. 73. A third change we propose in the common law rule concerns the distinction between hearsay evidence of the reputed existence of a right, which is admissible under the exception, and hearsay evidence of a fact perceived by the maker, which is not. This distinction produces results which must be astonishing to laymen and which are certainly difficult for lawyers to understand. A map showing land as unfenced, and hence suggesting it was part of an adjacent highway, was excluded because it was evidence of a fact, not reputation.⁵¹ Evidence that at intervals since 1189 the sea had covered a piece of foreshore, thus rendering it impossible that fishermen could have been drying nets there since that date, was excluded.⁵² This distinction, apart from its difficulty of application, is objectionable because sometimes it involves admitting untrustworthy and vague evidence of reputation while excluding clear statements of facts from which existence of the right in question can be convincingly deduced or disproved. The abolition of this distinction is effected by s. 73. The statement of a declarant who knows the fact to which the reputation relates can be admitted under s. 73 if he testifies or if there is justification for not calling him.

4.7.21 Section 79 (4): death of declarant. Finally, we abandon the common law requirement that the declarant be deceased. The declarant must testify unless there is justification for not calling him (s. 73).⁵³

⁵⁰ We therefore propose no equivalent to draft Canada Code (1975), cl. 31 (1), which permits evidence of "reputation as to events of general history important to the community, province or country where they occurred." See also Model Code (1942), r. 525 (b); Uniform Rules (1953), r. 63 (27) (b); California Code (1965), s. 1320; Federal Rules (1975), r. 803 (20). If this reputation has not made its way into learned treatises (s. 74), and if it is not so reliable as to be admissible under s. 74, we do not think it deserves admission.

⁵¹ *R. v. Berger* [1894] 1 Q.B. 823, at p. 826.

⁵² *Mercer v. Denne* [1905] 2 Ch. 538. See also *R. v. Bliss* (1837) 7 Ad. & El. 550; 112 E.R. 577; *Attorney-General v. Horner* (No. 2) [1913] 2 Ch. 140, at p. 154; *Fowke v. Berington* [1914] 2 Ch. 308.

⁵³ Cf. Model Code (1942), r. 523; Uniform Rules (1953), r. 63 (22); California Code (1965), s. 1321.

4.7.22 Section 79 (4) and the Uniform Rules, r. 63 (27). The Uniform Rules (1953) go further than our proposal. Rule 63 (27) provides that "evidence of reputation in a community [is admissible] as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting land in the community, and the judge finds that the reputation, if any, arose before controversy..." There is a doctrine to this effect at American common law.⁵⁴ "It arose because in the early unsettled condition of [the] country, many boundaries would have been unprovable if subsequent statements by the original surveyor or other members of the survey party were inadmissible."⁵⁵ In our view such a proposal would be unsuitable in New South Wales. There is no necessity for it; our history of land settlement differs from the American. If reputation as to private land rights were to be admitted automatically, why should not reputation as to the existence of rights generally be admitted?

4.7.23 Section 79 (5): general. At common law, one method of proving evidence of a trade usage is for a witness to assert the actual existence of the usage from his personal knowledge; it is not necessary for him to testify to particular instances of its exercise. So far as the assertion of the existence of the usage depends on the observation of particular instances, the hearsay rule is not infringed.⁵⁶ So far as the assertion of the existence of the usage depends on reputation, or upon what others have told the declarant, the evidence must be admitted, if at all, as a hearsay exception.⁵⁷ Section 79 (5) preserves this exception.

4.8 SECTION 80: PUBLISHED COMPILATION

4.8.1 Section 80: general. Section 80 provides for the admission of a statement in a list, register, periodical, directory, timetable or other compilation published for use by persons engaged in an occupation, or members of the public or a section of it. Thus it provides for the admission of a particular kind of hearsay statement which might not be admissible under s. 73 because it involves multiple hearsay. This is so because, for example, the compiler of a list of market prices may not have observed the individual sales or offers on which his list is based, but may be relying on the reports of dealers founded on particular observations or on a survey of the whole market which includes rumours and reputation. Although this kind of evidence may fall under s. 74, it is desirable to make special provision for it because the evidence is of common occurrence.

⁵⁴ See also Model Code (1942), r. 525 (a); California Code (1965), ss. 1321-1323; Federal Rules (1975), r. 803 (20); draft Canada Code (1975), cl. 31 (k).

⁵⁵ California Law Revision Commission, Vol. 4, pp. 552-3.

⁵⁶ Though opinion evidence issues may arise: see *Cuncliffe-Owen v. Teather & Greenwood* [1967] 1 W.L.R. 1421, at p. 1438, *per* Ungood-Thomas J.

⁵⁷ E.g., *Walton v. Meadmore* (Court of Appeal, N.S.W., 1975, unrep.).

4.8.2 Section 80 and the common law. There may be a similar exception of an ill-defined kind at common law. Lord Ellenborough C.J. admitted the evidence of a witness—some of which might have been multiple hearsay—as to what prices prevailed on the Stock Exchange at particular times.¹ (Cases illustrating this exception exemplify the little-discussed theoretical difficulty of determining whether some evidence is admitted under a common law exception to the hearsay rule, or whether it is admitted as a fact so notorious that judicial notice must be taken of it. If facts judicially noticed are admitted under a hearsay exception then s. 71 saves the exception. We do this for more abundant caution, because we do not agree with this view of the common law.²)

4.8.3 Section 80. American law. In some American jurisdictions commercial and professional registers, lists and reports are admissible without their compilers or those who supplied the information contained in them having to be called. Sometimes these persons are inaccessible; even if they are accessible it is unduly expensive and inconvenient to call them. Hughes J. said in the Supreme Court decision in *Virginia v. West Virginia*:³ “It is unquestioned that, in proving the fact of market value, accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence.” This doctrine was taken up in the Model Code (1942), r. 528, and the Uniform Rules (1953), r. 63 (30), provides for the admission of:

“Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them.”⁴

We agree with the basis on which this evidence is admitted. Wigmore pointed out that:

“There is a subjective test of trustworthiness, in that the author knows beforehand that his work will have no commercial or professional market unless it is found to have usual accuracy and that its inaccuracies will probably be discovered; and further in that there is ordinarily no motive to deceive. There is an objective test, in that the habitual use of the work by the trade or profession has tested its usual and practical accuracy and has sanctioned its trustworthiness.”⁵

Further, the risks of faulty memory are not usually involved. There may be some risk that the compiler has been fraudulent in respect of a particular entry, but the normal compiler will desire to record the truth.

¹ *R. v. de Berenger* (1814) Gurney 188, discussed in *Robinson v. Randfontein Estates Gold Mining Co. Ltd.* 1924 A.D. 15; see also *R. v. de Villiers* 1944 A.D. 493, at p. 502.

² Above, para. 3.8.1.

³ 238 U.S. 202, at p. 212 (1914).

⁴ See also California Code (1965), s. 1340; Federal Rules (1975), r. 803 (17); draft Canada Code (1975), cl. 31 (g).

⁵ Para. 1702.

There is a greater risk of carelessness in the compilation; but the trier of fact can, under s. 95 (h), be informed of the way in which the compilation is made if the fact is seriously disputed and will be able to make corresponding estimates of weight.

4.8.4 Section 80: examples. Section 80 will permit the admission of stock market reports, other price lists, business directories, pedigree lists, and trade journals; and it is thought to be sufficiently general to admit items of like reliable evidence as they occur, for example, growth rate and feed consumption charts used in turkey-raising.⁶

4.8.5 Section 80: "section of the public". These words will permit compilations used and relied on by quite small groups to be admissible. They are less restrictive than some phrase such as "on a matter of public interest".

4.9 SECTION 81: STATEMENT ON GOODS

4.9.1 Section 81: general. Section 81 provides that where in the course of manufacture, packaging or distribution of goods a statement is made to appear on the goods, or on any label, package or container associated with the goods, the statement is admissible as evidence of any fact asserted in it. This provides for the admission of a particular kind of hearsay statement which is not admissible at common law¹ and which might not be admissible under s. 73² because it could involve multiple hearsay: the person who stamps goods "Made in Morocco" may be a distributor in Australia relying on what his Moroccan supplier told him, and neither may be available. It would not be admissible as a business record within s. 14CE of the Evidence Act, 1898, because it is not part of a record of a business. It would fall under s. 74, but a special provision seems desirable because such statements are matters of common occurrence.

4.10 SECTION 82: STATEMENT ON LAND OR CONVEYANCE

4.10.1 Section 82: general. Section 82 provides that where a statement relating to a business is displayed in the course of the business on land, on or in any building or any attachment to land, or on or in an aircraft, vessel, ship, vehicle or conveyance, the statement is admissible as

⁶ *McMillen Feeds, Inc. v. Harlow* 405 S.W. 2d 123 (1966).

¹ *Patel v. Customs Comptroller* [1966] A.C. 356.

² Cf. Cross (1974b), pp. 23-4.

evidence of any fact asserted in it against a person carrying on the business at the time of the display. The purpose of the provision is to clear up a doubt which may exist at common law as to whether statements on land, buildings or conveyances displayed in the course of business are admissible evidence of what they assert.¹ It might be unfair for the statement to be admissible against third parties; the principal practical inconveniences arise at present only where the statement is tendered against a person carrying on the business. On the other hand, s. 81 is not so limited because statements falling within s. 81 are not likely to be isolated; they are likely to be made in the course of manufacturing, packaging or distributing goods by mass production methods, and hence to be more carefully considered than many s. 82 statements.

4.11 SECTION 83: EXPERT QUALIFICATION; EXPERT KNOWLEDGE

4.11.1 Section 83 (1): general. Section 83 (1) provides that a witness tendered as an expert witness may, for the purpose of qualifying himself, refer to or give in evidence any out-of-court statement. The witness might point to statements of writers recognizing him as an expert and s. 83 (1) will permit him to do so. Another purpose of s. 83 (1) is to avoid any doubt as to the admissibility of statements referred to by an expert witness in the course of qualifying himself. The witness might claim to have certain degrees: to say "I graduated" does not seem to entail any hearsay statement, but to say "The University granted me a degree" may be to repeat the assertion of a university officer that courses of instruction were attended and examinations passed. On one view the formation of expert qualifications in a witness in this way, and establishing that the witness has such qualifications, has no hearsay element. To be an expert is to possess a certain state of mind; to show that one has that state of mind one claims, *inter alia*, that one has read certain books, attended certain lectures or had certain conversations. But to avoid any doubt we propose s. 83 (1).

4.11.2 Section 83 (2): general. Section 83 (2) permits an expert witness to give evidence of any matter of knowledge within the scope of his expert qualification. He might have no personal knowledge of the second law of thermodynamics, or the normal temperature of the human mouth, or the melting point of lead; he may never have carried out experiments verifying these scientific truths, and may believe them simply because a teacher taught them to him, or he read them in a learned work. Section 83 (2) will permit an expert to give evidence of these matters as commonly occurs at present.

¹ See *Houston v. Wittner's Pty Ltd.* (1928) 41 C.L.R. 107; *Australian Safeway Stores Pty. Ltd. v. Gorman* [1973] V.R. 570; Wigmore, para. 150a.

4.12 SECTION 84: EXPERT: EXTENDED EVIDENCE

4.12.1 Section 84: general. Section 84 concerns "extended evidence" given by an expert. Section 84 (1) defines "extended evidence" to mean an out-of-court statement, a conclusion from an out-of-court statement, or the result of an inquiry or survey (whether made by the expert or not), tendered as evidence of a fact asserted in the statement, conclusion or result. Section 84 (2)–(4) provide that extended evidence may be given in three particular groups of circumstances. Section 84 (2) permits extended evidence of matters relating to the physical or mental condition of one person to be given when another person's physical or mental condition is in question. Section 84 (3) permits extended evidence to be given of the value of one property when that of another is in question. Section 84 (4) permits extended evidence to be given of the quality of material when the quality of other material is in question. Section 84 (5) is a general provision applying to cases where s. 84 (2)–(4) do not apply, and permitting an expert to give extended evidence of matters relating to a subject matter of any class where any other subject matter of that class is in question. It would have been possible to insert only a general provision along the lines of s. 84 (5) and leave it to cover the cases specifically dealt with in s. 84 (2), (3) and (4). However, we think that the specific listing of the three most commonly occurring and well understood cases will, by the analogies they provide, facilitate the understanding and application of the general provision.

4.12.2 Section 84 (2) and the common law: medical condition. When a doctor gives the court his opinion on a patient's health, he may base this partly on personal observation and on tests which he has conducted himself, and partly on X-rays, pathological or other reports by experts, the statements of nurses and medical orderlies who have observed the patient, and so on. Strictly speaking, so far as the doctor is relying on facts not personally observed by himself, it is necessary at common law to call the person who observed them—the radiologist, pathologist, biochemist, nurse or medical orderly. In practice, it seems, the hearsay objection is rarely taken, so that the inconvenience of the hearsay rule in this area is minimised. Sections 62 (3) (d) and s. 73 afford one avenue by which this evidence may be admitted in civil cases under the Bill, since there are strong arguments of inconvenience to witnesses and of disruption of flow of the trial against obliging the makers of such statements to be called.¹ Further, where an expert asserts an opinion based on facts—of an ordinary kind, outside his area of expertise—which he has considered but which were originally observed by others, at common law the facts have to be separately proved. There are other statements on which a doctor's opinions may be based. One group is the statements of the patient himself. At common law the statements as to his present but not his past condition are admissible as part of the *res gestae*.² A statement of history is admissible as a basis for the

¹ California Code (1965), ss. 801 and 804.

² E.g., *Evans v. Hartigan* (1941) 41 S.R. (N.S.W.) 179; *Ramsay v. Watson* (1961) 79 W.N. (N.S.W.) 151; (1961) 108 C.L.R. 642.

medical opinion, but not as evidence of the facts stated. These statements could be admitted under s. 73. It seems desirable that the patient should be called if he is available, for cross-examination of his non-expert views would be desirable and should only be dispensed with if it is impossible. Statements by a patient's relatives, friends, acquaintances or by some other member of his circle were inadmissible at common law³ but are now admissible under s. 73 if the declarant is called or there is justification for not calling him.⁴ All this is evidence about the patient whose condition is in issue and should be properly before the court in the form of direct evidence or otherwise admissible out-of-court statements. But a doctor may also assert an opinion on patient A which is the result of applying to the case of patient A what he has learnt by observing and considering the history of other patients, hearing lectures, reading books and articles describing cases of other patients and discussing with colleagues the cases of their patients, and it may be helpful for him to refer to such material in evidence to illustrate and substantiate his opinion.^{4A} It seems desirable to make special provision in section 84 (2) for this kind of evidence.

4.12.3 Section 84 (3) and the common law: valuation. The effect of the common law rules of evidence so far as they affect what a valuer may say were authoritatively restated by Megarry J. in *English Exporters (London) Ltd v. Eldonwall Ltd*.⁵

"As an expert witness, the valuer is entitled to express his opinion about matters within his field of competence. In building up his opinions about values, he will no doubt have learned much from transactions in which he has himself been engaged, and of which he could give first-hand evidence. But he will also have learned much from many other sources, including much of which he could give no first-hand evidence. Textbooks, journals, reports of auctions and other dealings, and information obtained from his professional brethren and others, some related to particular transactions and some more general and indefinite, will all have contributed their share. Doubtless much, or most, of this will be accurate, though some will not; and even what is accurate so far as it goes may be incomplete, in that nothing may have been said of some special element which affects values. Nevertheless, the opinion that the expert expresses is none the worse because it is in part derived from the matters of which he could give no direct evidence. Even if some of the extraneous information which he

³ E.g., *Steffen v. Ruban* (1966) 84 W.N. (Pt. 1) (N.S.W.) 264.

⁴ In America there is a rather narrow Uniform Act on the Use of Composite Reports as Evidence (1936) which renders admissible the non-interested written reports of experts based on "written information furnished by the co-operation of several persons acting for a common purpose;" if these persons are available for cross-examination they may be cross-examined, but their non-availability does not affect admissibility. Notices of intention to use such reports must be given.

^{4A} Cf. *Ramsay v. Watson* (1961) 108 C.L.R. 642, where a doctor was not allowed to give evidence of what other patients told him as to the cause of their condition, this evidence being tendered to prove the condition of a party. Our recommendation reverses this result.

⁵ [1973] Ch. 415, at pp. 420-3.

acquires in this way is inaccurate or incomplete, the errors and omissions will often tend to cancel each other out; and the valuer, after all, is an expert in this field, so that the less reliable the knowledge that he has about the details of some reported transaction, the more his experience will tell him that he should be ready to make some discount from the weight that he gives it in contributing to his overall sense of values. Some aberrant transactions may stand so far out of line that he will give them little or no weight. No question of giving hearsay evidence arises in such cases; the witness states his opinion from his general experience.

On the other hand, quite apart from merely expressing his opinion, the expert often is able to give factual evidence as well. If he has first-hand knowledge of a transaction, he can speak of that. He may himself have measured the premises and conducted the negotiations which led to a letting of them at £x, which comes to £y per square foot; and he himself may have read the lease and seen that it contains no provisions, other than some particular clause, which would have any material effect on the valuation; and then he may express his opinion on the value. So far as the expert gives factual evidence, he is doing what any other witness of fact may do, namely, speaking of that which he has perceived for himself. No doubt in many valuation cases the requirement of first-hand evidence is not pressed to an extreme: if the witness has not himself measured the premises, but it has been done by his assistant under his supervision, the expert's figures are often accepted without requiring the assistant to be called to give evidence. Again, it may be that it would be possible for a valuer to fill a gap in his first-hand knowledge of a transaction by some method such as stating in his evidence that he has made diligent enquiries of some person who took part in the transaction in question, but despite receiving full answers to his enquiries, he discovered nothing which suggested to him that the transaction had any unusual features which would affect the value as a comparable. But basically, the expert's factual evidence on matters of fact is in the same position as the factual evidence of any other witness. Further, factual evidence that he cannot give himself is sometimes adduced in some other way, as by the testimony of some other witness who was himself concerned in the transaction in question, or by proving some document which carried the transaction through, or recorded it; and to the transaction thus established, like the transactions which the expert himself has proved, the expert may apply his experience and opinions, as tending to support or qualify his views.

That being so, it seems to me quite another matter when it is asserted that a valuer may give factual evidence of transactions of which he has no direct knowledge, whether per se or whether in the guise of giving reasons for his opinion as to value. It is one thing to say 'From my general experience of recent transactions comparable with this one, I think the proper rent should be £x': it is another thing to say 'Because I have been told by someone else that the premises next door have an area of x square feet and were recently let on such-and-such terms for £y a year, I say the rent of these premises should be £z a year.' What he has been told about the premises next door may be inaccurate or misleading

as to the area, the rent, the terms and much else besides. It makes it no better when the witness expresses his confidence in the reliability of his source of information: a transparently honest and careful witness cannot make information reliable if, instead of speaking of what he has seen and heard for himself, he is merely retailing what others have told him. The other party to the litigation is entitled to have a witness whom he can cross-examine on oath as to the reliability of the facts deposed to, and not merely as to the witness's opinion as to the reliability of information which was given to him not on oath, and possibly in circumstances tending to inaccuracies and slips. Further, it is often difficult enough for the courts to ascertain the true facts from witnesses giving direct evidence, without the added complication of attempts to evaluate a witness's opinion of the reliability, care and thoroughness of some informant who has supplied the witness with the facts that he is seeking to recount.

It therefore seems to me that details of comparable transactions upon which a valuer intends to rely in his evidence must, if they are to be put before the court, be confined to those details which have been, or will be, proved by admissible evidence, given either by the valuer himself or in some other way. I know of no special rule giving expert valuation witnesses the right to give hearsay evidence of facts: and notwithstanding many pleasant days spent in the Lands Tribunal while I was at the Bar, I can see no compelling reasons of policy why they should be able to do this. Of course, the long-established technique in adducing expert evidence of asking hypothetical questions may also be employed for valuers. It would, I think, be perfectly proper to ask a valuer 'If in May 1972 No. 3, with an area of 2,000 sq. ft., was let for £10,000 a year for seven years on a full repairing lease with no unusual terms, what rent would be appropriate for the premises in dispute?' But I cannot see that it would do much good unless the facts of the hypothesis are established by admissible evidence; and the valuer's statement that someone reputable had told him these facts, or that he had seen them in a reputable periodical, would not in my judgment constitute admissible evidence.

. . . In *Wright v. Sydney Municipal Council*,⁶ much the same sort of point came before Sly J., Gordon J. and Ferguson J. The case concerned a sale and not a tenancy, but that seems immaterial.

It was contended⁷ that an expert valuer

'was entitled to state what sales he had knowledge of, even from hearsay, and to give the details of such sales, including price, etc., in evidence . . .';

but this contention was rejected. Sly J. said that the expert could, in addition to giving direct evidence of sales of other comparable land, provided there was legal evidence of these, testify that, inter

⁶ (1916) 16 S.R. (N.S.W.) 348.

⁷ See p. 359.

alia, he had kept in touch with sales not made by himself in the district, to show that he was competent to give evidence of values in the district. Sly J. added:⁸

'But he has no privilege beyond any other witness to speak in detail of the prices realised for other lands unless he can give legal evidence of such sales, or that evidence has already been given by the witnesses. It would be a most dangerous thing to allow an expert to speak of the details of sales of which he really knows nothing, and see the difficulty the plaintiff in a case like this would be in if he had to answer such evidence not knowing whether the sales were really existent or not. I think the same principle applies whether the evidence is given in chief or in reply.'

. . . Gordon J. took a similar view,⁹ and Ferguson J. rejected the contention that the witness could 'give hearsay evidence of the particulars of the transactions in question':¹⁰ see also *Phipson on Evidence* . . .¹¹ Bramwell B., I may say, apparently would have put matters on an even narrower basis, saying that a valuer may state his opinion of the value of land, but that he must not in chief add that he says this because some other land sold for such-and-such a price, although he may say this in cross-examination: see *Sheen v. Bumpstead*.¹² However, this, I think, was an obiter remark in a dissenting judgment . . ., and for many years now such evidence has not been rejected in chief when the witness has been speaking from his first-hand knowledge.

Putting matters shortly, and leaving on one side the matters that I have mentioned, such as the Civil Evidence Act 1968 and anything made admissible by questions in cross-examination, in my judgment a valuer giving expert evidence in chief (or in re-examination): (a) may express the opinions that he has formed as to values even though substantial contributions to the formation of those opinions have been made by matters of which he has no first-hand knowledge; (b) he may give evidence as to the details of any transactions within his personal knowledge, in order to establish them as matters of fact; and (c) may express his opinion as to the significance of any transactions which are or will be proved by admissible evidence (whether or not given by him) in relation to the valuation with which he is concerned; but (d) may not give hearsay evidence stating the details of any transactions not within his personal knowledge in order to establish them as matters of fact."

Unlike Megarry J., we do see compelling reasons why expert valuers should be able to give hearsay evidence of matters of fact relating to properties other than the property the value of which is in question.

⁸ *Ibid.*

⁹ See p. 365.

¹⁰ See p. 366.

¹¹ *Phipson* (1970), p. 518.

¹² (1862) 1 H. & C. 358, at p. 365; 158 E.R. 924, at pp. 926-7.

It seems unreasonable that he can give the court his opinion but not the material on which it is based. We believe that it is the constant practice of the Land and Valuation Court in New South Wales to admit evidence given by valuers of what they have discovered by inquiry concerning land which is comparable to that which is the subject of proceedings. This evidence is not objected to by counsel nor by the court. It seems desirable to preserve this convenient practice against interference by pedantic counsel in future. The effect of s. 84 (3) would be to reverse proposition (d) stated by Megarry J. at the end of the passage quoted, so far as concerns matter relating to property other than property the value of which is in issue. The inconvenience for the party calling the expert of calling also witnesses to the facts deposed to by the expert if he lacked personal knowledge would be very great. The opponent of the party calling the expert is at liberty to cross-examine him as to his means of knowledge and the basis for his beliefs. On the other hand, if the facts deposed to by the expert of which he has no personal knowledge relate to the property which is the subject of the proceedings, it seems proper that since they are matters directly in issue, the party who bears the onus of proof should be put to strict proof, i.e., that they should be proved either by direct evidence or in accordance with some exception to the hearsay rule other than s. 84 (3).

4.12.4 Section 84 (4)–(5) and the common law. There seems no reason in principle why the common law as to expert witnesses on the quality of material, or any other subject, should be different from the common law as to expert witnesses on medical condition and value. Often a scientist can only know facts within his area of expertise because he has heard reports from or read the writings of others, and many of the assertions he hears or reads are in turn likely to be based on other sources. Despite considerations of traditional principle, this evidence has been held admissible, at least so far as it depends on other experts; and the law may be wider.¹³ In Holmes J.'s words:

“When one who is competent on the general subject accepts from his reading as probably true a matter of detail which he has not verified, the fact receives an authority which it would not have had from the printed page alone and, subject perhaps to the exercise of some discretion, may be admitted.”¹⁴

4.13 SECTION 85: PUBLIC DOCUMENT

4.13.1 Section 85: general. Section 85 gives three avenues for admissibility of various kinds of “public document”. Section 85 (1) provides that where a document is made or kept or published in the course of public administration, for use as a reliable source of information of any kind by a public officer or by the public or any section of the public, a statement of information of that kind in the document is evidence of any matter asserted in the statement. Section 85 (2) provides

¹³ *R. v. Somers* [1963] 3 All E.R. 808. Cf. Phipson (1976), para. 1209, n. 66.

¹⁴ *Finnegan v. Gas Works Co.* 34 N.E. 523 (1893).

that a statement published in the course of public administration in the Gazette or a like publication¹ or in a newspaper or other periodical of an act done in the course of public administration is evidence of the doing of the act. Section 85 (3) provides that, in a civil legal proceeding, a statement of a fact of any kind in a report of a Royal Commission or other body charged with a duty of ascertaining the facts of that kind for the purpose of public administration is evidence of the fact stated. Section 85 (4) defines "public officer" as "a person employed or engaged in public administration". "Public administration" is defined in s. 60,^{1A} and this will serve to make it clear that s. 85 makes admissible public documents of places other than New South Wales.

4.13.2 Section 85 and the common law. Writers on evidence have grouped together various exceptions to the hearsay rule under a "public documents" or "public records" rubric.² Their struggles to generalize the rules of admissibility have not been wholly successful. Apart from these issues, there are a number of difficulties with the common law rules. One is the strictness with which "public document" is defined, requiring a public duty to inquire and record, relevance to a public matter, an intention that the record be retained, and its availability for public inspection.³ The requirement that a document be open to public inspection will sometimes enhance reliability; it will cause errors to be corrected and the fear that error will be detected will provoke care on the part of those who make such records. But very few errors are in fact corrected by public inspection, because most records are never inspected. The remote possibility of inspection is not often likely to have much beneficial influence on the maker. In any event the possibility of inspection by superiors or fellow workers or auditors of records not available for public inspection may be equally or more conducive to accuracy. Accordingly, the requirement has been dropped. Another problem raised by the common law is that it imposes an obscure limitation on the particular kinds of public document, e.g., registers and returns.⁴ A third problem was that the maker or keeper of the record must have personal knowledge: but this limitation has been now dropped.⁵

4.13.3 Public documents: England. The Civil Evidence Act 1968 (U.K.), s. 9 (2) (c), preserves any rule of law "whereby . . . public documents (for example, public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated therein". In our view the complexity, obscurity and anachronism of the common law means that this device of referential preservation of it is unsatisfactory. We think a bolder course is desirable, whether it is abolition or modification.

¹ For example, a Gazette of another government.

^{1A} See above, para. 2.2.1.

² Cross (1974), pp. 399-400, 454-9; Phipson (1976), ch. 22.

³ See *Sturla v. Freccia* (1880) 5 App.Cas. 623.

⁴ Cross (1974), p. 459.

⁵ *R. v. Halpin* [1975] 2 All E.R. 1124, at p. 1128. This appears to be an instance of a new hearsay exception, or, which amounts to the same thing, a new qualification to an existing exception, being created at common law.

4.13.4 Public documents and business records. To a large extent the evidence admitted under existing common law and statutory exceptions of this kind is admissible under the business records amendments made in 1976 to the Evidence Act, 1898, by inserting ss. 14CE–14CH. “Business” includes a business or undertaking carried on by the Crown; and also the public administration of the Commonwealth, of a State and of any country: s. 14CD (1). Some of the evidence admitted under the public documents exception includes certificates, surveys, reports and returns of various kinds; arguably these fall within “public administration”.⁶ However, a view might be open that though such records are kept by organs of the public administration, they are not in fact part of public administration. A further possibility might be that there are many records which a person has a duty to make, which are single records, and which are not part of a “business”, even so widely defined as in s. 14CD (1). When ownership of a dog is registered under the Dog Act, 1966, ss. 14 and 16, it is uncertain whether the registration is part of the record of a business, and whether it is made in the course of, or for the purposes of the business, namely, public administration (s. 14CE (5)). Instead it may be that the information is supplied by the owner to the public administration. Hence we think that if it is desirable to preserve any public records exception, the business records exceptions are not fully adequate to the task.

4.13.5 Public documents: specific statutory exceptions? The common law public documents exceptions have in part been made redundant by numerous special statutory exceptions even before 1976. One view is that this approach is correct: that the admissibility of such evidence should be governed not by a general evidence statute but by particular statutes regulating the particular proceedings in which particular kinds of evidence are to be admitted. It might be said that in modern conditions, with an army of public officers and private persons bearing public duties, no general rule of admissibility can possibly be satisfactory. It will either leave out reliable evidence, or admit evidence some of which is quite unreliable. It is better, the argument runs, for Parliament to state from instance to instance which declarations of, and records made by, which public officers should be admitted. Wigmore opposed the piecemeal approach to admitting public documents by making special provision for admissibility in the particular statutes imposing the duty to record. He wrote:⁷

“Those statutes are literally thousands in number, each one dealing with some specific kind of document and calling for special search and preparation to obtain the benefit of the particular statute. On the other hand, there are copious gaps leaving hundreds of similar kinds of documents unprovided for. So the solution is to

⁶ Compare the following provisions: Model Code (1942), rr. 515–20; Uniform Rules (1953), r. 63 (15)–(19); California Code (1965), ss. 1280–4; Federal Rules (1975), r. 803 (8)–(10); draft Canada Code (1975), cl. 31.

⁷ Para. 1638a.

substitute a *small group of concrete rules*, which will generalize the existing statutes and also cover those gaps . . . This method would enable the practitioner to find at a single place in the statutes, or court rules, all the law that he would ordinarily need for using such documents. To repeal existing statutes would not be necessary; these proposed Rules would merely generalize the existing rules in simpler and more inclusive form.”

Later his editor remarked:⁸

“What hours of skilled labour have been and are being daily expended, by legislators, judges, and practitioners, in formulating these petty provisions, in searching to find the one that fits the case, in briefing and arguing them, and in deciding upon them? And all for lack of a general statutory formula that would serve the purpose and save these labours.”

In our view, although some specific statutes will remain necessary, there is room for much greater progress towards a general statutory exception for public records.

4.13.6 Public documents: our proposals. Section 85 (1)–(3) have no requirement of personal knowledge in the compiler of the public document or the maker of statements appearing in it. There is no requirement of public inspection. There are no esoteric limitations on the meaning of public record. But s. 85 (1)–(3) do have plain links with the present common law. Thus maps made by a public body for inspection by local government officers and owners of land will continue to be admissible by virtue of s. 85 (1).⁹ So will temperature and rainfall records.¹⁰ Public acts of state, such as a reciprocity of legislation proclamation made in Britain, will continue to be provable by the London Gazette by virtue of s. 85 (2).¹¹ It will be noted that s. 85 (3) is limited to civil proceedings. A conviction should not be obtained by reliance on the report of a Royal Commission not governed by the procedural safeguards of a criminal trial.

⁸ Para. 1676c.

⁹ *Foletta v. Merri Creek Quarry Pty Ltd.* [1951] V.L.R. 149.

¹⁰ *Bailow Packing House and Cool Stores Rural Co-operative Society Ltd. v. Commonwealth and Dominion Line Ltd.* (1937) 37 S.R. (N.S.W.) 314; *Burnett and South Burnett Primary Producers' Co-operative Association Ltd. v. Commonwealth Bank of Australia* [1939] Q.W.N. 17.

¹¹ *Walt Disney Productions v. H. John Edwards Publishing Co. Pty Ltd.* (1955) 55 S.R. (N.S.W.) 162.

4.14 SECTION 86: FORMAL ADMISSION

4.14.1 Section 86: background. It is possible for a party to relieve his opponent of the burden of proving a particular fact in one of three principal ways. First, in civil cases he may not plead so as to put it in issue.¹ Secondly, in criminal cases the accused may plead guilty. Thirdly, at common law in civil cases formal admissions may be made;² the Crimes Act, 1900, s. 404, permits similar admissions to be made by the accused in criminal cases on the advice of counsel. In England, the Criminal Justice Act 1967, s. 10, made slightly wider provision for formal admissions in criminal cases by permitting the prosecutor to make them.³ Because formal admissions save time and money we think it desirable to put their reception on a statutory basis in civil cases; to clarify the present law in criminal cases; and to extend the present law in criminal cases by permitting the prosecution, and unrepresented accused persons, to make admissions. Further, in our view the introduction of the procedure we propose on a statutory basis would be an inducement to parties in civil cases to agree on the admissibility of some kinds of evidence. (Cf. Supreme Court Rules, Part 18, r. 1.)

4.14.2 Section 86 (1): definition. This subsection defines formal admission as a statement made by a party for the purpose of dispensing with the necessity of proof at the trial by another party of the fact admitted. The following are excluded from the definition: admissions on the pleadings;⁴ admissions under rules of court;⁵ and pleas in criminal legal proceedings. Each kind of statement excluded is regulated by its own regime.

4.14.3 Section 86 (2): changes in the law. This subsection makes unretracted formal admissions conclusive evidence of the fact admitted in both civil and criminal cases. However, s. 86 (7) (a) makes provision for false formal admissions. It should be noted that s. 86 (2) will not

¹ See, e.g., Supreme Court Rules, Part 15, r. 20.

² The Supreme Court Rules, Part 18, rr. 1 and 2, enacted in the Fourth Schedule to the Supreme Court Act, 1970, provide a procedure for doing this, but other procedures agreed on by the parties may be used. Part 18, r. 1, provides that a party may admit facts by notice served on another. A party may by notice on another party require him to admit a specified fact, and if the latter fails to dispute it within fourteen days, it shall be admitted by him (r. 2). These rules do not apply in most criminal proceedings in the court (Supreme Court Act, s. 17 (1) and Third Schedule). Admissions made under Part 18, rr. 1 and 2, only have effect for the purpose of the proceedings; since provision is made for them to be withdrawn, it seems they are conclusive until withdrawn; and they do not operate "in favour of any person other than the party in whose favour the admission was made" (r.6 (b)).

³ See also Evidence Act 1958 (Vic.), s. 149A; Queensland Criminal Code Act 1899, s. 644; Evidence Act 1929-76 (S.A.), s. 34. See *R. v. O'Sullivan* (1975) 13 S.A.S.R. 68 and cases there cited.

⁴ Supreme Court Rules, Part 15, r. 20.

⁵ See below, paras 4.15.10 and 8.9.1.

affect the operation of s. 89; the result is that it will remain possible for parties to continue the present procedure in civil cases of admitting facts by agreement. Section 86 (2) follows the Criminal Justice Act 1967 (U.K.), s. 10, in extending to the prosecution. The concluding words meet the case of admissions for a limited purpose: s. 86 (2) ensures that they operate as conclusive evidence for that purpose and not as evidence for any other purpose.

4.14.4 Section 86 (3): admission on terms or conditions. Section 86 (3) provides that where a formal admission is made on terms or conditions, it shall not be admitted until the terms or conditions are satisfied.

4.14.5 Section 86 (4): qualifications. Section 86 (4) (a) requires admissions by an accused person to be made with the approval of his legal adviser, or, if he has none, with the court's approval.⁶ At common law in civil cases there is no necessity for this and, in view of the right to retract formal admissions later provided in subsection (6), we see no reason to change. The paramount importance of not convicting the innocent justifies a difference for criminal cases. Section 86 (4) (b) and (c), which require out-of-court formal admissions to be written, and signed by the maker or his legal adviser, are self-explanatory.

4.14.6 Section 86 (5): party under a disability. The subsection protects parties under a disability by ensuring that formal admissions made by them may not be received without the leave of the court.

4.14.7 Section 86 (6): withdrawal of formal admissions. The subsection permits formal admissions to be withdrawn. We do not favour making the withdrawal of a formal admission automatically admissible as an ordinary non-conclusive admission by conduct under s. 87. The purpose of s. 86 (as of the Supreme Court Rules, Part 18) is to encourage admissions of facts which are not seriously disputed. A fact not disputed at an interlocutory stage may be strongly disputed at the final hearing and may mistakenly have been admitted generally and not for a limited purpose. Further, a formal admission may be made as a result of mistake as to the true facts. If the formal admission in the first instance could not be withdrawn it would tend to encourage parties never to make any formal admission. In this respect we differ from the English Criminal Law Revision Committee.⁷ In our opinion it is proper to give the court power to order to what extent a statement in a withdrawn formal admission, with or without the fact of its withdrawal, may be admissible.

⁶ At present an unrepresented accused person cannot make admissions: *R. v. Perry* [1970] 2 N.S.W.R. 501, at p. 503.

⁷ 9th Report (1966), para. 30.

4.14.8 Section 86 (7): untrue formal admissions. In *Adams v. Naylor*⁸ Lord Uthwatt suggested that it was not open to parties:

- (a) to plead in such a way as to leave undisputed allegations which are in truth contradicted by the evidence;
- (b) to agree on certain supposed facts which are proved false.

It follows that a formal admission contradicted by the evidence might not be accepted at common law; like the objects of Lord Uthwatt's attack, this amounts to seeking the court's view on hypothetical questions instead of the question as to which there actually is on the facts a *lis*. In our view, the court should therefore be given, or should retain, power not to be bound by formal admissions which are contradicted by the evidence. Section 86 (7) (a) so provides. Section 86 (7) (b) and (c) make similar provision for formal admissions which it is against public policy or the interests of justice to accept. The closing words of s. 86 (7) require the court to reject or exclude formal admissions relating to any fact proof of which is made mandatory by statute.

4.14.9 Section 86 (8): formal admissions for the purpose of a particular proceeding. Section 86 (8) provides that a formal admission which is made for the purpose of a particular legal proceeding is not, unless its terms otherwise provide, admissible in another legal proceeding. An opposite rule would discourage the making of formal admissions.

4.14.10 Section 86: the relation between ss. 86 and 62 (3) (d). It will be possible to have a written statement of evidence admitted under ss. 62 (3) (d) and 73 in civil cases where to call the witness would cause undue expense or delay. How does this possibility relate to the provisions of s. 86 on formal admissions? The English Criminal Law Revision Committee remarked, in speaking of their proposal to make admissible agreed written statements of facts:⁹

"Formal admissions will . . . differ from written statements of evidence in that the former will be binding and conclusive whereas the latter will be like other evidence. The formal admission goes to an issue in the case, whether this would but for the admission have to be proved by one witness or many, and will not necessarily dispense with the calling of any particular witness, as his evidence may still be needed on other issues. Proof by written statement, on the other hand, applies to the evidence of a particular witness only and will ordinarily exempt that witness from the necessity of giving evidence in court. How much part each of the new provisions will play will depend on what experience shows to be the most convenient method of preparing for the trial . . . Possibly written statements will be the more used, and formal admissions will be used chiefly for the purpose of filling up gaps in the evidence which

⁸ [1946] A.C. 543, at pp. 554-5; see also *Davison v. Vickery's Motors Ltd.* (1925) 37 C.L.R. 1, at p. 7; *Royster v. Cavey* [1947] K.B. 204, at p. 211.

⁹ 9th Report (1966), para. 26.

have been discovered at a late stage in the preparation of the case or at the trial. Again the defence might tell the prosecution soon after the charge is brought that such and such will be admitted and that therefore there is no need to serve a written statement in respect of it. The defence might also, on receiving a written statement, tell the prosecution that a fact given in it is admitted and that the statement need not be read. In any event, whichever procedure proves the more convenient at the different stages, we are convinced that both will have a part to play and should therefore be available. To make cumulative provisions for proof of the same kinds of matters might be criticised as a complication in that it increases the number of procedural rules; but it would surely be wrong to object on this ground when the result is to provide two new ways of simplifying the course of the trial."

4.14.11 Section 86 and the Crimes Act, 1900, s. 404. Section 86 makes superfluous the provision for formal admissions presently to be found in the Crimes Act, 1900, s. 404. We propose that s. 404 should be amended to read: "Every accused person on his trial may, if so advised by counsel, whatever the crime charged, give any consent which might lawfully be given in a civil case."¹⁰

4.15 SECTION 87: ADMISSION IN CIVIL LEGAL PROCEEDING

4.15.1 Section 87: admissions. At common law one major exception to the hearsay rule comprises out-of-court statements made by one party and tendered by an opponent. In civil cases these are usually termed "admissions". As we explained earlier, s. 69 provides that the law of admissions and confessions in criminal proceedings is unaffected by the Bill. Hence s. 87 is concerned only with civil proceedings. Two main reasons for the common law admissions exception have been advanced. One is that a statement known by its maker to be against his self-interest is likely to be true. Certainly, most admissions and confessions are of this kind; but some are admitted notwithstanding that their maker thought them to be in his interest at the time he made them. The second reason has a wider scope. In Morgan's words:¹

"The exclusionary rules of evidence and the procedure for enforcing them are not designed to be automatic eliminators of untrustworthy testimony; in the main they rather provide a privilege of protection against such testimony to the party against whom it is offered. A litigant can scarcely complain if the court refuses to take seriously his allegation that his extra-judicial statements are so little worthy of credence that the trier of fact should not even consider them. He can hardly be heard to object that he was not under oath or that he had no opportunity to cross-examine himself."

¹⁰ See the Bill, Sch. 6, and para. 7.3.1.

¹ Morgan (1929), p. 461.

4.15.2 Section 87: necessity for an admissions exception. Why should special admissions exceptions be necessary under our Bill? It is desirable that certain kinds of admission be received without the restrictions of s. 73 (1) (b), by which hearsay statements are inadmissible unless their maker is called or there is justification for not calling him. It is wrong that a party should have to call his opponent to prove an admission by the opponent; it may be thought hard that a party should have to call his opponent's servant (or prove justification for not doing so). Further, some admissions may involve multiple oral hearsay, as where the maker lacks personal knowledge of what he asserts. An example is proof of an admission by a person not called as a witness that a child is his; here the witness is reporting to the court, in effect, that a man, A, told him that a woman, B, had told A that A was father of B's child. Such evidence would not satisfy s. 73 (1) (a) (i) because so far as A is a declarant, he lacks personal knowledge of the matter dealt with in his statement—paternity; and so far as B is a declarant, her statement may not comply with the requirements of s. 73 (1) (c), (2) and (3). An example is *Lustre Hosiery Ltd v. York*² where the defendant said, in effect, "I admit the correctness of the total of outstanding debts which the auditors say is owing." Since the auditors were relying on the statements of others, and the defendant on the statements of the auditors, the court received second-hand hearsay as an admission. We should note that there is a view that admissions are not really a hearsay exception because they are not offered testimonially, but rather as conduct inconsistent with the stance adopted by their maker during the litigation.³ The other view is that admissions are in fact received as evidence of the truth of what they assert, not merely to show inconsistency, or as a substitute for proof, or as a waiver of proof. It has been held that they may be contradicted, explained away, or disbelieved.⁴ The matter is to some degree unsettled. We do not need to resolve it on this occasion, for the changes we propose to the common law do not touch this point.

4.15.3 Section 87 summarized. Our proposals concerning admissions in civil cases are simple. Section 87 (1) provides that s. 87 applies only in civil proceedings. Section 87 (2) provides that subject to s. 87 (3) and (4), Part VI does not affect the law relating to admissions in civil legal proceedings. Section 87 (3) provides that an admission in civil proceedings need not be of a matter within the knowledge of the declarant, may be of a matter of fact as well as of law, and may be of a matter which is one for an inference or conclusion by the court in evidence or is an issue in the legal proceeding. Section 87 (4) has a purpose similar to s. 69 (2). Section 87 (5) provides that s. 87 does not apply to admissions on the pleadings, or under rules of court; nor to formal admissions.

² (1935) 54 C.L.R. 134.

³ Strahorn (1937). This view is taken in the Federal Rules, r. 801 (d) (2). It is repudiated by Morgan (1921).

⁴ See *Hoad v. Swan* (1920) 28 C.L.R. 258, at pp. 264-5; *Menck v. Dickinson* [1924] V.L.R. 131; *Aikman v. Arnold* (1934) 51 W.N. (N.S.W.) 205.

4.15.4 Section 87: reasons for its scope. At the outset we give reasons for the narrow and unambitious scope of s. 87. As we explain below, the matters on which the law is changed or declared in s. 87 (3) are matters raising few difficulties of reform. So far as the common law on these points is doubtful, we have opted for what we take to be the better view. But we have decided not to go further for several reasons. The common law of admissions is complex and obscure, particularly so far as admission by representatives are concerned. There is no great authoritative treatise expounding the subject in detail. We have considered the subject extensively, and the longer our deliberations have continued the more doubts and unsettled points have emerged. Secondly, even if we took the view that the common law should be reformed without attempting to settle what it is, we think that any attempt to enact a new scheme of admissions would entail great complexity. A new scheme might be quite unpredictable in the problems it raised. It would no doubt be possible to deal with both the problems we have mentioned—to ascertain the common law and to reform it, if it needed reform. But it would consume much time and effort, and we do not think the reforms effected by the rest of the Bill should be delayed simply because of the problems of admissions. We add that the main problem caused by the present law in practice—the difficulty of proving that a principal has authorized his agent or employee to speak—is dealt with specifically by s. 88, and that despite the host of possible difficulties inherent in the common law of admissions, the law seems to work tolerably in practice.

4.15.5 Section 87 (1): civil proceedings. Section 87 (1) regulates admissions in civil proceedings. As we explained above, we make no proposals for admissions in criminal proceedings.⁵

4.15.6 Section 87 (2): preservation of general law. Section 87 (2) provides that, except as provided in s. 87 (3), the general law of admissions is to be unchanged.

4.15.7 Section 87 (3): “statement”. The opening words of the subsection concern “statements” which are admitted and have effect as an admission. Section 60 (1) defines “statement” as meaning “any assertion (whether made in words or otherwise) of a matter of fact, whether addressed to a person or not”. At common law, such items of evidence as co-ordination tests by motorists,⁶ and real evidence obtained from an accused person (e.g., samples of blood, skin and the like), are not “admissions” or “confessions”.⁷ In principle this seems correct for both civil and criminal cases. The definition of statement in s. 60 (1) preserves this position: such evidence is not an assertion. It is no more an assertion than the features of a man’s face or his footprints. But if, at common law, there are admissions which are not statements, they will be unaffected by the Bill, because the Bill only applies to statements.

⁵ See above, para. 3.6.1.

⁶ *Benny v. Dowling* [1959] V.R. 237.

⁷ Cf. *R. v. Voisin* [1918] 1 K.B. 531, where the contrary seems to have been assumed, since evidence as to how the accused spelt during a test was held admissible, but only after a finding of voluntariness.

4.15.8 Section 87 (3) (a): admissions of matters outside the maker's knowledge. Section 87 (3) (a) provides that a statement may be admitted and have effect as an admission notwithstanding that it deals with a matter not within the declarant's knowledge. At common law there is doubt as to whether an admission of a fact in the existence of which the maker had belief⁸ but not based on his own direct perception is admissible. In some cases such evidence has been received, e.g., a man's statement of his own age⁹ or paternity¹⁰ or legitimacy;¹¹ or a man's statement, based on markings on the material in question, that material in his possession was LSD.¹² The High Court has said that:¹³

"Words or conduct amount to an admission receivable in evidence against the party if they disclose an intention to affirm or acknowledge the existence of a fact whatever be the party's source of information or belief. . . . When admitted in evidence, however, its probative force must be determined by reference to the circumstances in which it is made and may depend altogether upon the party's source of knowledge. If it appears that he had no knowledge, or that, although he had some means of knowledge, he had formed no certain or considered belief and indicated nothing amounting to a personal judgment or conclusion of his own, the probative force of the admission may be so small that a jury ought not to be allowed to act upon it alone, or in preference to opposing evidence."

There are authorities which appear to assert that, in criminal cases, admissions of facts of which the maker lacks personal knowledge are inadmissible without more.¹⁴ However, the true position, and the ground of reconciling the authorities, has been said to be that such an admission is "not to be rejected as a matter of law; its weight is a question for the tribunal of fact, which may decline to act upon it".¹⁵

⁸ This is essential: *Roe d. Lord Trimlestown v. Kemmis* (1843) 9 Cl. & Fin. 749, at p. 780; 8 E.R. 601, at p. 613.

⁹ *R. v. Turner* [1910] 1 K.B. 346, at p. 362.

¹⁰ *R. v. Jones* (1933) 24 Cr.App.Rep. 55. See also *R. v. Schmidt* [1948] 4 D.L.R. 217.

¹¹ *Her Majesty's Procurator-General v. Williams* (1861) 31 L.J.P.M. & A. 157; *Re Perton* (1885) 53 L.T. 707.

¹² *Bird v. Adams* [1972] Crim.L.R. 174, discussed in *Anglim and Cooke v. Thomas* [1974] V.R. 363, at p. 372.

¹³ *Lustre Hosiery Ltd. v. York* (1936) 54 C.L.R. 134, at pp. 143-4; see *Smith v. Joyce* (1954) 89 C.L.R. 529; *Allen v. Roughley* (1955) 94 C.L.R. 98, at p. 142. See also cases cited by Mahoney J.A. in *Grey v. Australian Motorists & General Insurance Co. Pty Ltd.* [1976] 1 N.S.W.L.R. 669, at p. 685.

¹⁴ *Surujpaul v. R.* [1958] 3 All E.R. 300; *Comptroller of Customs v. Western Electric Co. Ltd.* [1966] A.C. 367; *Horne v. Comino* [1966] Qd.R. 202; *R. v. Vogelle* [1970] 3 C.C.C. 171; *R. v. Gibbons* [1971] V.R. 79; *Police v. Coward* [1976] 2 N.Z.L.R. 86.

¹⁵ *Coccia v. Australian Iron & Steel Pty Ltd.* (Court of Appeal, N.S.W., 12 June, 1975, unrep.), per Samuels J.A. Similarly in *Anglim and Cooke v. Thomas* [1974] V.R. 363, at p. 372, Harris J. said: "evidence consisting of an admission based on hearsay is not inadmissible in a criminal case, any more than it is in a civil case, but the circumstances under which it is of any weight and is capable of supporting an adverse finding against the party making it, may well be far more restricted in a criminal case than in a civil case". An example of evidence being disregarded for lack of weight because not based on personal knowledge is *Bulley v. Bulley* (1874) L.R. 9 Ch.App. 739 (admission of an event 120 years earlier); see also *The Actaeon* (1853) 1 Sp.Ecc. & Ad. 176; 164 E.R. 102.

In our view such evidence should generally be admissible; and should only be excluded if in the circumstances it has no weight. An admission based only on belief may sometimes be very weighty if the sources of the declarant's belief are normally reliable, or if he is in such a position that he is likely to be well informed. Further, admissions which are relevant in litigation normally concern matters of importance to the declarant, so that his belief is almost as convincing evidence of their truth as his knowledge of them; it is safe to assume that if he had any doubt he would have taken steps to obtain personal knowledge of the truth. And one valuable feature of admissions as evidence lies in the element of contradiction between the out-of-court statement and what the maker now asserts in litigation. In Wigmore's words:¹⁶

"[i]f the party-opponent . . . now claims that his contract, made by an agent in France, entitles him to a cargo of silk sheetings, his statement last month that his contract called for a cargo of silk ribbons would discredit his present claim, even though it may be apparent that in neither case could he speak from personal knowledge. The conflict of claims is the significant circumstance, and the element of personal knowledge merely increases or lessens that significance."

In our view the dangers of unreliability in some statements of facts of which the maker had no personal knowledge are sufficiently obvious to make it unnecessary that such statements should automatically be inadmissible.

4.15.9 Section 87 (3) (b) and (c): admissions of matters of law and admissions on matters for inference or conclusion by the court. At common law, a special rule appears to have grown up by which admissions may be proved even though they contain statements of law or statements of a conclusion as to an issue in the case (e.g., "I was negligent").¹⁷ In this kind of instance the declarant could not have given testimony in the same form as his admissible out-of-court statement. We think this rule should be preserved. We agree with McCormick's justification of the common law practice regarding admissions:

"the opinion-rule . . . has as its object the regulation of a witness on the stand, so as to elicit his answers in the more concrete form rather than in terms of inference. In its modern form it is a rule of preference for the more concrete answers, if the witness can give them, rather than a rule of exclusion. In any view, this rule designed to promote the concreteness of answers on the stand, is grotesquely misapplied to out-of-court statements, such as admissions, where the declarant's statements are made without thought of the form of courtroom testimony and where it can only be applied by excluding the statement, whereas in the courtroom if the opinion objection is sustained, counsel may reframe his question in the preferred form . . . While conceivably a party might give an opinion on an abstract question of law, such are not the statements actually offered in evidence. These always include in them an

¹⁶ Para. 1053.

¹⁷ See generally Phipson (1976), para. 684.

application of a standard to the facts; thus they suggest what the declarant thinks the facts are to which he is applying the standard of 'fault' or other legal or moral standard involved in his statement. The factual bearing is not to be ignored merely because the statement may also indicate the party's assumptions as to the law."¹⁸

Section 87 (3) (b) and (c) are intended to preserve the practice. It should be remembered that "fact" includes "opinion" (s. 60 (1)).

4.15.10 Section 87 (5): exclusions. We propose to exclude from the scope of s. 87 admissions on the pleadings,¹⁹⁻²⁰ admissions made under rules of court, and formal admissions received under s. 86.²¹ Admissions made under rules of court include such items of evidence as admissions made by notice,²² admissions in answer to a notice to admit facts whether made expressly or as a result of failure to serve a notice disputing those facts,²³ admissions required by the court,²⁴ admissions made by a party's counsel in court, and admissions in answer to interrogatories.²⁵ It seems that such admissions are conclusive unless withdrawn with the leave of the court.²⁶ These exclusions from s. 87 are made because the admissions excluded are *sui generis*. All three kinds differ from the "informal admissions" received as a hearsay exception, with which s. 87 is concerned, in that they are not evidence, but a substitute for evidence;

¹⁸ McCormick (1954), para. 241. The contrary argument has been put thus by Glass J.A., discussing questions seeking an admission from a party while testifying.

"[In] Phipson on Evidence, 11th ed. par. 684, p. 310, it is asserted that a party may make admissions as to questions of mixed law and fact. But in cases where this was allowed there appears to have been no regard to principle. I believe such a question to be objectionable. An expert witness may not be asked questions involving a conclusion of law, because his answer depends on the application of a legal standard: 'But the reason is that such matters are not subjects of opinion testimony. They are mixed questions of law and fact. When a standard, or a measure, or a capacity has been fixed by law, no witness whether expert or non-expert, nor however qualified, is permitted to express an opinion as to whether or not the person or the conduct, in question, measures up to that standard. On that question the court must instruct the jury as to the law, and the jury must draw its own conclusion from the evidence.': *Grismore v. Consolidated Products Co.* [5 N.W. 2d 646, at p. 663 (1942).]

In my opinion, it follows, in point of principle, that a party cannot be asked to admit a conclusion depending upon a legal standard. By extorting from a party an admission that he was negligent, or that he was not provoked, or that his grandfather possessed testamentary capacity, there is added to the record something which is, not merely of dubious value, but by definition valueless, owing to the witness' unfamiliarity with the standard governing his answer." (*Grey v. Australian Motorists & General Insurance Co. Pty Ltd.* [1976] 1 N.S.W.L.R. 669, at pp. 675-6; cf. Mahoney J.A. at pp. 684-6.) Although this reasoning has force, we think, at least in relation to out-of-court statements, it involves too great a sacrifice of convenience to principle.

¹⁹⁻²⁰ E.g., expressly, or by failure to traverse: see Supreme Court Rules, Part 15, r. 20.

²¹ See above, paras 4.14.1-4.14.11.

²² Supreme Court Rules, Part 18, r. 1.

²³ Supreme Court Rules, Part 18, r. 2.

²⁴ Supreme Court Act, 1970, s. 82 (1) (b).

²⁵ Supreme Court Rules, Part 24, r. 10.

²⁶ See *Hollis v. Burton* [1892] 3 Ch. 226; *Dunn v. Brown* (1911) 12 S.R. (N.S.W.) 22; *Ell v. Hunter District Water Supply and Sewerage Board* (1927) 27 S.R. (N.S.W.) 437.

they cannot be contradicted until formally retracted; they are generally only binding in the proceedings in which they were made; and they are necessarily made as part of the proceedings, not before them.

4.15.11 Section 87: general—credibility of statements. At common law it is open to the court, in either civil or criminal proceedings, to believe or disbelieve the whole of an admission, or to believe some parts and not others. This is but a specific instance of a more general attitude to the weight of evidence.²⁷ We intend this to remain so; this approach to evidence is so fundamental and so deeply-ingrained in our system that no special provision need be made to preserve it; and s. 87 (2) will in any case do so.

4.15.12 Section 87: general—evidence of witnesses called by a party in earlier proceedings. At common law, the evidence of witnesses called by a party to earlier proceedings is not receivable under the admissions exception in later proceedings because it is thought that a party could not predict or be responsible for what his witnesses would say: that is so even where the witness was called to prove a particular fact. Such, at least, was the holding of a majority of the Court of Appeal in *British Thomson-Houston Co. Ltd v. British Insulated and Helsby Cables Ltd*, but Sargant L.J.'s dissenting judgment has been much praised.²⁸ He said:²⁹

“... which is the preferable view on general principle? In my opinion it is that evidence of specific facts, which has once been definitely adopted and placed before the Court as true by a party to previous proceedings, is admissible against him thereafter, as constituting an assertion or statement by him to that effect of those specific facts. An assertion of such facts by the oath of a witness tendered for the purpose is a particularly definite and deliberate assertion by the party of the specific facts in question. And I can see no reason nor logic in a system of evidence which, while treating as admissible against a party a statement made less solemnly and deliberately by himself, should exclude and ignore a far more solemn and deliberate assertion which he has caused to be made through the sworn testimony of others.”

The majority view has also been criticised on the basis that a witness is not called without the party calling him knowing what he is likely to say, at least where the witness is called to prove one particular fact.³⁰ Further, some old authority supported the view that affidavits tendered by a party to legal proceedings could be used against him in later proceedings.³¹

²⁷ See, e.g., *R. v. Higgins* (1829) 3 C. & P. 603; 172 E.R. 565; *R. v. Clarke* [1959] V.R. 645; *R. v. McGregor* [1968] 1 Q.B. 371.

²⁸ E.g., Baker (1950), p. 47.

²⁹ [1924] 2 Ch. 160, at pp. 184–5.

³⁰ See *Keyser Canning Co. v. Klotz Throwing Co.* 128 S.E. 280 (1925).

³¹ *Brickell v. Hulse* (1837) 7 Ad. & El. 454; 112 E.R. 541; *Richards v. Morgan* (1863) 4 B. & S. 641; 122 E.R. 600. See Phipson (1976), para. 742.

Under s. 73 both kinds of evidence will be admissible independently of any admissions exception provided the witness or deponent is called as a witness in the subsequent proceedings or there is justification for not calling him. Thus s. 73 will achieve the same effect as provisions like r. 63 (3) (b) (i) of the Uniform Rules (1953), which attempt to enact Sargant L.J.'s view. So far as oral testimony is concerned, it will be proved either by someone who heard it or by the transcript, as an immediate record of the statement. There is no doubt a case for admitting prior testimony under an admissions exception; but in our view the party against whom it tells should generally have the right to cross-examine the maker, if he is available. There are many cases in which a witness does not say what the party calling him expected him to say, particularly on peripheral matters, which may be unimportant in the case in which he is called but may be very important in a later case. It is not desirable that a party should be deterred from calling a witness who may be of assistance to the court in the instant case because he runs the risk of being prejudiced in some future case by evidence which he cannot foresee or as to which he may quite genuinely believe the witness to be mistaken. However, some prior testimony will be admissible under s. 87. One example will be where the declarant is a party to the later proceedings or an agent of a party. An affidavit tendered in earlier proceedings could be admitted as an admission by conduct. Here the party does not need a right to cross-examine: he has himself adopted the statement. There are instances where the witness is called to prove a particular fact, which he does, in which the case for admissibility independently of s. 73 is strong; but in our view the difficulties of determining whether the witness was in fact so called, and the increased complication of the law, outweigh any advantages, which would be slight in the light of the availability of s. 73.

4.15.13 Section 87: other evidence inadmissible under s. 87 but admissible under s. 73. There are several examples of evidence not admissible under the common law admissions exception, as modified by s. 87, which will be rendered admissible on proof of compliance with the conditions of s. 73. They include: statements by the driver of an uninsured vehicle in proceedings brought under nominal defendant legislation;³² statements by one spouse tendered against the other; statements by co-parties; statements by agents made about a matter not within the scope of the agency or made after its termination. Further, there is a number of decisions under the common law hearsay rule, including the common law of admissions, which work substantial justice but which are hard to justify technically. Apart from cases already considered³³ we may note *R. v. Phillips*.³⁴ The English Court of Criminal Appeal held that the trial judge should have received out-of-court statements by two prosecution witnesses to be reported by other witnesses that they had been schooled by the accused's wife to testify against the accused, who was charged with incest. Yet the evidence was hearsay, and since prosecution witnesses are not parties (and neither was the wife), no version of the admissions exception would properly apply. This beneficent decision could be reached under the Bill by applying s. 73.

³² Cf. *Nominal Defendant v. Hook* (1962) 113 C.L.R. 641.

³³ Above, para. 1.4.3.

³⁴ (1936) 26 Cr.App.Rep. 17.

4.16 SECTION 88: STATEMENT AFFECTING A PARTY

4.16.1 Section 88: general structure. Section 88 applies only in civil proceedings: s. 88 (1). It makes admissible certain statements of employees or agents tendered by a party adverse in interest to the employer or principal: s. 88 (2). We refer to these statements as statements affecting a party and not as admissions, because, unlike admissions, their use does not depend on the principal authorizing their making. Section 88 (3) renders four kinds of statement admissible. First, statements made with the party's ostensible authority: s. 88 (3) (a). Secondly, statements of which the maker had personal knowledge and which relate to a matter within the scope of his employment and of which, where the fact asserted is not an opinion, he had personal knowledge, and where the fact asserted is an opinion, he would have been permitted to state in full or to some extent if at the time when he made the statement he had been testifying: s. 88 (3) (b). Thirdly, statements relating to a matter of which the maker had the superintendence on behalf of the party: s. 88 (3) (c). Fourthly, statements relating to a matter which it was within the scope of his employment or agency to discuss with any person to whom he made the statement: s. 88 (3) (d). Section 88 (4) provides that subject to s. 88 (3) (b), a statement admissible by virtue of s. 80 is so admissible notwithstanding that it deals with a matter mentioned in s. 87 (3).¹ Section 88 (5) provides that where the fact asserted in a statement admitted by virtue of s. 88 (3) (b) is not an opinion, the statement is admissible as evidence of the fact to the extent to which the declarant at the time when he made the statement had personal knowledge or may reasonably be supposed to have had personal knowledge of the fact. Section 88 (6) provides that where the fact asserted in a statement admitted by virtue of s. 88 (3) (b) is an opinion, the statement is admissible to the extent to which the declarant would have been permitted to give the opinion if at the time when he made the statement he were testifying. Section 88 (7) provides that statements admitted under s. 88 are admissible only against the party whose employee or agent made them, or a party tendering or consenting to tender of the statement.

4.16.2 Section 88: servants and agents—generally. At common law a statement made by an agent within the scope of his authority to third persons during the continuance of the agency can be received as a vicarious admission against the principal. For convenience we use the word "agent" to include "servant" in the rest of this discussion. The interpretation of the phrase "within the scope of his authority" has caused some difficulty at common law, but it came to be settled that "the admission must have been made by the agent as part of a conversation or other communication which he was authorized to have with a third party".² That is, on the one hand, the precise admission need not be one which the agent was authorized to make; on the other, it is not enough to determine what the agent's authority is to act on behalf of the principal, e.g., what acts fall within the course of an employee's employment. The effect of the common law rule is that statements by a

¹ See paras 4.15.8–4.15.9.

² Cross (1974), p. 450.

railway company's station master accusing a fellow employee of misconduct were received as an admission by the company³ but not statements by a railway company's night inspector concerning an error in the conduct of the company's business;⁴ the former was entitled to deal with the police and indicate suspects, but the latter had not authority to converse with outsiders. Similarly, in *Scott v. Fernhill Stud Poultry Farm Pty Ltd* Sholl J. had to consider a statement made by an absolute majority shareholder of a company who was also a director and who had stated that he was "senior partner" of the "firm". Sholl J. said that he was "prepared to infer that the authority to manage the affairs of the company, including the power to make admissions to a statutory authority charged with the administration of the trade in which the company was concerned, resided in the board of directors as such, and in such other person or persons, if any, as the board might delegate its powers to . . ."⁵ But he said the magistrate could not be said wrongly to have refused to infer that the maker of the statement was so authorized. Thus a managing director may have his company's authority to make admissions⁶ though an ordinary director normally does not.⁷ There is usually no authority to give answers respecting past transactions.⁸

4.16.3 Section 88 (3) (a): servants and agents—changes in the common law. This subsection changes the common law rule. All statements now admissible at common law will continue to be admissible under s. 87; but s. 88 expands admissibility. The effect of the common law rule is to exclude much evidence; for the authority of a servant or agent to act has usually been held to be much wider than his authority to speak about his acts.⁹ Wigmore wrote:¹⁰

"It is absurd to hold that the superintendent [of a coal company] has power to make the employer heavily liable by mismanaging the whole factory, but not to make statements about his mismanagement which can be even listened to in court; the pedantic unpracticalness of this rule as now universally administered makes a laughing-stock of court methods . . . [If a saleswoman has] authority to sell goods and make a profit . . . then why not an authority to say how she sold them? Such quibbles bring the law justly into contempt with laymen."

³ *Kirkstall Brewery Co. v. Furness Rail. Co.* (1874) L.R. 9 Q.B. 468.

⁴ *Great Western Rail. Co. v. Willis* (1865) 18 C.B.N.S. 748; 144 E.R. 639; see also *Lampson & Co. v. London and India Dock Joint Co.* (1901) 17 T.L.R. 663.

⁵ [1963] V.R. 12, at p. 14.

⁶ *Butcher v. The Longwarry and District Dairyman's Co-operative Association Ltd.* [1939] V.L.R. 263; *Lewis v. Crafter* [1942] S.A.S.R. 30; *Fraser Henleins Pty Ltd. v. Cody* (1945) 70 C.L.R. 100; *Harris v. Macquarie Distributors Pty Ltd.* [1967] V.R. 257; *Pomery v. Rural Hotels Pty Ltd.* (1973) 5 S.A.S.R. 191.

⁷ *Barrett v. Steel Products Distributing Co. Pty Ltd.* [1962] N.S.W.R. 981; *Scott v. Fernhill Stud Poultry Farm Pty Ltd.* [1963] V.R. 12.

⁸ *Peto v. Hague* (1804) 5 Esp. 134; 170 E.R. 763; *Ex p. Gerard & Co. Pty Ltd.*; *Re Craig* (1944) 44 S.R. (N.S.W.) 370.

⁹ See *Burr v. Ware R.D.C.* [1939] 2 All E.R. 688; *Botes v. Van Deventer* 1966 (3) S.A. 182.

¹⁰ Para. 1078, n. 2.

One answer to Wigmore's question was put thus in the words of one submission to us:

"[t]he rationale of admitting the employee's statement is the authority to speak given by the employer. Wigmore . . . [assumes] that an employer does grant authority to his employee, not only to do acts which increase the employer's wealth but to make statements which may diminish it . . . [I]n most cases the matter is never expressly considered. The common law takes the view that the employer does not impliedly authorize his employees to make statements against the employer's interests. This seems entirely consonant with the general approach of the law of contract. If when the employer and employee were discussing the terms of the contract of employment, an officious bystander were to ask the parties whether the employer authorizes the employee to make statements binding upon the employer, it would be most unlikely that the two parties would say 'of course'. The employer would be against such a term and the employee would probably be indifferent to it.

[Any statute expressing] the view implicit in the quotation from Wigmore . . . is subject to similar criticisms in principle. It could, however, be rationalized as a statutory implied term in contracts of employment. The question then arises whether the implied term can be excluded in the contract of employment (or agency). Another way of posing the question is whether the employer can expressly negate the authority which [such a statute] would otherwise confer.

Suppose, to take Wigmore's example . . . , the shopkeeper makes it a term of the contract with the saleswoman that she is to make no admission that any goods sold were defective but is to refer all complaints to the employer. Would a statement by the saleswoman that an article sold was defective be admissible . . . If so, the rationale of authorization is totally lost. If not, then employers would be well advised to contract out . . . and legal advisers ought to be alert to this possibility in drawing up contracts of employment".

The same submission makes a further point against changing the law.

"There may be cases where an employee holds a grudge against his employer. He may be under threat of dismissal before he makes the statement against his employer's interest. He may be new to the job or unfamiliar with the aspect of the work about which he makes the statement. These kinds of considerations would make it unjust to bind the employer by what the employee says against him."

4.16.4 Section 88 (3): justification. Despite these arguments, we think the changes made by s. 88 (3) are sound. They break the connection with authority and with the common law of vicarious admissions; they provide for certain statements to be received as evidence, but not by way of admission. The American Model Code (1942), r. 508 (a), and the Uniform Rules (1953), r. 63 (9) (a), are provisions which we have followed to some extent in permitting an agent's admission to be received if it relates to matters within the scope of the agency and was made before

its termination and of which he had, or may reasonably be supposed to have had, personal knowledge: see s. 88 (3) (b).¹¹ We go further, and make admissible statements made with ostensible authority, statements made which relate to a matter of which the maker had superintendence, and statements relating to a matter which it was within the scope of his employment or agency to discuss with any person to whom he made the statement: s. 88 (3) (a), (c) and (d). The law of admissibility should not depend on authority, or contract, or the principal being bound, but on what promotes the search for truth. It is perverse to exclude such admissions while permitting the agent to testify, for the admissions are more likely to be reliable, being made when the facts are fresher and the likelihood of evidence tailored to suit the principal's case is less. The agent is likely to be well informed about matters within his agency. He is unlikely to make false statements about them while the relationship continues, because of such factors as loyalty to his principal's interests, and fear of dismissal if discovered in an untruth. The result is that the principal will lack opportunity to cross-examine the agent; but the principal in engaging the agent must run certain risks, and it may not be thought unjust that one of them should be the risk of having what the agent says tendered against him. The argument based on the employee with a grudge should go to weight, not admissibility. In many cases a party in dispute with a company or other employer will have no source of information about the employer's activities other than what he has been told by the employee who is acting on behalf of the employer. The employer has placed the employee in the position of handling those activities and it would be unfair if the other party could not use the statements of the employee. The employer, on the other hand, will usually have some means of knowing whether the employee has told the truth and of contradicting him if he has not. One case in which the employer may have difficulty in checking his employee's statement is where it relates to the employee's own unsupervised conduct for which the employer is vicariously liable, for example, the driving of the employer's vehicle. But an employee will not normally concede that he has been at fault unless it is true. In any event much the same considerations as make it reasonable to hold the employer vicariously liable for the employee's unauthorized acts within the scope of his employment make it reasonable to admit the employee's statements against the employer. The arguments stated above concerning authority are strong if the law of vicarious admissions is based only on authority; our contention is that authority was always an unsatisfactory basis and a better basis is the justice of admitting in evidence the out-of-court explanations for actions of agents given by those agents. At common law, even where authority is discovered, it is largely the result of a fiction. The rules of evidence are for use not only in large commercial causes but also for small matters in inferior courts: persons suing companies in such courts should not be put to proof of authority. This is to give an unfair advantage to corporations. If s. 88 were not enacted, the statement in question would be admissible subject to s. 73, but it might be impossible to prove justification, and the declarant, if called, may cause great difficulty by being unfavourable to the party calling him without being technically hostile. Section 62 (3) (c) may be held inapplicable.

¹¹ See also California Code (1965), s. 1222; Federal Rules (1975), r. 801 (d) (2) (D); draft Canada Code (1975), cl. 30 (b).

4.16.5 Section 88 (3): agents and third parties. At common law there was a rule that admissions made by an agent had to be made to third parties. Thus Fry J. held that reports by a company chairman to a company meeting were not receivable as admissions on the ground that "when an agent is making a confidential report to his principal the report is not admissible evidence in favour of a third party".¹² The rule was doubted by Owen J. in *Finance & Guarantee Co. Ltd v. Commissioner of Taxation*.¹³

"At the present day when it is a common practice for a chairman's address to shareholders at an annual meeting of a public company to be supplied to the stock exchange and to the public through the medium of the press, it would be contrary to common sense to hold that such an address cannot be used in evidence in proceedings by a third party."

We agree. The common law rule extended to other contexts, however. A letter:

"written by the agent to the principal . . . can only bind the principal on the ground that it is within the scope of an agent's authority to bind his principal in the principal's relations with third parties by a statement made by the agent to the principal himself . . . The notion that a principal should be bound by what his agent says to him seems to me to have no warrant whatever, either in law or sense."¹⁴

In *Warner v. The Women's Hospital*,¹⁵ Sholl J. qualified the bald statement of the common law rule given above. He said that ship logs, books of account and in some circumstances hospital records—that is, records made by a servant in the course of performing his duty to his principal and not published to third parties—were admissible, provided that the servant were authorized to make entries as the principal's record.

"If, on the other hand, the documents are created by servants and agents, not for the purpose of fulfilling a duty of their employment to make such documents as and for the principal's record, but for the purpose of reporting to the principal—and . . . so as to adopt for the moment themselves the capacity of a principal—then . . . it becomes material . . . to consider the question of adoption by the employer."

¹² *In re Devala Provident Gold Mining Co.* (1883) 22 Ch.D. 593, at p. 596; cf. *The Solway* (1885) 10 P.D. 137. The correctness of Fry J.'s application of the rule to the facts before him may be doubted; a company chairman's principal is the company, not its members.

¹³ (1970) 44 A.L.J.R. 368, at p. 370.

¹⁴ *Swan v. Miller, Son and Torrance Ltd.* [1919] 1 I.R. 151, at p. 183, per O'Connor L.J.

¹⁵ [1954] V.L.R. 410, at p. 412. See also *Guarnaccia v. Rocla Concrete Pipes Ltd.* [1976] V.R. 302.

On this basis he distinguished hospital reports from the reports of agents held inadmissible in *Swan's Case*. The point of the distinction seems to be that in making the records the agents are in fact not making statements to their principal; the activity is the method by which the principal makes his own records. But reports of negotiations with third parties cannot be so analysed. There is no restriction in s. 88 (3) on the persons to whom s. 88 statements by agents may be made.

4.16.6 Section 88 (3): agents and proof of agency. At common law the existence of the agency had to be proved by non-hearsay evidence before the agent's admissions were receivable: that is, the terms of the admission itself could not be used to prove the fact of agency.¹⁶ This rule would be reversed by s. 97 (2) for s. 88 statements: see the discussion of that subsection.¹⁷ The terms of the statement will be admissible, although not conclusive, evidence of the fact of the agency. Because of s. 87 (2), s. 97 (2) will not apply to admissions admitted under s. 87; however, in the absence of evidence of authority which would make them admissible under s. 87, they will be tendered under s. 88 and s. 97 (2) will then apply.

4.16.7 Section 88 (3): agents and company officers. At common law there may be a distinction between an agent for a company making an out-of-court statement which may be tendered against it as a vicarious admission and an officer of a company making an answer which may be tendered against it, not as a vicarious admission, but because "the answer of the company's officer is the answer of the company and not of the individual". An example is a response to an interrogatory.¹⁸ In these circumstances the company will have made the statement, not its agent, and s. 88 will not apply.

4.16.8 Section 88 (3) (b): "within the scope of his employment or agency". The phrase "within the scope of his employment or agency" may give rise to argument in this area as it has in others. Thus if A is employed to drive B while the latter delivers messages, and after an accident caused by A's driving B says "We were on the wrong side of the road", it may be argued that the statement relates to a matter within the scope of A's service, but not B's. However, if this restriction were dropped, s. 88 (3) (b) might result in statements being received which would operate harshly against the employer.

4.16.9 Section 88 (7): parties as between whom statement admissible. The purpose of this subsection is to make provision for s. 88 statements substantially similar to the common law rule that an admission is only admissible against its maker. There are arguments for and against the

¹⁶ *Maxwell v. Inland Revenue Commissioners* [1959] N.Z.L.R. 708; *MacLennan v. Hastings Transport Pty Ltd.* [1969] V.R. 376; *G. (A.) v. G. (T.)* [1970] 3 All E.R. 546; cf. *Edwards v. Brookes (Milk) Ltd.* [1963] 3 All E.R. 62; *Harris v. Macquarie Distributors Pty Ltd.* [1967] V.R. 257.

¹⁷ See below, para. 6.4.2.

¹⁸ *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.* [1900] 2 Ch. 1, at p. 15; *Triplex Safety Glass Co. Ltd v. Lancegaye Safety Glass (1934) Ltd* [1939] 2 K.B. 395. See *Golden* (1975).

rule. If A's employee says he sold goods to B, it is odd that this is admissible against A but not B. On the other hand, a different rule could operate harshly against B who would be deprived of the opportunity of cross-examining A, particularly if A's employee's statement were the sole or principal evidence against B. The rule creates a need for a direction which may sometimes be confusing to a jury and which may do little to stop the jury treating the admissions as evidence against parties other than the maker if it seems sensible to do so. But where, for example, several defendants each have interests of their own to serve, it might be unfair that the statements of one should be admissible against the others without their consent. Another reason offered for the common law rule is the possibility, perhaps remote, that a party might seek to gain an unfair advantage by joining a friend as defendant or co-defendant.¹⁹ On balance we think that the principal underlying the common law rule should be applied to s. 88 statements.

4.17 SECTION 89: STATEMENT NOT OBJECTED TO

4.17.1 Section 89: purpose. Section 89 (1) (a) provides that where objection is not made to the admission of a statement in a civil legal proceeding, the statement is admissible unless the court otherwise directs. Section 89 (1) (b) provides that where, in a civil legal proceeding, objection is made to the admission of an out-of-court statement by one party but not another, the court may admit the statement against the party who does not object, whether or not it admits it against the party who does object. It is common in practice for hearsay evidence to be admitted if neither party objects.¹ The correctness of this is doubtful;² its utility is beyond argument. For this reason we propose s. 89. But there are instances of incompetent legal advisers and cases where a party has no legal adviser; to prevent injustice arising in these cases s. 89 gives the judge a discretion not to admit the evidence. In this way two principles are vindicated: that the parties should have reasonable liberty as to how their affairs should be settled, and that the court must have an overriding power to see that its processes are not abused. Section 89 (2) provides that Part VI does not affect the law and practice in relation to the admission in a criminal legal proceeding of an out-of-court statement where objection is not made. It may be that the rules of admissibility differ as between civil and criminal cases, and we do not wish to derogate from an accused person's rights by altering the latter, particularly as they may affect the possibility of an appeal.³

¹⁹ Phipson (1976), para. 718.

¹ See above, para. 1.2.4.

² See above, para. 1.2.4, n. 19. Even if the evidence is admissible for some purposes, it may not be for all: *McLennan v. Taylor* (1966) 85 W.N. (Pt 1) (N.S.W.) 525, at pp. 528-9, *per* Walsh J.A. It has been said that in criminal cases hearsay should be excluded even if not objected to: *Collins v. Morgan* (Tas. Sup. Ct, 17/8/72, unrep.); see [1972] A.L.M.D. 4544. The obscurity of the law is another reason for proposing s. 89.

³ See Watson and Purnell (1971), paras 1526 and 1570: an unrepresented accused person who does not object may still appeal against the admission of inadmissible evidence, and a represented accused person may do so in some circumstances.

4.18 SECTION 90: POSTAL OR OTHER MARK

4.18.1 Section 90: general. Section 90 provides that where in the course of a business a person receives from a second person a message, package or parcel for delivery or transmission, any statement made on or in it by the first in the course of delivery or transmission is admissible as evidence of any fact asserted in it.

4.18.2 Section 90 and the common law. There are old cases¹ in which postmarks were admitted as evidence of the date on which a letter passed through the post office. Since *Myers v. Director of Public Prosecutions*² it is clear that these statements are hearsay, and no exception seems available to make them admissible. The business records exceptions do not meet the problem since the postmark is not made as part of the records of the post office. Section 90 is intended to meet the problem of postmarks, and also of writings on telegrams and receipts. Section 90 applies not only to government postal agencies but private courier and delivery organizations.

¹ E.g., *Canning's Case* (1754) 19 St.Tr. 283, at p. 370; see also Wigmore, para. 2152; *R. v. Kelly* (1975) 24 F.L.R. 441, at pp. 448-9.

² [1965] A.C. 1001.

**PART V.—NOTES ON BILL: PART VI, DIVISION 4.—SECTIONS
91-93: BUSINESS RECORDS**

5.1 SECTION 91: ADMISSIBILITY GENERALLY

5.1.1 Section 91: general. Sections 91-93 embody our proposals for business records exceptions as recommended and explained in our Report on Evidence (Business Records),¹ and as enacted in the Evidence (Amendment) Act, 1976. Section 91 is substantially the same as the Evidence Act, 1898, s. 14CE, enacted in 1976. However, s. 14CE (2) is to be found in s. 60 of the Bill, and s. 14CE (3) is to be found in s. 66. As far as we are aware this legislation has worked satisfactorily. Indeed steps have been taken to have it adopted in federal jurisdictions. We do not think it calls for any major change. Some provisions have been extended to apply more generally.² Section 91 (5) is new. Its purpose is the same as ss. 73 (4)-(5) and 88 (5).³

5.1.2 Notion of “statement” in Division 4. It should be noted that Division 4 is concerned with statements just as Division 3 is; but they are statements of a somewhat different kind. Division 4 is concerned with business records. A business record is often the last link in a chain—e.g., a statement reproducing or derived from a chain of statements made by qualified persons. But in Division 3 “statement” refers to the utterance of a person with personal knowledge of the fact asserted. In Division 3 “statement” refers to what is at the beginning of the chain, while in Division 4 it refers to what is at the end of the chain. The reason for the difference is that a business record is admitted because it is part of an essentially reliable system of collecting, recording and transmitting information. Statements admitted under Division 3 are not necessarily part of any system of this kind; the inquirer after truth will seek to get back to the best possible source—to the statement of a person who is a witness, or in respect of whom there exists justification for not calling him.

¹ L.R.C. 17, ss. 14CB-14CE; paras 27-37, 47-63; Appendix B.

² See paras 6.1.1-6.13.1.

³ See above, paras 4.1.16-4.1.17 and 4.16.1.

5.2 SECTION 92: RESTRICTIONS ON ADMISSIBILITY UNDER SECTION 91: GENERAL

5.2.1 Section 92: general. In substance, s. 92 (1) and (3) is s. 14CF of the Evidence Act, 1898. The only changes have two purposes. One is to make it clear that the persons whose "contemplation" of legal proceedings is relevant include both the maker of a s. 91 statement and a person by or on behalf of whom the statement was induced or obtained. The other is to make it plain that s. 92 applies when a legal proceeding should reasonably have been contemplated as well as where it was actually contemplated.¹ Section 92 (2) is the same purpose as s. 75 (2).²

¹ Cf. s. 75; see above, paras 4.3.1–4.3.8.

² See above, para. 4.3.4.

5.3 SECTION 93: RESTRICTIONS ON ADMISSIBILITY UNDER SECTION 91: CRIMINAL PROCEEDINGS

5.3.1 Section 93: general. In substance, this is s. 14CG of the Evidence Act, 1898. The only changes are parallel to the provisions in s. 62 concerning justification for not calling a witness. The purpose of these changes has been explained.¹

¹ See above, paras 2.4.1–2.4.18.

**PART VI.—NOTES ON BILL: PART VI, DIVISION 5.—SECTIONS
94–106**

6.1 SECTION 94: ABSENCE OF RECORD

6.1.1 Section 94: general. One problem in relation to the scope of the hearsay rule at common law is whether it covers “negative hearsay”. If it is the universal practice of a firm to record certain facts, and a record of fact X does not exist, is that evidence of the non-existence of X? So far as the point has been considered the courts have differed on the issue.¹ The Evidence Act, 1898, s. 14CH, followed various American codes in providing for the admissibility of the absence of an entry in business records as evidence of the non-occurrence of an event; and s. 94 of the Bill follows s. 14CH. Wigmore said of this kind of exception: “The psychology of it is the same as that of testimony on the stand by a person who denies that a sound took place in his presence because he heard no such sound.”² The reasoning is commonly adopted where hearsay is not involved. If unsuccessful inquiry is made in Birmingham for “Samuel Knight, Market-place, Birmingham”, that is evidence that a bill of exchange which purports to have been accepted by Knight is forged;³ if the accused is not seen among a mob in a riot, that is evidence he was not there.⁴ Indeed, in *R. v. Brannan* hearsay evidence of this kind was admitted, namely, the evidence of a clerk in a firm to the effect that he knew of no customer called John Weston and the other clerks had told him they knew of none. Park J. said: “It would be highly inconvenient to trade, if it were held to be necessary to call all the clerks in a house of business to prove such a negative.”⁵ Although this kind of negative hearsay will not be admissible under s. 94, so far as it is first-hand it would be admissible under s. 73 in conjunction with s. 62, and so far as it is not so admissible it might be admitted under s. 74.

6.1.2 Section 94 compared with s. 14CH. Section 94 of the Bill is different in one respect from the Evidence Act, 1898, s. 14CH. Section 14CH applies where the happening of an event is in question; s. 94 applies also where the existence of a fact is in question.

¹ Compare the dicta opposing admissibility of Owen J., with whom Richardson J. agreed, with those of Brereton J. in *Commissioner for Motor Transport v. Collier-Moat Ltd* (1960) 60 S.R. (N.S.W.) 238. Owen J.’s view is supported by *R. v. Hally* [1962] Qd.R. 214, and denied by *S. v. Becker* 1968 (1) S.A. 18.

² Para. 1531.

³ *R. v. King* (1832) 5 C. & P. 123; 172 E.R. 905.

⁴ *Maskall’s Trial* (1780) 21 How.St.Tr. 653, at p. 681. See Wigmore, para. 664.

⁵ (1834) 6 C. & P. 326, at p. 327; 172 E.R. 1261, at p. 1262.

6.2 SECTION 95: WEIGHT OF EVIDENCE

6.2.1 Section 95: weight of evidence. This is an extension of the policy underlying the Evidence Act, 1898, s. 14C1, to all hearsay evidence admitted under the proposed Part VI. The provision, directing the court's attention to factors affecting the weight of hearsay evidence, might be thought superfluous. The trier of fact is generally regarded as being capable of making its own judgment as to weight in the light of its common sense and the particular facts of the case, for though in difficult cases the court may give directions as a guide, few of the rules of evidence are rules for the estimation of weight. The justification for such a provision, which has appeared in other Anglo-Australia statutes reforming hearsay,¹ is that the novelty of our proposals and the admission for the first time of large quantities of hearsay evidence pose a problem for our courts and our practitioners with which they have not had to deal before. Although much hearsay evidence has been admitted under the existing exceptions it is usually evidence that is fairly clearly reliable. This tends to be less true the more hearsay is admitted. Section 95 is the kind of provision which might cease to be necessary when the courts and other tribunals which apply the rules of evidence, and the practising profession, have had sufficient experience of the new law, and it might therefore be excluded from a future codification.² This section is also a means of bringing out some of the policy considerations which have influenced the drafting of the legislation.

6.2.2 Section 95 (a): availability of evidence of greater weight. Section 95 (a) provides that a factor which may be relevant to the weight of a statement tendered under the Bill may be whether there is evidence of greater weight reasonably available to be tendered that was not tendered. The Bill rejects the best evidence rule as a test of admissibility, but acknowledges that the policy considerations underlying it are relevant to weight. If hearsay evidence is tendered when non-hearsay was reasonably available, this may suggest that the non-hearsay evidence would have been unfavourable to the party not tendering it, and if the non-hearsay evidence seems likely to be more reliable, this is a ground for not placing weight on the hearsay evidence.

6.2.3 Section 95 (b): incentive for declarant to conceal or misrepresent. Section 95 (b) provides that one factor which may be relevant to the weight of a statement is the presence or absence of any incentive for any person concerned in the making of the statement, or dealing with the statement, to conceal or misrepresent any relevant matter in his statement. This is based on the Evidence Act, 1898, s. 14C1 (a) (iii), but is made general. Its purpose is plain. It should be noted with respect to s. 95 (b) that "any relevant matter" is intended to include, so far as statements of fact are concerned, the occurrence or existence of the fact stated, and, so far as statements of opinion are concerned, not only the opinion but also the occurrence or existence of the facts on which the opinion was based.

¹ E.g., Civil Evidence Act 1968 (U.K.), s. 6 (3); Evidence Ordinance 1971 (A.C.T.), ss. 32, 44.

² See generally L.R.C. 17, Appendix B, paras 49-55.

That is, the incentive to misrepresent facts is relevant to the weight of a statement, whether the statement narrates the facts or contains an opinion based on the facts. For the meaning of "dealing", see s. 60 (4).

6.2.4 Section 95 (c): recency of any matter dealt with in statement. Section 95 (c) provides that one factor which may be relevant to the weight of a statement is the recency or otherwise at the time when any person concerned in the making of the statement was so concerned, of any relevant matter dealt with in it. This is based on the Evidence Act, 1898, s. 14C1 (a) (i), but is made general. Its purpose is plain. The meaning of "any relevant matter" was discussed above.³

6.2.5 Section 95 (d): reliability of device or devices producing information which statement reproduces or is derived from. Section 95 (d) provides that one factor relevant to weight is the reliability of the device or devices producing information which the statement reproduces or is derived from. This corresponds with the Evidence Act, 1898, s. 14C1 (b). Section 91 (4) (b) (ii) makes admissible a statement which reproduces or is derived from information gained from one or more devices designed for and used for the purpose of a business in or for recording, measuring, counting or identifying information. Plainly the reliability of devices such as computers is vital in estimating the weight of statements based on information derived from them.

6.2.6 Section 95 (e): reliability of means of reproduction or derivation where statement reproduces or is derived from information. Section 95 (e) provides that one factor relevant to weight may be the reliability of the means of reproduction or derivation where the statement admitted wholly or in part reproduces or is derived from information. This is similar to the Evidence Act, 1898, s. 14C1 (c). Section 95 (e) relates to s. 91 (4) (b), which makes admissible a statement reproducing or deriving from certain kinds of information, and also to the reproduction of remote records. The reliability of the means of reproduction or derivation is plainly of cardinal importance in assessing the accuracy of the statement.

6.2.7 Section 95 (f): reliability of system of keeping records from which the statement is produced. Section 95 (f) provides that one factor relevant to weight may be the reliability of any system of keeping records from which the statement is produced. Documentary statements may be kept as part of a system of records; the reliability of such statements, as well as inferences from "negative hearsay" statements admitted under s. 94,⁴ may be affected by the orderliness with which records are kept.

³ See above, para. 6.2.3.

⁴ See above, paras 6.1.1–6.1.2.

6.2.8. Section 95 (g): extent to which reputation is tested by discussion and widely accepted. Section 95 (g) provides that two factors which may be relevant to the weight of a statement reporting a reputation are the extent to which that reputation is tested by discussion and the extent to which it is widely accepted. The essential reason for treating evidence of reputation as admissible in the rare instances where it is⁵ is that reputation is a matter of consuming interest and a matter likely to have been discussed again and again, with doubts overcome or confirmed. To the extent that a man's circle has not discussed him or his reputation much, to the extent that his circle is small, to the extent that there are dissenters within the circle from what the reputation suggests, a court should be cautious in acting on the reputation.

6.2.9 Section 95 (h): importance to persons making and acting on published compilations of their accuracy, and extent of publication. Section 95 (h) provides that two factors which may be relevant to the weight of a statement in a published compilation admitted under s. 80⁶ are the importance to persons making and acting on it of its being accurate, and the extent of its publication. Both factors plainly affect the care with which compilations are made, and hence their accuracy.

6.2.10 Section 95 (i): importance of statements on goods being accurate. Section 95 (i) provides that in the case of s. 81 statements admissible because they are made on goods in the course of their manufacture, packaging or distribution,⁷ one factor which may be relevant to weight is the importance to the manufacturer or distributor and to persons buying or dealing in the goods of the statement being accurate. Plainly this affects the care with which they are made.

6.2.11 Section 95 (j): whether statements on goods, land or vehicles are made in conformity with any custom, usage or legal requirement. Section 95 (j) applies to statements admitted under s. 81 because they are made on goods in the course of their manufacture, packaging or distribution,⁸ and to statements admitted under s. 82 because they relate to a business and are displayed in the course of a business on land or vehicles.⁹ Section 95 (j) provides that one factor which may be relevant to weight is whether the statements are made in conformity with any custom or usage or any requirement of law. These matters will obviously tend to affect accuracy.

6.2.12 Section 95 (k): incentive to omit recording event or fact. Section 95 (k) applies to "negative hearsay" admissible under s. 94.¹⁰ Section 95 (k) provides that one factor relevant to the weight of such evidence may be whether any person concerned with the system of recording the happening of events or the existence of facts had any incentive to omit recording the happening of the event or the existence of the fact in question. The provision is similar to the Evidence Act, 1898, s. 14CJ.

⁵ See s. 79.

⁶ See above, paras 4.8.1–4.8.5.

⁷ See above, para. 4.9.1.

⁸ *Ibid.*

⁹ See above, para. 4.10.1.

¹⁰ See above, paras 6.1.1–6.1.2.

6.3 SECTION 96: CREDIBILITY

6.3.1 Section 96: background. At common law the extent to which there could be challenge to the credibility of a declarant whose statement was admissible under one of the hearsay exceptions depending on his death varied. Stephen's assertion that the declarant was in the same position as a witness who denied what was put to him in cross-examination¹ is to some extent supportable for dying declarations by cases on competence², but in a case involving a declaration arguably made in the course of duty Lord Campbell remarked that what the declarant "may babble during the rest of his life on the subject cannot be admitted in evidence, contradicting, as it does here, what he has before written".³ Section 96 permits the admission of evidence respecting the credibility of the declarant, any person dealing with the statement, or a person concerned in the making of a statement, who is not called as a witness, in the same way as if he had been called as a witness; s. 96 (6) qualifies this by permitting, with the court's leave, further evidence of collateral matters.

6.3.2 Section 96 (1)–(3): non-witnesses. These subsections correspond to the Evidence Act, 1898, s. 14CK (1), with a change to take account of its intended wider application.⁴ It establishes the circumstances to which s. 96 applies—instances where a statement is admitted under Division 3 but the declarant, or a person dealing with the statement, is not called as a witness; and instances where a statement is admitted under s. 91, and a person concerned in the making of the statement is not called

6.3.3. Section 96 (4) and (5): credibility and inconsistent statements. These subsections are unchanged from the Evidence Act, 1898, s. 14CK (2) and (3). They permit the admission of evidence to destroy credibility in the same way as if the declarant, or a person who heard, saw or otherwise perceived him make the statement, had been called, and they permit proof of previous inconsistent statements.

6.3.4 Section 96 (6): final answers. This subsection, which differs from the Evidence Act, 1898, s. 14CK (4), provides that the credibility of the declarant, or a person who heard, saw or otherwise perceived him make the statement, cannot be attacked by evidence which, had he been called as a witness and denied the matter in cross-examination, would have been inadmissible at the instance of the cross-examiner unless the court gives leave to the contrary. Section 14 CK(4) follows the Civil Evidence Act 1968 (U.K.), s. 7; s. 96 (6) follows the English Criminal Law Revision Committee's proposal that such evidence should be admissible

¹ Stephen (1893), Art. 135.

² *R. v. Drummond* (1784) 1 Leach 337; 168 E.R. 27; *R. v. Pike* (1829) 3 C. & P. 598; 172 E.R. 562.

³ *Stapylton v. Clough* (1853) 23 L.J.Q.B. 5.

⁴ See L.R.C. 17, Appendix B, paras 56–8.

subject to the leave of the court.⁵ The latter view is justified by the fact that if it had been possible to call the declarant, or a person who heard, saw or otherwise perceived him make the statement, and discreditable conduct not resulting in a conviction had been put to him, he might have admitted it, or his denial, though not capable of contradiction, might have been disbelieved. On the other hand, to admit discreditable conduct which could have been denied, perhaps convincingly, by the man alleged to have been responsible for it might be unfair to him and unduly lengthen the trial. The matter perhaps is best left to the discretion of the court since the circumstances of particular cases are all-important.⁶

6.4 SECTION 97: FACTS RELEVANT TO ADMISSIBILITY

6.4.1 Section 97 (1): documents and admissibility. This corresponds to the Evidence Act, 1898, s. 14CL, with the substitution of "the statement or of any document in which the statement is contained" for "the document" to make it appropriate to the section's proposed new application outside the area of documentary evidence.¹ The words, "or of any other statement made on the occasion when the statement was made," are added: the form or content of this statement may be as significant as the form or content of the statement the admissibility of which is in question.

6.4.2 Section 97 (2): facts relevant to admissibility—general. Section 97 (2) provides that where the admissibility under Part VI of any statement is in question, that statement and any statement made by the same declarant on the same occasion shall, on questions of admissibility, be admissible evidence of the fact asserted. This is a new proposal. It is an attempt to overcome the problem of statements the admissibility of which depends on proof of some antecedent fact, and which assert that fact. On grounds of necessity it is desirable that to some extent such statements be allowed to hoist themselves up by their own bootstraps if in fact a bare assertion of the antecedent fact seems reliable. The effect of s. 97 (2) corresponds to a recommendation of the California Law Revision Commission² which does not appear to have been embodied in the final California Code (1965). We think the probable operation of s. 97 (2) in relation to s. 73, for example, will be as follows. Section 73 imposes broadly two kinds of requirement before it renders hearsay statements admissible. The first is that the declarant must be called as a witness, or there must be some justification—death, illness and so on—for him not being called. The second is that of s. 73 (1) (a) (i)—that the maker of the statement admitted should have personal knowledge of the matters dealt with in the statement. To require independent proof of these antecedent facts—particularly those relating to the issue of the

⁵ 11th Report (1972), para. 263.

⁶ See also Model Code (1942), r. 531; Uniform Rules (1955), r. 65; California Code (1965), s. 1202; Federal Rules (1975), r. 806.

¹ See L.R.C. 17, Appendix B, para. 59.

² California Law Revision Commission, Vol. 4, p. 470.

declarant's personal knowledge—might make the section nugatory in many instances. Section 97 (2) provides that a court in considering whether any fact antecedent to the admissibility of a statement under this Act is proved, may take into account any assertion as to the fact which is part of the statement, or of another statement made on that occasion by the declarant. Hence if the statement asserts that it was made on the basis of personal knowledge this is admissible evidence that it was. The same applies to any other fact relevant to admissibility. A statement "I am ill and I saw X and Y" might or might not be of little *weight* on the issue whether s. 62 (2) (a) is satisfied, but it ought at least be considered on that question. And where the assertion of a fact antecedent to admissibility has not been made with litigation in contemplation, it may be very weighty.³

6.4.3 Section 97 (3): facts relevant to admissibility to be determined by court. Section 97 (3) provides that any matter of fact relevant to the admissibility of a statement made under Part VI shall be determined by the court. This preserves the general rule at common law for determining issues of admissibility. Section 97 (3) goes on to give the judge a discretion to determine questions affecting admissibility in the absence of the jury. A *voir dire* is held in the absence of the jury for determining the admissibility of confessional evidence in criminal cases, but it is not always so held in determining the admissibility of evidence. It has been suggested that the competency of an expert witness must be determined before the jury.⁴ It has been traditionally thought, that the capacity of a child to give sworn evidence must be determined in the presence of the jury,⁵ though Gibbs J. has recently attacked this.⁶ It seems desirable to give the judge a discretion as to the procedure by which he determines the admissibility of statements under Part VI. There may be a saving of time, and other advantages, if the jury is present.

6.4.4 Section 97 (4): weight. Section 97 (4) provides that the jury, and if there is no jury, the court, shall determine the weight of any statement admitted under Part VI, and facts relevant to weight. This preserves the general rule at common law for determining issues of weight.

6.4.5 Section 97 (5): evidence relating to admissibility. Section 97 (5) permits the court to receive and act on any material, whether admissible under the general law of evidence or not, in determining the existence of any statement under Part VI. Section 97 (5) follows Federal Rules (1975), r. 1101 (d) (1). It avoids, for example, the need to call every person who took part in an attempt to subpoena a witness to show that that witness is unavailable. Though the judge is not, in considering whether facts exist which justify the admission of evidence on the issues in the case, to be bound by the rules of evidence, he will be able to insist on these rules, if he wishes.

³ Williams (1973b), pp. 144–5. Some obscure aspects of the common law are discussed by Maguire and Epstein (1926).

⁴ *Ex p. Whitelock; Re Mackenzie* [1971] 2 N.S.W.L.R. 534, at p. 539.

⁵ *R. v. Reynolds* [1950] 1 K.B. 606.

⁶ *Demirok v. R.* (1977) 51 A.L.J.R. 473, at p. 478.

6.4.6 Section 97 (6): evidence on information and belief. Section 97 (6) provides that without affecting the generality of s. 97 (5), evidence relevant to questions of admissibility under Part VI may be given on information and belief. This is an extension of the Evidence Act, 1898, s. 14CM.¹

¹ See L.R.C. 17, Appendix B, paras 60 and 61.

6.5 SECTION 98: PROOF OF STATEMENT IN A DOCUMENT

6.5.1 Section 98: general. Section 98 makes provision for the proof of documentary statements in various ways. It corresponds to the Evidence Act, 1898, s. 14CN.¹ Section 98 (2) is new. It provides that s. 98 (1) does not prevent proof of a statement in a document by other lawful means; the general law of secondary evidence, so far as it permits admissibility, thus applies. Section 98 (4) is made subject to s. 66 (2), so that the present law of secondary evidence is not restricted.

¹ See L.R.C. 17, Appendix B, paras 62–8.

6.6 SECTION 99: AUTHENTICATION

6.6.1 Section 99: general. Section 99 provides that for the purpose of Part VI, a document, a copy of a document, or a copy of part of a document may be authenticated in such manner as may be prescribed or as the court approves. Section 99 corresponds to the Evidence Act, 1898, s. 14CO.¹ This enables strict proof of the authenticity of a document, or a copy of or an extract from a document to be dispensed with if the court wishes or if rules of court or regulations so provide.

¹ See L.R.C. 17, Appendix B, para. 69.

6.7 SECTION 100: REJECTION FOR UNFAIRNESS, ETC.

6.7.1 Section 100: general. Section 100 (1) lists four groups of circumstances in which the court may reject evidence which is otherwise admissible under Part VI. Section 100 (1) (a) provides that it may be rejected if its weight is too slight to justify its admission. Section 100 (1) (b) provides that it may be rejected if its utility is outweighed by its tendency to prolong the proceeding unduly, to operate unfairly against any party other than the person tendering it, or to mislead the jury (if any). Section 100 (1) (c) provides that the evidence may be rejected if its tender is an abuse of the process of the court. Section 100 (1) (d) provides that the evidence may be rejected if it would unfairly surprise a party who has not had reasonable ground to anticipate its tender. (This will encourage one side to give notice to the other of hearsay evidence it proposes to tender. It will help quiet the fear that expanding the admissibility of hearsay evidence will produce unfairness through surprise unless there is a compulsory notice procedure.¹) The tailpiece to s. 100 (1) provides that

¹ See below, paras 6.12.2–6.12.10.

where evidence falls within one of paragraphs (a)–(d), the court may not only reject it, but may also, if it has been received, exclude it, or may admit it in relation to one party but not another, or may admit it on such terms and conditions as it thinks fit. The power to reject already admitted evidence is important because it may not be until well after the time of admission, in the light of later evidence, that the court realizes that s. 100 (1) (a)–(d) is satisfied. Another reason is that it reduces the need to interrupt a witness, e.g., a witness describing an accident where statements were made by bystanders, in order to determine each objection before the evidence goes in. The power to admit on terms may be important, e.g., where evidence has caused surprise. The terms imposed may be that adjournment should take place, the costs to be paid by the party tendering the evidence, in order to enable the other party to check the evidence or tender rebutting evidence. Section 100 (2) provides that the court, in exercising its discretion under s. 100 (1) shall have regard to all relevant matters, including the nature and importance of the evidence and the nature and importance of the question on which it is tendered. Section 100 corresponds to the Evidence Act, 1898, s. 14CP.² It has a counterpart in the California Code (1965), s. 352. In our view, it is important to have such a provision. In civil non-jury cases there is some doubt whether there is a discretion to exclude otherwise admissible evidence,³ and this doubt has been expressed more particularly in the context of the Evidence Act 1938 (U.K.).⁴ Whatever the need for such a discretion under the present law, the need is much greater as the admissibility of hearsay evidence widens.

6.8 SECTION 101: WITHHOLDING DOCUMENT FROM JURY

6.8.1 Section 101: general. We think that sometimes jurymen cannot help attributing more weight to a document or other exhibit taken with them into the jury room than oral testimony heard some days before which they may not be able to remember fully. The document may be admitted in substitution for unavailable oral evidence; the transcript of other oral evidence is not admitted; should the document be allowed to have such greater weight? Some documents probably should. We have made provision in s. 101, which corresponds with the Evidence Act, 1898, s. 14CQ, for the judge to have a power to direct whether or not a document may be withheld in whole or in part from the jury during their deliberations.¹ This includes the power to direct that parts of the document should be covered up. Consideration could be given to whether, in due course, this kind of provision ought to be made general; and to whether the jury should be allowed more than at present, e.g., the transcript. But these general issues are not appropriately dealt with in a Hearsay Report.

² See L.R.C. 17, Appendix B, paras 70–82.

³ It has been doubted whether the discretion exists in a civil jury trial: *Pallante v. Stadiums Pty Ltd (No. 2)* [1976] V.R. 363, at p. 368.

⁴ *Ozzard-Low v. Ozzard-Low* [1953] P. 272; cf. *Infields, Ltd v. Rosen & Sons* [1939] 1 All E.R. 121.

¹ See L.R.C. 17, Appendix B, paras 83–5; *R. v. Williams* (New South Wales Court of Appeal, 23 September 1977, unrep.).

6.9 SECTION 102: CORROBORATION

6.9.1 Section 102: general. The purpose of s. 102 (1) is to provide that a statement admissible under Part VI shall not be treated as corroboration of evidence given by a person who made or dealt with the statement (see s. 60 (4)). Section 102 (1) is based on the Evidence Act, 1898, s. 14CR, though there are changes to make it extend the full width of Part VI.¹ In principle it is quite unnecessary, because corroborative evidence must always be independent of the source of the evidence which requires corroboration; but the section is an attempt to ensure that this fundamental principle of corroboration is not forgotten in this context, as it often has been, at least at first instance, in others. Section 102 (2) provides in effect that the corroboration rules presently applying to witnesses apply also to the makers of out-of-court statements. It would be strange if sworn evidence given in court were from the point of view of corroboration treated more suspiciously than evidence tendered in the form of out-of-court statements.

¹ See L.R.C. 17, Appendix B, para. 86.

6.10 SECTION 103: CRIMINAL PROCEEDINGS: REJECTION OF EVIDENCE

6.10.1 Section 103: general. Section 103 provides that Part VI does not affect the power of a court in a criminal legal proceeding to reject evidence which, if admitted, would operate unfairly against the defendant. Section 103 corresponds to the Evidence Act, 1898, s. 14cs. To a large extent it overlaps with the likely operation of the proposed s. 100 in criminal cases, but not entirely. It is intended to ensure that no change in the common law discretion in criminal cases is made adversely to the accused.¹ The discretion to exclude unfairly obtained evidence is vague and ill-settled, but it is capable of further development and any consideration of it should be in a wider context than that of hearsay evidence.

¹ See L.R.C. 17, Appendix B, para. 87.

6.11 SECTION 104: TIME FOR ORDER

6.11.1 Section 104: time for order. Section 104 provides that the court may make orders for the admission of evidence under Part VI, or exclusion of evidence already admitted under Part VI, at any stage of a legal proceeding. Section 104 corresponds to the Evidence Act, 1898, s. 14CT. One use of this section may be to enable an application to be made in appropriate cases for a ruling on the admissibility of a statement before the actual hearing so that unnecessary expense in preparation may be avoided.

6.12 SECTION 105: RULES AND REGULATIONS

6.12.1 Section 105: general. Section 105 confers power to make regulations and rules. It corresponds, with modifications to extend its scope, to the Evidence Act, 1898, s. 14CU.¹

6.12.2 Section 105: notice procedure—England. This section raises one fundamental issue which we discuss in detail at this point. In England a new procedure has been adopted in respect of hearsay evidence in the Civil Evidence Act 1968 (U.K.).² It is as follows: Section 2 provides for the admissibility of first-hand oral and written hearsay, s. 4 for statements in records and s. 5 for documentary statements produced by computer. The hearsay statements rendered admissible by ss. 2, 4 and 5 cannot be admitted unless:

- (a) the party desiring admission gives a notice of his desire within twenty-one days of the proceeding being set down for trial or equivalent step being taken, or such other period as the court may specify; and
- (b) either no counter-notice requiring the declarant or other person concerned to be called as a witness is given, or the persons concerned are called as witnesses, or are unavailable to give evidence.

R.S.C. Ord. 38, r. 29, gives the court discretion to admit the evidence notwithstanding non-compliance with the procedure. But *Ford v. Lewis*³ suggests that the discretion is a narrow one, only to be exercised where there is inadvertence or impossibility. A scheme similar to that of the Civil Evidence Act 1968 (U.K.) has been proposed by the English Criminal Law Revision Committee:⁴ at trials on indictment hearsay evidence should not be admitted without notice being given of an intention to offer it within seven days of the close of committal proceedings.

6.12.3 Section 105: “undisputed” facts. We have carefully considered this notice procedure; but we do not recommend its adoption in New South Wales, at least at this moment in a compulsory form. The English Law Reform Committee Report on which the Civil Evidence Act was

¹ See L.R.C. 17, Appendix B, paras 89–94.

² A much vaguer procedure has been proposed by the Law Reform Commission of Canada; cl. 29 (4) of their draft Code provides: “A statement is not admissible under this section unless the party seeking to give it in evidence has within a reasonable time given notice to every other party of his intention to do so with particulars of the statement and the reason why the person is unavailable as a witness.” The Ghana Decree, 1975, s. 118, is to a like effect.

³ [1971] 1 W.L.R. 623. See also *Rasool v. West Midlands Transport Executive* [1974] 3 All E.R. 638.

⁴ 11th Report (1972), para. 240; see also the Criminal Law and Penal Methods Reform Committee of South Australia (1975), ch. 8, para. 3.7.

based suggested expressly and implicitly that a number of advantages would flow from it. One was that a party should be entitled to cross-examine an available witness when a "fact is really in dispute", but the notice procedure should encourage hearsay to be admitted without needing to call the witness in other cases.⁵ Yet to us it seems that the class of witnesses whose calling an opponent would be prepared to forego is narrow indeed. A party will dispute a fact if he knows it to be false or has reasonable grounds for believing it to be so. Whether or not he knows or believes it to be false, he may also dispute it if it is in his interest to contend that it is false and he has some prospect of doing so successfully. Even if he cannot successfully contend that it is false, it may be in his interest to put his opponent to proof of it in order to cross-examine the witnesses called to prove it, or gain an advantage from the documents tendered to prove it, or gain some like procedural or tactical advantage. Finally, a party may dispute a fact simply to cause trouble to his opponent without any legitimate purpose; only this last category of facts can be classed as facts not really in dispute, and the introduction of a compulsory notice and counter-notice procedure is not justified by it alone. It is true that in some of the earlier instances we have mentioned a party might cease to dispute a fact in the face of reliable hearsay evidence of that fact, but in our view this would not occur sufficiently often to justify the compulsory notice and counter-notice procedure.

6.12.4 Section 105: costs. A second reason for the notice and counter-notice procedure is that it would tend to save the costs of calling a witness to prove a fact. Against those costs should be balanced the costs of the special attention demanded by the procedure, including possibly the costs of obtaining counsel's advice.

6.12.5 Section 105: proof of antecedent facts. Thirdly, the Law Reform Committee state that:

"If, as we recommend, the categories of admissible statements are to be extended to oral statements and to written statements not authenticated in writing by the maker, we think it reasonable that the adverse party should be afforded an opportunity to make his own enquiries as to the unavailability of the maker, and also as to the authenticity of the statement, before he is confronted with it at the trial."⁶

But though we do not oppose the procedure simply because it interferes with the traditional rule that evidence need not generally be disclosed before trial, on balance we have tentatively concluded that the advantages of the procedure are outweighed by its disadvantages. Issues of unavailability will have to be proved, perhaps with the aid of s. 97; and we do not believe that a party will in fact rely on hearsay evidence to prove disputed facts if it is at all possible for him to get the declarant to court.

⁵ 13th Report (1966), para. 20.

⁶ 13th Report (1966), para. 22.

6.12.6 Section 105: surprise. Fourthly, the notice procedure tends to avoid unfair surprise. In our view some kinds of surprise are a positive virtue; the risk of unfair surprise operating is minimized by the fact that usually the kinds of evidence to be called by a party can be foreseen by his opponent. To the extent that unfairness arises, ss. 100 and 103 contain a power to exclude the evidence; and a possible remedy in many cases is for the court to adjourn the hearing until the opponent can answer the evidence, perhaps penalizing the responsible party in costs.⁷

6.12.7 Section 105: non-interruption of trial. Finally, the notice procedure is designed to ensure that questions of admissibility are determined, as far as possible, before the trial, so that the trial may flow smoothly without interruptions to debate admissibility, and so that the parties are made more fully aware of the strengths of each other's case with a view to prompting possible settlement. But in some cases the existing procedures of court will help achieve this; for example, in the Supreme Court, the court has the duty, in giving directions, to make "a thorough stock-taking relating to the issues in an action and the manner in which the evidence should be presented at a trial with a view to shortening the length of the trial and saving costs generally".⁸ Thus the Supreme Court Rules, Part 26, r. 4 (1), provides:

"The Court shall, where proceedings are before it for directions under this Part—

- (a) consider the preparations for the trial;
- (b) so far as possible, deal with all matters which may be dealt with on application to the Court before the trial;
- (c) give such directions for the conduct of the proceedings as appear best adapted for the just, quick and cheap disposal of the proceedings."

Further, we provide in s. 104 that orders may be made at any time, and this may promote settlement.

6.12.8 Section 105: difficulties of a compulsory notice procedure. Some further general comments may be made. We refer to our reasons for not adopting a notice procedure advanced in our Working Paper on Evidence (Business Records).⁹

"The preparation of a case for trial is a continuous process and often the desirability of tendering a business record would not become apparent until shortly before, or indeed, during the trial itself.

⁷ See s. 100 (2) and para. 6.7.1 above.

⁸ Supreme Court Practice (Eng.), para. 25.1.1.

⁹ Para. 199. Serious doubts have been expressed in England as to whether the Civil Evidence Act 1968 (U.K.) notice machinery has not turned out to be too cumbersome to work properly. See, for example, G. Williams, Justice Conference on 11th Report of Criminal Law Revision Committee, 10 February, 1973, pp. 39-40; Lewis Hawser, Q.C., *ibid.*, p. 46.

Equally those advising a party receiving a notice would often feel unable not to give a counter-notice within the specified time because of difficulty in anticipating what the course of the trial will be. A notice procedure seems to be particularly inappropriate to the many cases, for example, equity and commercial cases, which are heard quickly and without the set-piece formality the procedure seems to envisage."

Plainly the procedure would tend to increase the difficulties of preparing cases, because it is cumbersome in requiring the exchange of particular forms of document and because it would tend to require unusual skill to decide whether to issue a counter-notice in ignorance of what the other evidence in the case will be. There is a further danger that a party who must give notice of a hearsay statement may find that the other side's witnesses will tailor their case to meet it. In *Ford v. Lewis*¹⁰ the defendant did not give notice for this reason, and the Court of Appeal would not exercise its discretion to waive the breach. The conflict between avoiding surprise and avoiding manufacture is hard to reconcile.

6.12.9 Section 105: optional notice. In our view, a compulsory system of notice should not be introduced, at least at this stage. Prudence will dictate, however, that a party may wish to give notice to his opponent in some circumstances, and we therefore propose that power be given for rules of court to be made containing a procedure which a party may adopt if he thinks it sensible to do so. If a party gave advance notice of an intention to tender a statement without calling the declarant as a witness, the justification advanced for not calling him would be more easily checked and more likely to be believed, and therefore greater weight might be given to the hearsay evidence when it was admitted. One factor which might weigh with a party seeking to admit hearsay would be that if he failed to give a notice he might leave his opponent with grounds to seek an adjournment to investigate availability, and he might run the risk of having to pay the costs of this. The rules might provide that the notice should contain such one or more items as the party issuing it thinks fit. It might be appropriate only to give the name of the person said to be unavailable and not to specify the contents of his statement. In this way the orthodox position by which advance notice of evidence is not required is preserved without any special exception existing for hearsay. In crimes tried in proceedings on indictment the accused gets notice by committal proceedings, and it is the custom to inform him of evidence coming to light after committal proceedings; plainly he should not be surprised with this kind of evidence. Similarly parties in civil cases often ought not to be surprised with this kind of evidence. And there will be cases where the accused ought not to be allowed to surprise the prosecution with hearsay evidence not capable of being tested by cross-examination.¹¹ But under our proposals the court has a discretion to exclude it if it was unfair not to give notice. If the evidence itself is difficult to believe, it may be excluded on the ground that the weight of evidence is too slight to justify its admission under s. 100 (1) (a). If the

¹⁰ [1971] 1 W.L.R. 623.

¹¹ As has been recognized by Parliament in the context of alibis: Crimes Act, 1900, s. 405A.

reason given for not calling the declarant is not believed then the party tendering the evidence has not made out a case for admission. Rules of court are amenable to speedy change in the light of experience; legislation is not. It should be noted that the English Law Reform Committee preferred a system of rules made as rules, not as part of a statute, so that the rules could be altered speedily by the Rule Committee without returning to Parliament. We agree with their proposals in preference to the Act.¹² This has the further advantage that different rules can be made for different kinds of proceedings. What is appropriate for one jurisdiction may not be appropriate for others. In some types of proceedings a formal requirement of notice may never be desirable. What is the proper procedure for serious criminal trials may not be appropriate for summary offences or civil causes in the District Court. It may be, on the other hand, that experience will reveal a compulsory system of notice rules to be necessary; if so, they can be introduced speedily under the rule-making power provided. We have had to balance carefully the advantages and disadvantages of the English system; we think our recommendation is the best resolution of a difficult problem.

6.12.10 Section 105: notice procedure and the general law of evidence.

A further reason for not introducing a notice procedure at present, while leaving open the possibility of doing so later, is this. Our present proposals concern only the hearsay rule; yet in many respects hearsay reform is affected by other rules of evidence. One of these is the rule against a party impeaching his own witness. The English counter-notice procedure is compelled by the continued existence of this rule; for if the opponent of the party seeking admission of the hearsay statement is to attack the credibility of the declarant, he must not be in the position of having to call the declarant as a witness. If the rule against impeachment were abolished, then the opponent of the party tendering the hearsay statement could, on receipt of a notice announcing an intention to introduce the hearsay statement without calling the declarant as a witness, himself decide whether or not to call the witness.¹³ The kind of notice procedure to be introduced thus depends on the continued existence of the rule against impeachment. The introduction and amendment of a notice procedure is therefore better left to rules which can be changed quickly if the rule against impeachment is changed.

6.13 SECTION 106: POWER TO MAKE RULES OR REGULATIONS

6.13.1 Section 106: general. Section 106 confers on any authority with power to make rules or regulations regulating the practice and procedure of any court power to make rules or regulations with respect to Part VI. This corresponds to the Evidence Act, 1898, s. 14cv.¹

¹² Lord Diplock (1971); Law Reform Committee, 13th Report (1966), para. 24.

¹³ Waddell (1971), pp. 568–9; see Ghana Commentary (1975), p. 94.

¹ See L.R.C. 17, Appendix B, paras 95–96.

**PART VII.—NOTES ON PROPOSED BILL: SCH. 5:
AMENDMENTS TO CRIMES ACT, 1900**

7.1 CRIMES ACT, 1900: SECTION 339A: FALSE STATEMENTS

7.1.1 Crimes Act, 1900, s. 339A: general. It seems appropriate to establish penalties for telling lies in out-of-court statements intended for use under Part VI of the Evidence Act, 1898; and it seems appropriate that they should be approximately equivalent to those for perjury and like offences under the Crimes Act, 1900, Part VII. The maximum penalty for perjury is penal servitude for seven years (Crimes Act, 1900, s. 327). The maximum penalty for wilfully making false statements on oath where such offence is not perjury is five years (Crimes Act, 1900, s. 330). The latter seems appropriate for false out-of-court statements within the meaning of Part VI of the Evidence Act which do not fall within the remainder of Part VII of the Crimes Act but are made with intent that they be used in any legal proceeding. Section 339A so provides.

7.2 CRIMES ACT, 1900: SECTION 341 (4): LEAVE FOR PROSECUTION

7.2.1 Crimes Act, 1900, s. 341 (4): general. The Crimes Act, 1900, s. 341, imposes various requirements for the leave of a judge to be granted before a prosecution for perjury or a like offence can be brought. In our view the new offence we propose in s. 339A should be subject to a requirement of leave by a Supreme Court or District Court judge, and s. 341 (4) so provides. Part VI applies to proceedings other than court proceedings, and to statements which may not in fact have been used in the proceeding for which they were intended, and for these reasons we do not recommend following the exact language of s. 341 (1)–(3).

7.3 CRIMES ACT, 1900: SECTION 404: FORMAL ADMISSIONS

7.3.1 Crimes Act, 1900, s. 404: general. We have made proposals to widen the admissibility of formal admissions in criminal cases: see s. 86. As we explained earlier, s. 404 requires consequential amendment.¹

7.4 CRIMES ACT, 1900: SECTION 408: DYING DECLARATIONS

7.4.1 Crimes Act, 1900, s. 408: general. As we explained above,¹ the dying declarations exception to the hearsay rule is in various respects anomalous. In view of the proposals we make for much wider admissibility, the common law exception for dying declarations should be abolished, and s. 408, which modifies that exception, should be repealed.

¹ See above, para. 4.14.11.

PART VIII.—GENERAL CONSIDERATIONS

8.1 INTRODUCTION

8.1.1 General. In this Part of the Report we propose to attempt an answer to certain possible criticisms which may be made of our proposals, to explain certain points of doubt about what we have suggested, to justify certain omissions, to consider how far evidence at present admissible will be rendered inadmissible, and to discuss other issues related to hearsay.

8.2 EMPIRICAL RESEARCH

8.2.1 Doctrinal analysis and empirical research. A harsh critic of the California Code (1965) and of the Law Revision Commission which produced it has written:¹

“We have very little empirical evidence or other systematic study of the operations of the rules of evidence in trial courts. Though one can learn much by reading appellate opinions, even a man who had spent as much time in this activity as Wigmore was prepared to concede that one could not tell much about the importance of a rule from the number of times it was raised on appeal. As a result of this lack of hard data, much of the debate over the rules involves simply an exchange of anecdotes rather than any intelligent discussion on the effect of the rules in the trial of cases . . .

Perhaps the most significant decision the Law Revision Commission made . . . was to confine its research to simple doctrinal analysis. In deciding the existing state of the law the Commission and its various consultants relied entirely upon appellate reports and the various compilations of and commentaries upon the work product of appellate judges. At no time did the Commission attempt to determine whether the doctrines they were studying bore any relationship to the trial of cases, and if so what effect the rules had upon the objectives of a fair system of justice . . .

One should, perhaps keep in mind two somewhat different kinds of empiricism. One is the question of whether the suppositions of evidentiary doctrine with regard to the conduct of men in and out of court can be supported by the theories and investigation of other disciplines such as psychology . . . The other kind of empirical inquiry is whether or not the rules, regardless of soundness on other grounds, are susceptible of being administered in the trial courts without sacrificing other important values such as speed and efficiency . . .²

¹ Graham (1971), pp. 280, 286–8.

² A third kind of research would be to investigate the jury to determine how far exclusionary rules, judicial warnings and other assistance are needed. Would too much weight be attached to a criminal record? Does a rape charge so influence the jury that a corroboration warning is needed? What factors independently of the facts tend to induce jurors to acquit or convict? Some material on these topics may be found in Kalven and Zeisel (1966); McCabe and Purves (1972); Sealy and Cornish (1973); Cornish and others (1973); Zander (1974a); Baldwin and McConville (1974); Zander (1974b).

The failure to consider empirical studies had a number of effects on the Code. One is that the Commission wasted a good deal of time and created a good deal of complexity resolving scholastic debate of little practical import on the trial of cases . . .

In contrast, the issue of whether non-assertive conduct is or is not hearsay is one that, while being beaten to death by the writers, would probably not be recognized in practice by more than 1 per cent of the lawyers and judges in this state. Indeed, perhaps for this reason, there are only a handful of appellate cases that present the issue. Nonetheless, the drafters of the Code take great pride in having settled once and for all this burning question.

A more serious result of the failure of the Commission to do any empirical study is that it left the Commission at the mercy of practicing lawyers who have few inhibitions about expanding their personal experiences into Universal Truths . . .”

8.2.2 Problems of research. Are our proposals open to these criticisms?³

There is little doubt that some kinds of research would be valuable. But we think that empirical research is difficult to undertake. It has not been done on any scale. Limitations of time and other resources make it impossible for this Commission to undertake it. Complaints about lack of research were made about the English Criminal Law Revision Committee's 11th Report (1972).⁴ Most of these complaints do not apply to the hearsay area. Research into how juries handle hearsay evidence might be useful, but it has not occurred. We consider it wrong to delay proposals for any reform at all until the time when research has been done, for we think much can usefully be recommended without it. In short, it is not an essential prelude to reform. We add that we have had discussions with persons of very great practical experience of the law of evidence in action who have thought long and deeply about its practical operation. Faced with an absence of research, and the present impossibility of achieving it, are we to defer any proposal for reforming the law of evidence for a long time when less elaborate observations, a large experience among ourselves and those we have specifically consulted, and the teachings of common sense show that substantial advantages would follow at once from some reforms? Indeed, it has been doubted whether effective research is possible. Do those who report hearsay statements behave the same when an observer is with them? Do mock juries operate in the same way as real juries? Would it be better for real juries to be taperecorded as they deliberate? Should this be permitted as a matter of public policy? Because of doubts about the answers to those questions, we do not consider a lack of empirical research as an objection to our proposals.

³ See further Graham (1971), p. 287.

⁴ E.g., Tapper (1972), pp. 622-3; Tapper (1973), pp. 56-7; Twining (1973), p. 354.

8.2.3 Reliance on professional experience. Certainly there are some inquiries which it is feasible to undertake. How often are hearsay objections made? How often are valid objections not upheld because of judicial ignorance or common sense? How often are objections not made that could be made because of the ignorance or common sense of counsel? But we do not think detailed and expensive research could add anything to what our members have observed or been told about the day to day hearing of evidence. If a rule is persistently not applied because it is difficult to understand, it should be made clear. If it is persistently not applied because it offends common sense, it should be made to conform to common sense. Both these ideals can profitably be applied to much of the hearsay rule without detailed empirical research being necessary. We agree with Sir Rupert Cross's defence of the English Criminal Law Revision Committee's 11th Report (1972) on this point:

"I . . . wish to stress the need for rationalising the law of evidence . . .

The prime beneficiary of the sort of law reform that comes from the Criminal Law Revision Committee⁵ is the lawyer of the future rather than the practitioner of the present who, whatever his age, is like the writer, an old dog conscious of the difficulty of learning new tricks. It follows that I attach little if any, importance to the charge that the Committee neither did nor commissioned any empirical research. Even if it were the case that the present rules of evidence produced no wrongful acquittals, I would still be in favour of most if not all of the Committee's recommendations for the simple reason that their adoption would spare the judge from talking gibberish to the jury, the conscientious magistrate from directing himself in imbecile terms and the writer on the law of evidence from drawing distinctions absurd enough to bring a blush to the most hardened academic face."⁶

8.3 COMPLEXITY

8.3.1 The problem of complexity. One of our objects is simplicity, and it may be objected that the Bill is not simple. We have striven to make the Bill as simple as is compatible with other important considerations. We would have preferred a simpler Bill but have concluded that, given the traditions of legislative drafting, the principles of statutory interpretation applied by the courts, and the entrenched habits of the profession and the courts, we could not achieve greater simplicity without undue sacrifice of certainty and fairness and the risk of prejudice to the oral system of trial. In defence of the Bill we make these points. First, it is based on simple principles, and the seeming difficulty of the detailed scheme will be overcome by familiarity. Secondly, it is much less difficult, even in detail, than the present law. Difficulties in the Bill concern only peripheral instances. The vast majority of statements which it makes admissible are plainly admissible. Thirdly, we agree with the Criminal Law Revision Committee that:

⁵ In our view our own proposals will have as beneficiaries any litigant or other person concerned with the administration of justice so far as it depends on improved fact-finding.

⁶ (1973), pp. 332-3.

“provisions designed to simplify a complicated system of law cannot always themselves be expressed in simple terms . . . [I]t is better to have provisions which may look difficult but will simplify the working of the law than provisions which look easy but which make or leave the law difficult and obscure.”¹

Fourthly, some of our draft clauses are capable of applying to all evidence in the event of a wider codification.² Finally, it is desirable that a statutory formulation of the law relating to hearsay should anticipate and resolve as many questions as possible; this involves recourse to detail.

8.3.2 A remedy for complexity? It was suggested to us that in view of the complex and relatively radical nature of our proposals, it would help in the interpretation of the Bill if this Report were made a permissible aid to construction. There is much to be said for this course. But to adopt this course for this Bill and no other seems unsatisfactory without a review of its advantages and difficulties in other instances. The question is too important to be dealt with simply as an incident of reforming part of the law of evidence. In any event, we hope judges and practitioners will refer to the Report as a guide to our intentions; it is common for this kind of material to be so used. We hope they will consider that our intentions have sometimes been successfully achieved.

¹ 11th Report (1972), para. 25.

² E.g., many of those in Division 5 of the Bill.

8.4 RIGIDITY

8.4.1 Certainty and discretion. The California Code (1965) has been attacked in the following terms:

“It was futile for the Commission to pursue a set of rules that would hog-tie the trial judge, a vision which every trial lawyer should recognize as moonshine. As Wigmore has demonstrated, it is possible to reduce his ten volumes to a set of rules that read like the Internal Revenue Code or the instructions for assembling mail-order toys. But making such a set of rules work is another question.

I would emphasize that my present objection is not that nonsense codified remains nonsense; what I am suggesting is that the quest for certainty in a set of hard-and-fast rules to govern the admissibility of evidence is doomed to failure.”¹

We do not believe such a comment could fairly be made of our proposals. We think our proposed rules generally offer the courts sufficiently clear guides for normal cases, and contain a sufficient element of discretion to render them workable in difficult or unforeseen circumstances.²

¹ Graham (1971), p. 299.

² See above, para. 1.3.16.

8.5 SPECIAL PROBLEMS IN CRIMINAL CASES

8.5.1 Safeguards in criminal cases. Should any relaxation of the hearsay rule in civil cases apply equally to criminal?¹ It is generally undesirable in our view to have substantially different rules of evidence as between civil and criminal proceedings or as between jury and non-jury proceedings. It would be unnecessarily confusing for practitioners and judges to have to learn and apply two or more sets of evidentiary rules; and it seems improper that choice of mode of trial should have to be influenced by evidentiary considerations. However, some differences exist, and properly so. But while there are, in our view, respects in which the rules of evidence might properly differ as between civil and criminal cases, we think that the general framework of the law relating to hearsay should be the same. The reasons for departures from uniformity in particular cases have been explained at relevant places in this Report. So far as there are dangers of more unreliable evidence being admitted against an accused person, it should be remembered that there are numerous safeguards operating in the accused's favour. First, the need for the prosecution to prove its case beyond reasonable doubt makes it risky for the prosecution to rely on hearsay evidence when direct evidence is available. Secondly, we propose to preserve the court's power to reject relevant evidence which would operate unfairly against the accused, and we expect that this express preservation may lead to a more explicit delineation of its boundaries and a more vigorous use of it (s. 103). Thirdly, the court has a discretion to exclude evidence if its weight is too slight to justify the court acting on it, or if its utility is outweighed by a probability that it would unduly prolong the hearing, or be unfair, or mislead the jury, or if its tender would be an abuse of the process of the court, or if it would unfairly surprise a party (s. 100). Fourthly, our provision for the discretionary exclusion from the jury room of documents will tend to prevent unfairness (s. 101). Fifthly, we propose to retain the law relating to confessions and admissions in criminal cases; it differs radically from the common law of admissions in civil cases and from ss. 87 and 88 of the Bill.

8.5.2 Special dangers in criminal cases: general. The special dangers of hearsay in criminal cases are said to be the undesirability of convicting a man on evidence proceeding from a person whom he has had no chance to cross-examine, the fact that jury trial is very common for serious charges while its use in civil cases declines steadily, and the incentives there are to fabricate evidence. The last point concerns guilty accused persons who have much to gain by fabrication of evidence, though some on the prosecution side may be tempted to fabricate out-of-court statements, or may, in the course of recording as connected prose the answers to a series of questions, inadvertently misrepresent the meaning intended by the declarant. The latter risk is met by s. 62, which makes justification for not calling a witness much wider in civil cases than criminal, and by s. 75 (4). Section 75 (4) provides that statements made for the purpose of setting out evidence which the declarant would be able to give in a legal

¹ See above, paras 2.4.5–2.4.13, 4.1.28 and 4.2.9–4.2.10.

proceeding are not admissible in criminal legal proceedings when tendered under s. 73 on the basis that there is justification for not calling the declarant unless the court "for special reason" otherwise orders. That is, such statements will rarely be admitted unless the declarant testifies.^{1A} So far as accused persons are concerned, the argument has been put thus:

"It is argued that because the accused has so much at stake in a criminal case, and because he only has to raise a reasonable doubt about his guilt, that he will be unscrupulous in the methods he uses to get an acquittal. A relaxation of the hearsay rule would permit him to introduce a false confession of the crime by a person unavailable to give evidence, or to raise an alibi defence by hearsay alone."²

Some accused may be wrongly acquitted by abuse of this possibility, and s. 74 (2); but there is some safeguard in that hearsay statements falling within s. 73 and made after a charge has been preferred, or a like event, are admissible only with the leave of the court (s. 73 (9)). We believe our recommendations will assist the establishment of cases against guilty persons and the establishment of defences by the innocent; and we do not believe that rules of admissibility can cope with perjury or other lying. In Morgan's words:³

"Given a litigant willing to commit or suborn perjury and counsel ready to encourage or wink at it, no exclusionary rule will deter them . . . By . . . exclusionary provisions only the honest litigant will be hurt; he alone will be deprived of the benefit of persuasive evidence."

Wigmore made a similar point on the risk of fabricated testimony:⁴

"This is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of Evidence, viz., the argument of danger of abuse. This would be a good argument against admitting any witness at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies."

As for the argument resting on the fact that the accused in a criminal case has a great deal at stake, does it follow that since more is at stake in criminal cases than civil, the issues should be decided on the basis of less information? In our view the risk that accused persons who are guilty will seek to fabricate evidence which raises a reasonable doubt is less serious than the risk that innocent persons will be convicted because hearsay evidence in their favour is excluded.⁵ We think juries realize the dangers of hearsay evidence: they must already listen to a great deal of it in criminal cases as in civil under the present law. We do not believe that a case substantially based on hearsay not tested by cross-examination would be likely often to satisfy the criminal standard of proof.

^{1A} See above, para. 4.3.7.

² Law Reform Commission of Canada (1974), p. 7.

³ Foreword, Model Code (1942), p. 6.

⁴ Para. 1477.

⁵ Cf. N.Z. Torts and General Law Reform Committee Report (1967), p. 17.

8.5.3 Special dangers in criminal cases: conviction on hearsay alone. A further objection to relaxing the hearsay rule in criminal cases has been put by Wells J. He said:⁶

“It seems to me that the best way to judge any proposed reform is to try to see it performing its hardest task . . . As a constant test, I would ask you to bear in mind this one question—‘To what extent would you be prepared to accept a verdict of guilty against you based substantially on hearsay evidence?’”

We think that such attacks on reform of the hearsay rule by raising the spectre of conviction on hearsay evidence alone are unrealistic. One might as well require that all evidence be corroborated because it may not be safe to convict on the direct oral evidence of a single witness.

8.5.4 Special dangers in criminal cases: anonymous charges. Another attack on this kind of hearsay proposal relies on the risk of anonymous charges being made and admitted as being made by an unidentifiable declarant under ss. 62 (2) (c)–(f) and 73. This is an unfair *reductio ad absurdum*. The kind of evidence intended to be admitted is that excluded at common law in such cases as *Teper v. R.*⁷ and *R. v. Gibson*⁸—cries or statements made by passers-by who suddenly vanish. If the evidence appeared too unreliable for admission it could be excluded under ss. 100 or 103, or both. Section 73 (10) also ensures that s. 73 does not make admissible the evidence of a person who has deliberately concealed his identity.

8.5.5 Special danger in criminal cases: different standards of proof. Another argument is that relaxation of the hearsay rule appropriate in civil cases is not appropriate in criminal because the standard of proof in the latter is higher and to allow hearsay evidence to be admitted for the prosecution would reduce it. It may be that some hearsay evidence will fail to satisfy that standard, but that is not a reason for excluding evidence which does meet it. The objection rests on a fallacy; to admit reliable hearsay might make it easier for the prosecution to satisfy that standard, but would not reduce the standard itself.

8.5.6 Special dangers in criminal cases: other objections. Other reasons for a more extensive operation of the rule against hearsay in criminal cases than civil have been put.

- (a) Civil litigants are normally represented; the accused is often not represented and cannot oppose the admission of hearsay which should be excluded; nor can he comment on hearsay of little weight; to argue otherwise is in effect to deny or at least to minimize the value of counsel to an accused and the

⁶ (1971), p. 561.

⁷ [1952] A.C. 480.

⁸ (1887) 18 Q.B.D. 537.

cogency of persuasive argument. But the major premise is being increasingly eroded in view of the rapid expansion of legal aid in criminal cases. In any event, it seems wrong to deprive represented accused persons of the benefits of hearsay reform for the sake of unrepresented accused persons. Further, the circumstance that a party is not represented always throws more work on the court.

- (b) Overseas reform has always occurred in a more radical way in civil cases than criminal. But this, as we see it, does not answer the question whether this was the best course.
- (c) There is said to be merit in the Sixth Amendment to the American Constitution, requiring that an accused person be confronted by his accusers. Apart from the notorious difficulty of reconciling the mass of common law exceptions with this Amendment, we may query what the merit is which outweighs the evil of excluding possibly reliable evidence. Given the restriction of justification in criminal cases, and the discretions to protect an accused, the out-of-court statements which will be admitted under our proposals will not usually be those of persons who can fairly be described as "accusers". They will usually be simply those of persons who are in a position to give evidence about some relevant fact. One exception will be the evidence of the dead or incapacitated victim or other key witness. This is an exception of necessity, and in some cases may have the useful side effect of reducing the temptation to silence inconvenient witnesses.
- (d) The distinction between trials by judge and by jury is important; more hearsay reform would increase the complexity of jury directions. But many of our proposals simplify them; sometimes, admittedly, complexity may increase, but we think it is worth paying this price in order to get a nearer approach to the truth.

8.6 RES GESTAE

8.6.1 The common law *res gestae* exceptions. We have made no express provision for the continued admission of evidence under the common law *res gestae* exceptions to the hearsay rule. Cross¹ divides these confused exceptions into four groups: statements accompanying and explaining relevant acts, spontaneous statements relating to an event in issue made by participants in or observers of that event, statements concerning the maker's contemporaneous state of mind or emotion, and statements concerning the maker's contemporaneous physical sensation. So far as any of these statements do not involve second-hand oral hearsay, it will be admissible under s. 73 if there is some justification for the maker not being called or if the maker is called. *Res gestae* evidence is often reliable, and to that extent its admission under s. 73 is satisfactory.

¹ Cross (1974), ch. 20.

Section 74 (1) provides for the admission of reliable hearsay not otherwise admissible, and we believe this will avoid the need for express codification of the *res gestae* exceptions. But it may be doubted whether second-hand hearsay should commonly be admitted as part of the *res gestae*; and it may be doubted whether first-hand *res gestae* evidence should in general be admitted without satisfying the conditions of s. 73. A *res gestae* statement, which is often vague and sometimes a response to an emergency or a sudden drama, is precisely the kind of statement the maker of which should, if available, be produced for cross-examination as to precisely what he meant and as to his means of observation. The exciting nature of the event which provoked some *res gestae* statements may induce unreliability through over-excitement. Other *res gestae* statements—of feeling, or intention, or physical sensation—may be more reliable than sworn testimony a long time later, but if the maker is available it is desirable that at least his sincerity be tested by cross-examination. If he is not available, the evidence should be admitted for what it is worth. It might be said that there is a problem for parties who find it necessary to tender statements of persons who, if called, might give adverse evidence. We hope that s. 62 (3) (c) will help meet the problem. Section 62 (3) (c) provides that in civil cases there is justification for not calling a person where, having regard to the relations at any time between the person and any party, it is unreasonable to expect the party tendering the statement to call the person. We draw attention again to the residual discretion under s. 74 (1) to admit reliable evidence. The general law as to hostile witnesses may well be unsatisfactory, but this Report is not the proper place for a review of it.

8.6.2 Criticisms of the common law. In our view, then, the *res gestae* exceptions do not deserve independent preservation. We therefore only partly agree with the Final Report of the English Committee on Supreme Court Practice and Procedure, which stated:²

“Generally we express the hope that the judges, if possible by concerted action, will bring their influence to bear . . . by a liberal interpretation of the rule of evidence known as *res gestae*. It has been represented to us that, particularly in personal injuries actions, the admission, as evidence which might otherwise be barred under the hearsay rule, of statements overheard on the part of third parties at or about the time of events giving rise to the cause of action would greatly assist in the ascertainment of the truth. The formulation of any revision of the *res gestae* rule presents the greatest difficulties and not least because the admission of such evidence is largely a matter of the discretion of the judge to be exercised in accordance with principles laid down in decided cases.”

The extreme difficulty the common law courts had in formulating the *res gestae* exceptions suggests that codification would be equally difficult.³

² English Committee on Supreme Court Practice and Procedure (1953), para. 258 (b).

³ *Ratten v. R.* [1972] A.C. 378 was the latest attempt. See also *R. v. Bedingfield* (1879) 14 Cox C.C. 34; *Brown v. R.* (1913) 17 C.L.R. 570; *Poriotis v. Australian Iron & Steel Ltd* (1963) 63 S.R. (N.S.W.) 991; *Vocisano v. Vocisano* (1974) 3 A.L.J.R. 97; cf. *O'Hara v. Central S.M.T. Co.* 1941 S.C. 363. See also the American attempts to grapple with the codification problem: Model Code (1942), rr. 512-3; Uniform Rules (1953), rr. 63 (4) and (12); California Code (1965), ss. 1240-1 and 1250-2; Federal Rules (1975), r. 803 (1)-(4).

The analysis of admissible evidence as admissible because it is part of the *res gestae* has never been convincing to those who have pondered the problem. Learned Hand J. said: "It is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."⁴ The phrase is "adopted to provide a respectable legal cloak for a variety of cases to which no formula of precision can be applied";⁵ it is "a vicious element in our legal phraseology . . . an empty phrase . . . encouraging to looseness of thinking and uncertainty of decision";⁶ it is "a bubble of verbiage: the unmeaning term merely fudges the truth that there is no universal formula for all the kinds of relevancy".⁷ As Lord Blackburn said, "If you wish to tender inadmissible evidence, say it is part of the *res gestae*."⁸ Such limited areas of presently admissible *res gestae* evidence as may exist outside s. 73 do not seem to justify the erection of a separate *res gestae* exception; s. 74 will cover them. In this respect we follow the Civil Evidence Act 1968 (U.K.), though not the Bill proposed by the 11th Report of the English Criminal Law Revision Committee: see cl. 37.⁹ Our provisions for admitting on tender by a party statements of a declarant who is called, or in respect of whom there is justification for him not being called, and the general discretions of s. 74, will cover many of the instances which prompted that Committee to codify the exceptions. Our proposals, then, solve the problem of defining the *res gestae* exceptions by providing wider categories of admissibility which in practice, we anticipate, will cover all instances of reliable evidence presently admissible. The problems of contemporaneity, of whether a transaction has ended, of whether the statement was spontaneous or narrated, will cease to arise.

8.6.3 Self-serving statements of the accused. One consequence of abolishing the *res gestae* exceptions is that the self-serving statements of the accused which might have been admissible in that way at common law are inadmissible if the accused does not testify unless s. 74 is applied;¹⁰ and that section might properly be applied if in the court's view the statement had some reliability and the accused had a good reason for refusing to testify, such as mental weakness. In other circumstances we see no reason why the accused should have advantages which other makers of hearsay statements do not have.¹¹

8.6.4 *Res gestae*, hearsay opinion evidence and statements of a conclusion. In Cross's view, it is possible that "in certain cases evidence which would infringe both the rule against hearsay and the opinion rule may be received

⁴ *United States v. Matot* 146 F. 2d 197, at p. 198 (1944).

⁵ *Homes v. Newman* [1931] 2 Ch. 112, at p. 120, *per* Lord Tomlin.

⁶ Wigmore, para. 1767.

⁷ Sir Frederick Pollock in *Pollock-Holmes Letters* (1942) II, pp. 284-5, 23 April, 1931.

⁸ Cross (1974), p. 37, n. 2. See generally Gooderson (1956), p. 199, (1957), p. 55; Morgan (1922); Nokes (1954); Stone (1939).

⁹ Nor the Criminal Law and Penal Methods Reform Committee of South Australia (1975), ch. 8, para. 4.

¹⁰ See Gooderson (1968), pp. 66-74.

¹¹ Above, para. 4.1.37.

as part of the *res gestae*".¹² An example would be if a bystander at a car accident alleged negligence on the part of one of the drivers. To avoid excluding this evidence we have inserted s. 66 (1) (d). As we explained earlier,¹³ such rules as the opinion evidence rule and the rule against statements of a conclusion are directed to the form of evidence given in court, and have less utility when applied to out-of-court statements. In practice the opinion evidence rule even in court is tending to become more relaxed, and in the period before this trend comes to fruition, either as a result of judicial development or statutory change, it seems desirable to prevent the opinion rule interfering with hearsay reform. The court has a discretion to reject such evidence under s. 94 because it may be thought in some cases desirable to prevent total evasion of the rules in question by manufactured out-of-court statements.

8.6.5 Effects of recommendations summarized. At this point we summarize the effect of our recommendations on the four categories of evidence into which the common law *res gestae* exceptions are traditionally divided.

- (a) Statements accompanying and explaining relevant acts (e.g., a person's declaration of his intention to go to a certain country on an issue concerning domicile). The statement will be admissible under s. 73 if the declarant is called or there is justification for not calling him; in civil cases s. 62 (3) (c) should be noted in particular if there are relations between the party and the declarant making it unreasonable for the former to call the latter. Section 74 also affords an avenue of admissibility.
- (b) Spontaneous statements relating to an event in issue made by participants in or observers of that event (e.g., a cry by the victim of an assault and battery). Again s. 73 renders the statement admissible if the declarant is called or there is justification for not calling him; and s. 74 gives the court a discretion to admit the statement if its conditions are satisfied. It should be noted that a cry by an unidentified observer will be admissible because inability to identify a declarant is justification for the purposes of s. 73: see s. 62 (2) (c) and (d).
- (c) Statements concerning the maker's contemporaneous state of mind or emotion (e.g., a statement of intention). Again a statement of this kind is admissible if the conditions of either s. 73 or s. 74 are satisfied.
- (d) Statements concerning the maker's contemporaneous physical sensation (e.g., a statement of an injured workman complaining of pain). Sections 73 and 74 afford avenues of admissibility. It should be noted that, unlike a statement admitted at common law under this head, statements admitted under ss. 73 and 74 which indicate the cause of the sensation will be admissible provided the matter is not one calling for expertise. If it is, s. 84 (2) must be relied on.¹⁴

¹² Cross (1974), p. 517.

¹³ Above, para. 4.15.9.

¹⁴ See above, para. 4.12.2.

8.7 MISCELLANEOUS HEARSAY EXCEPTIONS

8.7.1 Undue influence proceedings. There is a mass of exceptions to the hearsay rule, little noted in the books and difficult to reconcile with orthodoxy—indeed little noted because difficult to reconcile with orthodoxy. In succeeding paragraphs it is proposed to consider some of these exceptions and certain other exceptions in the light of our proposals and to explain either how they are subsumed under them or why they have not been. One exception is the reception, in proceedings raising an issue of undue influence, of declarations made by a person alleged to have exerted the influence, whether or not he is deceased and whether or not he is party to the action.¹ If he is not a party to the action, the declaration cannot be an admission. In our view the admission of this evidence should be left to the agreement of the parties, to s. 73, or to s. 74; special provision does not seem called for. Where the making of the statement is contested and the maker is available, he should be called; if, for example, he is unavailable, or if the relations between the party and the declarant make it unreasonable for the former to call the latter (s. 62 (3) (c)), s. 73 will apply; where second-hand oral hearsay is involved s. 74 can be applied if the court thinks fit.

8.7.2 Ancient documents. Another example is the rule by which:

“ancient documents coming out of proper custody, and purporting on the face of them to show exercise of ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them as being in themselves acts of ownership and proof of possession.”²

The reasoning is that “in the ordinary course of things men do not make leases unless they act on them, and lessees do not, in general, pay rent unless they are in possession, so that the ancient payment of rent adds weight to the ancient indenture”.³ Cross argues that the evidence is admissible because it is not hearsay; no question of admissibility under an exception to the hearsay rule arises because “at no point in the reasoning leading to the admissibility of the evidence is the court asked to assume that anything said by anybody was true”.⁴ Under our proposals, if it were regarded as hearsay, it might be admitted under ss. 62 (2) (a) and 73 (1) (b) (ii): the declarant is very likely to be dead, otherwise the document would not be ancient. The evidence might also be admissible under s. 74. In view of these possibilities, we do not propose an equivalent to Uniform Rules (1953), r. 63 (29), which went further than the common law rule under consideration, and which makes admissible:

“Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth

¹ *Radford v. Risdon* (1912) 28 T.L.R. 342.

² *Malcolmson v. O’Dea* (1863) 10 H.L.C. 593, at p. 614; 11 E.R. 1155, at p. 1164, *per* Willes J.

³ *Bristow v. Cormican* (1878) 3 App.Cas. 641, at pp. 668, *per* Lord Blackburn.

⁴ Cross (1974), p. 415.

of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement.”⁵

8.7.3 Interpreters. It may be that a hearsay exception has been created by the common law where a police officer is allowed to give evidence of what an interpreter told him a suspect said.⁶ This is a more attractive explanation of the authorities which produced this result than, for example, the view that the hearsay rule has not been infringed at all, or the view that the interpreter is the accused’s agent to make admissions.⁷ In any event, s. 73 will now permit the evidence to be admitted if the interpreter was called, as he was in *Gaio v. R.*, or if there is justification for not calling him.

8.7.4 Age. A further problem in relation to the hearsay rule concerns proof of age. Age may be proved under the Evidence Act, 1898, s. 30, which provides that a certificate under the hand of the Registrar-General relating to any birth, marriage or death, shall be evidence of the fact of such birth, marriage or death. This provision is untouched by our proposals. But it remains necessary to prove that the person whose age is in question is the same person as that mentioned in the certificate. A witness who was present at both the birth and the registration, and has known the person since, would not infringe the hearsay rule in testifying to this identity. But there are several cases where these conditions were not satisfied, so that hearsay evidence was admitted.⁸ Provided only first-hand hearsay is involved, such evidence would now be admissible under s. 73. If no certificate is available, s. 73 will provide a number of other possible avenues of proving age.

8.7.5 Depositions. There are numerous statutory hearsay exceptions concerned with the taking of evidence in other proceedings or before an authorized officer which survive our proposals. In some instances the statements are not out-of-court statements and hence the Bill does not apply to them. Thus evidence may be taken on commission under the Witnesses Examination Act, 1900, s. 11, in civil proceedings; in criminal proceedings potential witnesses whose evidence would otherwise be lost may be examined and their statements admitted under s. 6 of the same Act. The Workers’ Compensation Act, 1926, s. 70 (1), permits the examination of witnesses abroad if the witness is likely to be absent through illness or infirmity. In other instances the statements are out-of-court statements, but the legislation is not repealed by the Bill.

⁵ See also Model Code (1942), r. 527; California Code (1965), s. 1330; Federal Rules (1975), r. 803 (15).

⁶ E.g., *Gaio v. R.* (1960) 104 C.L.R. 419.

⁷ *R. v. Korwin-Drozynky* [1963] Qd.R. 362. See generally para. 1.4.3 above.

⁸ *R. v. Weaver* (1873) L.R. 2 C.C.R. 85; *Re Bulley’s Settlement* [1886] W.N. 80; *Wilton & Co. v. Phillips* (1903) 19 T.L.R. 390; *R. v. Bellis* (1911) 6 Cr.App.Rep. 283.

Thus the Crimes Act, 1900, s. 406, permits a Justice of the Peace to take the depositions of dangerously ill persons to prevent their evidence being lost. The Crimes Act, 1900, s. 409, makes provision for the admission of depositions taken at committal proceedings. There are also like non-statutory rules. These include, first, the admissibility of depositions and transcripts of the testimony of a deceased or ill witness.⁹ If the statement was made in earlier proceedings it will be an out-of-court statement and the common law exception permitting its reception will be abolished and replaced by s. 73. If the statement was made earlier in the same proceedings, it will not be an out-of-court statement and will not be affected by the Bill. Secondly, at common law, coronial depositions are admissible at any trial that takes place in consequence of the coroner's inquisition.¹⁰ Thirdly, in equity, a suit for the perpetuation of testimony may be brought to preserve evidence to support a possible future claim to property.¹¹ This procedure is now general under the Supreme Court Rules. These latter two exceptions will be abolished under our proposals, but their effect will be swallowed up by s. 73 and thereby preserved. We do not contemplate that the procedure for the perpetuation of testimony will cease to be employed; if s. 73 is satisfied, the evidence will be admissible.

8.7.6 The rule in *Walker v. Walker*. At common law there is a general rule that, at least in civil cases, and possibly in criminal cases too,¹² if a party calls for a document in the possession of a second party and the second party produces it without putting it in evidence, and the first party reads it, the second party can require the first to put it in evidence.¹³ The English Criminal Law Revision Committee proposed the reversal of this rule by cl. 29 of their draft Bill:

"Where in any proceedings a party calls for and inspects a document which is in the possession or power of an opposing party or of a witness called by an opposing party, his doing so shall not of itself entitle the opposing party to make the document evidence in the proceedings."

In Australia the High Court, in *Walker v. Walker*, permitted the reception as evidence of the truth of the facts asserted of a statement contained in a document made evidence in this way, notwithstanding that the document would not be admissible in chief on grounds of non-compliance with the

R. v. Hall [1973] Q.B. 496; see also *R. v. Scaife* (1851) 17 Q.B. 238, at p. 243; 117 E.R. 1271, at p. 1273; *R. v. Beeston* (1854) Dears. C.C. 405, at pp. 411-414; 169 E.R. 782 at pp. 784-6; *R. v. Cowle* (1907) 71 J.P. 152. See above, para. 4.1.40.

¹⁰ *R. v. Cowle* (1907) 71 J.P. 152; see also *R. v. Butcher* (1900) 64 J.P. 808; *R. v. Black* (1909) 74 J.P. 71; *R. v. Marriott* (1911) 75 J.P. 288.

¹¹ *Ranken v. Pearce* (1927) 27 S.R. (N.S.W.) 410. See Supreme Court Rules, Pt 27.

¹² *Stroud v. Stroud* [1963] 3 All E.R. 539, at p. 541.

¹³ Cf. the rules for refreshing memory: above, para. 1.2.34. The differences are explained in *R. v. Pachonick* [1973] 2 N.S.W.L.R. 86, at pp. 87-8, per Lee J.

hearsay rule.¹⁴ A certain amount of case law has become encrusted around the decision.¹⁵ It does not apply to depositions given during committal proceedings.¹⁶ It has been termed "a very special case".¹⁷ The English Criminal Law Revision Committee said this of the general rule of inspection:¹⁸

"It seems to us very doubtful whether it is right that a party should be able to get a document before the court in this way when it may be impossible or difficult to find out who supplied the information contained in the document or what was his authority for doing so. The information might even have come from somebody incompetent to give evidence to the effect of the information. We considered whether to recommend preserving the rule, adjusting it to our proposals about hearsay evidence; but we came to the conclusion that, if the rule applies to criminal proceedings, it should do so no longer, because the benefit which it might confer in these proceedings is minute and it might work injustice, especially in a case such as suggested where the reliability of information contained in the document cannot be checked. Clause 29 therefore abolishes the rule so far as criminal proceedings are concerned."

But we do not think it appropriate, at least in a Report on Hearsay, to deal with the rule making documents evidence in these circumstances. We reserve the matter for consideration in a later Report. Sometimes the rule in *Walker v. Walker* is analysed as recognizing a special common law exception to the hearsay rule.¹⁹ Another view is that it is one example of evidence, which, if objected to, would be inadmissible but, if not objected to, is admissible.²⁰ Whatever the correct analysis of the common law, we think that at this stage it is right to provide for the statement to be admissible in the discretion of the court. This would be achieved in civil proceedings by s. 89 of our proposals, which permits the admission, subject to the court's power to direct otherwise, of an out-of-court statement which is not objected to and which is not admissible under any other provision of Part VI. The Bill does not operate until evidence is tendered. It does not affect the procedure by which a party may compel

¹⁴ (1937) 57 C.L.R. 630; see also *Stunzi Sons v. House of Youth Pty Ltd* [1960] S.R. (N.S.W.) 220. In *Walker v. Walker* Dixon J., at p. 636, relied on *Wharam v. Routledge* (1805) 5 Esp. 235; 170 E.R. 797, and *Calvert v. Flower* (1836) 7 C. & P. 386; 173 E.R. 172.

¹⁵ See Cross-Gobbo (1970), pp. 271-2. The principle involved in *Walker v. Walker* appears to have been unduly extended in *Tausz v. Elton* [1974] 2 N.S.W.L.R. 163, at p. 171.

¹⁶ *R. v. Weatherstone* (1968) 12 F.L.R. 14, at p. 16. The reason is that there is "an unconditional right" of an accused person to inspect depositions: see Crimes Act, 1900, s. 403.

¹⁷ *O'Brien v. Clegg* [1951] Q.S.R. 1, at p. 12, per Townley J. See also the decision by the New South Wales Court of Appeal in *McLennan v. Taylor* (1967) 85 W.N. (Pt 1) N.S.W. 525.

¹⁸ 11th Report (1972), para. 223. See also Eggleston (1975).

¹⁹ *Tausz v. Elton* [1974] 2 N.S.W.L.R. 163, at p. 171.

²⁰ E.g., *Stunzi Sons Ltd v. House of Youth Pty Ltd* [1960] S.R. (N.S.W.) 220, at p. 225; *McLennan v. Taylor* (1966) 85 W.N. (Pt 1) N.S.W. 525, at pp. 538-41, per Asprey J.A.; *McGregor-Lowndes v. Collector of Customs (Q.)* (1966) 11 F.L.R. 349, at pp. 357-9, per Hart J.

another who has called for a document to tender it. When the party tendering it does tender it, the other party does not object to the admission of the document, and the terms of s. 89 are satisfied. Even if the terms of s. 89 are satisfied, the court has power to control the admissibility of the document to prevent unfair consequences arising.

8.8 JUDGMENTS AS EVIDENCE

8.8.1 *Hollington v. Hewthorn*. Sometimes American codes include among their hearsay provisions a reversal of the effect of *Hollington v. F. Hewthorn & Co. Ltd*¹ that a conviction is not admissible evidence of the facts on which it was based in a later civil case.² It is true that to reverse that decision would involve a further inroad into the hearsay rule, for this would entail admission of assertions made by judge or jury—persons who are not witnesses in the later trial. But the rule in *Hollington v. Hewthorn* raises other problems as well, and we defer consideration of it until a review is made of the remainder of the law of evidence.³

8.8.2 Judgments respecting land. We have no equivalent to Uniform Rules (1953), r. 63 (22), admitting evidence of judgments to prove the existence or non-existence of a public interest in land; nor do we have any equivalent to the common law rule of *Neill v. Duke of Devonshire* admitting equity decrees on a question of a public right to use a fishery. Lord Blackburn said:⁴

“The evidence afforded by a record showing that a Court of competent jurisdiction inquired into and pronounced upon the state of facts, and the question of usage at a time before living memory, is perhaps not properly evidence of reputation that the state of facts, and the usage at that time were as those pronounced to be. But it is as strong or stronger than reputation, and the authorities are agreed that it is admissible, at least in cases where reputation would be admissible.”

In many instances this will fall within s. 79 (4), as a statement by the court of the reputed evidence of a public right. In other instances admissibility will depend on s. 74. In view of their rare occurrence, this seems adequate.

¹ [1943] K.B. 587.

² E.g., California Code (1965), s. 1300; Federal Rules (1975), r. 803 (22); draft Canada Code (1975), cl. 31 (h).

³ The Defamation Act, 1974 (N.S.W.), s. 55, abolished the rule in *Hollington v. Hewthorn* so far as defamation proceedings are concerned. Under s. 55, convictions in Australian courts are conclusive evidence of guilt. The common law prevails in other proceedings.

⁴ (1882) 8 App.Cas. 135, at p. 186.

8.9 SUPREME COURT RULES

8.9.1 Relation between our proposals and the Supreme Court Rules. We have mentioned throughout this Report particular rules of the Supreme Court which are relevant to hearsay questions.¹ One or two others may be mentioned at this point. Part 36, r. 4, of the Supreme Court Rules provides that where undue delay or hardship would otherwise be caused, a statement made on information or belief shall not be inadmissible as hearsay if the deponent or witness gives the source of the statement. This does not apply to evidence on an issue at a trial. We propose no change, though the need for resort to this rule would be reduced by the implementation of our proposals, particularly s. 73.² The answers to interrogatories are receivable as admissions: see Supreme Court Rules, Part 24, r. 10. The effect of the law on the point is preserved by s. 70 (a) of the Bill.³

¹ E.g., para. 4.14.2.

² See also the Supreme Court Act, 1970, s. 86.

³ See above, para. 3.7.1.

8.10 WIDER REFORM OF THE HEARSAY RULE

8.10.1 Wider reform of the hearsay rule: one possibility. We considered carefully whether we should propose more extensive changes in the law of hearsay than we have in fact recommended. We do not discuss here the merits of reforming the hearsay rule more extensively than we propose in the Bill. We have already done so.¹ But we do discuss two Bills—Bill A and Bill B—simply to indicate to interested persons how a more extensive reform might be implemented if it were thought desirable, now or later. Some of those who made submissions argued forcefully that we ought to recommend the complete abolition of the hearsay rule, at least in civil cases. They supported a Bill of the following kind, which we call here “Bill A”. Section 1 (1) would contain definitions of “declarant”, “derived”, “document”, “fact”, “out-of-court statement”, and “statement” similar to those in s. 60 (1) of our Bill. Section 1 (2)–(5) would be the same as s. 60 (2)–(7). Section 2 would be the same as s. 61. Section 3 would be the same as s. 62, except that s. 62 (3) would apply in criminal proceedings as well as civil. Sections 12, 13 and 14 would be as follows:

12. (1) Where evidence of a fact is admissible, an out-of-court statement of the fact is admissible.

(2) Subsection (1) has effect subject to sections 13 and 14.

13. (1) Where a party tenders a statement in a document for admission under section 12 (1) and it appears to the court that the statement may have been made at a time when that or any other legal proceeding was contemplated or pending and for the purpose of setting out evidence which a person could be expected to give in the proceeding, the court may refuse to admit the statement unless the party satisfies the court that the statement was not so made.

¹ See above, para. 1.3.3.

(2) In subsection (1) the purpose referred to includes not only the sole purpose but also a substantial purpose.

14. (1) In this section "relevant declarant" means in relation to a statement—

- (a) where the statement is in a document—the maker of the statement;
- (b) where the statement is in a document and appears to be based directly or indirectly on another statement—the maker of that other statement; and
- (c) where the statement is given in evidence by a witness giving evidence in the proceeding and appears to be based directly or indirectly on another statement—the maker of that other statement.

(2) Where—

- (a) an out-of-court statement is tendered under section 12 (1);
- (b) a relevant declarant is not called as a witness; and
- (c) objection is made to the admission of the statement,

the court has a discretion not to admit the statement unless it is satisfied there is justification for not calling the relevant declarant as a witness.

The purpose of ss. 13 and 14 would be to preserve oral trial and first-hand evidence where desirable. The remainder of the legislation could adopt such provisions of our proposed Part VI, Division 5 as was felt desirable; ss. 95, 100 and 103 are important. The legislation might be applied, alternatively, only in civil proceedings, or only in non-jury proceedings, or with such modifications for criminal or jury proceedings as taste demanded.

8.10.2 Wider reform of the hearsay rule: another possibility. Another possibility which received some support among those with whom we discussed it is the same in substance as Bill A, though it has more detail. We call it here "Bill B". Sections 1–2 would be the same as our ss. 60–61; s. 3 would be like s. 62, with s. 62 (3) applying in criminal proceedings as well as civil. Sections 4–11 would be the same as ss. 63–5, 67 and 69–72. Sections 12–14 would be the same as in Bill A. The rest of Bill B would be the same as ss. 74 and 77–106. Modifications could be made to Bill B to cater for special problems in criminal and jury proceedings if desired. The merit of Bill B, as compared with Bill A, is that though the rules of admissibility would be the same, there would be many precise narrow avenues of admissibility having antecedents in the present law on which the courts and practitioners could more confidently rely. Bill B is a more satisfactory piece of transitional legislation on the road to a short simple statute abolishing the hearsay rule. It would serve an educational purpose while lawyers became used to the new system of admissibility.

8.11 SURPRISE

8.11.1 Power to order new trial where a party who has acted reasonably is taken by surprise. One submission suggested that the court be given power to terminate the trial and order a new trial where evidence was tendered which took by surprise a party who, having acted reasonably, was not then and there in a position to rebut the evidence. We make four comments on the suggestion. First, plainly power to order the recommencement of a trial involves some expense and inconvenience in trials without a jury and great expense and inconvenience in jury trials. The power to adjourn is likely to cause less trouble than the power to order a new trial; and a power to order a new trial would be less likely to be exercised where there was no jury. Secondly, a new trial is most commonly ordered at present in rather limited circumstances: mainly where inadmissible, and usually very prejudicial, evidence has been brought before the jury, usually by accident (e.g., a witness's statement of an accused person's criminal record, or a witness's statement that the defendant in tort proceedings is insured). Thirdly, the risk of an accused person being surprised is slight where there have been committal proceedings. Fourthly, the line between foreseeable and unforeseeable evidence does not necessarily coincide with the line between non-hearsay and hearsay. While it may be desirable to introduce a general power to assist surprised parties, a Hearsay Bill is not the place for such a general change; and the case for making the change for hearsay alone does not seem compelling. There is power to adjourn a trial on terms under the Bill,¹ and to reject evidence, or admit it in relation to one party but not another.

¹ See s. 100 (1): above, para. 6.7.1.

8.12 EFFECT OF THE BILL ON ORAL SYSTEM OF TRIAL

8.12.1 Oral system of trial. The Final Report of the English Committee of Supreme Court Practice and Procedure¹ stated:

"There is no doubt that the difference between the English and Continental systems in regard to evidence, *i.e.* in regard to the rules of evidence and the way in which evidence is taken, is very marked; and equally there is no doubt that the difference is one of the main reasons for the fact that litigation in England is substantially more costly than (for example) in France or Germany . . .

In both France and Germany all (oral) witnesses are the court's witnesses, though generally speaking they are tendered by the parties. In both countries the system is (as has been said) unlike the English system, 'inquisitorial'. There is substantially no cross-examination and for practical purposes none at all by the parties or their legal representatives. The witness in effect makes a deposition before the examining Judge who decides what witnesses shall be summoned. The process of taking evidence is almost invariably at an early stage of the proceedings, and not before the 'trial' proper.

¹ English Committee on Supreme Court Practice and Procedure (1953), paras 250 and 251.

. . . The witness makes his statement in his own words—there being no ‘hearsay’ rule. It is for the Court to decide the value of what has been said. It is, however, to be noted that the parties themselves are, generally, not competent witnesses in Germany; and in France, parents, relatives, and servants of the parties and certain other categories of persons are not competent.

. . . In both France and Germany oral testimony is regarded as of far less significance than in England . . . The main emphasis is on written evidence including notarially attested records of every sort of transaction . . .

We considered carefully whether it would be right to recommend the adoption in England wholly or in part of the Continental practice in regard to evidence, but we have come to a conclusion against so doing. In the first place, to do so would obviously strike at the root of the English ideas of the administration of justice. There are no doubt two views on the question which system is better adapted to elicit the truth. We are not prepared to say that in this respect the French or German systems are superior: and there is no demand, so far as we have been able to discover, for such a sweeping change. The Bar Council and the Law Society were opposed to it. The Haldane Society (who have given much consideration to the matter), though favouring substantial relaxations in our laws of evidence, were also opposed to the wholesale adoption of the Continental system of trials. It is of the essence of the English system . . . that generally speaking (*i.e.* save where expressly provided to the contrary by some statute) no writing or other formality is required to prove a right. Under the system, therefore, the greatest weight and importance is attached to the oral testimony of the parties and their respective witnesses. A change to the Continental system would logically involve a shifting of this very characteristic emphasis. We do not think such a change could effectively be made unless the Continental system of the administration of justice were adopted in its entirety. The laws and rules of evidence in England are adapted to the English system of justice. Those in France and Germany are adapted to the French and German systems. They are not interchangeable. The adoption here of Continental rules and practice in regard to evidence would mean a new kind of judiciary with many hundreds of local examining magistrates. It would mean also (at any rate if the French model were followed) the creation of a system of notaries all over the country before whom every transaction of any significance would have to be recorded if it were to be legally enforceable in practice. We are not prepared to recommend such changes . . .”

In many respects our proposals involve an inroad into this characteristic principle of orality, but we have at all stages taken into account the desirability of preserving a substantially oral trial as an important factor in making our recommendations. It should be noted that, by Act of Parliament and by rules of court, there are many proceedings where trial is not wholly oral because evidence in chief is given by affidavit.² Subject to that and to the numerous wider hearsay exceptions we propose, evidence will be admitted through oral testimony in examination in chief, and

² See above, para. 2.2.13.

witnesses must submit to cross-examination and re-examination in court. For the reasons given by the Final Report of the English Committee on Supreme Court Practice and Procedure, we do not believe that any fundamental change in this system of oral trial should occur, at least through any general reform in the hearsay rule. It may properly occur in particular kinds of civil proceeding; but the remarks of the English Criminal Law Revision Committee in their 11th Report should be noted:³

“The preservation of the principle of orality in criminal trials seems to us particularly important. We are not concerned to argue that the English system is the best system; but since this system is clearly going to be preserved in its essentials it would be wrong to disrupt it by giving the parties complete freedom to choose between proving their case by oral evidence given by witnesses of the events in question and proving it by second-hand evidence of these events. To do so would alter the character of trials and would be likely to confuse juries.”

A particular example of preserving the principle of orality may be found in s. 75.⁴ The central provision in the Bill, s. 73, requires the maker of an out-of-court statement to be called unless there is justification for not doing so, and the grounds of justification are narrower in criminal than in civil proceedings. If he is called, ss. 73 (8) and 75 work to maintain the orality of trial where it is important.

8.13 EXPERIENCE OF TRIBUNALS NOT BOUND BY RULES OF EVIDENCE

8.13.1 General. We mentioned above the fact that administrative and other tribunals are often not bound by the rules of evidence.¹ Sir Richard Eggleston, the first President of the Trade Practices Tribunal, has indicated what this meant in practice under his presidency.

“The use of hearsay in tribunals of this kind has never been the subject of any kind of codification, but experience in the Conciliation and Arbitration Commission (and its predecessor, the Court), where economic arguments also loom large, has led over the years to an ill-defined understanding that seems to work well in practice. I shall try to set down some of the unwritten rules.

First, evidence which involves specific wrongdoing or misconduct is usually treated according to the rules of law. Thus if allegations are made of breaches of a pricing agreement, hearsay would not generally be accepted.

Secondly, statements in official documents (statistical bulletins, year books, official reports and the like) are usually accepted in evidence. How much weight is given to them will depend first on whether the other side complains, and if so how loudly, and secondly, on how important the facts seem to be. It is a fundamental rule relating to this sort of enquiry that almost everything under the sun is relevant, but hardly anything is important.

³ 11th Report (1972), para. 239.

⁴ See above, paras 4.3.1–4.3.8.

¹ See above, para. 1.2.5.

Thirdly, we have taken a wide view of the term 'expert'. Anyone who is familiar with a particular trade by reason of long association with it can speak of the conditions and practices in the industry, even though a large part of his knowledge has only been gained by reading material that is strictly hearsay. This view I believe is in accordance with the best historical approach of the common law, even if judges in more recent years have strayed from the true path. Fourthly, we have normally allowed the results of surveys and questionnaires to be given in evidence, subject however to the right of the opposing party to have access to the basic material, and if necessary to cross-examine on it.

Finally, there is a good deal of give and take in the conduct of any case that lasts for several weeks, as most of these cases do. If a statement is tendered that is hearsay, and the opponent knows that it is true, he is unlikely to object to it, since he is only prolonging the agony. This approach is helped by our having made it clear that the normal practice of the courts, of having continuous hearing with each side taking strict turns, will not be followed in the tribunal if the interests of justice require otherwise. Hence a party who offers a statement that is objected to will have a chance to mend his hand if the tribunal thinks that the evidence is important. Moreover, as I have said, in these cases there is much that is relevant and little that is compelling. A lot of hearsay may be admitted as 'background' without doing any real harm to anyone, while its admission helps to explain and clarify the evidence that is really important.

These principles, if they may be so dignified, may need modification in the light of further experience, but so far I think they have worked reasonably well."²

To us this shows that in practice some rules of evidence will continue even in a theoretically quite unfettered tribunal. It shows too that what may be suitable for tribunals the proceedings before which are lengthy and leisurely may be less suitable where cases are fought to a finish over a short period of time. In the former instance the side against whom hearsay is tendered has the opportunity to rebut it if it is misleading or wrong; in the latter he may not. Sir Richard Eggleston's experience fortifies our conclusion that at present the rule against hearsay requires substantial change but not complete abandonment.

² Eggleston (1976), p. 306.

J. H. WOOTTEN, Chairman.

R. D. CONACHER, Deputy Chairman.

26th May, 1978.

J. H. P. DISNEY, Commissioner.

D. GRESSIER, Commissioner.

T. J. MARTIN, Commissioner.

APPENDIX A

DRAFT EVIDENCE (AMENDMENT) BILL, 1978

ARRANGEMENT OF
NEW PART VI OF THE EVIDENCE ACT, 1898

DIVISION 1.—*Preliminary*

- Section 60.—Interpretation
61.—Immediate and remote record
62.—Justification for not calling person as a witness
63.—Provisions for admissibility cumulative

DIVISION 2.—*Admissibility Generally*

- Section 64.—Abolition of common law rule against hearsay
65.—Admissibility of out-of-court statement
66.—Relation of this Part to general law of evidence
67.—Inadmissibility of out-of-court statement not limited to examination-in-chief
68.—Statement qualifying or explaining another statement
69.—Admission or confession in criminal legal proceeding
70.—Admission by answer to interrogatory or on notice to admit
71.—Judicial notice
72.—Existing statement

DIVISION 3.—*Out-of-Court Statements Generally*

- Section 73.—Admissibility of oral and documentary hearsay
74.—Discretionary admission of reliable statement
75.—Proof of evidence
76.—Statement of one accused person: admissibility against another
77.—Multiple admissibility
78.—Work of authority
79.—Reputation
80.—Published compilation

APPENDIX A—*continued*

- Section 81.—Statement on goods
82.—Statement on land or conveyance
83.—Expert qualification; expert knowledge
84.—Expert: extended evidence
85.—Public document
86.—Formal admission
87.—Admission in civil legal proceeding
88.—Statement affecting a party
89.—Statement not objected to
90.—Postal or other mark

DIVISION 4.—*Business Records*

- Section 91.—Admissibility generally
92.—Restrictions on admissibility under section 91: general
93.—Restrictions on admissibility under section 91: criminal proceeding

DIVISION 5.—*General*

- Section 94.—Absence of record
95.—Weight of evidence
96.—Credibility
97.—Facts relevant to admissibility
98.—Proof of statement in a document
99.—Authentication
100.—Rejection for unfairness, etc.
101.—Withholding document from jury
102.—Corroboration
103.—Criminal proceedings: rejection of evidence
104.—Time for order
105.—Rules and regulations
106.—Power to make rules or regulations

SCHEDULE 5.—AMENDMENTS TO PART VII OF THE CRIMES ACT, 1900

6.—AMENDMENTS TO PART XI OF THE CRIMES ACT, 1900

APPENDIX A

A BILL

To amend the Evidence Act, 1898, and the Crimes Act, 1900; and to make certain hearsay and other evidence admissible.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the "Evidence (Amendment) Act, 197". Short title.

2. (1) This section and section 1 shall commence on the date of assent to this Act. Commence-
ment.

(2) Except as provided in subsection (1), this Act shall commence on such day, being a day not earlier than three months after the date of assent to this Act, appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

3. The Evidence Act, 1898, is referred to in this Act as the Principal Act. Principal
Act.

4. This Act contains the following Schedules:— Schedules.

SCHEDULE 1.—AMENDMENTS TO PART I OF THE PRINCIPAL ACT.

SCHEDULE 2.—REPEAL OF PART IIA OF THE PRINCIPAL ACT.

SCHEDULE 3.—REPEAL OF PART IIC OF THE PRINCIPAL ACT.

SCHEDULE 4.—INSERTION OF PART VI INTO THE PRINCIPAL ACT.

SCHEDULE 5.—AMENDMENTS TO PART VII OF THE CRIMES ACT, 1900.

SCHEDULE 6.—AMENDMENTS TO PART XI OF THE CRIMES ACT, 1900.

Appendix A—Bill

5. The Principal Act and the Crimes Act, 1900, are amended in the manner set forth in Schedules 1–6.

Amendment
of Act No.
11, 1898,
and Act No.
40, 1900.

Sec. 5.

SCHEDULE 1.

AMENDMENTS TO PART I OF THE PRINCIPAL ACT.

(a) Section 1—

Omit the matter relating to Parts IIA and IIC.

(b) Section 1—

After the matter relating to Part V, insert—

PART VI.—*Hearsay*—ss. 60–106.

DIVISION 1.—*Preliminary*—ss. 60–63.

DIVISION 2.—*Admissibility Generally*:—ss. 64–72.

DIVISION 3.—*Out-of-Court Statements Generally*—ss. 73–90.

DIVISION 4.—*Business Records*—ss. 91–93.

DIVISION 5.—*General*—ss. 94–106.

(c) Section 3—

Omit “, other than Part IIA,”.

SCHEDULE 2.

Sec. 5.

REPEAL OF PART IIA OF THE PRINCIPAL ACT.

PART IIA—

Omit the Part.

SCHEDULE 3.

Sec. 5.

REPEAL OF PART IIC OF THE PRINCIPAL ACT.

PART IIC—

Omit the Part.

SCHEDULE 4.

Sec. 5.

INSERTION OF PART VI INTO THE PRINCIPAL ACT.

PART VI—

After Part V, insert:—

Appendix A—Bill

PART VI.

*Hearsay.*DIVISION 1.—*Preliminary.*

60. (1) In this Part, except in so far as the context or subject-matter otherwise indicates or requires—

“Business” includes—

Interpreta-
tion.

ss. 14CD (1),
14CE (2) as
added by Act
No. 13, 1976.

(a) any business, profession, occupation, calling, trade, undertaking or administration whether engaged in or carried on—

(i) by the Crown in right of the State or any other right, or a person;

(ii) by any international organisation formed between governments or otherwise;

(iii) for profit or not; or

(iv) in New South Wales or elsewhere; and

(b) public administration.

“Civil legal proceeding” means a legal proceeding which is not a criminal legal proceeding.

“Declarant”, in relation to a statement, means—

(a) any person by whom the statement is made;

or

(b) where a statement is made by a corporation, any person who causes or joins in causing the statement to be made by the corporation.

“Derived” means derived by the use of a computer or otherwise, by calculation, comparison, selection, sorting, consolidation or by accounting, statistical or logical procedures.

“Document” includes any record of information.

Appendix A—Bill

“Enactment” includes any provision of this or any other Act or Imperial Act.

“Fact” includes opinion.

“Out-of-court statement”, in relation to any trial, hearing or other occasion for the reception of evidence by a court in a legal proceeding, means a statement made otherwise than in testimony to the court on that occasion.

“Party” includes any person adducing evidence, or entitled or permitted to adduce evidence, in a legal proceeding.

“Public administration” means administration of, or of any part of, the Commonwealth (including a Territory of the Commonwealth), a State, or any country, and includes that engaged in or carried on by any of their respective administrative organs or units, whether engaged in or carried on—

(a) in New South Wales or elsewhere; or

(b) for general or local or other purposes.

“Qualified person”, in relation to a statement made in the course of or for the purposes of a business, means a person who, at the time when the statement was made—

(a) was—

- (i) an owner of the business or a person carrying on the business;
- (ii) the holder of an office or position in the business;
- (iii) a servant or agent employed or engaged in the business;
- (iv) a person retained for the purposes of the business;
- (v) a person associated with the business in the course of another business; or

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- (vi) a person having by himself or with another person power to direct or control, or responsibility for, any part of the business; and
- (b) (i) in the case of a statement of opinion, would have been permitted to state the opinion, in full or to some extent, if he were testifying; or
- (ii) in any other case, had personal knowledge or may reasonably be supposed to have personal knowledge of the fact stated, in full or to some extent.

“Statement” means any assertion (whether made in words or otherwise) of a matter of fact, whether addressed to a person or not.

(2) For the purposes of this Part, a statement in a document is made by a person if—

s. 14cd (2) as
added by Act
No. 13, 1976.

- (a) it is written, made, dictated or otherwise produced by him; or
- (b) it is recognized by him as his statement by writing or otherwise.

(3) For the purposes of this Part, a person is concerned in the making of a statement (in this subsection called the statement in question) if—

s. 14cd (3) as
added by Act
No. 13, 1976.

- (a) he makes the statement in question; or
- (b) he makes a statement containing information which the statement in question reproduces or from which the statement in question is derived, wholly or in part.

(4) For the purposes of this Part, a person deals with a statement if—

- (a) where the statement is proved by an immediate record of the statement, he makes the immediate record;

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- (b) where the statement is proved by a remote record taken from an immediate record, he makes the immediate record or the remote record; or
- (c) where the statement is proved by a remote record described in section 61 (2) (b), he makes—
 - (i) the immediate record mentioned in section 61 (2) (b) (i); or
 - (ii) a member of the series mentioned in section 61 (2) (b).

(5) Except in so far as the context or subject-matter otherwise indicates or requires, in the application of this Part to a legal proceeding in which the evidence of a person may be adduced by affidavit, by deposition, or by any means other than oral testimony given before the court—

- (a) a reference to a witness extends to a person whose evidence is so adduced;
- (b) a reference to calling a person as a witness extends to adducing evidence of a person by that means;
- (c) a reference to evidence being given by a witness extends to evidence of a person being adduced by that means;
- (d) a reference to testifying extends to a person doing what is required for his evidence to be adduced by that means;
- (e) a reference to testimony extends to evidence adduced by that means; and
- (f) a cognate reference has a corresponding extension.

Act No. 4,
1897, s. 29A.

(6) Where two or more statements are made in one utterance (whether oral or written or otherwise) or by any conduct on a single occasion, then except in so far as the context or subject-matter otherwise indicates or requires, each statement is a separate statement for the purposes of this Part.

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(7) Where a statement is made by two or more persons, each person makes a separate statement for the purposes of this Part.

61. (1) In this Part, “immediate record” means, in Immediate and remote record.
relation to a statement of a declarant, a record of or taken from the statement, being a record made by the declarant or by a person who heard, saw or otherwise perceived the declarant make the statement, and, where the statement is made in a document, includes the document.

(2) In this Part, “remote record” means, in relation to a statement—

- (a) a record taken from an immediate record of the statement; or
- (b) a record which is a member of a series of two or more records, where—
 - (i) the first member of the series is taken from an immediate record of the statement; and
 - (ii) each later member of the series (up to the member of the series tendered in proof) is taken from the next earlier member of the series.

(3) For the purposes of subsections (1) and (2), a record (in this subsection called the record in question) is taken from a statement or from another record if the record in question is—

- (a) a copy, transcription or other fair reproduction of;
or
- (b) a fair extract from or fair summary of,
the statement or other record, as the case requires.

(4) In subsection (3), “fair” means fair having regard to the purpose for which the statement is tendered.

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62. (1) For the purposes of this Part, a party tendering a statement has justification for not calling a person as a witness in the cases mentioned in this section, but not in any other case. **Justification for not calling person as a witness.**

(2) In any legal proceeding a party has justification for not calling a person as a witness where—

- (a) he is dead, or is unfit by reason of his bodily or mental condition to testify;
- (b) he is compellable to testify but refuses to be sworn;
- (c) reasonable steps have been taken to identify him, but he has not been identified;
- (d) it is not reasonably practicable to identify him;
- (e) his identity is known, but reasonable steps have been taken to find him and he has not been found; or
- (f) his identity is known, but it is not reasonably practicable to find him.

(3) In a civil legal proceeding a party has justification for not calling a person as a witness where—

- (a) he is outside New South Wales and reasonable steps have been taken to procure his testimony, but his testimony has not been procured;
- (b) he is competent but not compellable to testify and refuses to testify;
- (c) having regard to the relations at any time between the person (whether or not he is a party) and any party, it is unreasonable to expect the party who tenders the statement to call the person as his witness;
- (d) undue delay, expense or inconvenience would be caused by calling him as a witness, or by seeking to identify or find him; or
- (e) he cannot reasonably be expected to have a useful recollection of the matter dealt with in the statement.

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(4) In deciding whether any of subsections (2) (c) to (f) and (3) (a), (c), (d) and (e), is satisfied, the court shall have regard as well to—

- (a) the nature and importance of the statement and of the question on which the statement is tendered;
- (b) the resources available to the parties; and
- (c) in a criminal legal proceeding, the standard of proof to be met by the prosecution,

as to other relevant matters.

(5) (a) Where—

- (i) statements of several declarants are obtained for the purpose of establishing some matter of fact, whether by means of a survey or otherwise;
- (ii) a party elicits from a witness evidence of one of the statements;
- (iii) the witness is asked by an adverse party to give evidence of another of the statements; and
- (iv) it appears to the court that the first statement may be misleading without the other or that the admission of the first statement without the other may be unfair to the adverse party,

the adverse party has in relation to evidence by that witness of the other statement justification for not calling the declarant of the other statement as a witness.

(b) In paragraph (a), “adverse party” means a party adverse in interest to the party mentioned in paragraph (a) (ii) in relation to any question to which the evidence mentioned in paragraph (a) (ii) is relevant.

63. Any provision of this Part for admissibility of evidence shall be in addition to and not in derogation from any other provision of this Part for admissibility of evidence.

Provisions
for admissi-
bility
cumulative.

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DIVISION 2.—Admissibility Generally.

64. Subject to this Part, the rule against hearsay is abolished.

Abolition of
common law
rule against
hearsay.

65. (1) Where evidence of a fact is admissible, an out-of-court statement of the fact is admissible as evidence of the fact if the statement is so admissible under this Part, or under any other enactment, but not otherwise.

Admissi-
bility of
out-of-court
statement.

(2) Subsection (1) does not restrict the admissibility of an out-of-court statement in a legal proceeding in which the out-of-court statement is admissible notwithstanding the matters mentioned in section 66 (1) (a) to (d).

66. (1) This Part makes an out-of-court statement admissible notwithstanding—

Relation of
this Part to
general law
of evidence.

(a) the rules against secondary evidence of the contents of a document,

s. 14CE (3) as
added by Act
No. 13, 1976.

and notwithstanding—

(b) that any person concerned in the making of the statement is a witness, whether or not he gives testimony consistent or inconsistent with the statement;

(c) that the statement is in such a form that it would not be admissible if given as oral testimony; or

(d) that the statement deals with a matter of law, or a matter which is a matter for an inference or conclusion by the court or jury on evidence, or a matter of opinion on which the declarant, if called as a witness, would not be permitted to give evidence, or a matter which is an issue in the legal proceeding,

but does not make admissible a statement which is otherwise inadmissible.

(2) This Part does not restrict the admissibility of secondary evidence of the contents of a document.

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67. Subject to section 62 (5) and any other enactment, an out-of-court statement which is inadmissible by virtue of section 65 (1) is inadmissible whether tendered in chief, in cross-examination, in re-examination or otherwise.

Inadmissibility of out-of-court statement not limited to examination-in-chief.

68. Where an out-of-court statement, in this section called the first statement, is admissible under this Part, so much of any other statement made by the same declarant as qualifies or explains the first statement or is otherwise so connected with the first statement that the first statement ought not to be used without that other statement is admissible as evidence of any fact asserted in it, and the court may reject the tender of the first statement unless that other statement is also tendered.

Statement qualifying or explaining another statement.

69. (1) Except as provided in subsection (2), this Part does not affect the law or practice relating to an admission or confession tendered against an accused person in a criminal legal proceeding.

Admission or confession in criminal legal proceeding.

(2) Where a statement that an accused person has made an admission or confession would be admissible if it were not an out-of-court statement, the provisions of this Part apply to the statement.

70. This Part does not affect the law relating to an admission—

- (a) by answer to an interrogatory; or
- (b) on notice to admit facts or documents.

Admission by answer to interrogatory or on notice to admit.

71. This Part does not restrict the means by which the court may be informed of any matter of which it may take judicial notice.

Judicial notice.

72. This Part does not render inadmissible any statement which was made before the date when this Part commenced and which was admissible under the law in force immediately before that date.

Existing statement.

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 DIVISION 3.—*Out-of-Court Statements Generally.*

73. (1) Subject to this Part, where evidence of a fact is Admissibility of oral and documentary hearsay. admissible, an out-of-court statement by a declarant is admissible as evidence of that fact, if—

- (a) (i) where the fact is not an opinion, the declarant at the time when he made the statement had personal knowledge or may reasonably be supposed to have had personal knowledge of the fact in full or to some extent; or
- (ii) where the fact is an opinion, the opinion is one which the declarant would have been permitted to state in full or to some extent if at the time when he made the statement he were testifying;
- (b) (i) the declarant is called or is to be called as a witness; or
- (ii) the party tendering the statement has justification for not calling the declarant as a witness; and
- (c) the statement is proved in accordance with subsection (2) or (3).

(2) Where a statement is made in a document, the statement may be proved for the purposes of subsection (1) (c)—

- (a) by the document or by admissible secondary evidence of the contents of the document; or
- (b) if it is not practicable to prove the statement by the document, by an immediate or remote record of the statement, or by admissible secondary evidence of the contents of such a record.

(3) Where the statement is made otherwise than in a document, the statement may be proved for the purposes of subsection (1) (c)—

- (a) by testimony of the declarant or of a person who heard, saw or otherwise perceived the declarant make the statement; or

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(b) if—

- (i) no person heard, saw or otherwise perceived the declarant make the statement;
- (ii) a person who heard, saw or otherwise perceived the declarant make the statement is called or is to be called as a witness in the legal proceeding; or
- (iii) there is, as regards each person who heard, saw or otherwise perceived the declarant make the statement, justification for not calling him as a witness,

by an immediate or remote record of the statement or admissible secondary evidence of the contents of an immediate or remote record of the statement.

(4) Where the fact asserted in an out-of-court statement is not an opinion, the statement is admissible as evidence of the fact to the extent to which the declarant at the time when he made the statement had personal knowledge or may reasonably be supposed to have had personal knowledge of the fact.

(5) Where the fact asserted in an out-of-court statement is an opinion, the statement is admissible as evidence of the opinion to the extent to which the declarant would have been permitted to give the opinion if at the time when he made the statement he were testifying.

(6) In a criminal legal proceeding, a statement made by a declarant who is, at the time the statement is tendered, the husband or wife of an accused person is not admissible by virtue of this section on tender by the prosecution or by another accused person, unless the declarant—

- (a) is compellable to give evidence for the party tendering the statement; or
- (b) gives evidence for any party.

(7) Where a statement is admitted on the basis that the declarant is to be called as a witness and the declarant is not so called, then unless it is admissible on some other basis, the statement shall be excluded.

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(8) Where a statement is tendered on the basis that the declarant is called or is to be called as a witness, the court may, in admitting the statement, impose one or more of the following conditions—

- (a) that the declarant is first called as a witness;
- (b) that the declarant first testifies to such extent as the court may direct; or
- (c) that, if the declarant has already testified, he further testifies to such extent as the court may direct.

(9) (a) This subsection applies only in a criminal legal proceeding.

(b) In this subsection—

“Offence in question” means an offence with which a person is charged in the proceeding.

“Related offence”, in relation to an offence in question, means an offence arising wholly or partly out of the facts out of which an offence in question arises, whether with or without other facts.

(c) Where a statement is tendered for admission and it appears that the statement was made after any person was—

- (i) charged with;
- (ii) informed by a member of the police force, or a person having the duty of investigating offences or charging offenders, that he might be prosecuted for; or
- (iii) apprehended pursuant to a warrant, or served with a summons, in respect of,

an offence in question or a related offence, the statement is not admissible under this section on the basis that there is justification under any of paragraphs (b) to (f) of section 62 (2) for not calling the declarant as a witness, except by leave of the court.

(10) This section does not make admissible a statement by a person who has refused to disclose or who has deliberately withheld or concealed his identity.

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74. (1) Where—

- (a) an out-of-court statement is made which is not admissible or which it is not reasonable to expect a party to tender otherwise than under this subsection; and

Discretion-
ary admis-
sion of
reliable
statement.

- (b) there are reasonable grounds, in the light of the circumstances in which it was made and other relevant circumstances, for thinking the statement may be reliable,

the court may admit the statement.

(2) In a criminal legal proceeding, where an out-of-court statement is made—

- (a) which is not admissible or which it is not reasonable to expect an accused person to tender otherwise than under this subsection; and
- (b) which, whether taken by itself or with other evidence, tends to support the acquittal of the accused person on the charge, or any of the charges, on which he is being tried,

the court may admit the statement.

75. (1) This section applies where—

- (a) a statement is tendered for admission under section 73;
- (b) the statement is proved by an immediate or remote record, or by secondary evidence of an immediate or remote record, of the statement; and
- (c) the statement was made at a time when a legal proceeding was contemplated or should reasonably have been contemplated—

Proof of
evidence.

- (i) by the declarant; or

- (ii) by a person by or on behalf of whom the making of the statement was induced or obtained,

for the purpose of indicating testimony which the declarant would be able to give in a legal proceeding.

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(2) The purpose referred to in subsection (1) includes not only the sole purpose but also a substantial purpose.

(3) Where the declarant is called as a witness, the court shall have power, in addition to the powers conferred by section 73 (8), to refuse to admit the statement.

(4) In a criminal legal proceeding, where the statement is tendered for admission on the basis that there is justification for not calling the declarant as a witness, it is not admissible unless the court for special reason otherwise orders.

76. In a criminal legal proceeding, where there are two or more accused persons and an out-of-court statement made by one of them is admitted under section 73 or 74, the statement is not admissible in relation to another of the accused persons unless that other accused person tenders the statement or consents to its tender in relation to him.

Statement
of one
accused
person:
admissibility
against
another.

77. (1) Where, apart from this subsection—

- (a) a statement of a witness inconsistent with his present testimony is proved by virtue of section 53 or 54; or
- (b) a statement of a witness is proved by virtue of section 55,

Multiple
admissibility

the statement is admissible by virtue of this subsection as evidence of any fact asserted in it.

(2) Where apart from this subsection—

- (a) a prior statement tendered as a complaint consistent with the testimony of a witness is admissible;
- (b) a prior statement tendered to rebut an allegation that the testimony of a witness is fabricated is admissible; or
- (c) a prior statement by a witness identifying a person is admissible,

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otherwise than as evidence of a fact asserted in the statement, the statement is admissible by virtue of this subsection also as evidence of any fact asserted in it.

78. Any book, monograph, article, map, table, chart or Work of other work relating to historical, scientific, actuarial, lexico- authority. graphical, topographical or other matters of learning or special study which the court considers to be of authority is admissible evidence of any fact relating to such matters which is asserted in the work.

79. (1) Subject to subsections (2) to (5), this Part does Reputation. not affect any rule of law permitting the reception of evidence of reputation.

(2) A reputation that at any time a man and a woman then cohabitating were married is admissible to prove that they were then married, except when tendered against an accused person in a criminal legal proceeding.

(3) Family or other reputation of a fact relevant to a person's pedigree is admissible to prove that fact, except when tendered against an accused person in a criminal legal proceeding.

(4) A reputation concerning the existence of a public or general right is admissible on a question of the existence of that right.

(5) A reputation concerning the existence of a custom or usage is admissible on a question of the existence of the custom or usage.

80. A statement in a list, register, periodical, directory, Published timetable or other published compilation is admissible compilation. evidence of any fact asserted in it if the compilation is published for use by persons engaged in an occupation, or members of the public, or a section of it, and is used and relied upon by them.

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81. Where in the course of manufacture, packaging or distribution of goods, a statement relating to the goods is made to appear on the goods, or on any label, package or container associated with the goods, the statement is admissible as evidence of any fact asserted in it. Statement on goods.

82. Where a statement relating to a business is displayed in the course of the business on land, on or in any building or any attachment to land, or on or in any aircraft, vessel, ship, vehicle or conveyance, the statement is admissible as evidence of any fact asserted in it against a person carrying on the business at the time of the display. Statement on land or conveyance.

83. (1) A witness tendered as an expert witness may refer to or give in evidence any out-of-court statement concerning his qualification as an expert. Expert qualification; expert knowledge.

(2) An expert witness may give evidence of any matter of knowledge within the scope of his expert qualification.

84. (1) In this section, “extended evidence”, in relation to evidence given by an expert, means— Expert extended evidence.

- (a) an out-of-court statement;
- (b) a conclusion from an out-of-court statement; or
- (c) the result of an inquiry or survey, whether made by the expert or not,

tendered as evidence of a fact asserted in the statement, conclusion or result.

(2) Where the physical or mental condition of any person is in question, and an expert witness gives or is to give in evidence his opinion on that condition, he may give extended evidence, bearing on his opinion, of matters relating to the physical or mental condition of another person.

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(3) Where the value of any property is in question, and an expert witness gives or is to give in evidence his opinion on that value, he may give extended evidence, bearing on his opinion, of matters relating to the value of other property.

(4) Where any quality of any material is in question, and an expert witness gives or is to give in evidence his opinion on that quality, he may give extended evidence, bearing on his opinion, of matters relating to the quality of other material.

(5) Generally, in a case to which subsections (2) to (4) do not apply, where anything relating to a subject-matter of any class is in question, and an expert witness gives or is to give in evidence his opinion on it, he may give extended evidence, bearing on his opinion, of matters relating to any other subject-matter of that class.

85. (1) Where a document is made or kept or published in the course of public administration, for use as a reliable source of information of any kind by a public officer or by the public or by any section of the public, a statement of information of that kind in the document is evidence of any matter asserted in the statement. ^{Public document.}

(2) A statement published in the course of public administration in the Gazette or a like publication or in a newspaper or other periodical of an act done in the course of public administration is evidence of the doing of the act.

(3) In a civil legal proceeding, a statement of a fact of any kind in a report of a Royal Commission or other body charged with a duty of ascertaining facts of that kind for the purpose of public administration is evidence of the fact stated.

(4) In this section—

“public officer” means a person employed or engaged in public administration.

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86. (1) In this section “formal admission” in relation to a ^{Formal} matter of fact means any statement made by a party for the ^{admission.} purpose of dispensing with the necessity of proof by another party of the fact admitted, but does not include an admission on the pleadings, an admission under rules of court, or a plea in a criminal legal proceeding.

(2) Subject to this section, a formal admission of any fact of which evidence may be given may be made by or on behalf of a party, including the prosecution in a criminal legal proceeding, and a formal admission so made shall, as against that party, be conclusive in that proceeding of the fact admitted, and where the admission is made for a limited purpose it shall be conclusive evidence for that purpose and not evidence for any other purpose.

(3) Where a formal admission is made on terms or conditions, it shall not be admitted until the terms or conditions are satisfied.

(4) A formal admission—

- (a) is admissible against an accused person in a criminal legal proceeding only if approved by his counsel or solicitor, or if he is not represented by counsel or solicitor, with the leave of the court;
- (b) if made otherwise than in court, shall be in writing; and
- (c) if made in writing shall be signed by the person making it, or by his counsel or solicitor.

(5) A formal admission, if made by a party under a disability, shall not be admitted without the leave of the court.

(6) A formal admission may, with the leave of the court, be withdrawn in the legal proceeding for the purpose of which it is made on such terms as the court thinks fit, and the court may order to what extent, if any, a statement in the formal admission, with or without the fact of its withdrawal, may be admissible in the proceeding.

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(7) Where any party makes any formal admission—

- (a) which the court, on the balance of probabilities, is satisfied is untrue; or
- (b) which the court considers it against public policy to accept; or
- (c) which it is against the interests of justice to accept,

the court may reject the admission or, if it has been received, exclude it; and where the formal admission relates to a fact, proof of which is made mandatory by any enactment, the court must so reject or exclude it.

(8) A formal admission which is made for the purpose of a particular legal proceeding is not, unless its terms otherwise provide, admissible in another legal proceeding.

87. (1) This section applies only in a civil legal proceeding. Admission in civil legal proceeding.

(2) Subject to subsections (3) and (4), this Part does not affect the law relating to admissions.

(3) A statement may be admitted and have effect as an admission notwithstanding that the statement deals with—

- (a) a matter not within the knowledge of the declarant;
- (b) a matter of law as well as a matter of fact; or
- (c) a matter which is one for an inference or conclusion by the court or jury on evidence or is an issue in the legal proceeding.

(4) Where a statement that a party or other person has made an admission would be admissible against the party if it were not an out-of-court statement, the provisions of this Part shall apply to the statement.

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(5) This section does not apply to—

- (a) an admission on the pleadings, if any, in the legal proceeding;
- (b) an admission made in the legal proceeding under rules of court;
- (c) a formal admission as defined in section 86.

88. (1) This section applies only in a civil legal proceeding. Statement affecting a party.

(2) Where a statement affects a party as mentioned in subsection (3) and is tendered by a party adverse in interest (in relation to the matter in question) to the party affected, then, subject to this section, the statement is admissible as evidence of any fact asserted in it.

(3) For the purposes of subsection (2), an out-of-court statement affects a party if it was made by a person who, although he did not have authority to make the statement, was at the time of making the statement an employee or agent of the party against whom it is tendered, and the statement—

- (a) was made with the ostensible authority of the party;
- (b) relates to a matter which was within the scope of his employment or agency and—
 - (i) where the fact asserted is not an opinion, is a matter of which the declarant at the time when he made the statement had personal knowledge or may reasonably be supposed to have had personal knowledge, in full or to some extent; or
 - (ii) where the fact asserted is an opinion, is a matter which the declarant would have been permitted to state in full or to some extent if at the time when he made the statement he were testifying;

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(c) relates to a matter of which he had the superintendence on behalf of the party; or

(d) relates to a matter which it was within the scope of his employment or agency to discuss with any person to whom he made the statement.

(4) Subject to subsection (3) (b), a statement admissible by virtue of this section is so admissible notwithstanding that it deals with—

(a) a matter not within the knowledge of the declarant;

(b) a matter of law as well as a matter of fact; or

(c) a matter which is one for an inference or conclusion by the court or jury on evidence or is an issue in the legal proceeding.

(5) Where the fact asserted in a statement admitted by virtue of subsection (3) (b) is not an opinion, the statement is admissible as evidence of the fact to the extent to which the declarant at the time when he made the statement had personal knowledge or may reasonably be supposed to have had personal knowledge of the fact.

(6) Where the fact asserted in a statement admitted by virtue of subsection (3) (b) is an opinion, the statement is admissible to the extent to which the declarant would have been permitted to give the opinion if at the time when he made the statement he were testifying.

(7) Where an out-of-court statement is tendered against a party, and the statement is admitted by virtue of this section, it shall be admissible in relation to that party, but shall not be admissible by virtue of this section in relation to any other party unless he tenders the statement or consents to its tender in relation to him.

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89. (1) In a civil legal proceeding—

Statement
not objected
to.

- (a) where no objection is made to the admission of an out-of-court statement, the statement is admissible unless the court otherwise orders;
- (b) where objection to the admission of an out-of-court statement is made by one party but not by another, the court may admit the statement against the party who does not object, whether or not it admits it against the party who does object.

(2) This Part does not affect the law and practice in relation to the admission in a criminal legal proceeding of an out-of-court statement where an objection is not made.

90. Where in the course of a business a person receives from another person a message (whether in the form of a letter, telegram or otherwise), package or parcel for delivery or transmission, any statement which the first person makes or causes to be made—

Postal or
other mark.

- (a) on a document in which the message is recorded;
- (b) on any covering, envelope or wrapping encasing the message, package or parcel; or
- (c) on any label or other document associated with the delivery or transmission of the message, package or parcel,

in the course of delivery or transmission, is admissible as evidence of any fact asserted in the statement.

DIVISION 4.—Business Records.

91. (1) Subject to this Division, where evidence of a fact is admissible, a statement in a document of the fact is admissible as evidence of the fact, if the requirements of subsections (2), (3) and (4) are satisfied.

Admissibil-
ity generally.
s. 14CE (1) as
added by
Act No. 13,
1976.

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(2) The statement must be in a document which forms part of a record of a business, but the business need not be in existence at the time when the question of admissibility arises. s. 14CE (4) as added by Act No. 13, 1976.

(3) The statement must have been made in the course of or for the purposes of the business. s. 14CE (5) as added by Act No. 13, 1976.

(4) The statement must—

s. 14CE (6) as added by Act No. 13, 1976.

(a) be made by a qualified person; or

(b) reproduce or be derived from one or other or both of the following descriptions of information—

(i) information in one or more statements, each made by a qualified person in the course of or for the purposes of the business;

(ii) information from one or more devices designed for, and used for the purposes of the business in or for, recording, measuring, counting or identifying information, not being information based on information supplied by any person.

(5) (a) This subsection applies where the statement tendered is made by a qualified person or, where it reproduces or is derived from information in a statement by a qualified person, to the extent that it reproduces or is derived from that information.

(b) Where the fact stated in the document is not an opinion, the statement tendered is admissible to the extent to which the qualified person, at the time when he made his statement, had or may reasonably be supposed to have had personal knowledge of the fact.

(c) Where the fact stated in the document is an opinion, the statement tendered is admissible to the extent to which the qualified person would have been permitted to give the opinion if at the time when he made his statement he were testifying.

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92. (1) Where—

(a) a statement is tendered for admission under section 91;

(b) the statement tendered or an earlier statement having in it information which the statement tendered reproduces or from which the statement tendered is derived, wholly or in part, was made at a time when a legal proceeding was contemplated or should reasonably have been contemplated—

(i) by a person concerned in the making of the statement tendered; or

(ii) by a person by or on behalf of whom the making of the statement tendered or the earlier statement was induced or obtained,

for the purpose of indicating testimony which a person concerned in the making of the statement tendered would be able to give in a legal proceeding,

the statement tendered is not admissible under section 91.

(2) The purpose referred to in subsection (1) includes not only the sole purpose but also a substantial purpose.

(3) Where a person proposes to tender, or tenders, a statement in evidence under section 91, the court may require that any other document related to the statement be produced and, in default, may reject the statement or, if it has been received, exclude it.

Restrictions
on admissi-
bility under
section 91:
general.

s. 14CF (1) as
added by Act
No. 13, 1976.

s. 14CF (2) as
added by Act
No. 13, 1976.

93. (1) Subsection (2) applies where a statement is tendered in a criminal legal proceeding for admission under section 91 and the statement tendered—

(a) is a statement made by a person; or

(b) reproduces or is derived from information in a statement made by a person.

Restrictions
on admissi-
bility under
section 91:
criminal
proceeding.

s. 14CG (1) as
added by Act
No. 13, 1976.

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(2) The statement is not admissible under section 91 s. 14CG (2) as
unless, as to each person concerned in the making of the added by Act
statement tendered— No. 13, 1976.

(a) the tendering party calls him as a witness if required to do so by a party adverse in interest (in relation to the matter in question) to the tendering party; or

(b) it appears to the court—

- (i) that he is dead, or is unfit by reason of his bodily or mental condition to testify;
- (ii) that he is outside New South Wales and it is not reasonably practicable to procure his testimony;
- (iii) that reasonable steps have been taken to identify him, but he has not been identified;
- (iv) that it is not reasonably practicable to identify him;
- (v) that his identity is known, but reasonable steps have been taken to find him and he has not been found;
- (vi) that, having regard to the time which has elapsed since he was concerned in the making of the statement and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement; or
- (vii) that, having regard to all the circumstances of the case, undue delay or expenses would be caused by calling him as a witness.

(3) In deciding whether any of subparagraphs (2) (b) (ii) to (vii) is satisfied, the court shall have regard as well to—

- (a) the nature and importance of the statement and of the question on which the statement is tendered;
- (b) the resources available to the parties; and
- (c) the standard of proof to be met by the prosecution, as to other relevant matters.

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(4) A statement made in connection with a criminal legal proceeding or with any investigation relating or leading to a criminal legal proceeding is not admissible under section 91. s. 14CG (3) as added by Act No. 13, 1976.

DIVISION 5.—General.

94. (1) Where the happening of an event or the existence of a fact of any description is in question, and in the course of a business a system has been followed to make and keep a record of the happening of all events, or the existence of all facts, of that description, oral or other evidence to establish that there is no record of the happening of the event or the existence of the fact in question is admissible to prove that the event did not happen or that the fact does not exist. Absence of record. s. 14CH (1) as added by Act No. 13, 1976.

(2) Where a party tenders or has tendered evidence under this section, the court may require that the whole or part of the record concerned be produced and, in default, may reject the evidence or, if it has been received, exclude it. s. 14CH (2) as added by Act No. 13, 1976.

95. In estimating the weight, if any, to be attached to a statement tendered for admission or admitted under this Part, the court shall have regard (or, if it is admitted and there is a jury, may warn the jury to have regard) to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including, where applicable— Weight of evidence. s. 14CI as added by Act No. 13, 1976.

- (a) whether there is evidence of greater weight reasonably available to be tendered that is not tendered;

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- (b) the presence or absence of any incentive for any person concerned in the making of the statement, or dealing with the statement, to conceal or misrepresent any relevant matter in his statement;
- (c) the recency or otherwise, at the time when any person concerned in the making of the statement was so concerned, of any relevant matter dealt with in the statement;
- (d) in the case of a statement wholly or in part reproducing or derived from information from one or more devices, the reliability of the device or devices;
- (e) in the case of a statement wholly or in part reproducing or derived from any information, the reliability of the means of reproduction or of derivation;
- (f) in the case of any system of keeping records from which the statement is produced, the reliability of the system;
- (g) in the case of a statement reporting a reputation, the extent to which that reputation is tested by discussion and the extent to which it is widely accepted;
- (h) in the case of a statement admissible under section 80, the importance to persons making and acting on the statement of it being accurate, and the extent of its publication;
- (i) in the case of evidence admissible under section 81, the importance to the manufacturer or distributor and to persons buying or dealing in the goods of the statement being accurate;
- (j) in the case of evidence admissible under sections 81 and 82, whether the statement was made in conformity with any custom or usage or any requirement of law; and
- (k) in the case of evidence admissible under section 94, whether any person concerned with the system had any incentive to omit recording the happening of the event or the existence of the fact in question.

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96. (1) In relation to a statement tendered for admission or Credibility. admitted under Division 3, this section applies to the declarant and to any person dealing with the statement.

(2) In relation to a statement tendered for admission or admitted under section 91, this section applies to any person concerned in the making of the statement. s. 14CK (1) (a), (b) as added by Act No. 13, 1976.

(3) Subsections (4) to (6) have effect where a person to whom this section applies is not called as a witness. s. 14CK (1) (c) as added by Act No. 13, 1976.

(4) Evidence is admissible which, had he been called as a witness, would be admissible for the purpose of attacking or supporting his credibility. s. 14CK (2) as added by Act No. 13, 1976.

(5) Evidence is admissible to show that the statement made by him is inconsistent with another statement made by him. s. 14CK (3) as added by Act No. 13, 1976.

(6) Notwithstanding anything in subsection (4) or (5), evidence is not admissible under this section, except with the leave of the court, of any matter of which, had the person been called as a witness and denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party. s. 14CK (4) as added by Act No. 13, 1976.

97. (1) The court may, for the purpose of deciding questions of admissibility of a statement under this Part, draw inferences as well from the form or content of the statement, or of any document in which the statement is contained, or of any other statement made on the occasion when the statement was made, as from other relevant matters. Facts Relevant to admissibility. s. 14CL as added by Act No. 13, 1976.

(2) Where the admissibility under this Part of a statement is in question, that statement and any statement made by the same declarant on the same occasion shall, on any question of admissibility of that statement, be admissible evidence of the fact asserted.

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(3) Any matter of fact relevant to the admissibility of a statement under this Part shall be determined by the court, and may, if it thinks fit, be determined in the absence of the jury (if any).

(4) The jury, or if there is no jury the court, shall determine the weight of any statement admitted under this Part, and facts relevant to weight shall be admissible.

(5) In determining the existence of any fact relevant to the admissibility of a statement under this Part the court may receive and act on any material, whether admissible under the laws of evidence or not.

(6) Without limiting the generality of subsection (5), evidence relevant to questions of admissibility under this Part may be given on information and belief. s. 14CM (1)
as added by
Act No. 13,
1976.

98. (1) For the purposes of this Part—

- Proof of
statement
in a
document.
s. 14CN (1) as
added by Act
No. 13, 1976.
- (a) a statement in a document may, as may be prescribed or by leave of the court, be proved by the production of a copy of the document, or of the material part of the document;
 - (b) a statement in a document which is designed to be used to produce the statement in the form of a visible display or of sound may be proved by reproducing the statement in that form before the court; and
 - (c) a statement in a record of information made by the use of a computer may be proved by the production of a document produced by the use of a computer containing the statement in a form which can be understood by sight.

(2) Subsection (1) does not prevent proof of a statement in a document by other means.

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(3) For the purposes of section 94, the absence of a record of the happening of an event or the existence of a fact in a record of information made by the use of a computer may be proved by the production of a document produced by the use of a computer containing a statement based on the absence of such a record.

s. 14CN (2) as
added by Act
No. 13, 1976.

(4) Subject to section 66 (2), where a person proposes to prove or proves under this Part a statement in a document otherwise than by producing the document the court may require that the document be produced or be made available to the court or to other parties for examination or testing and, in default, may reject the statement or, if it is in evidence, exclude it.

s. 14CN (3) as
added by Act
No. 13, 1976.

(5) Where a person proposes to prove or proves under this Part a statement by reproducing the statement in the form of a visible display or of sound, the court may direct a written or other permanent record of the statement to be tendered and, in default, may reject the statement or, if it is in evidence, exclude it.

s. 14CN (4) as
added by Act
No. 13, 1976.

(6) For the purposes of this section "computer" means any device for storing or processing information.

s. 14CN (5) as
added by Act
No. 13, 1976.

99. For the purposes of this Part, a document, a copy of a document or a copy of part of a document may be authenticated in such manner as may be prescribed or as the court approves.

Authentica-
tion.
s. 14Co as
added by
Act No. 13,
1976

100. (1) Where a party tenders any evidence under this Part, and it appears to the court—

Rejection for
unfairness,
etc.

(a) that the weight of the evidence is too slight to justify its admission;

s. 14CP (1) as
added by Act
No. 13, 1976.

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(b) that the utility of the evidence is outweighed by the tendency of the evidence—

- (i) to prolong the proceeding unduly;
 - (ii) to operate unfairly against any other party;
- or

(iii) to mislead the jury (if any);

(c) that the tender of the evidence is an abuse of the process of the court; or

(d) that the evidence would unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered,

the court may reject the evidence or, if it has been received, exclude it, or may admit it in relation to one party but not another, or may admit it on such terms or conditions as it thinks fit.

(2) In exercising its discretion under subsection (1), the court shall have regard as well to the nature and importance of the evidence and of the question on which the evidence is tendered as to other relevant matters.

101. Where there is a jury, and a statement in a document ^{Withholding document from jury.} or an immediate or remote record of a statement is admitted ^{s. 14CQ as added by Act No. 13, 1976.} in evidence under this Part, and it appears to the court that if the jury were to have the document or record with it during its deliberations it might give the statement undue weight, the court may direct that the document or record be withheld in whole or in part from the jury during its deliberations.

102. (1) In relation to any matter in question, where a ^{Corroboration.} person—

- (a) makes or deals with a statement relating to that ^{s. 14CR as added by Act No. 13, 1976.} matter, which statement is admitted under Division 3;

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- (b) gives testimony—
 - (i) pursuant to Division 3 reporting a statement relating to that matter;
 - (ii) pursuant to Division 3 by way of secondary evidence of an immediate or remote record of a statement relating to that matter; or
 - (iii) otherwise relating to that matter; or
- (c) is concerned in the making of a statement relating to that matter which statement is admitted under section 91,

a statement or testimony described in this subsection is not corroboration of another statement or other testimony described in this subsection.

- (2) Subject to subsection (1), where—

- (a) a person—
 - (i) makes or deals with a statement which is admitted under Division 3; or
 - (ii) is concerned in the making of a statement which is admitted under section 91,
 relating to any matter in question; and
- (b) if that person gave testimony relating to that matter, any law or practice relating to corroboration would apply to his testimony,

that law or practice applies to the statement in the same manner as nearly as may be as it would apply to his testimony.

103. This Part does not affect the power of a court in a criminal legal proceeding to reject evidence which, if admitted, would operate unfairly against an accused person.

Criminal proceedings: rejection of evidence.
s. 14CS as added by Act No. 13, 1976.

104. A court may make orders concerning the admissibility of any statement or evidence under this Part, or the exclusion of any statement or evidence already admitted, at any stage of a legal proceeding.

Time for order.
s. 14CT as added by Act No. 13, 1976.

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105. (1) The Governor may make regulations, and rules may be made as prescribed in section 106, not inconsistent with this Part, for or with respect to any matter which by this Part is required or permitted to be prescribed or which is necessary or convenient for carrying out or giving effect to this Part and, without limiting the generality of the foregoing, for or with respect to—

Rules and regulations.
s. 14cu (1) as added by Act No. 13, 1976.

- (a) the giving by a party, who proposes to tender any evidence under this Part, to the court or to other parties of notice of his intention to do so and of particulars of the evidence (including copies of any statement or document);
- (b) the giving by a party, who has received notice from another party of his intention to tender any evidence under this Part, to the court or to other parties of notice of his intention to dispute the evidence and of particulars of the grounds on which he intends to dispute the evidence;
- (c) the production by a party, who proposes to tender any evidence under this Part, or who proposes to adduce evidence in answer to any such evidence, to the court or to other parties for inspection of any document he proposes to tender or any document related to any such evidence he proposes to tender;
- (d) the making by a court of orders requiring a person not a party to a legal proceeding before the court to produce to the court, or to parties to the legal proceeding, for inspection, any document which a party desires to inspect for the purpose of the application of this Part to the legal proceeding;
- (e) the making by the Supreme Court or the District Court of orders in respect of a legal proceeding in a court, other than the Supreme Court or the District Court, requiring a person not a party to the legal proceeding to produce to the court or to the Supreme Court or District Court or to parties to the legal proceeding for inspection, any document which a party desires to inspect for the purpose of the application of this Part to the legal proceeding;

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(f) the proof of any of the matters relevant to admissibility under this Part by affidavit or statutory declaration;

(g) the making by a court of orders under this Part at any stage of a legal proceeding.

(2) Subsection (1) does not affect any power to make rules or regulations under any other Act.

s. 14cu (2)
added by
No. 13, 19

106. (1) Where there is any authority having for the time being power to make rules or regulations regulating the practice and procedure of any court, that authority shall have power to make rules or regulations, not inconsistent with this Part, for the purpose of regulating any legal proceeding before that court, for or with respect to any matter that by this Part is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part.

Power to
make rule
or regu-
lations.
s. 14cv (1)
added by
No. 13, 19

(2) For the purpose of a legal proceeding before an arbitrator, rules for giving effect to this Part may be made under the Supreme Court Act, 1970.

s. 14cv (2)
added by
No. 13, 19

(3) Subsection (2) does not apply to a legal proceeding before an arbitrator in respect of which rules or regulations may be made by an authority referred to in subsection (1).

s. 14cv (3)
added by
No. 13, 19

(4) In the case of a court to which neither subsection (1) nor subsection (2) applies, the Governor may make regulations under this section for the purpose of a legal proceeding before that court.

s. 14cv (4)
added by
No. 13, 19

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SCHEDULE 5.

Sec. 5.

AMENDMENTS TO PART VII OF THE CRIMES ACT, 1900.

PART VII—

(1) before section 340, insert—

339A. Whosoever wilfully makes any false statement, ^{Other false} being a statement within the meaning of Part VI of the ^{statements.} Evidence Act, 1898, with intent that it be used as evidence in any legal proceeding shall be liable to penal servitude for five years.

(2) In section 341, insert—

(4) No prosecution in respect of any statement to which section 339A applies shall be instituted without the leave of a Judge of the Supreme Court, or a Judge of the District Court.

SCHEDULE 6.

Sec. 5.

AMENDMENTS TO PART XI OF THE CRIMES ACT, 1900

PART XI—

(1) Section 404—

Omit “make any admissions as to matters of fact”.

Omit “or”.

(2) Section 408—

Omit the section.

APPENDIX B

OTHER JURISDICTIONS

1. American Proposals

1.1 *Model Code.* There have been in the last fifty years several distinct proposals formulated in America for the reform of the hearsay rule. We reproduce four of them as Appendixes F-I. The most radical was that of the American Law Institute's Model Code of Evidence (1942). It has not been enacted in any jurisdiction, but contains a wealth of material useful in hearsay reform which has been influential in many other proposals. The Model Code excludes all hearsay evidence save as it provides. The major exception is declarations by persons unavailable as witnesses, or present and subject to cross-examination (r. 503, similar to s. 73). Documents used to refresh memory are admissible as evidence of the facts stated (r. 504). Business records are made admissible (r. 514). Many common law exceptions are preserved, remodelled and extended. Double hearsay is admissible if both hearsay statements fall within some exception (r. 530).

1.2 *Uniform Rules.* In 1953, the National Conference of Commissioners on Uniform State Laws approved a substantial modification of the Model Code called the Uniform Rules of Evidence. Though approved by the American Bar Association, these Rules, particularly in their hearsay aspect, have been enacted in only a few states. The Uniform Rules result in less hearsay being admitted than under the Model Code. The definition of hearsay is similar (r. 63). Hearsay is inadmissible subject to thirty-one listed exceptions (r. 63). In essence they add to the common law four new hearsay exceptions: business and hospital records (r. 63 (13)); spontaneous statements by those present at an incident (r. 63 (4) (a) and (b)); statements made shortly after an event where the maker is unavailable to testify (r. 63 (1)). The principal respect in which admissibility is more restrictive than under the Model Code is that there is no provision for admitting hearsay statements made by unavailable declarants.

1.3 *California Code.* The Californian Evidence Code was enacted in 1965 after a report that year of the California Law Revision Committee. So far as hearsay is concerned it departs from earlier proposals to some extent, though it is basically modelled on the Uniform Rules. By our standards, therefore, it is again conservative.

Appendix B—Other Jurisdictions

1.4 *Federal Rules.* The Federal Rules of Evidence were drafted by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. They adopt a number of formal changes to previous models, and contain one major innovation. This appears in r. 803 (24) and r. 804 (5). Rule 803 (24) provides for the admission of a "statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness". Rule 804 (5) is to a like effect. This affords the courts the opportunity to continue creating new exceptions as the need arises and it is in part the inspiration of s. 74 (1) of our proposed Bill.

1.5 *The American codes reviewed.* In general we think the American proposals, so far as we have not adopted them, are on the whole too conservative, and, worse, retain far too much of the technicality and distinction—riddled quality of the present law. We agree with Cross's comment on the Federal Rules:¹

"It does scant justice to a carefully thought out set of rules to point to two situations where, it is submitted, the statements ought to be admissible, and yet they are not admissible; but such situations are almost bound to arise whenever the hearsay problem is dealt with by a general prohibition followed by a number of specific exceptions, instead of being followed by a general permission with qualifications. The situations in question are first, that which arose in *Morris v. Stratford-on-Avon U.D.C.*² in which a witness unexpectedly gave confused and inconsistent evidence, and second, the case in which the maker of the statement has not perceived the event described in it recently. Someone aged 20 tells his friend that he vividly remembers how, on his 16th birthday, his mother hit his father. It is absurd not to allow the friend to prove this statement as evidence of the assault if the maker is not available."

2. Other Proposals

2.1 *Australian legislation.* In Australia there have been, apart from our own Evidence (Amendment) Act, 1976,³ recent statutory reforms. Victoria in 1971 amended the Evidence Act 1958 to provide for the admission of business records and computer evidence (ss. 54–56).⁴ In the Australian Capital Territory there is in force the Evidence Ordinance 1971 which makes extensive provision for the admission of documentary hearsay.⁵ South Australia in 1972 amended the Evidence Act, 1928, to provide for the admission of business and other records (ss. 45–45b) and

¹ Cross (1974), p. 444.

² [1973] 3 All E.R. 263.

³ See below, Appendix C.

⁴ See below, Appendix K.

⁵ See below, Appendix L.

Appendix B—Other Jurisdictions

the admission of computer evidence (ss. 59a–59c).⁶ The Tasmanian Evidence Act 1974, s. 5, adds a new Division VII to the Evidence Act 1910 which has the following effects.⁷ First, it makes admissible first-hand written hearsay; where the maker testifies, the facts recorded must be fresh in his mind, and where he does not, he must be unavailable, and the opponent, being represented, must not require his attendance in criminal cases. Secondly, and without derogating from the common law *res gestae* exceptions, to make admissible oral statements made by a person while actually perceiving an event or made by a person spontaneously while under the stress of excitement caused by such perception, provided that the maker is either called as a witness or unavailable. The court is to have a discretion to exclude both kinds of hearsay and to both of them a modified notice procedure applies. Thirdly, to modify the dying declarations exception. Fourthly, to make admissible as evidence of the facts stated prior inconsistent statements and prior consistent statements admitted to rebut a suggestion of recent invention. Fifthly, to admit documents relating to the transportation of persons and goods. Its first group of provisions is much narrower than the Civil Evidence Act 1968 (U.K.), s. 2, and follows the Australian Capital Territory Ordinance 1971, ss. 28–30. The second has many of the difficulties in practice posed by the current *res gestae* rules and of American proposals which have attempted to modify them. The Queensland Evidence Act 1977 substantially follows the Queensland Law Reform Commission's Report on the Law Relating to Evidence (Q.L.R.C. 19); its hearsay provisions⁸ (Part VI) might be described as representing a reformist conservative point of view. They make hearsay statements admissible in civil cases on a basis similar, first, to the Civil Evidence Act 1968 (U.K.) and, secondly, to the Evidence Act, 1898, ss. 14CD–14CV and the Victorian Evidence Act, s. 55B (computers). And they make hearsay statements admissible in criminal cases on a similar basis to the Civil Evidence Act 1968 (U.K.), s. 1.

2.2 *Australian proposals: South Australia.* The Criminal Law and Penal Methods Reform Committee of South Australia in Chapter 8 of their 3rd Report (1975) recommended some reform of the hearsay rule. They recommended that provisions similar to the Criminal Justice Act 1967 (U.K.), s. 9, be made for the admissibility of written statements where no party objected (para. 3.1.1). They recommended that the out-of-court statements of witnesses in criminal proceedings, and of unavailable persons, be admissible as part of the facts asserted, subject to limitations for competent persons refusing to testify, unknown persons, co-accused persons, statements after the time of charge, and proofs of evidence (para. 3.6). They recommended a judicial warning that statements the maker of which did not testify have not been tested on cross-examination (para. 3.6 (e)). Previous inconsistent statements, and previous consistent statements rebutting a suggestion of recent invention,

⁶ See below, Appendix M.

⁷ See below, Appendix N.

⁸ See below, Appendix O.

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should be admissible as evidence of the truth of the facts asserted (para. 3.6 (1)). Only first-hand hearsay is to be admitted under the foregoing proposal (para. 3.6 (k)). The English Criminal Law Revision Committee proposal (11th Report (1972), cl. 31 (1)) for a reformulation of that part of the *res gestae* rule which concerns immediate reactions to an event was recommended for adoption (para. 4.1). It was recommended that the credibility of a declarant not called as a witness should be capable of challenge in the same way as if he had been so called (para. 5.1). It is recommended that declarations against penal interest (para. 7.3), and computer output (para. 9.2.1) be admissible, and that some modification to the admissibility of business records in South Australia be considered in the light of our Evidence (Business Records) Report, now enacted as ss. 14CD–14CV of the Evidence Act, 1898 (para. 9.1).

2.3 Australian proposals: Commonwealth. An Evidence Amendment Bill was introduced into Parliament late in 1977 which, had it been enacted, would have amended the Evidence Act 1905 (Cth) by importing the New South Wales law on Business Records enacted in 1976. Another Bill to a like effect was passed in 1978. The Senate Standing Committee on Constitutional and Legal Affairs has made a Report on the Evidence (Australian Capital Territory) Bill 1972 (1977) recommending, so far as hearsay is concerned, draft legislation based on the Evidence Ordinance 1971 (A.C.T.),⁹ with modifications, particularly as far as computer evidence is concerned.

2.4 Scottish proposals. The English Civil Evidence Act 1968 and the 11th Report (1972) of the Criminal Law Revision Committee have been discussed throughout this Report. The Scottish Law Commission have made hearsay proposals as follows. They propose that oral hearsay be admissible if the maker gives evidence, or is unavailable (draft Scottish Code, Arts. 1.4 and 1.5). Hearsay is also admissible “if the reported statement was made by a person as a natural, spontaneous and immediate reaction to an event which took place in his presence, sight or hearing, so as to form part of that event and be explicatory of it” (Art. 1.6). Documentary hearsay is admissible unless excluded on some ground other than hearsay. Another Scottish Committee chaired by Lord Thomson has proposed certain reforms relevant to admissions in criminal cases in its Second Report on Criminal Procedure in Scotland (1975). The Committee recommends that statements made before arrest by a suspect in answer to police questioning should be admissible, provided they are not unfairly obtained, their maker is cautioned, interrogations in police stations are taperecorded, and, where a person is proceeded against on petition, he is given an opportunity at a judicial examination held as soon as reasonably practicable after the interrogation to admit, deny, expand or qualify his statements. Statements made outside a police station should be recorded in the police officer’s notebook and signed by the suspect.¹⁰ We make no recommendation on these issues.¹¹

⁹ See below, Appendix L.

¹⁰ Chs 7 and 8.

¹¹ See above, para. 3.5.1.

Appendix B—Other Jurisdictions

2.5 New Zealand proposals. The New Zealand Torts and General Law Reform Committee issued a cautious Report on Hearsay Evidence (1967), which adhered very closely to both the letter and the spirit of the existing law. In criminal and civil cases it is recommended that first-hand documentary hearsay emanating from unavailable declarants should be admissible; and in civil cases that first-hand oral hearsay emanating from unavailable declarants should be admissible in non-jury proceedings.

2.6 Canadian proposals. There has been much discussion in Canada of reform of the law of evidence in general, and in particular of reform of the hearsay rule. The principal report is the Law Reform Commission of Canada's Report on Evidence (1975). Their proposed Code provides for the general exclusion of hearsay evidence (s. 27 (1)) subject to numerous exceptions. These include: previous statements of witnesses (s. 28); statements of unavailable persons, provided notice is given to other parties (s. 29); admissions made, authorized or agreed to by a party, his agent, his predecessor in title, or one engaged with him in a common enterprise (s. 30); business records (s. 31 (a) and (d)); public records (s. 31 (b) (c)); statements in marriage certificates and like documents (s. 31 (e)); statements in ancient documents (s. 31 (f)); market reports (s. 31 (g)); prior convictions (s. 31 (h)); and various kinds of reputation (s. 31 (i)–(l)). Reference should also be made to the draft Ontario Evidence Act (1976): see Appendix P.

2.7 Ghana Decree. In Ghana the Evidence Decree, 1975 effects some major reforms of the hearsay rule. Hearsay evidence is inadmissible save as the parties agree or statute provides (s. 117). A hearsay statement may be admitted if its maker testifies or is unavailable (s. 118). Exceptions are recognized for admissions (s. 119), confessions (s. 120), former testimony (s. 121), documents which refresh memory (s. 122), declarations of the declarant's state of mind (s. 123), *res gestae* (s. 124), records of regularly conducted activity (s. 125), official records (s. 126), judgments (s. 127), family history (s. 128), evidence of community traditions and customs concerning land, and of reputed events in community history (s. 129), dispositive documents and ancient documents (s. 130), reputation of character (s. 131), works by experts and commercial lists (s. 132). The credibility of a hearsay declarant not called as a witness may be impeached in the same way as if he had been so called (s. 133). The opponent of a hearsay may call the declarant as a witness and cross-examine him (s. 134). The court has a discretion to exclude certain statements by available declarants if they do not seem sufficiently trustworthy (s. 135).

APPENDIX C

PARTS IIA AND IIC OF EVIDENCE ACT, 1898

PART IIA.

Admissibility of Documentary Evidence as to Facts in Issue in Civil Proceedings.

New Part added, Act No. 35, 1954, s. 2 (b).
 Heading amended, Act No. 1, 1966, s. 2 (c).

14A. In this Part of this Act—

Interpretation.

“Court” means the court, judge, justice of the peace, arbitrator or person before whom proceedings are held or taken. cf. 1 & 2 Geo. 6, c. 28, s. 6 (1).

“Document” includes books, maps, plans, drawings and photographs. New section added, Act No. 35, 1954 s. 2 (b).

“Proceedings” means any proceedings or inquiry in which evidence is or may be given, and includes an arbitration.

“Statement” includes any representation of fact, whether made in words or otherwise.

14B. (1) In any civil proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

Admissibility of documentary evidence as to facts in issue. cf. 1 & 2 Geo. 6, c. 28, s. 1.

(i) if the maker of the statement either—

(a) had personal knowledge of the matters dealt with by the statement; or New section added, Ibid.

(b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of those matters; and

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- (ii) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection one of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence—

- (a) notwithstanding that the maker of the statement is available but is not called as a witness;
- (b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

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(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a legally qualified medical practitioner.

(6) In any civil proceedings with a jury, the court may reject a statement notwithstanding that it is admissible as evidence under this section if it appears to the court that the weight of the statement is too slight to justify its admission, or that the utility of the statement is outweighed by a probability that its admission will be unfair or mislead the jury.

(7) If, in any civil proceedings with a jury, it appears to the court that the jury might give a statement admitted as evidence under this section undue weight if it had that statement with it during its deliberations, the court may direct that the statement be withheld from the jury during its deliberations.

14c. (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Part of this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

Weight
to be
attached to
evidence.
cf. 1 & 2
Geo. 6,
c. 28, s. 2.
New section
added,
Act No. 35,
1954, s. 2
(b).

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Part of this Act shall not be treated as corroboration of evidence given by the maker of the statement.

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PART IIC.

Admissibility of Business Records.

14CD. (1) In this Part—

Interpreta
tion:
Pt. IIC.

“Business” includes—

- (a) any business, profession, occupation, calling, trade or undertaking whether engaged in or carried on—
 - (i) by the Crown in right of the State or any other right, or a person;
 - (ii) for profit or not; or
 - (iii) in New South Wales or elsewhere; and
- (b) public administration of the Commonwealth, including a Territory of the Commonwealth, a State or any country, carried on in New South Wales or elsewhere.

“Derived” means derived, by the use of a computer or otherwise, by calculation, comparison, selection, sorting, consolidation or by accounting, statistical or logical procedures.

“Document” includes any record of information.

“Qualified person”, in relation to a statement made in the course of or for the purposes of a business, means a person who, at the time when the statement was made—

- (a) was—
 - (i) an owner of the business or a person carrying on the business;
 - (ii) a servant or agent employed or engaged in the business;
 - (iii) a person retained for the purposes of the business; or
 - (iv) a person associated with the business in the course of another business; and

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- (b) (i) where the statement is not admissible in evidence unless made by an expert on the subject matter of the statement, was such an expert; or
- (ii) in any other case, had, or may reasonably be supposed to have had, personal knowledge of the fact stated.

“Statement” includes any representation of fact whether made in words or otherwise.

(2) For the purposes of this Part, a statement in a document is made by a person if—

- (a) it is written, made, dictated or otherwise produced by him; or
- (b) it is recognised by him as his statement by signing, initialling or otherwise.

(3) For the purposes of this Part, a person is concerned in the making of a statement if—

- (a) he made that statement; or
- (b) he made a statement containing information which the statement the admissibility of which is in question reproduces or from which the statement in question is derived, wholly or in part.

14CE. (1) Subject to this Part, where in a legal proceeding evidence of a fact is admissible, a statement in a document of the fact is admissible as evidence of the fact, if the requirements of subsections (4), (5) and (6) are satisfied. ^{Admissibility generally.}

(2) In subsection (1), “fact” includes opinion.

(3) This section makes a statement admissible notwithstanding—

- (a) the rules against hearsay;
- (b) the rules against secondary evidence of the contents of a document;

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- (c) that any person concerned in the making of the statement is a witness in the legal proceeding, whether or not he gives testimony consistent or inconsistent with the statement; or
- (d) that the statement is in such a form that it would not be admissible if given as oral testimony.

but does not make admissible a statement which is otherwise inadmissible.

(4) The statement must be in a document which forms part of a record of a business, but the business need not be in existence at the time when the question of admissibility arises.

(5) The statement must have been made in the course of or for the purposes of the business.

(6) The statement must—

- (a) be made by a qualified person; or
- (b) reproduce or be derived from one or other or both of the following descriptions of information—
 - (i) information in one or more statements, each made by a qualified person in the course of or for the purposes of the business;
 - (ii) information from one or more devices designed for, and used for the purposes of the business in or for, recording, measuring, counting or identifying information, not being information based on information supplied by any person.

14CF. (1) Notwithstanding section 14CE, a statement made or obtained for the purpose of, or in contemplation of, a legal proceeding or any other legal proceeding arising out of the same or substantially the same facts is not admissible.

Restric-
tions on
admissibil-
ity under
s. 14CE:
general.

(2) Where a person proposes to tender, or tenders, a statement in evidence under section 14CE, the court may require that any other document related to the statement be produced and, in default, may reject the statement or, if it has been received, exclude it.

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14CG. (1) Subsection (2) applies where a statement is tendered in a criminal legal proceeding for admission under section 14CE and the statement tendered—

Restrictions on admissibility under s. 14CE: criminal proceedings.

- (a) is a statement made by a person; or
- (b) reproduces or is derived from information in a statement made by a person.

(2) The statement is not admissible under section 14CE unless, as to each person concerned in the making of the statement tendered—

- (a) the tendering party calls him as a witness in the proceeding if any opposing party so requires; or
- (b) it appears to the court—
 - (i) that he is dead or is unfit by reason of his bodily or mental condition to attend as a witness;
 - (ii) that he is outside New South Wales and it is not reasonably practicable to secure his attendance;
 - (iii) that all reasonable steps have been taken to identify him and he cannot be identified;
 - (iv) that his identity being known, all reasonable steps have been taken to find him and he cannot be found;
 - (v) that, having regard to the time which has elapsed since he supplied the information and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement; or
 - (vi) that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling him as a witness.

(3) A statement made in connection with a criminal legal proceeding or with any investigation relating or leading to a criminal legal proceeding is not admissible under section 14CE.

14CH. (1) Where in any legal proceeding the happening of an event of any description is in question, and in the course of a business a system has been followed to make and keep a record of the

Dispute as to happening of event.

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happening of all events of that description, oral or other evidence to establish that there is no record of the happening of the event in question is admissible to prove that the event did not happen.

(2) Where evidence is, or is proposed to be, tendered under this section, the court may require that the whole or part of the record concerned be produced and, in default, may reject the evidence or, if it has been received, exclude it.

14CI. In estimating the weight, if any, to be attached to a statement tendered for admission or admitted under section 14CE, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—

- (a) in the case of a statement made by a person or a statement wholly or in part reproducing or derived from a statement made by a person—
 - (i) the recency or otherwise at the time when he made his statement of any relevant matter dealt with in his statement; and
 - (ii) the presence or absence of any incentive for him to conceal or misrepresent any relevant matter in his statement;
- (b) in the case of a statement wholly or in part reproducing or derived from information from one or more devices, the reliability of the device or devices; and
- (c) in the case of a statement reproducing or derived from any information, the reliability of the means of reproduction or of derivation.

14CJ. In estimating the weight, if any, to be attached to evidence admissible under section 14CH, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the evidence including whether any person concerned with the system had any incentive to omit recording the happening of the event in question.

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14CK. (1) This section applies where—

- (a) a person makes a statement;
- (b) that statement, or a statement wholly or in part reproducing or derived from information in that statement, is tendered for admission or is admitted under section 14CE; and
- (c) that person is not called as a witness.

Credibility
of the
maker of a
statement.

(2) Evidence is admissible which, had the person referred to in subsection (1) been called as a witness, would be admissible for the purpose of destroying or supporting his credibility.

(3) Evidence is admissible to show that a statement made by the person referred to in subsection (1) is inconsistent with another statement made at any time by him.

(4) Notwithstanding any other provision of this section, evidence is not admissible of any matter of which, had the person referred to in subsection (1) been called as a witness and denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.

14CL. The court may, for the purpose of deciding questions of admissibility under this Part, draw inferences as well from the form or content of the document in which the statement is contained as from other matters from which inferences may lawfully be drawn.

Inferences
concerning
admissi-
bility.

14CM. (1) Evidence relevant to the matters mentioned in section 14CE, 14CG or 14CH may, if given by a person who had, at the relevant time or afterwards, a responsible position in relation to the making or keeping of the records concerned, be given on information and belief.

Ancillary
evidence.

(2) Evidence given under subsection (1) may include evidence of the contents of a document notwithstanding that the document is not produced and that its non-production is not accounted for.

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14CN. (1) For the purposes of section 14CE—

Production
of
document,
etc.

- (a) a statement in a document may, as may be prescribed or by leave of the court, be proved by the production of a copy of the document, or of the material part of the document;
- (b) a statement in a document which is designed to be used to reproduce the statement in the form of a visible display or of sound may be proved by reproducing the statement in that form in the presence of the court; and
- (c) a statement in a record of information made by the use of a computer may be proved by the production of a document produced by the use of a computer containing the statement in a form which can be understood by sight.

(2) For the purposes of section 14CH, the absence of a record of the happening of an event in a record of information made by the use of a computer may be proved by the production of a document produced by the use of a computer containing a statement based on the absence of such a record.

(3) Where a person proposes to prove, or proves, a statement in a document otherwise than by producing the document, the court may require that the document be produced or be made available to the court or to other parties for examination or testing and, in default, may reject the statement or, if it is in evidence, exclude it.

(4) Where a person proposes to prove, or proves a statement by reproducing the statement in the form of a visible display or of sound, the court may direct a record of the statement to be produced and, in default, may reject the statement or, if it is in evidence, exclude it.

(5) For the purposes of this section, “computer” means any device for storing or processing information.

14CO. For the purposes of this Part, a document, a copy of a document or a copy of part of a document may be authenticated in such manner as may be prescribed or as the court approves.

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14CP. (1) Where a party to a legal proceeding in a court tenders any evidence under this Part, and it appears to the court that the weight of the evidence is too slight to justify its admission, or that the utility of the evidence is outweighed by a probability that its admission will unduly prolong the proceeding, or that the evidence may be unfair to any other party, or (where there is a jury) mislead the jury, the court may reject the evidence or, if it has been received, exclude it.

Rejection
for
unfairness,
etc.

(2) This section does not affect the admissibility of any evidence otherwise than by virtue of this Part.

14CQ. Where in a legal proceeding there is a jury, and a statement in a document is admitted in evidence under this Part, and it appears to the court that if the jury were to have the document with it during its deliberations it might give the statement undue weight, the court may direct that the document be withheld from the jury during its deliberations.

With-
holding
statement
from jury.

14CR. For the purposes of any Act or rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement admissible under section 14CE shall not be treated as corroboration of evidence given by a qualified person who was concerned in the making of the statement.

Corrobor-
ation.

14CS. This part does not affect the power of a court in a criminal legal proceeding to reject evidence which, if admitted, would operate unfairly against the defendant.

Rejection of
evidence in
criminal
pro-
ceedings.

14CT. A court may make orders concerning the admissibility of any statement or evidence under this Part at any stage of a legal proceeding.

Time for
order.

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14CU. (1) The Governor may make regulations, and rules may be made, as prescribed in section 14CV, not inconsistent with this Part, for or with respect to any matter which by this Part is required or permitted to be prescribed or which is necessary or convenient for carrying out or giving effect to this Part and, without limiting the generality of the foregoing, for or with respect to—

Rules and
regulations.

- (a) the giving by a party, who proposes to tender any statement under section 14CE or evidence under section 14CH, to the court or to other parties of notice of his intention to do so and of particulars of the statement or evidence (including copies of any statement or document);
- (b) the giving by a party, who has received notice from another party of his intention to tender any statement under section 14CE or evidence under section 14CH, to the court or to other parties of notice of his intention to dispute the statement or evidence and of particulars of the grounds on which he intends to dispute the statement or evidence;
- (c) the production by a party, who proposes to tender any statement under section 14CE or evidence under section 14CH, or who proposes to adduce evidence in answer to any such statement or evidence, to the court or to other parties for inspection of any document he proposes to tender or any document related to any such statement or evidence he proposes to tender;
- (d) the making by a court of orders requiring a person not a party to a proceeding in the court to produce to the court, or to parties to the proceeding, for inspection any document which a party desires to inspect for the purpose of the application of this Part to the proceeding;
- (e) the making by the Supreme Court or the District Court of orders in respect of proceedings in a court, other than the Supreme Court or the District Court, requiring a person not a party to a proceeding in such a court to produce to the court or to the Supreme Court or District Court or to parties to the proceeding for inspection any document which a party desires to inspect for the purpose of the application of this Part to the proceeding;
- (f) the proof of any of the matters mentioned in section 14CE, 14CG or 14CH by affidavit or statutory declaration provided

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that any such rule or regulation shall, if it is not otherwise so provided, provide for the attendance at the proceeding of the deponent or maker of any such affidavit or statutory declaration for cross-examination by any party who desires to cross-examine him; and

(g) the making by a court of orders under this Part at any stage of a legal proceeding.

(2) Subsection (1) does not affect any power to make rules or regulations under any other Act.

14cv. (1) Where there is any authority having for the time being power to make rules or regulations regulating the practice and procedure of any court, that authority shall have power to make rules or regulations, not inconsistent with this Part, for the purpose of regulating any proceedings in or before that court, for or with respect to any matter that by this Part is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part.

(2) For the purposes of a legal proceeding before an arbitrator, rules for giving effect to this Part may be made under the Supreme Court Act, 1970.

(3) Subsection (2) does not apply to a legal proceeding before an arbitrator in respect of which rules or regulations may be made by an authority referred to in subsection (1).

(4) In the case of a court to which neither subsection (1) nor subsection (2) applies, the Governor may make regulations under this section for the purpose of proceedings in or before that court.

APPENDIX D

CIVIL EVIDENCE ACT 1968 (U.K.), PART I

1.—(1) In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part of this Act or by virtue of any other statutory provision or by agreement of the parties, but not otherwise.

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(2) In this section “statutory provision” means any provision contained in, or in an instrument made under, this or any other Act, including any Act passed after this Act.

2.—(1) In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person by whom the statement was made, the statement—

- (a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and
- (b) without prejudice to paragraph (a) above, shall not be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person by whom it was made, except—
 - (i) where before that person is called the court allows evidence of the making of the statement to be given on behalf of that party by some other person; or
 - (ii) in so far as the court allows the person by whom the statement was made to narrate it in the course of his examination-in-chief on the ground that to prevent him from doing so would adversely affect the intelligibility of his evidence.

(3) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it:

Provided that if the statement in question was made by a person while giving oral evidence in some other legal proceedings (whether civil or criminal), it may be proved in any manner authorised by the court.

3.—(1) Where in any civil proceedings—

- (a) a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865; or
- (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,

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that statement shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Nothing in this Act shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any civil proceeding is cross-examined on a document used by him to refresh his memory, that document may be made evidence in those proceedings; and where a document or any part of a document is received in evidence in any such proceedings by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh his memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

4.—(1) Without prejudice to section 5 of this Act, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty.

(2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person who originally supplied the information from which the record containing the statement was compiled, the statement—

- (a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and
- (b) without prejudice to paragraph (a) above, shall not without the leave of the court be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person who originally supplied the said information.

(3) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.

5.—(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

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(2) The said conditions are—

- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2) (a) above was regularly performed by computers, whether—

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

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- (c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part of this Act—

- (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
- (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(6) Subject to subsection (3) above, in this Part of this Act “computer” means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

6.—(1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 2, 4 or 5 of this Act it may, subject to any rules of court, be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 2, 4 or 5 of this Act, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of that document.

(3) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 2, 3, 4 or 5 of this Act regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular—

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- (a) in the case of a statement falling within section 2 (1) or 3 (1) or (2) of this Act, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts;
 - (b) in the case of a statement falling within section 4 (1) of this Act, to the question whether or not the person who originally supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not that person, or any person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts; and
 - (c) in the case of a statement falling within section 5 (1) of this Act, to the question whether or not the information which the information contained in the statement reproduces or is derived from was supplied to the relevant computer, or recorded for the purpose of being supplied thereto, contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not any person concerned with the supply of information to that computer, or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent the facts.
- (4) For the purpose of any enactment or rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated—
- (a) a statement which is admissible in evidence by virtue of section 2 or 3 of this Act shall not be capable of corroborating evidence given by the maker of the statement; and
 - (b) a statement which is admissible in evidence by virtue of section 4 of this Act shall not be capable of corroborating evidence given by the person who originally supplied the information from which the record containing the statement was compiled.
- (5) If any person in a certificate tendered in evidence in civil proceedings by virtue of section 5 (4) of this Act wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both.
- 7.—(1) Subject to rules of court, where in any civil proceedings a statement made by a person who is not called as a witness in those proceedings is given in evidence by virtue of section 2 of this Act—
- (a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings; and

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- (b) evidence tending to prove that, whether before or after he made that statement, that person made (whether orally or in a document or otherwise) another statement inconsistent therewith shall be admissible for the purpose of showing that that person has contradicted himself:

Provided that nothing in this subsection shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(2) Subsection (1) above shall apply in relation to a statement given in evidence by virtue of section 4 of this Act as it applies in relation to a statement given in evidence by virtue of section 2 of this Act, except that references to the person who made the statement and to his making the statement shall be construed respectively as references to the person who originally supplied the information from which the record containing the statement was compiled and to his supplying that information.

(3) Section 3 (1) of this Act shall apply to any statement proved by virtue of subsection (1) (b) above as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in paragraph (a) of the said section 3 (1).

8.—(1) Provision shall be made by rules of court as to the procedure which, subject to any exceptions provided for in the rules, must be followed and the other conditions which, subject as aforesaid, must be fulfilled before a statement can be given in evidence in civil proceedings by virtue of section 2, 4 or 5 of this Act.

(2) Rules of court made in pursuance of subsection (1) above shall in particular, subject to such exceptions (if any) as may be provided for in the rules—

- (a) require a party to any civil proceedings who desires to give in evidence any such statement as is mentioned in that subsection to give to every other party to the proceedings such notice of his desire to do so and such particulars of or relating to the statement as may be specified in the rules, including particulars of such one or more of the persons connected with the making or recording of the statement or, in the case of a statement falling within section 5 (1) of this Act, such one or more of the persons concerned as mentioned in section 6 (3) (c) of this Act as the rules may in any case require; and
- (b) enable any party who receives such notice as aforesaid by counter-notice to require any person of whom particulars were given with the notice to be called as a witness in the proceedings unless that person is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has

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elapsed since he was connected or concerned as aforesaid and to all the circumstances) to have any recollection of matters relevant to the accuracy or otherwise of the statement.

(3) Rules of court made in pursuance of subsection (1) above—

- (a) may confer on the court in any civil proceedings a discretion to allow a statement falling within section 2 (1), 4 (1) or 5 (1) of this Act to be given in evidence notwithstanding that any requirement of the rules affecting the admissibility of that statement has not been complied with, but except in pursuance of paragraph (b) below shall not confer on the court a discretion to exclude such a statement where the requirements of the rules affecting its admissibility have been complied with;

- (b) may confer on the court power, where a party to any civil proceedings has given notice that he desires to give in evidence—

(i) a statement falling within section 2 (1) of this Act which was made by a person, whether orally or in a document, in the course of giving evidence in some other legal proceedings (whether civil or criminal); or

(ii) a statement falling within section 4 (1) of this Act which is contained in a record of any direct oral evidence given in some other legal proceedings (whether civil or criminal),

to give directions on the application of any party to the proceedings as to whether, and if so on what conditions, the party desiring to give the statement in evidence will be permitted to do so and (where applicable) as to the manner in which that statement and any other evidence given in those other proceedings is to be proved; and

- (c) may make different provision for different circumstances, and in particular may make different provision with respect to statements falling within sections 2 (1), 4 (1) and 5 (1) of this Act respectively;

and any discretion conferred on the court by rules of court made as aforesaid may be either a general discretion or a discretion exercisable only in such circumstances as may be specified in the rules.

(4) Rules of court may make provision for preventing a party to any civil proceedings (subject to any exceptions provided for in the rules) from adducing in relation to a person who is not called as a witness in those proceedings any evidence which could otherwise be adduced by him by virtue of section 7 of this Act unless that party has in pursuance of the rules given in respect of that person such a counter-notice as is mentioned in subsection (2) (b) above.

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(5) In deciding for the purposes of any rules of court made in pursuance of this section whether or not a person is fit to attend as a witness, a court may act on a certificate purporting to be a certificate of a fully registered medical practitioner.

(6) Nothing in the foregoing provisions of this section shall prejudice the generality of section 99 of the Supreme Court of Judicature (Consolidation) Act 1925, section 102 of the County Courts Act 1959, section 15 of the Justices of the Peace Act 1949 or any other enactment conferring power to make rules of court; and nothing in section 101 of the Supreme Court of Judicature (Consolidation) Act 1925, section 102 (2) of the County Courts Act 1959 or any other enactment restricting the matters with respect to which rules of court may be made shall prejudice the making of rules of court with respect to any matter mentioned in the foregoing provisions of this section or the operation of any rules of court made with respect to any such matter.

9.—(1) In any civil proceedings a statement which, if this Part of this Act had not been passed, would by virtue of any rule of law mentioned in subsection (2) below have been admissible as evidence of any fact stated therein shall be admissible as evidence of that fact by virtue of this subsection.

(2) The rules of law referred to in subsection (1) above are the following, that is to say any rule of law—

- (a) whereby in any civil proceedings an admission adverse to a party to the proceedings, whether made by that party or by another person, may be given in evidence against that party for the purpose of proving any fact stated in the admission;
- (b) whereby in any civil proceedings published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated therein;
- (c) whereby in any civil proceedings public documents (for example, public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated therein; or
- (d) whereby in any civil proceedings records (for example, the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts stated therein.

In this subsection “admission” includes any representation of fact, whether made in words or otherwise.

(3) In any civil proceedings a statement which tends to establish reputation or family tradition with respect to any matter and which, if this Act had not been passed, would have been admissible in evidence by virtue of any rule of law mentioned in subsection (4) below—

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- (a) shall be admissible in evidence by virtue of this paragraph in so far as it is not capable of being rendered admissible under section 2 or 4 of this Act; and
- (b) if given in evidence under this Part of this Act (whether by virtue of paragraph (a) above or otherwise) shall by virtue of this paragraph be admissible as evidence of the matter reputed or handed down;

and, without prejudice to paragraph (b) above, reputation shall for the purposes of this Part of this Act be treated as a fact and not as a statement or multiplicity of statements dealing with the matter reputed.

(4) The rules of law referred to in subsection (3) above are the following, that is to say any rule of law—

- (a) whereby in any civil proceedings evidence of a person's reputation is admissible for the purpose of establishing his good or bad character;
- (b) whereby in any civil proceedings involving a question of pedigree or in which the existence of a marriage is in issue evidence of reputation or family tradition is admissible for the purpose of proving or disproving pedigree or the existence of the marriage, as the case may be; or
- (c) whereby in any civil proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving the existence of any public or general right or of identifying any person or thing.

(5) It is hereby declared that in so far as any statement is admissible in any civil proceedings by virtue of subsection (1) or (3) (a) above, it may be given in evidence in those proceedings notwithstanding anything in sections 2 to 7 of this Act or in any rules of court made in pursuance of section 8 of this Act.

(6) The words in which any rule of law mentioned in subsection (2) or (4) above is there described are intended only to identify the rule in question and shall not be construed as altering that rule in any way.

10.—(1) In this Part of this Act—

“computer” has the meaning assigned by section 5 of this Act;

“document” includes, in addition to a document in writing—

- (a) any map, plan, graph or drawing;
- (b) any photograph;
- (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

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(d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

“film” includes a microfilm;

“statement” includes any representation of fact, whether made in words or otherwise.

(2) In this Part of this Act any reference to a copy of a document includes—

- (a) in the case of a document falling within paragraph (c) but not (d) of the definition of “document” in the foregoing subsection, a transcript of the sounds or other data embodied therein;
- (b) in the case of a document falling within paragraph (d) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not;
- (c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and
- (d) in the case of a document not falling within the said paragraph (d) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged or not,

and any reference to a copy of the material part of a document shall be construed accordingly.

(3) For the purposes of the application of this Part of this Act in relation to any such civil proceedings as are mentioned in section 18 (1) (a) and (b) of this Act, any rules of court made for the purposes of this Act under section 99 of the Supreme Court of Judicature (Consolidation) Act 1925 shall (except in so far as their operation is excluded by agreement) apply, subject to such modifications as may be appropriate, in like manner as they apply in relation to civil proceedings in the High Court:

Provided that in the case of a reference under section 92 of the County Courts Act 1959 this subsection shall have effect as if for the references to the said section 99 and to civil proceedings in the High Court there were substituted respectively references to section 102 of the County Courts Act 1959 and to proceedings in a county court.

(4) If any question arises as to what are, for the purposes of any such civil proceedings as are mentioned in section 18 (1) (a) or (b) of this Act, the appropriate modifications of any such rule of court as is mentioned in subsection (3) above, that question shall, in default of agreement, be determined by the tribunal of the arbitrator or umpire, as the case may be.

APPENDIX E

DRAFT CRIMINAL EVIDENCE BILL

(English Criminal Law Revision Committee, 11th Report)

PART II

HEARSAY EVIDENCE

30.—(1) In any proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Act or any other statutory provision, or by virtue of any rule of law mentioned in section 40 of this Act, but not otherwise.

(2) In this section “statutory provision” means any provision contained in, or in an instrument made under, this or any other Act, including any Act passed after this Act.

31.—(1) In any proceedings a statement made, whether orally or in a document or otherwise, by any person shall, subject to this and the next following section and to section 2 of this Act, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible, if—

- (a) he has been or is to be called as a witness in the proceedings; or
- (b) being compellable to give evidence on behalf of the party desiring to give the statement in evidence, he attends or is brought before the court but refuses to be sworn; or
- (c) it is shown with respect to him—
 - (i) that he is dead, or is unfit by reason of his bodily or mental condition to attend as a witness; or
 - (ii) that he is beyond the seas and that it is not reasonably practicable to secure his attendance; or
 - (iii) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to give evidence on behalf of that party; or
 - (iv) that all reasonable steps have been taken to identify him, but that he cannot be identified; or
 - (v) that, his identity being known, all reasonable steps have been taken to find him, but that he cannot be found.

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PART II

(2) Subject to section 2 of this Act, in any proceedings in which two or more persons are jointly charged, a statement made, whether orally or in a document or otherwise, by any of the accused may be given in evidence by the prosecution as evidence of any fact stated therein of which direct oral evidence by the maker would be admissible, notwithstanding that the maker has not been and is not to be called as a witness in the proceedings; and any statement given in evidence by virtue of this subsection shall be admissible as evidence of any such fact in relation to each of the accused.

(3) Where in any proceedings a statement has been received in evidence by virtue of paragraph (a) of subsection (1) above on the footing that the maker of it is to be called as a witness in the proceedings, then, if he is not subsequently so called, the statement shall not be admissible by virtue of that paragraph, and (unless it is or becomes admissible otherwise than by virtue of that paragraph) shall be disregarded accordingly.

(4) Where in any proceedings a deposition of a child or young person is received in evidence by virtue of section 43 of the Children and Young Persons Act 1933 on the ground that his attendance before the court would involve serious danger to his life or health, subsection (1) above shall apply to any statement made by him otherwise than in the deposition as if he had been shown to be unfit by reason of his bodily or mental condition to attend as a witness. 1933 c. 12.

(5) Where in any proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the maker of the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it, and nothing in section 2 or 9 of the Criminal Justice Act 1967 or any other enactment passed before this Act shall render a written statement admissible for that purpose: 1967 c. 80.

Provided that if the statement in question was made by a person while giving oral evidence in some other legal proceedings (whether civil or criminal), it may be proved in any manner authorised by the court.

(6) Where a person makes an oral statement to or in the hearing of another person who, acting at the instance of the maker of the statement, reduces it (or the substance of it) into writing at the time or reasonably soon afterwards, thereby producing a corresponding statement in a document, the statement in the document shall be treated for the purposes of this section (and sections 32, 36 and 41 so far as they have effect for the purposes of this section) as having been made in the document by the maker of the oral statement, whether or not it would be so treated apart from this subsection.

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32.—(1) A statement shall not be admissible in evidence in any proceedings by virtue of subsection (1) (b) or subsection 1 (c) (ii), (iii), (iv) or (v) of section 31 of this Act if it was made after the earliest time when any of the following things was done in relation to the accused or where two or more persons are jointly charged, in relation to any of the accused, that is to say—

- (a) he was charged with any offence in respect of the conduct constituting the offence with which he is charged; or
- (b) he was officially informed that he might be prosecuted in respect of that conduct; or
- (c) he was served with a summons issued against him under section 1 of the Magistrates' Courts Act 1952 in respect of that conduct.

In this subsection "officially informed" means informed by a police officer or by a person (other than a police officer) charged with the duty of investigating offences or charging offenders.

(2) A statement made by a person who is the wife or husband of the accused shall not be given in evidence on behalf of the prosecution by virtue of section 31 (1) (a) of this Act unless the maker gives evidence for the prosecution; and a statement made by a person who is (or was at the time of that person's death) the wife or husband of the accused shall not be given in evidence on behalf of the prosecution by virtue of section 31 (1) (c) unless the maker is (or would if living be) compellable to give evidence for the prosecution by virtue of section 9 (3) or (4) of this Act.

(3) Where a document setting out the evidence which a person could be expected to give as a witness has been prepared for the purpose of any pending or contemplated proceedings, whether civil or criminal, then in any criminal proceedings in which that person has been or is to be called as a witness a statement made by him in that document shall not be given in evidence by virtue of section 31 (1) (a) of this Act without the leave of the court; and the court shall not give leave under this subsection in respect of any such statement unless it is of the opinion that, in the particular circumstances in which that leave is sought, it is in the interests of justice for the witness's oral evidence to be supplemented by the reception of that statement or for the statement to be received as evidence of any matter about which he is unable or unwilling to give oral evidence.

(4) At a trial on indictment a statement shall not without the leave of the court be given in evidence by virtue of section 31 (1) (c) of this Act on behalf of a party to the proceedings unless, before the end of the prescribed period, a notice complying with such of the requirements set out in subsection (5) below as are applicable has been served by or on behalf of that party on each of the other parties to the proceedings.

In this subsection "the prescribed period" means the period of seven days from the end of the proceedings before the examining justices or, where two or more persons are being jointly tried, from the end of the proceedings before the examining justices in respect of whichever of them was last committed for trial.

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(5) The requirements referred to in subsection (4) above are as **PART II** follows:—

- (a) the notice must state on which of the grounds mentioned in section 31 (1) (c) of this Act it is claimed that the statement is admissible and, if the ground stated is that mentioned in section 31 (1) (c) (iv) or (v), must give particulars of the steps taken to identify or find the maker;
- (b) in the case of a statement made otherwise than in a document, the notice must state whether it was made orally or in some other (and, if so, what) manner, and must also state—
 - (i) the time and place at which the statement was made; and
 - (ii) the name of the maker of the statement, if known, and (unless he is dead) his address, if known; and
 - (iii) the name and address of a person who heard or otherwise perceived the statement being made; and
 - (iv) the substance of the statement or, if it was made orally and the actual words used in making it are material, the words so used;
- (c) in the case of a statement made in a document, the notice must contain or have attached to it a copy of that document, or of the material part thereof, and must state the following matters, that is to say—
 - (i) the matters mentioned in paragraph (b) (i) and (ii) above; and
 - (ii) if the maker of the document is not the same person as the maker of the statement, the name of the maker of the document, if known, and (unless he is dead) his address, if known,

in so far as those matters are not readily apparent from the document or part in question.

(6) A notice required by subsection (4) above to be served on any person may be served—

- (a) by delivering it to him or to his solicitor; or
- (b) by addressing it to him and leaving it at his usual or last known place of abode or place of business or by addressing it to his solicitor and leaving it at his office; or
- (c) by sending it in a registered letter or by the recorded delivery service addressed to him at his usual or last known place of abode or place of business or addressed to his solicitor at his office; or

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- (d) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or sending it in a registered letter or by the recorded delivery service addressed to the secretary or clerk of the body at that office.

33.—(1) Where in any proceedings—

- (a) a previous inconsistent statement made by a person called as a witness in those proceedings is proved by virtue of section 12 or 13 of this Act; or
- (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,

Witness's
previous
statement,
proved, to
be evidence
of facts
stated.

that statement shall by virtue of this subsection (and notwithstanding anything in section 31 or 32 of this Act) be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Nothing in this Act shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in those proceedings; and where a document or any part of a document is received in evidence in any such proceedings by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh his memory shall by virtue of this subsection (and notwithstanding anything in section 31 or 32 of this Act) be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

34.—(1) Without prejudice to section 35 of this Act, in any proceedings a statement contained in a document shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if—

- (a) the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty; and

Admissi-
bility of
certain
records as
evidence
of facts
stated.

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PART II

- (b) the condition specified in subsection (2) (a) below or the condition specified in subsection (2) (b) below or any of the conditions specified in subsection (2) (c) below is satisfied as regards the person who originally supplied the information from which the record containing the statement was compiled.
- (2) The conditions referred to in subsection (1) (b) above are the following, namely—
- (a) that the person in question has been or is to be called as a witness in the proceedings;
 - (b) that the person in question, being compellable to give evidence on behalf of the party desiring to give the statement in evidence, attends or is brought before the court but refuses to be sworn;
 - (c) that it is shown with respect to the person in question—
 - (i) that he is dead or is unfit by reason of his bodily or mental condition to attend as a witness; or
 - (ii) that he is beyond the seas and that it is not reasonably practicable to secure his attendance; or
 - (iii) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to give evidence on behalf of that party; or
 - (iv) that all reasonable steps have been taken to identify him, but that he cannot be identified; or
 - (v) that, his identity being known, all reasonable steps have been taken to find him, but that he cannot be found; or
 - (vi) that, having regard to the time which has elapsed since he supplied the information and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement.
- (3) Section 31 (3) of this Act shall apply to a statement received in evidence by virtue of subsection (2) (a) above as it applies to a statement received in evidence by virtue of section 31 (1) (a).
- (4) A statement shall not be admissible in evidence in any proceedings by virtue of subsection (2) (b) or subsection (2) (c) (ii), (iii), (iv) or (v) above if the person who originally supplied the information from which the record containing the statement was compiled did so after the earliest time when any of the following things was done in relation to the accused or, where two or more persons are jointly charged, in relation to any of the accused, that is to say—
- (a) he was charged with any offence in respect of the conduct constituting the offence with which he is charged; or

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(b) he was officially informed that he might be prosecuted in respect **PART II** of that conduct; or

(c) he was served with a summons issued against him under section 1 of the Magistrates' Courts Act 1952 in respect of that conduct. 1952 c. 55

In this subsection "officially informed" has the same meaning as in section 32 (1) of this Act.

(5) Where a document setting out the evidence which a person could be expected to give as a witness has been prepared for the purpose of any pending or contemplated proceedings, whether civil or criminal, and that document falls within subsection (1) (a) above, then in any criminal proceedings in which that person has been or is to be called as a witness a statement contained in that document shall not be given in evidence by virtue of subsection (2) (a) or (c) (vi) above without the leave of the court; and the same restrictions shall apply with respect to the giving of leave under this subsection as apply under section 32 (3) with respect to the giving of leave under section 32 (3).

(6) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.

35.—(1) In any proceedings a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

Admissi-
bility of
statement
produced
by
computer

(2) The said conditions are—

- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

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- (d) that the information contained in the statement reproduces or **PART II** is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2) (a) above was regularly performed by computers, whether—

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) Notwithstanding subsection (4) above, in any such proceedings as are therein mentioned the court may for special cause require oral evidence to be given of any matter of which evidence could ordinarily be given by means of a certificate under that subsection.

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(6) If any person in a certificate tendered in evidence in any proceedings **PART II** by virtue of subsection (4) above intentionally makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall on conviction on indictment be liable to imprisonment for a term not exceeding two years or a fine, or both.

(7) For the purposes of this Part of this Act—

- (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
- (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(8) Subject to subsection (3) above, in this Part of this Act “computer” means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

36.—(1) Where in any proceedings a statement contained in a document **Provisions supplementary to ss. 31 to 35,** is admissible in evidence by virtue of section 31, 34 or 35 of this Act, it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 31, 34 or 35 of this Act, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of that document.

(3) In relation to a statement made by a child sections 31 (1) (b) and 34 (2) (b) of this Act shall each have effect as if for the reference to his refusing to be sworn there were substituted a reference to his refusing to give evidence.

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(4) In estimating the weight, if any, to be attached to a statement **PART II** admissible in evidence by virtue of section 31, 33, 34 or 35 of this Act regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular—

- (a) in the case of a statement falling within section 31 (1) or (2) or 33 (1) or (2) of this Act, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts;
- (b) in the case of a statement falling within section 34 (1) of this Act, to the question whether or not the person who originally supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not that person, or any person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts; and
- (c) in the case of a statement falling within section 35 (1) of this Act, to the question whether or not the information which the information contained in the statement reproduces or is derived from was supplied to the relevant computer, or recorded for the purpose of being supplied thereto, contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not any person concerned with the supply of information to that computer, or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent the facts.

(5) For the purpose of any enactment (whenever passed) requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated—

- (a) a statement which is admissible in evidence by virtue of section 31 or 33 of this Act shall not be capable of corroborating evidence given by the maker of the statement; and
- (b) a statement which is admissible in evidence by virtue of section 34 of this Act shall not be capable of corroborating evidence given by the person who originally supplied the information from which the record containing the statement was compiled.

(6) In deciding for the purposes of section 31 or 34 of this Act whether or not a person is fit to attend as a witness, a court may act on a certificate purporting to be a certificate of a duly registered medical practitioner.

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37.—(1) In any proceedings a statement made by a person otherwise than in a document shall be admissible as evidence of any fact stated therein if—

PART II

- (a) it directly concerns an event in issue in those proceedings which took place in the presence, sight or hearing of that person; and
- (b) it was made by him as an immediate reaction to that event.

Admissibility of statements made as immediate reaction to events in issue personally witnessed.

(2) Where in any proceedings a statement is admissible by virtue of this section, no evidence other than direct oral evidence by the maker of the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it, and nothing in section 2 or 9 of the Criminal Justice Act 1967 or any other enactment passed before this Act shall render a written statement admissible for that purpose. 1967 c. 80.

(3) Section 36 (5) of this Act shall apply to a statement which is admissible in evidence by virtue of this section as it applies to a statement which is admissible in evidence by virtue of section 31.

38.—(1) If, as regards any statement contained in a document or made by a person otherwise than in a document, the parties to any proceedings agree at a hearing that for the purpose of those proceedings the statement may be given in evidence, then, unless the court otherwise directs, the statement shall in those proceedings and in any proceedings arising out of them (including any appeal or retrial) be admissible as evidence of any fact stated therein: Admissibility of hearsay evidence by agreement of the parties.

Provided that such an agreement—

- (a) shall not enable a statement to be given in evidence by virtue of this section on behalf of the prosecution if at the time when the agreement is made the accused or any of the accused is not represented by counsel or a solicitor; and
- (b) if made during proceedings before a magistrates' court inquiring into an offence as examining justices, shall be of no effect for the purpose of any proceedings on indictment or any proceedings arising out of proceedings on indictment.

(2) Where in any proceedings a statement contained in a document is admissible by virtue of this section, it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

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(3) Where a statement is given in evidence by virtue of this section **PART II** but might have become admissible in evidence by virtue of section 31 or 34 of this Act, section 36 (5) of this Act shall apply to it as if it were admissible by virtue of section 31 or 34 as the case may be.

39.—(1) Where in any proceedings a statement made by a person **Admissibility of evidence as to credibility of maker etc. of statement admitted under certain provisions of Part II.** who is not called as a witness in those proceedings is given in evidence by virtue of section 31 of this Act—

- (a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings; and
- (b) as regards any matter which, if that person had been so called, could have been put to him in cross-examination for the purpose of destroying his credibility as a witness, being a matter of which, if he had denied it, evidence could not have been adduced by the cross-examining party, evidence of that matter may with the leave of the court be given for that purpose.

(2) Where in any proceedings a statement made by a person who is not called as a witness in those proceedings is given in evidence by virtue of section 31 or 37 of this Act, evidence tending to prove that, whether before or after he made that statement, that person made (whether orally or in a document or otherwise) another statement inconsistent therewith shall be admissible for the purpose of showing that that person has contradicted himself.

(3) Subsections (1) and (2) above shall apply in relation to a statement given in evidence by virtue of section 34 of this Act as they apply in relation to a statement given in evidence by virtue of section 31 of this Act, except that references to the person who made the statement and to his making the statement shall be construed respectively as references to the person who originally supplied the information from which the record containing the statement was compiled and to his supplying that information.

(4) Section 31 (6) of this Act shall apply for the purposes of this section as it applies for the purposes of section 31.

(5) Section 33 (1) of this Act shall apply to any statement proved by virtue of subsection (2) above as it applies to a previous inconsistent statement made by a person called as a witness which is proved as mentioned in paragraph (a) of section 33 (1).

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40.—(1) Nothing in this Part of this Act shall prejudice the admissibility of any statement which, apart from the provisions of this Part of this Act, would by virtue of any rule of law mentioned in subsection (2) below be admissible as evidence of any fact stated therein.

PART II
Saving for
certain
common-
law
exceptions
to rule
against
hearsay.

(2) The rules of law referred to in subsection (1) above are the following, that is to say any rule of law whereby in any proceedings—

(a) an admission adverse to the accused made—

(i) by an agent of the accused acting within the scope of his authority; or

(ii) by a person engaged with the accused in a common enterprise, if made in pursuance of their common purpose; or

(iii) by one person to another where the maker is a person to whom the other was referred by the accused for information,

may be given in evidence against the accused for the purpose of proving any fact stated in the admission;

(b) published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated therein;

(c) public documents (for example, public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated therein;

(d) records (for example, the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts stated therein;

(e) evidence of a person's reputation is admissible; or

(f) evidence of reputation or family tradition is admissible for the purpose of proving or disproving the existence of any public or general right or of identifying any person or thing.

or whereby in any proceedings involving a question of pedigree or in which the existence of a marriage is in issue evidence of reputation or family tradition is admissible for the purpose of proving or disproving pedigree or the existence of a marriage, as the case may be.

(3) The words in which any rule of law mentioned in subsection (2) above is there described are intended only to identify the rule in question and shall not be construed as altering that rule in any way.

(4) In this section "admission" includes any representation of fact, whether made in words or otherwise.

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41.—(1) In this Part of this Act—Interpreta-
tion of
Part II.

“computer” has the meaning assigned by section 35 of this Act;

“document” includes, in addition to a document in writing—

- (a) any map, plan, graph or drawing;
- (b) any photograph;
- (c) any disc, tape, sound-track, or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

“film” includes a microfilm;

“statement” includes any representation of fact, whether made in words or otherwise.

(2) In this Part of this Act any reference to a copy of a document includes—

- (a) in the case of a document falling within paragraph (c) but not (d) of the definition of “document” in the foregoing subsection, a transcript of the sounds or other data embodied therein;
- (b) in the case of a document falling within paragraph (d) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not;
- (c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and
- (d) in the case of a document not falling within the said paragraph (d) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged or not;

and any reference to a copy of the material part of a document shall be construed accordingly.

(3) For the purposes of this Part of this Act a protest, greeting or other verbal utterance may be treated as stating any fact which the utterance implies.

APPENDIX F

U.S. MODEL CODE

Rule 501. DEFINITIONS.

(1) A statement includes both conduct found by the judge to have been intended by the person making the statement to operate as an assertion by him and conduct of which evidence is offered for a purpose requiring an assumption that it was so intended.

(2) A hearsay statement is a statement of which evidence is offered as tending to prove the truth of the matter intended to be asserted or assumed to be so intended except a statement made by a witness in the process of testifying at the present trial or contained in a deposition or other record of testimony taken and recorded pursuant to law for use at the present trial.

(3) A hearsay declaration is a hearsay statement which if made in the process of testifying at the present trial would be admissible and would not itself be a hearsay statement.

(4) A declarant is a person who makes a hearsay statement or a hearsay declaration.

(5) The matter declared is the matter which the declarant intended to assert, or is assumed to have intended to assert, in a hearsay statement or hearsay declaration.

(6) Hearsay evidence is evidence of a hearsay statement or of a hearsay declaration.

Rule 502. ADMISSIBILITY OF HEARSAY EVIDENCE.

Hearsay evidence is inadmissible except as stated in Rules 503 to 530.

Rule 503. ADMISSIBILITY OF EVIDENCE OF HEARSAY DECLARATION.

Evidence of a hearsay declaration is admissible if the judge finds that the declarant—

- (a) is unavailable as a witness; or
- (b) is present and subject to cross-examination.

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Rule 504. ADMISSIBILITY OF EVIDENCE OF RECORD OF MATTER PERCEIVED BY WITNESS.

Evidence of a written statement constituting a record of what was perceived by a witness who is present and subject to cross-examination is admissible if—

- (a) the statement would be admissible were the witness making it as a part of his testimony; and
- (b) the judge finds that at a time when the matter was recently perceived and the recollection of it by the witness was clear,
 - (i) the witness recognized the written statement as an accurate record of what he had perceived; or
 - (ii) the witness stated what he had perceived and the written statement, by whomever or however made, correctly sets forth what the witness stated.

Rule 505. CONFESSIONS.

Evidence of a hearsay statement by an accused that he has done or omitted something the doing or omission of which constitutes a crime or an essential part of a crime is admissible against him in a criminal action if, but only if, the judge finds that—

- (a) the accused was not induced to make the statement by—
 - (i) infliction of physical suffering upon him or threats thereof; or
 - (ii) threats or promises, likely to cause him to make such a statement falsely, which concerned action to be taken by a public official with reference to the crime and were made by a person whom the accused reasonably believed to have the power or authority to secure the execution of the threats or promises; and
- (b) the accused when making the statement was conscious and was capable of understanding what he said and did.

Rule 506. ADMISSIONS.

Evidence of a hearsay statement is admissible against the declarant if the judge finds that the declarant—

- (a) is a party to the action in his individual capacity; or
- (b) is a party to the action in a representative capacity and was acting in that capacity in making the statement.

Rule 507. AUTHORIZED AND ADOPTIVE ADMISSIONS.

Evidence of a hearsay statement is admissible against a party to the action if the judge finds that—

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- (a) the declarant was authorized by the party to make a statement or statements for him concerning the subject-matter of the statement; or
- (b) the party with knowledge of the content of the statement by words or other conduct manifested his adoption or approval of the statement or his belief in its truth.

Rule 508. VICARIOUS ADMISSIONS.

Evidence of a hearsay declaration is admissible against a party to the action if the judge finds that—

- (a) the declaration concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of the agency or employment; or
- (b) the party and the declarant were participants in a plan to commit a crime or civil wrong and the hearsay declaration was relevant to the plan or its subject-matter and was made while the plan was in existence and before its execution was complete; or
- (c) one of the issues between the party and the proponent of the evidence is a legal liability of the declarant, and the matter declared tends to establish that liability.

Rule 509. DECLARATIONS AGAINST INTEREST.

(1) A declaration is against the interest of a declarant if the judge finds that the fact asserted in the declaration was at the time of the declaration so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the declaration unless he believed it to be true.

(2) Subject to Rule 505, evidence of so much of a hearsay declaration is admissible as consists of a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy.

Rule 510. VOTER'S STATEMENTS.

Evidence of a voter's hearsay declaration concerning his qualification to vote or the fact or content of his vote is admissible.

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Rule 511. PRIOR TESTIMONY OR DEPOSITION.

Evidence of a hearsay statement which consists of testimony given by the declarant as a witness in an action or in a deposition taken according to law for use in an action is admissible for any purpose for which the testimony was admissible in the action in which the testimony was given or for use in which the deposition was taken, unless the judge finds that the declarant is available as a witness and in his discretion rejects the evidence.

Rule 512. CONTEMPORANEOUS OR SPONTANEOUS STATEMENTS.

Evidence of a hearsay statement is admissible if the judge finds that the hearsay statement was made—

- (a) while the declarant was perceiving the event or condition which the statement narrates or describes or explains, or immediately thereafter; or
- (b) while the declarant was under the stress of a nervous excitement caused by his perception of the event or condition which the statement narrates or describes or explains.

Rule 513. DECLARATIONS OF A STATE OF MIND, EMOTION OR PHYSICAL SENSATION.

Evidence of a hearsay declaration of declarant's existing state of mind, emotion or physical sensation, other than a declaration by a declarant, available but not present for cross-examination, stating his memory or belief of a fact when offered as tending to prove the fact remembered or believed, is admissible unless—

- (a) the judge finds that the declarant made the declaration in bad faith; or
- (b) the evidence is offered as tending to show a fact which caused the declarant to have the state of mind, emotion or physical sensation, and the judge finds that the declarant had no personal knowledge of that fact.

Rule 514. BUSINESS ENTRIES AND THE LIKE.

(1) A writing offered as a memorandum or record of an act, event or condition is admissible as tending to prove the occurrence of the act or event or the existence of the condition if the judge finds that it was made in the regular course of a business and that it was the regular course of that business for one with personal knowledge of such an act, event or condition to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record, and for the memorandum or record to be made at or about the time of the act, event or condition or within a reasonable time thereafter.

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(2) Evidence of the absence of a memorandum or record of an asserted act, event or condition from the memoranda or records of a business is admissible as tending to prove the non-occurrence of the act or event or the non-existence of the condition in that business, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events, or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.

(3) The word business as used in Paragraphs (1) and (2) includes every kind of occupation and regular organized activity, whether conducted for profit or not.

Rule 515. WRITTEN STATEMENTS BY PUBLIC OFFICIALS.

Subject to Rule 519, evidence of a writing made as a record, report or memorandum of facts and conclusions concerning an act, event or condition, unless specifically privileged from disclosure by a statute requiring it to be made, is admissible as tending to prove the truth of the matter stated therein if the judge finds that—

- (a) the writing was made in the performance of the functions of his office by an official of a state or nation or governmental division thereof, acting personally or through his subordinates; and
- (b) it was a function of the official acting personally or through his subordinates—
 - (i) to do the act; or
 - (ii) to observe the act, event or condition; or
 - (iii) to investigate the facts concerning the act, event or condition and to make findings or draw conclusions about it.

Rule 516. WRITTEN STATEMENTS BY PERSONS REQUIRED TO REPORT AUTHORIZED ACTS.

Subject to Rule 519, evidence of a writing made as a record, report or memorandum of facts and conclusions concerning an act, event or condition, unless specifically privileged from disclosure by a statute requiring it to be made, is admissible as tending to prove the truth of each matter stated therein in compliance with statutory requirements if the judge finds that—

- (a) the maker of the writing was duly authorized pursuant to statute to perform designated functions performance of which by persons not so authorized was forbidden by statute, and was required by statute to file a written report in a designated place or office setting forth specified matters relating to the performance of those functions and the persons or things connected therewith; and
- (b) the writing was made and filed by him as a report so required by the statute.

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Rule 517. PROOF OF CONTENT OF OFFICIAL RECORD.

(1) Subject to Rule 519, a writing purporting to be a copy of an official record or of an entry therein is admissible as tending to prove the content of the record if—

- (a) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or
- (b) the office in which the record is kept is within this state and the writing is attested as a correct copy of the entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or
- (c) the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record and is accompanied by a certificate that such officer has the custody of the record, made and authenticated as follows:
 - (i) if the office in which the record is kept is within the United States or within a territory or possession subject to the dominion of the United States, the certificate may be made by a person purporting to be a judge of a court of record of the district of the United States, or purporting to be a judge of the state, territory or possession or of the governmental subdivision thereof, in which the record is kept, authenticated by the seal of the court, or purporting to be a public officer having a seal of office and having official duties in the district or governmental subdivision in which the record is kept, authenticated by the seal of his office;
 - (ii) if the office in which the record is kept is in a foreign state or nation, the certificate may be made by a person purporting to be a secretary of an embassy or legation, consul general, consul, vice-consul, or consular agent or any officer in the foreign service of the United States stationed in the foreign state or nation in which the record is kept, authenticated by the seal of his office; or
- (d) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry.

(2) Subject to Rule 519, a writing stating that the writer is an officer, or a deputy of an officer, having the official custody of specified records, and that he has made a diligent search of the records of the office and has found therein no record or entry of a specified tenor is admissible as tending to prove that the records of the office contain no such record or entry if the writing is accompanied by a certificate that the officer has the custody of the specified records, made and authenticated as provided in Paragraph (1) (c) of this Rule.

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Rule 518. CERTIFICATES OF MARRIAGE.

Subject to Rule 519, a certificate that the maker thereof performed a marriage ceremony is admissible as tending to prove the truth of the matter certified if the judge finds that—

- (a) the maker of the certificate was, at the time and place certified as the time and place of the marriage, authorized by law to perform marriage ceremonies; and
- (b) the certificate was issued at that time or within a reasonable time thereafter.

Rule 519. DISCRETION OF JUDGE TO EXCLUDE EVIDENCE ADMISSIBLE UNDER RULES 515, 516, 517 AND 518.

The judge in his discretion may exclude evidence admissible under Rules 515, 516, 517 and 518 if he finds that the party against whom it is offered has not been furnished a copy of the writing or of its material portions a reasonable time before the evidence is offered.

Rule 520. OFFICIAL RECORDS OF CONVEYANCES.

Evidence of the content of an official record of a document purporting to affect an interest in realty or personalty is admissible as tending to prove the content of the original document and its execution, including delivery, by each person by whom it purports to have been executed, if the judge finds that—

- (a) the record is a record of an office of a state, or nation, or of any governmental division thereof; and
- (b) an applicable statute authorized such a document to be recorded in that office.

Rule 521. JUDGMENTS OF CONVICTION.

Evidence of a subsisting judgment adjudging a person guilty of a crime or a misdemeanor is admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment.

Rule 522. JUDGMENT AGAINST PERSON ENTITLED TO INDEMNITY.

In an action in which a judgment-debtor seeks from an adverse party partial or total indemnity or exoneration for money paid or liability incurred because of the judgment, evidence of the judgment is admissible as tending to prove a wrong of the adverse party and the

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amount of damages caused the judgment-creditor thereby if the judge finds that the judgment was rendered for damages found to have been suffered by the judgment-creditor as a result of the wrong of the adverse party.

Rule 523. JUDGMENTS AS TO PUBLIC RIGHT OR INTEREST.

Evidence of a judgment or decree determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land is admissible as tending to prove the interest as therein determined in any action in which such interest or lack of interest is a material matter.

Rule 524. DECLARATIONS AND REPUTATION CONCERNING FAMILY HISTORY.

(1) Evidence of a hearsay statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared—

- (a) is admissible if the judge finds that the declarant is unavailable; and
- (b) may be admitted by the judge in the exercise of his discretion even if the declarant is available.

(2) Evidence of a hearsay statement of a matter concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant—

- (a) is admissible if the judge—
 - (i) finds that the declarant was related to the other by blood or marriage or finds that the declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family; and
 - (ii) finds that the declarant is unavailable as a witness; and
- (b) may be admitted by the judge in the exercise of his discretion if he finds the facts specified in clause (a) (i) of this Paragraph even if all declarants are available.

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(3) Evidence of a hearsay statement by one declarant, admissible under these Rules, that a hearsay statement admissible under Paragraph (1) or Paragraph (2) was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, is admissible if the judge finds that both declarants are unavailable as witnesses.

(4) Evidence of reputation among members of a family is admissible, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage.

Rule 525. REPUTATION: BOUNDARIES, GENERAL HISTORY, FAMILY HISTORY.

Evidence of reputation in a community is admissible as tending to prove the truth of the matter reputed, if—

- (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy; or
- (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community; or
- (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable repute in that community.

Rule 526. REPUTATION AS TO CHARACTER.

Whenever a trait of a person's character at a specified time is a material matter, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with whom he then habitually associated in his work or business or otherwise is admissible as tending to prove the truth of the matter reputed.

Rule 527. RECITALS IN DISPOSITIVE DOCUMENTS.

Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in realty or personalty, offered as tending to prove the truth

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of the matter stated, is admissible if the judge finds that the matter stated would be relevant upon an issue as to an interest in the realty or personalty, and that the dealings with the realty or personalty since the statement was made have not been inconsistent with the truth of the statement.

Rule 528. COMMERCIAL LISTS AND THE LIKE.

Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation is admissible as tending to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them therein.

Rule 529. LEARNED TREATISES.

A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject.

Rule 530. ADMISSIBILITY OF DOUBLE HEARSAY.

Evidence of a hearsay declaration or statement of a declarant admissible under any Rule as tending to prove that a hearsay declaration or hearsay statement was made by another declarant is admissible also to prove all other matter which the other declarant's declaration or statement would be admissible to prove were it made by him in the process of testifying, if the judge finds that the other declarant—

- (a) made the declaration or statement; and
- (b) is unavailable as a witness or is a party to the action.

Rule 531. CREDIBILITY OF HEARSAY DECLARANT.

Wherever hearsay evidence has been received—

- (a) evidence of a statement or other conduct by the declarant inconsistent with the declaration is admissible though he had no opportunity to deny or explain it; and
- (b) other evidence tending to impair or support the credibility of the declarant is admissible as if the declarant had been a witness.

APPENDIX G

U.S. UNIFORM RULES

Rule 62. Definitions

RULE 62. As used in Rule 63 and its exceptions and in the following rules:

(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matters stated.

(2) "Declarant" is a person who makes a statement.

(3) "Perceive" means acquire knowledge through one's own senses.

(4) "Public Official" of a state or territory of the United States includes an official of a political subdivision of such state or territory and of a municipality.

(5) "State" includes the District of Columbia.

(6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(7) "Unavailable as a witness" includes situations where the witness is—

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant; or

(b) Disqualified from testifying to the matter; or

(c) Unable to be present or to testify at the hearing because of death or then existing physical or mental illness; or

(d) Absent beyond the jurisdiction of the court to compel appearance by its process; or

(e) Absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

(7) But a witness is not unavailable.

(a) If the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable neglect of such party; or

(b) If unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, or expense and that the probable importance of the testimony is such as to justify the expense of taking such deposition.

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Rule 63. Hearsay Evidence Excluded—Exceptions

Opening Paragraph: General Rule Excluding Hearsay Evidence.

RULE 63: Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

Subdivision (1): Previous Statement of Trial Witness

(1) A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;

Subdivision (2): Affidavits

(2) Affidavits to the extent admissible by the statutes of this state;

Subdivision (3): Former Testimony Offered Against a Party to the Former Action or Proceeding

(3) Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;

Subdivision (4): Contemporaneous and Spontaneous Statements

(4) A statement

(a) Which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains; or

(b) Which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception; or

(c) If the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;

Subdivision (5): Dying Declarations

(5) A statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good

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faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery;

Subdivision (6): Confessions

(6) In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same;

Subdivision (7): Admissions by Parties

(7) As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement;

Subdivision (8): Authorized and Adoptive Admissions

(8) As against a party, a statement

(a) By a person authorized by the party to make a statement or statements for him concerning the subject of the statement; or

(b) Of which the party, with knowledge of the content thereof, has, by words or other conduct, manifested his adoption or his belief in its truth.

Subdivision (9): Vicarious Admissions

(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if

(a) The statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship; or

(b) The party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination; or

(c) One of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability.

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Subdivision (10): Declarations Against Interest

(10) Subject to the limitations of exceptions (6), a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

Subdivision (11): Voter's Statements

(11) A statement by a voter concerning his qualifications to vote or the fact or content of his vote:

Subdivision (12): Statements of Physical or Mental Condition of Declarant

(12) Unless the judge finds it was made in bad faith, a statement of

(a) The declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant; or

(b) Previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition;

Subdivision (13): Business Records

(13) Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

Subdivision (14): Absence of Entry in Business Records

(14) Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter and to preserve them;

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Subdivision (15): Reports of Public Officers and Employees

(15) Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;

Subdivision (16): Reports of Vital Statistics

(16) Subject to Rule 64, writings made as a record, report or finding of fact if the judge finds that (a) the maker was authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

Subdivision (17): Content of Official Record

(17) Subject to Rule 64 (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record a writing purporting to be a copy of an official record or of an entry therein;

(b) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record;

Subdivision (18): Certificate of Marriage

(18) Subject to Rule 64 certificates that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof if the judge finds that

(a) The maker of the certificate at the time and place certified as the time and place of the marriage, was authorized by law to perform marriage ceremonies; and

(b) The certificate was issued at that time or within a reasonable time thereafter;

Subdivision (19): Records of Documents Affecting an Interest in Property

(19) Subject to Rule 64 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; and

(b) An applicable statute authorized such a document to be recorded in that office;

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Subdivision (20): Judgment of Previous Conviction

(20) Evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment;

Subdivision (21): Judgment Against Persons Entitled to Indemnity

(21) To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor evidence of a final judgment if offered by a judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;

Subdivision (22): Judgment Determining Public Interest in Land

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;

Subdivision (23): Statement Concerning One's Own Family History

(23) A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;

Subdivision (24): Statement Concerning Family History of Another

(24) A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge

(a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family; and

(b) finds that the declarant is unavailable as a witness;

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Subdivision (25): Statement Concerning Family History Based on Statement of Another Declarant

(25) A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;

Subdivision (26): Reputation in Family Concerning Family History

(26) Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage;

Subdivision (27): Community Reputation Concerning Boundaries, General History and Family History

(27) Evidence of reputation in a community as tending to prove the truth of the matter reputed, if

(a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy; or

(b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community; or

(c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

Subdivision (28): Reputation as to Character

(28) If a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed;

Subdivision (29): Recitals in Documents Affecting Property

(29) Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement;

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Subdivision (30): Commercial Lists and the Like

(30) Evidence of statements of matters of interest to persons engaged in an occupation, contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them.

Subdivision (31): Learned Treatises

(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

Rule 64. Discretion of Judge Under Certain Exceptions to Exclude Evidence

RULE 64. Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

Rule 65. Credibility of Declarant

RULE 65. Evidence of a statement or other conduct by a declarant inconsistent with a statement received in evidence under an exception to Rule 63, is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

Rule 66. Multiple Hearsay

RULE 66. A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

APPENDIX H

CALIFORNIA EVIDENCE CODE

1200. The hearsay rule

1200. (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

1201. Multiple hearsay

1201. A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

1202. Credibility of hearsay declarant

1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

1203. Cross-examination of hearsay declarant

1203. (a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

(b) This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the statement.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

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(d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for examination pursuant to this section.

1204. Hearsay statement offered against criminal defendant

1204. A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.

1205. No implied repeal

1205. Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence.

1220. Admission of party

1220. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

1221. Adoptive admission

1221. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

1222. Authorized admission

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

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1223. Admission of co-conspirator

1223. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

1224. Statement of declarant whose liability or breach of duty is in issue

1224. When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

1225. Statement of declarant whose right or title is in issue

1225. When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.

1226. Statement of minor child in parent's action for child's injury

1226. Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 of the Code of Civil Procedure for injury to such minor child.

1227. Statement of declarant in action for his wrongful death

1227. Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 377 of the Code of Civil Procedure.

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1230. Declaration against interest

1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

1235. Inconsistent statement

1235. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

1236. Prior consistent statement

1236. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.

1237. Past recollection recorded

1237. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

(a) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(b) Was made (1) by the witness himself or under his direction or (2) by some other person for the purpose of recording the witness' statement at the time it was made;

(c) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(d) Is offered after the writing is authenticated as an accurate record of the statement.

1238. Prior identification

1238. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

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(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

1240. Spontaneous statement

1240. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

1241. Contemporaneous statement

1241. Evidence of a statement is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made while the declarant was perceiving the act, condition, or event.

1242. Dying declaration

1242. Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.

1250. Statement of declarant's then existing mental or physical state

1250. (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

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1251. Statement of declarant's previously existing mental or physical state

1251. Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:

- (a) The declarant is unavailable as a witness; and
- (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

1252. Limitation on admissibility of statement of mental or physical state

1252. Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.

1260. Statement concerning declarant's will

1260. (a) Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

1261. Statement of decedent offered in action against his estate

1261. Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was:

- (a) Made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear; and
- (b) Made under circumstances such as to indicate its trustworthiness.

1270. "A business"

1270. As used in this article, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

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1271. Business record

1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of a business;
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

1272. Absence of entry in business records

1272. Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the non-occurrence of the act or event, or the nonexistence of the condition, if:

- (a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and
- (b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

1280. Record by public employee

1280. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

- (a) The writing was made by and within the scope of duty of a public employee;
- (b) The writing was made at or near the time of the act, condition, or event; and
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

1281. Record of vital statistic

1281. Evidence of a writing made as a record of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law.

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1282. Finding of presumed death by authorized federal employee

1282. A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (56 Stats. 143, 1092, and P.L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. 1001-1016), as enacted or as heretofore or hereafter amended, shall be received in any court, office, or other place in this State as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance.

1283. Record by federal employee that person is missing, captured, or the like

1283. An official written report or record that a person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive, made by an employee of the United States authorized by any law of the United States to make such report or record shall be received in any court, office, or other place in this State as evidence that such person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive.

1284. Statement of absence of public record

1284. Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office.

1290. "Former testimony"

1290. As used in this article, "former testimony" means testimony given under oath in:

(a) Another action or in a former hearing or trial of the same action;

(b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States;

(c) A deposition taken in compliance with law in another action; or

(d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.

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1291. Former testimony offered against party to former proceeding

1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing, except that testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not made admissible by this paragraph against the defendant in a criminal action unless it was received in evidence at the trial of such other action.

(b) Except for objections to the form of the question which were not made at the time the former testimony was given, and objections based on competency or privilege which did not exist at that time, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing.

1292. Former testimony offered against person not a party to former proceeding

1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

(1) The declarant is unavailable as a witness;

(2) The former testimony is offered in a civil action or against the prosecution in a criminal action; and

(3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered at the hearing.

(b) Except for objections based on competency or privilege which did not exist at the time the former testimony was given, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing.

1300. Judgment of conviction of crime punishable as felony

1300. Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment unless the judgment was based on a plea of *nolo contendere*.

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1301. Judgment against person entitled to indemnity

1301. Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

(c) Recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached.

1302. Judgment determining liability of third person

1302. When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.

1310. Statement concerning declarant's own family history

1310. (a) Subject to subdivision (b), evidence of a statement by a declarant who is unavailable as a witness concerning his own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race, ancestry, or other similar fact of his family history is not made inadmissible by the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

1311. Statement concerning family history of another

1311. (a) Subject to subdivision (b), evidence of a statement concerning the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The declarant was related to the other by blood or marriage;
or

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(2) The declarant was otherwise so intimately associated with the other's family as to be likely to have had accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

1312. Entries in family records and the like

1312. Evidence of entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

1313. Reputation in family concerning family history

1313. Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

1314. Reputation in community concerning family history

1314. Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule.

1315. Church records concerning family history

1315. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if:

(a) The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under Section 1271;

Appendix H—California Evidence Code

(b) The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing; and

(c) The writing was made as a record of a church, religious denomination, or religious society.

1316. Marriage, baptismal, and similar certificates

1316. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

(a) The maker was a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and

(b) The certificate was issued by the maker at the time and place of the ceremony or sacrament or within a reasonable time thereafter.

1320. Reputation concerning community history

1320. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community.

1321. Reputation concerning public interest in property

1321. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns the interest of the public in property in the community and the reputation arose before controversy.

1322. Reputation concerning boundary or custom affecting land

1322. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy.

Appendix H—California Evidence Code

1323. Statement concerning boundary

1323. Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

1324. Reputation concerning character

1324. Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule.

1330. Recitals in writings affecting property

1330. Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

- (a) The matter stated was relevant to the purpose of the writing;
- (b) The matter stated would be relevant to an issue as to an interest in the property; and
- (c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

1331. Recitals in ancient writings

1331. Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

1340. Commercial lists and the like

1340. Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270.

1341. Publications concerning facts of general notoriety and interest

1341. Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.

APPENDIX I

U.S. FEDERAL RULES

ARTICLE VIII. HEARSAY

Rule 801.

DEFINITIONS

The following definitions apply under this article:

(a) **Statement.** A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **Declarant.** A “declarant” is a person who makes a statement.

(c) **Hearsay.** “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if—

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802.**HEARSAY RULE**

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803.**HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statement for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

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(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

Appendix I—U.S. Federal Rules

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statement of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage ancestry, or other similar fact of his personal or family history.

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(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among his associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to personal, family or general history, boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804.**HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE**

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

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(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Appendix I—U.S. Federal Rules

(5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805.**HEARSAY WITHIN HEARSAY**

Hearsay included within hearsay is not excluded under the hearsay rule if each party of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806.**ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT**

When a hearsay statement, or a statement defined in Rule 801 (d) (2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

APPENDIX J

DRAFT CANADIAN EVIDENCE CODE

16. (1) A statement made by the accused to a person in authority is inadmissible if tendered by the prosecution in a criminal proceeding, unless the judge is satisfied beyond a reasonable doubt that the statement was not made under circumstances (including the presence of threats or promises) that were likely to render the statement unreliable, or unless the accused personally or through his counsel agrees to its admission.

Statements
to persons i
authority.

(2) Nothing in this section affects the admissibility of evidence other than a statement of the accused, including evidence of any fact discovered as a result of such statement or that such facts were discovered as a result of the statement.

Facts found
as a result
of statement
admissible.

27. (1) Hearsay evidence is inadmissible except as provided in this Code or any other Act.

Hearsay
rule.

(2) In this Code

Definitions
"Hearsay"

(a) "hearsay" means a statement, other than one made by a person while testifying at a proceeding, that is offered in evidence to prove the truth of the statement; and

(b) "statement" means an oral or written assertion or non-verbal conduct of a person intended by him as an assertion.

"State-
ment".

28. A statement previously made by a witness is not excluded by section 27 if the statement would be admissible if made by him while testifying as a witness.

Exception
previous
statement
witness.

29. (1) A statement made by a person who is unavailable as a witness is not excluded by section 27 if the statement would be admissible if made by the person while testifying as a witness.

Exception
statement
person
unavailab
as witness

(2) "Unavailable as a witness" includes situations where a person who made a statement

"Unavail-
able as a
witness"
defined.

(a) is dead or unfit by reason of his bodily or mental condition to attend as a witness;

Dead or
unfit.

(b) is absent from the proceeding and the proponent of his statement has been unable to procure his attendance by process or other reasonable means;

Attendan
cannot be
obtained.

Appendix J—Draft Canadian Evidence Code

- (c) persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; Refuses to testify.
- (d) testifies to a lack of memory of the subject matter of the statement; or Unable to remember.
- (e) is absent from the proceeding and the importance of the issue or the added reliability of his testimony in court does not justify the expense or inconvenience of procuring his attendance or deposition. Cost and trouble of attendance not warranted.
- (3) A statement is not admissible under this section if the unavailability of the person who made it was brought about by the proponent of the statement for the purpose of preventing the person from attending or testifying. When proponent procures unavailability.
- (4) A statement is not admissible under this section unless the party seeking to give it in evidence has within a reasonable time given notice to every other party of his intention to do so with particulars of the statement and the reason why the person is unavailable as a witness. Notice required before tendering evidence.

30. The following statements are not excluded by section 27 when offered against a party: Exception: statements against party.

- (a) a statement made, authorized, adopted or agreed to by the party; Party's statement.
- (b) a statement by the party's agent or servant concerning a matter within the scope of his agency or employment and made during the continuation of that relationship; Agent.
- (c) a statement regarding title by a predecessor in title or other person in privity of title with the party; and Person in privity of title.
- (d) a statement by a person engaged with the party in common enterprise made in pursuance of their common purpose. Person in common enterprise.

31. The following are not excluded by section 27: Other exceptions.

- (a) a record of a fact or opinion, if the record was made in the course of a regularly conducted activity at or near the time the fact occurred or existed or the opinion was formed, or at a subsequent time if compiled from a record so made at or near such time; Statements made in course of regularly conducted activities.

Appendix J—Draft Canadian Evidence Code

- (b) records, reports or statements of public offices or agencies, setting forth the activities of the office or agency, matters observed pursuant to a duty imposed by law, or in civil cases and against the prosecution in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law; Public records and reports.
- (c) records or data compilations of vital statistics if the report thereof was made to a public office pursuant to requirements of law; Records of vital statistics.
- (d) evidence that a matter is not included in a record made in the course of a regularly conducted activity, to prove the non-occurrence or non-existence of the matter if it was of a kind of which such a record was regularly made or preserved; Absence of record or entry.
- (e) statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter; Marriage, baptismal and similar certificate.
- (f) statements in a document in existence twenty years or more; Ancient documents.
- (g) market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations; Market reports.
- (h) evidence of a final judgment adjudging a person guilty of a crime, to prove any fact essential to sustain the judgment, except when tendered by the prosecution in a criminal proceeding against anyone other than the person adjudged guilty; Judgments and convictions.
- (i) reputation of a person's character arising before the controversy among those with whom he associates or in the community; General reputation.
- (j) reputation among members of a person's family by blood, adoption or marriage, or among his associates, or in the community, concerning a fact of his personal or family history, such as birth, death or relationship; Reputation of person or family history.
- (k) reputation in a community, arising before the controversy, as to boundaries or of customs affecting lands in the community; and Reputation of boundaries.
- (l) reputation as to events of general history important to the community, province or country where they occurred. Reputation of general history.

APPENDIX K

EVIDENCE ACT 1958 (VIC.), ss. 54-56

54. Nothing in this Division shall—

Saving.

- (a) prejudice the admissibility of any evidence which would apart from the provisions of this Division be admissible; or
- (b) enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this Division had not passed.

55. (1) In any legal proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall be admissible as evidence of that fact if—

Admissibility of documentary evidence as to facts in issue.

- (a) the maker of the statement had at the time of the making of the statement personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or
- (b) the document is, or forms part of, a record relating to any business and made in the course of that business from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.

(2) In any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall be admissible as evidence of that fact if the document is, or forms part of, a record relating to any business and made in the course of that business from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.

U.K. 1965
s. 1 (1) (a).

(3) Sub-section (2) does not make a statement contained in a document admissible in any criminal proceeding if the statement was made in the course of or for the purposes of—

- (a) the investigation of facts constituting or being constituents of the alleged offence being dealt with in the proceeding;
- (b) an investigation which led to the discovery of facts constituting or being constituents of the alleged offence;
- (c) the preparation of a defence to a charge for any offence; or
- (d) the preparation of the case for the prosecution in respect of any offence.

Appendix K—Evidence Act 1958 (Vic.), ss. 54–56

(4) Nothing in this section shall render admissible as evidence in any legal proceedings any statement made by a person interested at a time when the proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

U.K.

(5) Notwithstanding anything to the contrary in the foregoing provisions of this section, the condition that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where—

- (a) he is dead, or unfit by reason of his bodily or mental condition to attend or testify as a witness;
- (b) he is out of Victoria and it is not reasonably practicable to secure his attendance;
- (c) he cannot with reasonable diligence be found or identified;
- (d) no party to the proceeding requires the attendance of the witness;
or
- (e) the parties to the proceedings consent to his not being required to attend.

(6) Notwithstanding anything to the contrary in paragraph (b) of sub-section (1) or in sub-section (2) the condition that the person who supplied the information be called as the witness need not be satisfied where it cannot reasonably be supposed (having regard to the time which has elapsed since he supplied the information and to all the circumstances) that he would have any recollection of the matters dealt with in the information he supplied.

(7) The court may at any stage of the proceeding, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-section (1) or sub-section (2) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence, notwithstanding that the maker of the statement or the person who supplied the information (as the case may be) is available but is not called as a witness.

(8) In deciding whether or not a person is fit to attend or to testify as a witness, the court may act on a certificate purporting to be a certificate of a legally qualified medical practitioner.

(9) The court may in its discretion reject any statement or defer the admission of and subsequently reject any statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be then admitted or, as the case requires, should be admitted at all.

Appendix K—Evidence Act 1958 (Vic.), ss. 54–56

55A. (1) Where in any legal proceeding a statement is given in evidence by virtue of section 55, but the person who made the statement or supplied the information recorded in it is not called as a witness in the proceeding—

Admissibility of evidence concerning credibility of person responsible for statement.

U.K. 1968 s. 7.

- (a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings;
- (b) any evidence tending to prove that, whether before or after he made that statement or supplied that information, he made another statement or supplied other information (whether orally or in a document or otherwise) inconsistent therewith shall be admissible for the purpose of showing that he has contradicted himself—

but nothing in paragraphs (a) or (b) shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(2) Where in any legal proceeding a statement is given in evidence by virtue of section 55, but the person who made the statement or supplied the information recorded in it is not called as a witness in the proceeding any evidence proving that that person has been guilty of any indictable or other offence shall be admissible in the proceedings to the same extent as if that person had been so called and on being questioned as to whether he had been convicted of an indictable or other offence had denied the fact or refused to answer the question.

55B. (1) In any legal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document produced by a computer and tending to establish that fact shall be admissible as evidence of that fact, if it is shown that the conditions mentioned in sub-section (2) are satisfied in relation to the statement and computer in question.

Admissibility of statements produced by computers.
U.K. 1968 s. 5 (1).

(2) The said conditions are—

- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

U.K. 1968 s. 5 (2).

Appendix K—Evidence Act, 1958 (Vic.), ss. 54–56

- (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

ib. s. 5 (3).

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub-section (2) was regularly performed by computers, whether—

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers—

all the computers used for that purpose during that period shall be treated for the purposes of this Division as constituting a single computer; and references in this Division to a computer shall be construed accordingly.

U.K. 1968
s. 5 (4).

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate—

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

Appendix K—Evidence Act 1958 (Vic.), ss. 54–56

(5) Any person who in a certificate tendered in evidence by virtue of sub-section (4) wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, shall be guilty of a misdemeanour.

Penalty: Imprisonment for not more than two years or a fine or both.

(6) For the purposes of this Division—

ib. s. 5 (5)

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any person, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(7) The court may in its discretion reject any statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(8) Subject to sub-section (3), in this section “computer” means any device for storing or processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

*U.K. 1968
s. 5 (6).*

55C. For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 55 or section 55B, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances.

ib. s. 6 (2).

55D. Where in any civil or criminal proceeding a statement contained in a document is proposed to be given in evidence by virtue of section 55 or section 55B it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or the material part thereof, authenticated in such manner as the court may approve.

ib. s. 6 (1).

56. For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Division shall not be treated as corroboration of evidence given by the maker of the statement or the person who supplied the information from which the record containing the statement was made.

*As to effect of
Division on
rules requiring
corroboration.*

APPENDIX L

A.C.T. EVIDENCE ORDINANCE 1971, PARTS VI AND VII

PART VI.—ADMISSIBILITY OF STATEMENTS IN DOCUMENTS.

28.—(1.) Where direct oral evidence of a fact or of an opinion would be admissible in a proceeding, a statement made by a person in a document tending to establish the fact or expressing the opinion, as the case may be, is, subject to this Part, admissible as evidence of the fact or the opinion in the proceeding if—

Documentary evidence of facts in issue where maker of document is called as a witness.

- (a) in the case of a statement tending to establish a fact, the maker of the statement had personal knowledge of the matters dealt with by the statement or, in the case of a statement expressing an opinion, the person expressing the opinion is qualified to give evidence of his opinion;
- (b) the maker of the statement is called as a witness in the proceeding; and
- (c) the court is satisfied that the statement was made at a time when the facts stated in the document were fresh in the memory of the witness or, in the case of a statement expressing an opinion, the facts on which the opinion was based were fresh in the mind of the person expressing the opinion.

(2.) The last preceding sub-section applies whether the statement is or is not consistent with the evidence given by the maker of the statement but, where—

- (a) the statement is tendered by the party by whom the witness is being called; and
- (b) the statement is inconsistent with the evidence given by the witness in the proceeding,

the statement is admissible in evidence only with the leave of the court.

(3.) A statement referred to in this section shall not, without the leave of the court, be tendered in evidence by the party by whom the witness has been called except at the conclusion of the examination-in-chief of the witness and before the witness is cross-examined.

29.—(1.) Where direct oral evidence of a fact would be admissible in a proceeding, a statement made by a person in a document tending to establish that fact is, subject to this Part, admissible as evidence of that fact in the proceeding if the maker of the statement had personal knowledge of the matters dealt with in the statement and if—

Documentary evidence of facts in issue

- (a) the maker of the statement is dead;
- (b) the maker of the statement is outside Australia and it is not reasonably practicable to secure his attendance;

Appendix L—A.C.T. Evidence Ordinance 1971, Parts VI and VII

- (c) the maker of the statement is unfit by reason of old age or his bodily or mental condition to appear as a witness; or
- (d) the maker of the statement cannot with reasonable diligence be found.

(2.) Where direct oral evidence of a fact would be admissible in a proceeding, a statement made by a person in a document tending to establish that fact is, subject to this Part, admissible as evidence of that fact if the document was made—

- (a) by a person acting under a duty to make the statement;
- (b) in the course of, and as a record or part of a record relating to, any business; or
- (c) in the course of, or as a record or part of a record relating to, the administration of, or the performance of the functions of, a government department,

from information supplied (whether directly or indirectly) by a person who had, or might reasonably be supposed to have had, personal knowledge of the matters dealt with in the information supplied by him and if—

- (d) the person who supplied the information is dead;
- (e) the person who supplied the information is outside Australia and it is not reasonably practicable to secure his attendance as a witness;
- (f) the person who supplied the information is unfit by reason of old age or of his bodily or mental condition to appear as a witness;
- (g) the person who supplied the information cannot with reasonable diligence be identified or found; or
- (h) the person who supplied the information cannot reasonably be expected, having regard to the time that has elapsed since he supplied the information and to all other relevant circumstances, to recollect the matters dealt with in the information supplied by him.

(3.) Where, in a civil proceeding, direct oral evidence of a fact would be admissible, a statement made by a person in a document tending to establish that fact is (whether or not it would be admissible under the preceding provisions of this section) admissible in such a proceeding as evidence of that fact if—

- (a) the maker of the statement had personal knowledge of the matters dealt with in the statement; and
- (b) the court or judge is satisfied that undue delay or expense would be caused by requiring the attendance as a witness of the maker of the statement.

Appendix L—A.C.T. Evidence Ordinance 1971, Parts VI and VII

(4.) In this section—

- (a) a reference to a person acting under a duty shall be read as including a reference to a person acting in the course of any trade, business, profession or other calling or occupation in which the person is or was engaged or employed and to a person acting for the purposes of any paid or unpaid office held by him; and
- (b) a reference to a government department shall be read as including a reference to a Department of State of the Commonwealth or of a State and to an authority established by or under an Act, and Ordinance, a State Act or a law in force in another Territory.

30.—(1.) Where direct oral evidence of an opinion would be admissible in a proceeding, an opinion expressed in a document made by a person expressing the opinion or by another person on his direction is, subject to this Part, admissible as evidence of the opinion in the proceeding if—

Documentary evidence of opinions.

- (a) the person expressing the opinion would, if he had been called as a witness in the proceeding, have been qualified to give evidence of the opinion;
- (b) the court is satisfied that the facts on which the opinion was based sufficiently appear from—
 - (i) the form or contents of the document; or
 - (ii) the circumstances in which the document expressing the opinion was made,
 and that those facts are facts in respect of which evidence is given in the proceedings; and
- (c) the person expressing the opinion—
 - (i) is dead;
 - (ii) is outside Australia and it is not reasonably practicable to secure his attendance;
 - (iii) is unfit by reason of old age or his bodily or mental condition to appear as a witness; or
 - (iv) cannot with reasonable diligence be found.

(2.) Where, in a civil proceeding, direct oral evidence of an opinion would be admissible, a statement in a document expressing that opinion is (whether or not it would be admissible under the last preceding sub-section) evidence of that opinion if—

- (a) the conditions referred to in paragraphs (a) and (b) of the last preceding sub-section are satisfied; and
- (b) the court or judge is satisfied that undue delay or expense would be caused by requiring the attendance as a witness of the person expressing the opinion.

Appendix L—A.C.T. Evidence Ordinance 1971, Parts VI and VII

31. Nothing in this Part renders admissible as evidence in a criminal proceeding a statement in a document made at a time when that proceeding was pending or at a time when it might reasonably have been contemplated that criminal proceedings would be instituted.

Certain statements not admissible in criminal proceedings.

32. In estimating the weight (if any) to be given to a statement admitted in evidence under this Part, a court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the correctness or otherwise of the statement including—

Weight to be given to statements admitted under this Part.

- (a) in the case of a statement tending to establish a fact—
 - (i) the time when the statement was made in relation to the occurrence or existence of the fact which the statement is tendered to prove; and
 - (ii) the question whether or not the maker of the statement or any person by or through whom the information was supplied to the maker of the statement had any incentive to conceal or misrepresent facts; and
- (b) in the case of a statement expressing an opinion—
 - (i) the time when the statement expressing the opinion was made in relation to the time when the facts on which the opinion was based were fresh in the mind of the person expressing the opinion; and
 - (ii) the question whether or not the person expressing the opinion had any incentive to misrepresent his opinion.

33. For the purpose of any rule of evidence or of any practice or of the provision of a State Act in its application to the Territory, or of an Ordinance, requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated—

Statement not to corroborate evidence of its maker.

- (a) a statement admitted in evidence under section 28 of this Ordinance shall not be treated as corroboration of the evidence given by that person; and
- (b) a statement that is admissible in evidence in a proceeding under sub-section (2.) of section 29 of this Ordinance by reason of the fact that the person who supplied the information contained in the statement is a person referred to in paragraph (h) of that sub-section shall not, if that person gives evidence in the proceeding, be treated as corroboration of the evidence given by that person.

34. For the purposes of this Part, proof that a statement has been made in a document may be given on production of the document or may, with the leave of the court, be given by the production of a copy of the document proved to be a true copy of the document or of a copy of the document certified or authenticated in such manner as the court approves.

Proof of statement by production of copy of document.

Appendix L—A.C.T. Evidence Ordinance 1971, Parts VI and VII

35. For the purposes of this Part, a statement in a document shall be deemed to have been made by a person if the document or the material part of the document was written, made or produced by him with his own hand or was signed or initialled by him or otherwise recognized by him as his statement.

When document deemed to have been made by a person.

36.—(1.) The court may, for the purpose of deciding whether a document tendered in evidence should or should not be admitted in evidence in pursuance of this Part, draw any reasonable inference from the circumstances in which the statement was made and from the form or contents of the document in which the statement is contained.

Court may refuse to admit document in evidence.

(2.) In a criminal proceeding, the judge may refuse to admit in evidence in pursuance of this Part a document tendered in evidence if he has reason to doubt its reliability or is satisfied that it would be unfair to the person charged to admit the document in evidence.

37. The court may, in deciding, for the purposes of this Part, whether a person is or is not fit to attend as a witness, accept an opinion in a document purporting to be a certificate by a medical practitioner.

Court may act on medical certificate.

38.—(1.) Subject to this section, a document that states that—

- (a) during a period specified in the document, a person was employed by the person by whom, or on whose behalf, the document is signed; and
- (b) in respect of that period or a specified part of that period, the first-mentioned person was paid, as wages or salary, an amount specified in the document,

Statement of wages to be evidence of amount paid.

is evidence in a proceeding that, in respect of that period or the specified part of that period, the first-mentioned person received wages or salary, as the case may be, in the amount specified in the document.

(2.) For the purpose of this section, a document that purports to be signed by, or on behalf of, a person shall, unless the contrary is proved, be deemed to be so signed.

(3.) Except with the leave of the court, a document shall not be tendered in evidence under this section unless the party tendering the document has given to each of the other parties to the proceeding not less than seven days' notice in writing of his intention to tender the document.

Appendix L—A.C.T. Evidence Ordinance 1971, Parts VI and VII

PART VII.—ADMISSIBILITY OF DOCUMENTS PRODUCED BY COMPUTERS.

39.—(1.) A reference in this Part to a computer shall be read as a Computers.
reference to—

- (a) a device that stores information;
- (b) a device that processes information; or
- (c) a device that stores and processes information.

(2.) Where the function of storing or processing information was performed by two or more computers whether—

- (a) by a combination of computers;
- (b) by different computers operating in succession;
- (c) by different combinations of computers operating in succession;
or
- (d) by the successive operation of one or more computers and one
or more combinations of computers,

all those computers shall be regarded, for the purposes of this Part, as constituting a single computer.

40.—(1.) For the purposes of this Part—

- (a) information shall be taken to be supplied to a computer if it is supplied to the computer in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) where, in the course of activities of a kind referred to in paragraph (a) of section 42 of this Ordinance, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if supplied to that computer, shall be taken to have been supplied to it in the course of those activities; and
- (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Information
supplied to
computers.

(2.) In this Part, a reference to information being derived from other information shall be read as a reference to information derived from other information whether by calculation, comparison or by any other process.

Appendix L—A.C.T. Evidence Ordinance 1971, Parts VI and VII

41. In this Part, a reference to the appropriate rules of court shall be read as a reference— Appropriat
rules of co

- (a) in the case of a proceeding in the Supreme Court—to the Rules of the Supreme Court; or
- (b) in the case of a proceeding in the Court of Petty Sessions—to the rules of court in force under the *Court of Petty Sessions Ordinance 1930–1970*.

42. In a proceeding (other than a criminal proceeding) in the Supreme Court or in the Court of Petty Sessions, a statement contained in a document produced by a computer is, subject to this Part and to the appropriate rules of court, admissible as evidence of any facts stated in the document of which direct oral evidence would be admissible if— Admissibi
of stateme
produced
computers

- (a) the document was produced by the computer during a period in which the computer was used to store or process information relating to activities carried on, whether for profit or not—
 - (i) by a person;
 - (ii) by a body, association or institution, whether corporate or not;
 - (iii) a Department of State of the Commonwealth or of a State; or
 - (iv) an authority established by or under an Act, an Ordinance, a State Act or a law in force in another Territory;
- (b) information of the kind contained in the statement or of the kind from which the information contained in the statement is derived was in that period regularly supplied to the computer in the ordinary course of the carrying on of those activities;
- (c) the computer was, throughout the material part of that period operating properly or, if it was not, that any respect in which it was not operating properly or was out of operation during part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the carrying on of those activities.

Appendix L—A.C.T. Evidence Ordinance 1971, Parts VI and VII

43.—(1.) The Court may, if it has reason to doubt the accuracy or authenticity of a document sought to be tendered in evidence under this Part, or of the facts stated in such a document, refuse to admit the document in evidence. Court may refuse to admit document in evidence.

(2.) For the purpose of deciding whether to admit or refuse to admit the document, the Court may draw any reasonable inference from the circumstances in which the information contained in the statement was obtained or the information from which the statements contained in the document was derived was obtained and from any other circumstances, including the form and contents of the document and of the information.

44. In estimating the weight, if any, to be given to a statement admitted in evidence under this Part, the Court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the correctness or otherwise of the statement, including— Weight to be given to statements admitted under this Part.

(a) the relationship in time between—

(i) the time when the information which the statement reproduces or from which it is derived was supplied to the relevant computer or was recorded for the purpose of being supplied to the relevant computer; and

(ii) the occurrence or existence of the facts which the statement is tendered to prove; and

(b) the question whether or not any person concerned with the supply of information to that computer, or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent facts.

45. Where, but for this section, a document produced by a computer would be inadmissible in evidence by reason of a failure to comply with the provisions of appropriate rules of court, the Court may, if it thinks that it is just to do so, admit the statement in evidence notwithstanding the failure to comply with those provisions. Court may admit statement notwithstanding failure to comply with rules of court.

APPENDIX M

EVIDENCE ACT 1929-76 (S.A.), ss. 45-45b, 59a-59c

45. (1) An apparently genuine document purporting to be a document of a prescribed nature and to relate to the transportation or shipment of any person or goods, from one place to another—

Documents relating to transportation of persons or goods.

(a) shall be admissible in evidence on production without further proof; and

S. 45 substituted by 53, 1972, s. 10.

(b) shall be evidence of any fact stated, or referred to, in the document, or to be inferred from the document, and where the document relates to the shipment of goods, shall be evidence that the ownership of goods referred to in the document is in the consignee named in the document or his assignee.

(2) Evidence of the description of any package or property, or of any inscription or mark upon any package or property shall be admissible (without production of the original inscription or mark) for the purpose of raising an inference as to the identity of the package or property with that referred to in a document admissible in evidence under this section.

(3) For the purpose of determining the evidentiary weight, if any, of a document admitted in evidence under this section, consideration shall be given to the source from which the document is produced, the safeguards (if any) that have been taken to ensure its accuracy and any other relevant matters.

(4) In this section—

“document of a prescribed nature” means—

(a) bill of lading, manifest, shipping receipt, consignment note, way-bill, delivery sheet, register or order, invoice, ticket, passenger list or register, and any document of a like nature;

or

(b) any reproduction of any such document by photographic, photostatic, lithographic or other like process:

“shipment” means carriage by any means by air, land or water.

Appendix M—Evidence Act 1929–76 (S.A.), ss. 45–45b, 59a–59c

45a. (1) An apparently genuine document purporting to be a business record—

Admission of
business
records in
evidence.

S. 45a enacted
by 53, 1972,
s. 10.

(a) shall be admissible in evidence without further proof;

and

(b) shall be evidence of any fact stated in the record, or any fact that may be inferred from the record (whether the inference arises wholly from the matter contained in the record, or from that matter in conjunction with other evidence).

(2) A document shall not be admitted in evidence under this section if the court is of the opinion—

(a) that the person by, or at whose direction, the document was prepared can and should be called by the party tendering the document to give evidence of the matters contained in the document;

(b) that the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties from the admission of the document in evidence;

or

(c) that it would be otherwise contrary to the interests of justice to admit the document in evidence.

(3) For the purpose of determining the evidentiary weight, if any, of a document admitted in evidence under this section, consideration shall be given to the source from which the document is produced, the safeguards (if any) that have been taken to ensure its accuracy, and any other relevant matters.

(4) In this section—

“business” means business, occupation, trade or calling and includes the business of any governmental or local governmental body or instrumentality;

“business record” means—

(a) any book of account or other document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business;

or

(b) any reproduction of any such record by photographic, photostatic, lithographic or other like process.

Appendix M—Evidence Act 1929–76 (S.A.), ss. 45–45b, 59a–59c

45b. (1) An apparently genuine document purporting to contain a statement of fact, or written, graphical or pictorial matter in which a statement of fact is implicit, or from which a statement of fact may be inferred shall, subject to this section, be admissible in evidence.

Admission of
certain
documents in
evidence.
S. 45b enacted
by 53, 1972,
s. 10.

(2) A document shall not be admitted in evidence under this section where the court is not satisfied that the person by whom, or at whose direction, the document was prepared could, at the time of the preparation of the document, have deposed of his own knowledge to the statement that is contained or implicit in, or may be inferred from the contents of the document.

(3) A document shall not be admitted in evidence under this section if the court is of the opinion—

- (a) that the person by, or at whose direction, the document was prepared can and should be called by the party tendering the document to give evidence of the matters contained in the document;
- (b) that the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties from the admission of the document in evidence;

or

- (c) that it would be otherwise contrary to the interests of justice to admit the document in evidence.

(4) In determining whether to admit a document in evidence under this section, the Court may receive evidence by affidavit of any matter pertaining to the admission of that document in evidence.

(5) For the purpose of determining the evidentiary weight, if any, of a document admitted in evidence under this section, consideration shall be given to the source from which the document was produced, the safeguards (if any) that have been taken to ensure its accuracy, and any other relevant matters.

(6) In this section—

“document” means—

- (a) any original document;

or

- (b) any reproduction of an original document by photographic, photostatic or lithographic or other like process.

PART VIA
COMPUTER EVIDENCE

PART VIA

Part VIA and
Heading enacted
by 53, 1972,
s. 14.

59a. In this Part, unless the contrary intention appears—

“computer” means a device that is by electronic, electro-mechanical, mechanical or other means capable of recording and processing data according to mathematical and logical rules and of reproducing that data or mathematical or logical consequences thereof:

“computer output” or “output” means a statement or representation (whether in written, pictorial, graphical or other form) purporting to be a statement or representation of fact—

(a) produced by a computer;

or

(b) accurately translated from a statement or representation so produced:

“data” means a statement or representation of fact that has been transcribed by methods, the accuracy of which is verifiable, into the form appropriate to the computer into which it is, or is to be, introduced.

Interpretation.
S. 59a enacted
by 53, 1972,
s. 14.

59b. (1) Subject to this section, computer output shall be admissible as evidence in any civil proceedings.

Admissibility of
computer
output.
S. 59b enacted
by 53, 1972,
s. 14.

(2) The court must be satisfied—

- (a) that the computer is correctly programmed and regularly used to produce output of the same kind as that tendered in evidence pursuant to this section;
- (b) that the data from which the output is produced by the computer is systematically prepared upon the basis of information that would normally be acceptable in a court of law as evidence of the statements or representations contained in or constituted by the output;
- (c) that, in the case of the output tendered in evidence, there is, upon the evidence before the court, no reasonable cause to suspect any departure from the system, or any error in the preparation of the data;
- (d) that the computer has not, during a period extending from the time of the introduction of the data to that of the production of the output, been subject to a malfunction that might reasonably be expected to affect the accuracy of the output;

Appendix M—Evidence Act 1929–76 (S.A.), ss. 45–45b, 59a–59c

- (e) that during that period there have been no alterations to the mechanisms or processes of the computer that might reasonably be expected adversely to affect the accuracy of the output;
- (f) that records have been kept by a responsible person in charge of the computer of alterations to the mechanism and processes of the computer during that period;
- and
- (g) that there is no reasonable cause to believe that the accuracy or validity of the output has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer.

(3) Where two or more computers have been involved, in combination or succession, in the recording of data and the production of output derived therefrom and tendered in evidence under this section, the court must be satisfied that the requirements of subsection (2) of this section have been satisfied in relation to each computer so far as those requirements are relevant in relation to that computer to the accuracy or validity of the output, and that the use of more than one computer has not introduced any factor that might reasonably be expected adversely to affect the accuracy or validity of the output.

(4) A certificate under the hand of a person having prescribed qualifications in computer system analysis and operation or a person responsible for the management or operation of the computer system as to all or any of the matters referred to in subsection (2) or (3) of this section shall, subject to subsection (6) of this section, be accepted in any legal proceedings, in the absence of contrary evidence, as proof of the matters certified.

(5) An apparently genuine document purporting to be a record kept in accordance with subsection (2) of this section, or purporting to be a certificate under subsection (4) of this section shall, in any legal proceedings, be accepted as such in the absence of contrary evidence.

(6) The court may, if it thinks fit, require that oral evidence be given of any matters comprised in a certificate under this section, or that a person by whom such a certificate has been given attend for examination or cross-examination upon any of the matters comprised in the certificate.

59c. The Governor may make such regulations as he deems necessary or expedient for the purposes of this Part, and without limiting the generality of the foregoing those regulations may—

Regulations
S. 59c enacted
by 53, 1972,
s. 14.

- (a) make any provision for the purposes of this Part with respect to the preparation, auditing or verification of data, or the methods by which it is prepared;
 - and
 - (b) prescribe the qualifications of a person by whom a certificate may be given, or a translation made, under this Part.
-

APPENDIX N

EVIDENCE ACT 1910 (TAS.), ss. 81A–81Q

Division VII—Provisions relating to modifications of the hearsay rule

81A—(1) In this Division, unless the contrary intention appears— Interpretation
 ‘document’ includes—

- (a) any material or thing on which there is writing or other representation, or on which there are marks, symbols, or perforations having a meaning for persons who are qualified to interpret them; and
- (b) a recording;

‘recording’ means anything on which any material has been recorded in such a manner that, by the use of any device or instrument, it may be reproduced in a manner suitable for human perception;

‘representation’ includes conduct by a person expressed otherwise than by words and intended by him as a substitute for words in expressing the matter represented by him.

(2) For the purposes of this Division—

(a) a person shall be deemed to be unavailable as a witness in a proceeding if he is—

- (i) unable to be present or to testify at the hearing thereof because of death or physical or mental illness existing at the time of the hearing;
- (ii) out of the Commonwealth;
- (iii) out of this State but elsewhere in the Commonwealth and the probable importance of his evidence is not such as to justify the expense of procuring his attendance; or
- (iv) absent from the place of hearing because the party producing his evidence does not know, and has been unable with reasonable diligence to ascertain, his whereabouts; and

(b) a person shall not be deemed to be unavailable as a witness if the judge finds that his inability to be present or to testify at the hearing of any proceeding or his absence from the place of hearing is due to—

- (i) procurement or other wrongdoing by the party producing his evidence for the purpose of preventing that person from attending or testifying; or
- (ii) the culpable neglect of that party.

Appendix N—Evidence Act 1910 (Tas.), ss. 81A–81Q

81B—(1) Where direct oral evidence of a fact or of an opinion would be admissible in a proceeding, a representation made by a person in a document tending to establish the fact or expressing the opinion, as the case may be, is, subject to this Division, admissible as evidence of the fact or the opinion in the proceeding, if—

Documentary evidence of facts in issue where maker of representation in document is called as witness.

Cf. A.C.T. Ordinance No. 4 of 1971, s. 28. Imp., 1968, Ch. 64, s. 6 (1).

(a) in the case of a representation—

(i) tending to establish a fact, the maker of the representation had personal knowledge of the matters dealt with by the representation; or

(ii) expressing an opinion, the person expressing the opinion is qualified to give evidence of his opinion;

(b) the maker of the representation is called as a witness in the proceeding or, in a proceeding where evidence is given by affidavit, makes an affidavit; and

(c) the court is satisfied, in the case of a representation—

(i) tending to establish a fact, that the representation was made at a time when the facts stated in the document were fresh in the memory of the witness; or

(ii) expressing an opinion, that the facts on which the opinion was based were fresh in the mind of the person expressing the opinion.

(2) Subsection (1) applies whether a representation is or is not consistent with the evidence given by the maker of the representation, but, where the representation—

(a) is tendered by the party by whom the witness is being called; and

(b) is inconsistent with the evidence given by the witness in the proceeding,

the representation is admissible in evidence only with the leave of the court.

(3) A representation referred to in this section shall not, without the leave of the court, be tendered in evidence by the party by whom the witness making the representation has been called, except at the conclusion of the examination-in-chief of that witness and before his cross-examination.

(4) Where in any proceeding a representation in a document is sought to be given in evidence under this section, it may be proved by the production of that document or, whether or not the document is still in existence, by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

Appendix N—Evidence Act 1910 (Tas.), ss. 81A–81Q

81C—(1) Where direct oral evidence of a fact would be admissible in a proceeding, a representation made by a person in a document tending to establish that fact is, subject to this section, admissible as evidence of the fact in the proceeding, if the maker of the representation—

- (a) had personal knowledge of the matters dealt with in the representation; and
- (b) is unavailable as a witness.

Documentary evidence of facts in issue where maker of representation in document unavailable as witness.
Cf. A.C.T. Ordinance No. 4 of 1971, ss. 29 and 33.

(2) Notwithstanding subsection (1), a representation referred to in that subsection is not admissible in any criminal proceeding if the adverse party—

- (a) objects to its being tendered; or
- (b) is not represented by counsel or a public officer within the meaning of the *Justices Act* 1959.

(3) Notwithstanding subsection (1), a representation referred to in that subsection is not admissible in any civil proceeding if the judge is of the opinion that, having regard to all the circumstances, the representation ought not to be admitted without being tested by cross-examination.

(4) For the purpose of any rule of evidence or of any practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a representation admitted in evidence under this section shall not be treated as corroboration of the evidence given by that person.

81D—(1) Where direct oral evidence of an opinion would be admissible in a proceeding, an opinion expressed in a document made by a person expressing the opinion or in a document made by another person on the first-mentioned person's direction is, subject to this section, admissible as evidence of the opinion in the proceeding, if—

Documentary evidence of opinions.
Ibid., s. 30.

- (a) the person expressing the opinion would, if he had been called as a witness in the proceeding, have been qualified to give evidence of the opinion;
- (b) the court is satisfied that the facts on which the opinion was based appear sufficiently from—
 - (i) the form or contents of the document; or
 - (ii) the circumstances in which the document expressing the opinion was made,
 and that those facts are facts in respect of which evidence is given in the proceeding; and
- (c) the person expressing the opinion is unavailable as a witness.

Appendix N—Evidence Act 1910 (Tas.), ss. 81A–81Q

(2) Notwithstanding subsection (1), an opinion referred to in that subsection is not admissible in any criminal proceedings if the adverse party—

- (a) objects to its being tendered; or
- (b) is not represented by counsel or a public officer within the meaning of the *Justices Act* 1959.

(3) Notwithstanding subsection (1), an opinion referred to in that subsection is not admissible in any civil proceeding if the judge is of the opinion that, having regard to all the circumstances, the opinion ought not to be admitted without being tested by cross-examination.

81E—For the purposes of this Division, a representation in a document shall be deemed to have been made by a person if the document or the material part of the document—

- (a) was written, made, or produced by him with his own hand; or
- (b) was signed or initialled by him or otherwise acknowledged by him as his representation.

Proof of representation by production of copy of document.
Ibid., s. 35.

81F—(1) Subject to subsection (2), a representation previously made by a person that is offered to prove the truth of the matter represented is admissible in any proceeding if it purports to narrate, describe, or explain an act, condition, or event perceived by that person and if it was made—

- (a) while that person was perceiving; or
- (b) spontaneously while that person was under the stress of excitement caused by perceiving,

Spontaneous contemporaneous representations.

the act, condition, or event.

(2) Notwithstanding subsection (1), unless a person is unavailable as a witness, evidence by him of such a representation as is referred to in that subsection is not admissible in any proceeding unless the person is called to testify as a witness in the proceeding or, in a proceeding where evidence is given by affidavit, makes an affidavit.

(3) The provisions of this section are in addition to, and not in derogation of, the common law exception to the hearsay rule known as *res gestae*.

81G—(1) Where in any proceeding (other than committal proceedings) a party intends to adduce as evidence a representation under section 81C, section 81D, or section 81F, he shall, if he does not intend to call the maker of the representation—

- (a) give to every other party to the proceeding notice, in accordance with subsection (2), of his intention to adduce the evidence without calling the maker of the representation; and

Notice of intention to adduce hearsay representation in evidence.

Appendix N—Evidence Act 1910 (Tas.), ss. 81A–81Q

(b) deliver with that notice a copy of the representation, in the case of a representation expressed by words, or particulars thereof, in any other case.

(2) A notice given by a party for the purposes of subsection (1)—

(a) shall state the party's reason for not proposing to call the maker of the representation to which the notice relates; and

(b) shall be given a reasonable time before the date fixed for the trial.

(3) A complainant may, in committal proceedings, submit in evidence a representation that is *prima facie* admissible under section 81B, section 81C, section 81D, or section 81F.

(4) The justices shall receive a representation to which subsection (3) applies without ruling on its admissibility, but may prohibit publication thereof.

(5) The provisions of subsection (1) apply to a proceeding after the defendant is committed for trial.

81H—(1) The court may, in its discretion, exclude any evidence tendered before it pursuant to section 81B, section 81C, section 81D, or section 81F, if the court is of the opinion that the probative value of the evidence is outweighed by the consideration that its admission or the determination of its admissibility—

Court's discretion of excluding evidence.

(a) may necessitate undue consumption of time; or

(b) may create undue prejudice, confuse the issues, or mislead the jury, in the case of a proceeding with a jury.

(2) The provisions of subsection (1) are supplemental to, and not in derogation of, the common law discretion to exclude evidence at a criminal trial or the hearing of a summary offence.

81J—(1) Subject to subsection (2), where in any proceeding a representation made by a person who is not called as a witness is given in evidence by virtue of section 81C, section 81D, or section 81F—

Impeaching credit of persons not called as witnesses.

(a) any evidence that, if that person had been so called, would be admissible for the purpose of supporting or detracting from his credibility as a witness is admissible for that purpose in that proceeding; and

Cf. Imp., 1968, Ch. 64, s. 7.

(b) evidence tending to prove that, whether before or after he made that representation, that person made (whether orally or in a document or otherwise) another representation inconsistent or partly inconsistent therewith is admissible for the purpose of showing that that person has contradicted or partly contradicted himself.

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(2) Nothing in this section enables evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

81K—(1) A declaration by a person since deceased is admissible in any criminal proceeding in which a dying declaration is now admissible, if the declarant was at the time of making the declaration aware of his danger, and on the whole believed that he would shortly die, although he entertained some degree of hope of recovery.

(2) No declaration to which subsection (1) applies shall be excluded because of its having been, or purporting to be, on oath, if it is otherwise admissible as a dying declaration.

81L—(1) Nothing in this Division affects the admissibility of a representation not made admissible by this Division but which is admissible as—

- (a) a previous inconsistent or contradictory statement under section 98 or section 99; or
- (b) a previous consistent statement to rebut a suggestion of recent invention.

Admissibility of certain previous inconsistent and contradictory statements; certain previous consistent statements.
Ibid., s. 3.

(2) Where in any proceeding—

- (a) a previous inconsistent or contradictory statement made by a person who is called as a witness in that proceeding is proved by virtue of section 98 or section 99; or
- (b) a previous statement made by such a person is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,

that statement is admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

81M The court may, in deciding, for the purposes of this Division, whether a person is or is not fit to attend as a witness, accept an opinion in a document purporting to be a certificate by a legally-qualified medical practitioner.

Court may accept opinion on medical certificate.
Cf. A.C.T. Ordinance 14 of 1971, s.

81N Where the maker of a representation referred to in section 81C or section 81D, although not proved to be unavailable—

- (a) is not called as a witness in a civil proceeding; or
- (b) in a civil proceeding where evidence is given by affidavit, is not produced for cross-examination pursuant to notice,

Powers of judge in relation to certain representations where maker not called as witnesses, &

a judge may, if, having regard to all the circumstances of the case, he is satisfied—

Appendix N—Evidence Act 1910 (Tas), ss. 81A-81Q

- (c) that undue delay or expense would otherwise be caused; or
- (d) that it would not for any reason be inexpedient in the interests of justice to do so,

make an order that the representation be admitted in evidence.

81P In a criminal proceeding a representation in a document admitted under section 81B, section 81C, or section 81D shall be read out at the trial, but, unless the judge is satisfied that the contents of the representation are so complex that the representation could not reasonably be comprehended by members of the jury without reading it for themselves, it shall not be made available to them as an exhibit.

Representations to be read out in criminal proceedings in certain cases.

81Q—(1) An apparently genuine document purporting to be a document of a prescribed nature and to relate to the transportation or shipment of any person or goods, from one place to another—

Documents relating to transportation of persons or goods.

- (a) is admissible in evidence on production without further proof; and
- (b) is evidence of any fact stated, or referred to, in the document, or to be inferred from the document, and, where the document relates to the shipment of goods, shall be evidence that the ownership of goods referred to in the document is in the consignee named in the document or his assignee.

(2) Evidence of the description of any package or property, or of any inscription or mark upon any package or property, is admissible (without production of the original inscription or mark) for the purpose of raising an inference as to the identity of the package or property with that referred to in a document admissible in evidence under this section.

(3) For the purpose of determining the evidentiary weight (if any) of a document admitted in evidence under this section, consideration shall be given to the source from which the document is produced, the safeguards (if any) that have been taken to ensure its accuracy, and any other relevant matters.

(4) In this section—

‘document of a prescribed nature’ means—

- (a) a bill of lading, manifest, shipping receipt, consignment note, way-bill, delivery sheet, register or order, invoice, ticket, or passenger list or register, and any document of a like nature; or
- (b) any reproduction of any such document by photographic, photostatic, lithographic, or other like process;

‘shipment’ means carriage by any means by air, land, or water.

APPENDIX O

EVIDENCE ACT 1977 (QLD), PART VI

PART VI—ADMISSIBILITY OF STATEMENTS

92. Admissibility of documentary evidence as to facts in issue. [cf. Vic. s. 55; Qld. E.D. s. 42B.]. (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this Part, be admissible as evidence of that fact if—

- (a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or
- (b) the document is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.

(2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where—

- (a) he is dead, or unfit by reason of his bodily or mental condition to attend as a witness;
- (b) he is out of the State and it is not reasonably practicable to secure his attendance;
- (c) he cannot with reasonable diligence be found or identified;
- (d) it cannot reasonably be supposed (having regard to the time which has elapsed since he made the statement, or supplied the information, and to all the circumstances) that he would have any recollection of the matters dealt with by the statement he made or in the information he supplied;
- (e) no party to the proceeding who would have the right to cross-examine him requires his being called as a witness; or
- (f) at any stage of the proceeding it appears to the court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling him as a witness.

(3) The court may act on hearsay evidence for the purpose of deciding any of the matters mentioned in paragraphs (a), (b), (c), (d) or (f) of subsection (2).

(4) For the purposes of this Part a statement contained in a document is made by a person if—

- (a) it was written, made, dictated or otherwise produced by him;
- (b) it was recorded with his knowledge;

Appendix O—Evidence Act 1977 (Qld), Part VI

- (c) it was recorded in the course of and ancillary to a proceeding;
or
- (d) it was recognized by him as his statement by signing, initialling
or otherwise in writing.

93. Admissibility of documentary evidence as to facts in issue in criminal proceedings. [cf. Eng. 1965 s. 1; W.A. s. 79E.]. (1) In any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this Part, be admissible as evidence of that fact if—

- (a) the document is or forms part of a record relating to any trade or business and made in the course of that trade or business from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied; and
- (b) the person who supplied the information recorded in the statement in question—
 - (i) is dead, or unfit by reason of his bodily or mental condition to attend as a witness;
 - (ii) is out of the State and it is not reasonably practicable to secure his attendance;
 - (iii) cannot with reasonable diligence be found or identified;
or
 - (iv) cannot reasonably be supposed (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.

(2) In this section “business” includes any public transport, public utility or similar undertaking carried on in Queensland or elsewhere by the Crown (in right of the State of Queensland or any other right) or a statutory body.

94. Admissibility of evidence concerning credibility of persons responsible for statement. [cf. Vic. s. 55A; Eng. 1968 s. 7.]. (1) Where in any proceeding a statement is given in evidence by virtue of section 84, 92 or 93 and a person who made the statement or supplied the information recorded in it is not called as a witness in the proceeding—

- (a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in that proceeding;
- (b) any evidence tending to prove that, whether before or after he made that statement or supplied that information, he made another statement or supplied other information (whether orally

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or in a document or otherwise) inconsistent therewith shall be admissible for the purpose of showing that he has contradicted himself,

but nothing in paragraphs (a) or (b) shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(2) Where in any proceeding a statement is given in evidence by virtue of section 84, 92 or 93 and a person who made the statement or supplied the information recorded in it is not called as a witness in the proceeding any evidence proving that that person has been guilty of any indictable or other offence shall, with the leave of the court, be admissible in the proceeding to the same extent as if that person had been so called and on being questioned as to whether he had been convicted of an indictable or other offence had denied the fact or refused to answer the question.

95. Admissibility of statements produced by computers. [cf. Vic. s. 55b; Eng. 1968 s. 5.]. (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document produced by a computer and tending to establish that fact shall, subject to this Part, be admissible as evidence of that fact, if it is shown that the conditions mentioned in subsection (2) are satisfied in relation to the statement and computer in question.

(2) The said conditions are—

- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

- (a) by a combination of computers operating over that period; or

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- (b) by different computers operating in succession over that period;
or
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Part as constituting a single computer and references in this Part to a computer shall be construed accordingly.

(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing all or any of the following things, that is to say—

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in subsection (2) relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of the matters stated in the certificate and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) Any person who in a certificate tendered in evidence by virtue of subsection (4) wilfully makes a statement material in that proceeding which he knows to be false or does not believe to be true is guilty of an offence.

Penalty: Imprisonment with hard labour for one year or a fine of \$1,000 or both such imprisonment and such fine.

(6) For the purposes of this Part—

- (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) where, in the course of activities carried on by any person, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

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(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(7) Subject to subsection (3), in this section “computer” means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

96. Inferences concerning admissibility. [cf. Qld. E.D. s. 42B; Vic. ss. 55, 55C.]. (1) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of this Part, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances.

(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 92 or 93, the court may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a legally qualified medical practitioner.

97. Authentication. [Vic. s. 55D; cf. Qld. E.D. s. 42B.]. Where in any proceeding a statement contained in a document is proposed to be given in evidence by virtue of this Part, it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or the material part thereof, authenticated in such manner as the court may approve.

98. Rejection of evidence. [cf. Vic. s. 55; Qld. E.D. s. 42B.]. (1) The court may in its discretion reject any statement notwithstanding that the requirements of this Part are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(2) This section does not affect the admissibility of any evidence otherwise than by virtue of this Part.

99. Withholding statement from jury room. [N.S.W. s. 14CQ.]. Where in a proceeding there is a jury, and a statement in a document is admitted in evidence under this Part, and it appears to the court that if the jury were to have the document with them during their deliberations they might give the statement undue weight, the court may direct that the document be withheld from the jury during their deliberations.

100. Corroboration. [Vic. s. 56; cf. Qld. E.D. s. 42C.]. For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Part shall not be treated as corroboration of evidence given by the maker of the statement or the person who supplied the information from which the record containing the statement was made.

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101. Witness's previous statement, if proved, to be evidence of facts stated. [cf. Eng. 1968 ss. 3, 7.]. (1) Where in any proceeding—

- (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; or
- (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,

that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Subsection (1) shall apply to any statement or information proved by virtue of paragraph (b) of section 94 (1) as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in paragraph (a) of the said subsection (1).

(3) Nothing in this Part shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any proceeding is cross-examined on a document used by him to refresh his memory, that document may be made evidence in that proceeding, and where a document or any part of a document is received in evidence in any such proceeding by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh his memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

102. Weight to be attached to evidence. [cf. Qld. E.D. s. 42C.]. In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—

- (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
- (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

103. Provisions of Part are alternative. The provisions of sections 92, 93, 94, 95 and 101 shall be construed as in aid of and as alternative to one another, any other provision in any other Part, and any other law practice or usage with respect to the admissibility in evidence of statements.

APPENDIX P

DRAFT ONTARIO EVIDENCE ACT 1976

22.—(1) In this section “statement” means any representation of fact, ^{Interpre-} whether in words or otherwise, made to a witness called to give evidence. ^{tation.}

(2) In a civil proceeding a statement that would otherwise be in- ^{Where} admissible as hearsay is nevertheless admissible as evidence of any fact ^{hearsay} stated therein of which direct evidence would be admissible, ^{admissible}

- (a) if the parties to the proceeding agree to its admission with or without admission of the truth of facts; or
- (b) if the maker of the statement could have testified from personal knowledge and
 - (i) he has died, or
 - (ii) he is too ill to testify, or
 - (iii) he cannot with reasonable diligence be identified or found.

(3) Notice of intention to introduce evidence under clause *b* of sub- ^{Notice.} section 2 shall be given by the party intending to do so to other parties to the proceeding in accordance with such rules as the Rules Committee may make.

(4) Where corroboration is required by law, a statement admitted ^{Where} under this section shall not be taken to be corroborative of the evidence ^{corrobor-} of a witness called to prove the statement. ^{required.}

(5) Where a statement is tendered in evidence under this section, the ^{Credibilit} circumstances under which it was made may be investigated by the court, ^{maker of} and, where it is admitted, the credibility of the maker of the statement ^{statement} may be impeached to the same extent and in the same manner as if he had been a witness in the proceeding except as to the right to cross-examine him.

(6) Nothing in this section is to be taken to affect the admission of ^{Limits up} evidence that would otherwise be admissible under this Act or any other ^{scope of} Act or at common law or to make admissible any evidence that would ^{section.} be inadmissible on any ground of privilege under this Act or any other Act or at common law. *New.*

23. Whether or not a person is called as a witness in a proceeding, a ^{Spontane} statement made by him is admissible in evidence if it was made in such ^{and cont-} conditions of spontaneity or contemporaneity in relation to an event ^{aneous s} perceived by the witness as to exclude the probability of concoction or ^{ments.} distortion. *New.*

Appendix P—Draft Ontario Evidence Act 1976

28.—(1) A previous consistent statement made by a witness in a proceeding is admissible in evidence to rebut an allegation that his evidence has been fabricated, and such a statement shall be admitted not only to support the credibility of that witness, but also as evidence of any fact contained therein of which direct oral evidence by him would be admissible. Where previous consistent statements admissible as evidence of facts stated therein.

(2) Where corroboration is required by law, a statement admitted under this section shall not be taken as corroborative of the evidence of the witness who made the statement. *New.* Corroboration.

32.—(1) In this section “statement” means any statement against interest, and includes any expression however made and any gesture or other assertive conduct. Interpretation.

(2) In a civil proceeding, without limiting the admissibility of any statement admissible at common law or under this or any other Act, Admissibility of statements against interest.

- (a) any statement of a person who is a party to the proceeding in his personal capacity is admissible against him regardless of the capacity in which he made the statement;
- (b) any statement of a person who is a party to the proceeding in a representative capacity is admissible against him and the party whom he represents regardless of the capacity in which he made the statement, if the statement was made during the period of time he was a representative;
- (c) any statement of any person that has been authorized by a party to the proceeding is admissible against that party;
- (d) any statement is admissible against a party to the proceeding if he expressly adopted it or if, in the circumstances, it is reasonable to infer that he adopted it;
- (e) any statement made by an agent or employee of a party to the proceeding during the existence of the agency or employment is admissible against that party if the statement concerned a matter within the scope of the agency or employment.

(3) No statement is admissible under this section if it is inadmissible by reason of any privilege conferred by this or any other Act or at common law. *New.* Idem.

Appendix P—Draft Ontario Evidence Act 1976

34.—(1) If in a proceeding a witness upon cross-examination as to a former statement made by him relative to the matter in question and inconsistent with his present testimony does not distinctly admit that he did make such statement, proof may be given that he did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R.S.O. 1970, c. 151, s. 22, *amended*.

Proof of
contradictory
oral
statements.

(2) Where under this section it is proved that a witness made a statement inconsistent with his present testimony, the statement shall be admitted as evidence of the facts stated therein but only if the witness could have testified as to such facts. *New*.

Idem.

39.—(1) In this section,

Interpretatio

- (a) "business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;
- (b) "copy", in relation to any record, includes a print, whether enlarged or not, from a photographic film of such record, and "photographic film" includes a photographic plate, micro-photographic film or photostatic negative;
- (c) "record" includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections 4 and 5, any copy or transcript received in evidence under this section pursuant to subsection 4 or 5.

(2) Where oral evidence in respect of a matter would be admissible in a proceeding, a record that contains information in respect of that matter is admissible in evidence in a proceeding upon production of the record if it was made in the usual and ordinary course of business and it was in the usual and ordinary course of business to make such a record.

Business
records.

Appendix P—Draft Ontario Evidence Act 1976

(3) Where a record was made in the usual and ordinary course of business and it was in the usual and ordinary course of business to make such a record, and that record does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may upon production of the record admit the record in a proceeding for the purpose of establishing that fact and may draw the inference that such matter did not occur or exist.

Inference where
information
not in
business record.

(4) Where it is not possible or reasonably practicable to produce a record described in subsection 2 or 3, a copy of the record accompanied by an affidavit setting out the reasons why it is not possible or reasonably practicable to produce the record and an affidavit of the person who made the copy setting out the source from which the copy was made and attesting to its authenticity, is admissible in evidence under this section in the same manner as if it were the original record.

Copy of
records.

(5) Where production of a record or of a copy of a record described in subsection 2 or 3 would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation, accompanied by an affidavit of that person setting forth his qualifications to make the explanation, and attesting to the accuracy of the explanation is admissible in evidence under this section in the same manner as if it were the original record.

Where record
kept in form
requiring
explanation.

(6) Where part only of a record is produced under this section by a party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of such other part be produced by that party.

Production
of additional
parts of
records.

(7) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in a record admitted in evidence under this section, the court may, upon production of any record, examine the record, admit evidence in respect thereof given orally or by affidavit, including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Power of
court to draw
inferences.

(8) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by such party.

Notice of
intention to
produce.

Appendix P—Draft Ontario Evidence Act 1976

(9) Where evidence is tendered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit. Formalities of affidavits.

(10) Any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the proceeding. Examination of those with knowledge of records.

(11) Nothing in this section makes admissible in evidence in a proceeding, Rules as to admissibility and privileged documents not affected.

- (a) the part of any record as is proved to be,
 - (i) a record made in the course of an investigation or inquiry,
 - (ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,
 - (iii) a record in respect of the production of which any privilege exists and is claimed, or
 - (iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;
- (b) any record whose production would be contrary to public policy;
- or
- (c) any transcript or recording of evidence taken in the course of another proceeding.

(12) The provisions of this section shall be deemed to be in addition to and not in derogation of, Scope of section.

- (a) any other provision of this or any other Act of the Legislature respecting the admissibility in evidence of any record or the proof of any matter; or
- (b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

(13) Where a record containing information in respect of a matter is made by the use of a computer or a similar device, the out-put thereof in a form which may be understood is admissible in evidence if the record would be admissible under this section if made by other means. Computer out-put. *New.*

APPENDIX Q

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