THE PERIPHERY OF HEARSAY

By RUPERT CROSS*

The main purpose of this article[1] is to consider whether three recent cases were rightly decided. Each of them raises a highly debatable issue concerning the applicability of the rule against hearsay to a particular item of evidence and may therefore be said to be on the periphery of hearsay. At the risk of being somewhat elementary, I begin with a statement of the rule coupled with three hypothetical illustrations. The first two of these illustrations are glimpses of the obvious; the third is a little more unusual.

STATEMENT AND ILLUSTRATIONS OF THE HEARSAY RULE

There is no authoritative formulation of the rule against hearsay, but the following would command universal assent except on matters of detail which are irrelevant to my present purpose:

> Oral or written assertions of persons other than the witness who is testifying are inadmissible as evidence of the truth of that which was asserted.

In *Kenny's Outlines of Criminal Law* the rule is stated to be that 'a witness in court is not allowed to give another person's direct evidence for him'.[2] When pondering on the applicability of the rule to a particular item of evidence, the student will do well to ask himself whether the witness before the court is seeking, either by direct repetition or by reference to the contents of a document which he produces, to make another person's statement serve as evidence of the occurrence of anything stated to have been perceived or done by that other. If the answer is in the affirmative, the rule against hearsay applies and the evidence of the witness in court is inadmissible unless it comes within one of the exceptions to the rule.

The following three examples are based on a hypothetical running-down case.

(i) A bystander tells a policeman what he saw of the accident, but does not give evidence. The policeman gives evidence in the course of which he repeats what the bystander told him, as evidence against the defendant. It is obvious that the hearsay rule has been infringed.

(ii) The bystander tells the policeman that he heard the defendant admit that he was not looking where he was going, but does not come to court to prove the admission. The policeman testifies to what the bystander told him as evidence against the defendant. Again it is obvious that the hearsay rule has been infringed. Had he come to court, the bystander could have

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[1] A slightly amended and extended version of a lecture delivered to the evidence class in the Monash University in September 1968.

[2] *Kenny's Outlines of Criminal Law* (19th ed. 1966) 498.

proved the statement against the defendant as an admission, but the rule against hearsay applies to the proof of admissions just as much as it applies to the proof of any other fact.

(iii) The bystander tells the policeman what he saw of the accident, and the policeman takes notes which he destroys after preparing a full statement for signature by the bystander. The bystander declines to sign the statement and subsequently suffers an almost complete loss of memory; but he gives evidence. Had the notes not been destroyed, he might have used them to refresh his memory provided they were made under his supervision; had he signed the statement, it would have been admissible as evidence of the facts stated under s.55 of the Victorian Evidence Act.[3] As things are, the bystander can only say to the court, 'I saw the accident and told the policeman exactly what I saw. I have no recollection of what I saw, but I swear that everything I said to the policeman about it was true'. The policeman produces the statement and swears that it contains an accurate account of everything said by the bystander about the accident. The hearsay rule has again been infringed, although less obviously so than in the previous examples. By producing the document and deposing to its accuracy as an account of what the bystander told him, the policeman was giving the bystander's direct evidence for him. The statements in the document were neither elicited in examination-in-chief nor tested by cross-examination. The fact that the bystander had previously sworn that everything he told the policeman about the accident was accurate is immaterial. For aught the court knows, the bystander has not got the slightest idea of what the policeman is going to say that he said. The policeman's repetition, through the instrumentality of the document produced by him, of what the bystander told him was tendered as evidence of the truth of what the bystander said and nonetheless so because the bystander had sworn that what he said to the policeman about the accident was true. The statement of the bystander proved by the policeman might have borne no resemblance to what the bystander told him, and one of the reasons for the existence of the hearsay rule is the danger that the witness who is testifying will repeat the other person's statement inaccurately.

The rule may appear to produce sensible results in the above three examples, but it has in fact become highly technical and capable of producing results which are absurd almost beyond belief. As authority for this proposition it is only necessary for me to refer to *Myers v. Director of Public Prosecutions*,[4] a decision of the House of Lords which I take the liberty of assuming to be authoritative in Australia although I realize that there is Australian authority, not cited to the House, to the contrary.[5] Records consisting of microfilms of cards handed in by workmen employed

[3] Enacting s.1 and s.2 of the English Evidence Act 1938, 1 & 2 Geo. vi c.28. There is similar legislation in every Australian state. The English provisions are repealed and re-enacted in a drastically amended form by the Civil Evidence Act 1968.

[4] [1965] A.C. 1,009.

[5] *Potts v. Miller* (1940) 64 C.L.R. 282; *R. v. Seifert* (1956) 73 W.N. (N.S.W.) 358.

by motor manufacturers were held to be inadmissible as evidence of the numbers on cylinder blocks placed by the workmen in the engines of the cars which they handled.

> They [the cards] only tended to prove that a particular car bore a particular number when it was assembled if the jury were willing to infer that the entries were accurate at least in the main; and the entries on the cards were assertions of the unidentifiable men who made them that they had entered numbers which they had seen on the cars.[6]

One can recognize the truth of this statement and, at the same time, regret the refusal of the majority of the House of Lords to create a further exception to the rule against hearsay. The effect of *Myers v. D.P.P.*[7] has been mitigated by statute in many jurisdictions, but it is still capable of producing surprising results. A car's logbook has been held to be inadmissible evidence of the car's engine number,[8] and the inscription 'Produce of Morocco' has been held inadmissible as evidence that the goods bearing it were produced in Morocco.[9] It is difficult to escape the conclusion that the Melbourne postmark is no evidence that a letter received in Perth was posted in Melbourne. In the circumstances, I must ask you not to be surprised if some of my conclusions with regard to the admissibility of certain items of evidence are such as would seem to a layman to be completely 'out of this world'.

GAIO v. THE QUEEN[10]

The first of the three recent cases that I want to discuss is *Gaio v. The Queen.*[11] A., a police officer, interrogates B., a suspect whose language he does not understand, with the aid of C., an interpreter. A. tells C. in English what to say; C. then holds a conversation with B. in B.'s language, and thereafter tells A. what B.'s answer to his question is. B.'s answers to a number of questions amount to a confession of guilt. A. takes notes, C. takes no notes and remembers nothing. Having refreshed his memory from his notes, A. gives evidence at B.'s trial; he repeats what C. told him B. had said, and C. swears to the accuracy of his interpretation. Is B.'s confession properly proved? A majority of the High Court of Australia said 'Yes' in *Gaio's case*[12] because, in its view, the rule against hearsay had not been infringed. With all due respect and diffidence, I say 'No, unless a further exception to the rule against hearsay is recognized'.

Let me begin by getting rid of two red herrings. In the first place there can be no question of the admissibility of what A. said to C. and what C. said to A. as statements made in the presence of B. Even if the utterances in question were admissible on this basis, they could only be received as

[6] *Myers v. D.P.P.* [1965] A.C. 1,009, 1022 *per* Lord Reid.
[7] *Ibid.*
[8] *R. v. Sealby* [1965] 1 All E.R. 701.
[9] *Patel v. Comptroller of Customs* [1966] A.C. 356.
[10] (1960) 104 C.L.R. 419.
[11] *Ibid.* [12] *Ibid.*

a foundation for any admission of their truth that happened to be made by B. They are, however, wholly inadmissible on this ground for the simple reason that B. did not understand them. Secondly, nothing is gained by treating C. as the agent of both A. and B. So far as B. was concerned, C.'s authority, if any, was limited to accurate translation. The problem of proving what B. said to C. remains.

A.'s evidence of what C. told him that B. had said was tendered as evidence of what B. did say to C. It would appear therefore that the case is identical with the second hypothetical example mentioned above. An admission was proved in a manner infringing the rule against hearsay because it was proved by someone other than the person to whom it was made. This was the view taken by the English Court of Criminal Appeal in a case in which the interpreter did not give evidence at all.[13] Does the fact that C. swore to the accuracy of his translation make any difference? I submit that it makes no difference because C. had no recollection of what he translated. A.'s repetition to the court of what C. told him B. had said was tendered as evidence of the fact that B. made statements in his language to C. which, when translated into English, were what C. told A. B. had said. The fact that there was sworn evidence of the accuracy of the translation does not alter the fact that the court was apprised of what B. had said, not by C., but by a repetition of what C. said to A. A. was giving C.'s direct evidence for him.

The argument which found favour with the majority of the High Court was that it is a mistake to treat C. as a party to the interrogation. There were not, it is said, two conversations, the one between A. and B., the other between B. and C.; there was just one conversation between A. and B. in relation to which C. acted as a kind of telephone for the accuracy of which he vouched in his evidence. The answer to this argument seems to me to be that telephones do not engage in the skilled process of translation, and the fact that C. vouched for the accuracy of his translation does not alter the fact that what B. said to C. was proved by A.'s repetition of what C. had told him that B. had said.

The usual way of dealing with interrogations at which an interpreter assists is for both the interrogator and the interpreter to take notes and to give evidence. On facts such as those of *Gaio's case*,[14] C., having refreshed his memory from his notes, would depose to what A. had told him to say to B. and to what B. said in reply. C. would also depose to what he told A., and A. would give confirmatory evidence. Strictly the interrogation could be proved without A.'s evidence. I appreciate that this procedure is not possible in Papua and New Guinea, the jurisdiction from which the appeal in *Gaio's case*[15] was brought, because the native interpreters do not take notes and soon forget what happened. There may be good grounds for the creation of a new exception to the hearsay rule to meet such a

[13] *R. v. Attard* (1959) 43 Cr. App. R. 90.
[14] *Gaio v. The Queen* (1960) 104 C.L.R. 419.
[15] *Ibid.*

situation, but this is not how the High Court looked at the matter. It would also be possible to tape-record the entire interrogation. There would then be no danger of inaccuracies creeping in through the imperfect repetition by C. to A. of what B. said to C. This is obviously a very serious danger in a case in which C. takes no notes and forgets everything, but the recommendation of a tape recorder may be a counsel of perfection.

I am made to feel all the more uneasy in differing from the view taken by the majority of the High Court by the fact that the South African Appellate Division had previously concluded that the rule against hearsay was not infringed in the situation covered by *Gaio's case.*[16]

> The interpreter deposes to a fact within his own knowledge, namely that he interpreted correctly; the person to whom he interpreted also deposes to a fact within his own knowledge, namely what the interpreter told him. The sum of the evidence of B. [the interpreter] and C. [the person to whom B. interpreted], each speaking from his own knowledge, proves what was said by A. [the person interpreted].[17]

I trust I shall not be considered disrespectful in replying that I thought there is a rule that witnesses must testify to that of which they have personal knowledge, and by asking which of the witnesses B. and C. had, at the material time, personal knowledge of what A. said to B. C. never had such knowledge; whether B. ever had it depends on the extent to which he was concentrating, at the time of the interrogation, exclusively on his task of interpretation, but to suggest that B. had personal knowledge, at the time of the trial, of what A. said to him at the interrogation is contrary to the facts. Is it really plausible to suggest that the rule that witnesses must testify from personal knowledge is satisfied by someone who swears as follows?

> I remember absolutely nothing of what A. said to me or of what I told C. that A. had said to me, but whatever I told C. that A. said to me (and I don't know what C. will say about that) was accurate.

Could there be a clearer infringement of the hearsay rule? The Appellate Division stressed the importance of interpreters concentrating on their task without pausing to remember what was said. Could there be a more cogent reason for a further exception to that already eroded rule?

R. v. MCLEAN[18]

The issue raised by *R. v. Mclean,*[19] the second of the three recent cases that I want to discuss, is the same as that raised by *Gaio v. The Queen.*[20] Does the fact that the maker of the repeated statement deposes to the accuracy of what he said prevent the rule against hearsay from applying? I nonetheless think that *R. v. Mclean*[21] is worth a brief discussion because

[16] *Ibid.*
[17] *R. v. Mutche* [1946] A.D. 874, 878 *per* Davis A.J.A.
[18] (1967) 52 Cr. App. R. 80.
[19] *Ibid.*
[20] (1960) 104 C.L.R. 419.
[21] (1967) 52 Cr App. R. 80.

it highlights some of the arguments against the application of the hearsay rule to such a situation.

A. is charged with robbery in the course of a 'smash and grab' raid. A car was used in the raid and there is evidence that, shortly before the incident, A. hired a car with the registration number BKB138D. In the course of his evidence B., the victim of the raid says that, although he was unable to identify the driver of the car, he read its number and he swears that he dictated it accurately to C. a few minutes later; thereafter he forgot what the number was. C. swears that he wrote down what B. told him and produces a piece of paper with BKB138D written upon it. Is there admissible evidence that the car used in the raid bore the registration number BKB-138D? The Criminal Division of the English Court of Appeal said 'No', and, although the answer is offensive to common sense, I respectfully agree. There was a technical infringement of the rule against hearsay, but it is difficult not to sympathise with the Court of Appeal's regrets that the conviction had to be quashed on this ground.

B. did not see C. write down what he dictated, and the Court of Appeal therefore thought that it would have been impossible for him to have refreshed his memory of the number of the car from the paper produced by C. Whether this is an unduly restricted view of the circumstances in which a document qualifies for use in refreshing memory is beside the point, because the admissibility of C.'s evidence concerning the number of the car was not challenged at the trial. For similar reasons, the law concerning the use of documents to refresh memory can be disregarded in relation to the earlier English cases which I am about to mention.

I express my respectful agreement with the Court of Appeal with diffidence because previous English cases might be thought to support the reception of C.'s evidence concerning the number of the car and because I am conscious of a formidable argument which may be advanced against the view that the rule against hearsay was infringed.

The previous cases are *Grew v. Cubitt*[22] and *Jones v. Metcalfe*.[23] In the first, the defendant was charged with careless driving and other road traffic offences. An eyewitness of the incident noted the number of the lorry involved and dictated it to his wife. The defendant admitted that he had been driving a lorry with that registration number at the material time, but denied all knowledge of the incident. The eyewitness gave evidence, but he apparently said no more by way of proof of the number of the lorry involved than that he had dictated it to his wife who was not called as a witness. When holding that the fact that the defendant was the driver involved in the incident had not been properly proved, Lord Goddard C.J., speaking for a Divisional Court, said that, had the witness's wife been called, she, having written it down at the time, could have said what the number was.

In *Jones v. Metcalfe*,[24] another case of careless driving, a witness to the

[22] [1951] 2 T.L.R. 305.
[23] [1967] 3 All E.R. 205.
[24] *Ibid.*

incident swore that he had dictated the number of the lorry involved to the police, and a policeman deposed to an interview with the defendant in which the latter admitted that, at the material time, he was driving a lorry with the same registration number as that given by the witness to the police, although he denied all knowledge of the incident. The witness could not recollect the number of the lorry, and the only policeman who gave evidence was the one who had interviewed the defendant. It appears that he had then been acting on information supplied. In holding that there was no case to answer, the Divisional Court implied that there would have been a case to answer if the number given by the witness to the police had been proved by the officer to whom it had been given.

The argument in favour of the admissibility of the evidence in *R. v. Mclean*[25] where, it will be recollected, the policeman to whom the number was dictated produced what he had written is that his evidence was tendered simply in order to show that B. told him to write a number down and to produce the paper bearing that number. Although B. no doubt said to C. 'That was the number I saw on the car used in the raid', C.'s testimony was, on the view I am endeavouring to express, original evidence. C. was not narrating what B. said as evidence of its truth. He was simply saying 'I obeyed an instruction (or complied with a request) and here is the result of what I did'. On the above view, the whole of the evidence concerning the car used in the raid in *Mclean's case*[26] was B.'s as he deposed to the fact that he had dictated the number of the car accurately to C. I am unable to accept this view because I think that, in such a situation, the completion by C. of B.'s evidence does infringe the hearsay rule. The fact that B. dictated a number to C. is only relevant as evidence of what B. perceived. The further fact that B. swore that he dictated accurately to C. what he had perceived does not alter the fact that C. was proving something said to him by B. as evidence of what B. saw. The infringement of the rule against hearsay was about as technical as such an infringement could be, but there is no escaping the conclusion that the court was asked to assume, not only that B. dictated accurately, but also that C. correctly heard and correctly recorded what B. had dictated. In fact, though very much in miniature, the court was confronted with a typical hearsay situation in which what would be good direct evidence is rendered less reliable because it is given by someone to whom it was repeated.

R. v. RICE[27]

The third of the recent cases that I want to discuss is *R. v. Rice*.[28] It raises the deceptively simple question whether a used air ticket bearing a particular name is admissible evidence that a person of that name travelled on the flight to which the ticket relates. The answer given by the English Court of Criminal Appeal was 'Yes; the evidence is real evidence and there

[25] (1967) 52 Cr. App. R. 80.
[26] *Ibid.*
[27] [1963] 1 Q.B. 857.
[28] *Ibid.*

is no infringement of the rule against hearsay'. My answer is 'No, unless the evidence is admissible under an exception to the hearsay rule'; but I am bound to admit that, if I am right, the tension between common sense and the operation of the rule against hearsay is even more acute than the examples I have given so far would lead you to suppose.

One Hoather, called on behalf of the prosecution, swore that Rice had flown with him from London to Manchester on a day in May. A used ticket bearing a date in May was produced by the airline official in charge of the appropriate file and that ticket had the names of Rice and Moore written on it. It was part of the prosecution's case that Moore was not on the flight, but the Court of Criminal Appeal nonetheless held that the recorder had rightly directed the jury that they might treat the ticket as confirmatory of Hoather's evidence that Rice travelled with him on the flight in question. Speaking in the name of common sense and the court, Winn J. said:

> The Court has no doubt that the ticket and the fact of the presence of that ticket in the file or other place where tickets used by passengers would in the ordinary course be found were facts which were in logic relevant to the issue whether or not there flew on those flights two men either of whom was a Mr Rice or a Mr Moore. The relevance of that ticket in logic and its legal admissibility as a piece of real evidence both stem from the same root *viz,* the balance of probability, recognized by common sense, and common knowledge, that an air ticket which has been used on a flight and which has a name upon it has more probably than not been used by a man of that name or by one of two men whose names are upon it . . . The document must not be treated as speaking its contents for what it might say could only be hearsay. Thus a passport cannot say 'My bearer is X.' nor can the ticket 'I was issued to Y'.[29]

Commenting on the trial judge's direction Winn J. said:

> The Court thinks that it would have been more accurate had the Recorder said that the production of the ticket from the place where used tickets would properly be kept was a fact from which the jury might infer that probably two people had flown on that particular flight and that it might or might not seem to them by applying their common knowledge of such matters that the passengers bore the surnames which were written on the ticket.[30]

The subsequent history of *R. v. Rice*[31] throws little, if any, light on the question whether it was correctly decided. It was mentioned with approval by a differently constituted Court of Criminal Appeal in *Myers's case*,[32] but the court appears to have considered the ticket to have been evidence which was only admissible as confirmatory of other evidence that Rice had travelled on the flight in question, and, in any event, the judgment was

[29] *Ibid.* 871-2.
[30] *Ibid.* 872.
[31] *Ibid.*
[32] *R. v. Myers* [1965] A.C. 1,001, 1,007-1,008.

reversed by a majority of the House of Lords, although the appeal was dismissed on other grounds. In the course of a speech in which he dissented from the majority of the House on the question of admissibility of the microfilms with which *R. v. Myers*[33] was concerned, Lord Pearce said that he agreed with the reasoning of Winn J. in *R. v. Rice*[34] and added:

> That an air ticket marked with the name of Rice was apparently given up by one of the passengers was somewhat more consistent with Rice having flown on the aeroplane than with his not having flown. It was a piece of confirmatory evidence. It was one of the circumstances which the jury might consider. But it was not evidence (unless the writer of the name of Rice on the ticket was called) that someone had given his name as Rice, or, a fortiori, that it was Rice who bought the ticket. So, too, if a handkerchief marked with his name had been found.[35]

R. v. Rice[36] was not mentioned in the speeches of the majority in *Myers's case*,[37] but it is clear from those speeches that the reception of the ticket cannot be justified, as a matter of law, on the ground that it was confirmatory of Hoather's evidence. No doubt the primary significance of the ticket in the particular case was due to that fact, but the notion that evidence which would not otherwise be admissible may be admitted because of its tendency to confirm other evidence came in for some rough treatment in *Myers's case*.[38] The ticket must, so to speak, stand on its own feet when its admissibility, as distinct from its relevance, is under consideration; it cannot be treated as parasitic on Hoather's evidence. The relevance of the ticket to the question whether Rice travelled on the flight with Hoather is beyond dispute, but did its reception for the purpose of supporting an affirmative answer to that question infringe the rule against hearsay?

My difficulties in accepting the view that the hearsay rule was not infringed because the ticket was real evidence begin when I ask myself why it is recognized 'by common sense and common knowledge that an air ticket which has been used on a flight and has a name upon it has more probably than not been used by a man of that name'. When applied to the facts of *R. v. Rice*[39] the answer must surely be 'Because it is a matter of common knowledge that an air ticket bearing the name of Rice was issued to someone who either said that his name was Rice or else indicated that it was to be used by someone of that name'. Yet both Winn J. and Lord Pearce said that the rule against hearsay would have been infringed if the ticket had been used as evidence of that fact. The witness who produced the ticket would have been giving the direct evidence of the person who issued it.

Though they are no doubt hallowed by long usage, I find metaphors such as that which refers to a document 'speaking its contents' unhelpful;

[33] [1965] A.C. 1,009.
[34] [1963] 1 Q.B. 857.
[35] [1965] A.C. 1,009, 1,045.
[36] [1963] 1 Q.B. 857.
[37] [1965] A.C. 1,009.
[38] *Ibid.*
[39] [1963] 1 Q.B. 857.

but, if the rule against hearsay would have been infringed if the ticket had been treated as saying 'I was issued to Rice', why was the rule not equally infringed by treating the ticket as saying 'I was used by a Mr Rice'? Yet this is precisely how the ticket was treated by the Court of Criminal Appeal. With respect, it is little more than a quibble to argue that the ticket was tendered not as the equivalent of an assertion that it had been used by someone called Rice, but rather as an item of evidence from which it might be inferred that a person named Rice used the ticket because 'an air ticket which has been used on a flight and which has a name upon it has more probably than not been used by a man of that name'. It would be just as plausible to say that goods inscribed with the name of a country in which they are said to have been produced were more probably than not produced in that country. If the rule against hearsay is infringed by the use of the inscription 'Produce of Morocco' as evidence that the goods so inscribed were produced in Morocco, the rule is likewise infringed by the production of a ticket inscribed with the name of Rice as evidence that it was used by a man of that name. In each instance the court is deprived of the evidence of the person who made the inscription. In the one case it might have transpired that the inscriber had no idea where the goods were produced, in the other he or she may have thought that a Mr Spice was asserting that he was Mr Rice.

What then would have been the position if a handkerchief bearing the name of Rice had been found in the plane immediately after the flight on which Hoather had travelled? Although I am conscious of the apparent absurdity of my answer, it is that the reception of the handkerchief as evidence that a man named Rice travelled on the flight would have infringed the rule against hearsay. The inscription on the handkerchief would have been accepted as evidence that the handkerchief was the property of a Mr Rice. The person producing the handkerchief would have been allowed to give its owner's evidence for him.

I must now point to three things I have not said. In the first place, I have not suggested that the rule against hearsay is infringed in cases in which gloves bearing fingerprints or shoes bearing the traces of a particular kind of earth are produced as evidence that the gloves were worn by a particular person or that the shoes were used in a particular place; the hearsay rule is confined to human assertions. Secondly, I have not suggested that a used air ticket or lost handkerchief can never be evidence of the presence on a particular flight of a person of the name inscribed upon them. Once there is evidence showing that they were in the possession of someone who passed by that name round about the time of the flight, they became admissible circumstantial evidence of the presence of that person on the plane. The evidence of the official who issued the ticket in Rice's case that he handed it to someone who said either that his name was Rice or else that he was acting on behalf of a Mr Rice might even have sufficed for this purpose. Finally, I have not denied the possibility that the ticket

or handkerchief is admissible under an exception to the hearsay rule. I suppose it is arguable that the requisite exception existed at common law before the House of Lords refused to sanction the creation of further exceptions by the courts in *Myers v. D. P. P.*,[40] although the exception would be difficult to formulate and the argument is not one in which I have much confidence. In jurisdictions in which there is legislation on the lines of the English Criminal Evidence Act 1965 a file of used tickets such as that produced in *Rice's case*[40a] might be treated as a record of the names of those who apparently flew on particular flights, although the terms of the legislation are not very readily applicable to such a situation.[41]

HYPOTHETICAL CASES

Not the least of the difficulties that beset someone who is discussing cases on the periphery of the rule against hearsay is the absence, mentioned at the beginning of this article, of anything in the nature of an official formulation of the rule. It is confined to statements (*i.e.*, representations of fact by words or conduct) which were intended to be assertive when they were made, or does it extend to words or conduct which, though not intended to be assertive by the speaker or agent, are nonetheless treated by the person tendering them in evidence as equivalent to an express assertion of fact? My answer is that the rule is confined to statements that were intended to be assertive by the person who made them, but I must at least refer, albeit with a brevity so excessive as to amount to dogmatism, to two well known hypothetical cases. The first draws attention to the difficulty of drawing the line between utterances which were intended to be assertive and those which were not so intended: the second is a vivid illustration by a protagonist of the view that the hearsay rule applies to non-assertive conduct when tendered as the equivalent of an assertion.

The first example will be familiar to readers of *Kenny's Outlines of Criminal Law*. It follows on the discussion of *R. v. Gibson*,[42] the case of

[40] [1965] A.C. 1,009.

[40a] *R. v. Rice* [1963] 1 Q.B. 857.

[41] S.1 (1) reads 'In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, 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 compiled in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and (b) the person who supplied the information recorded in the statement in question 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 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.' S.14.C added by the Evidence Amendment Act 1966 (N.S.W.) is in identical terms. The difficulty of applying the provision to a file of used air tickets (assuming it to be a record) is that whoever bought the ticket could not, at the time, have personal knowledge of the name of the person who actually used it; while the person who handed the ticket in was not supplying information.

[42] (1887) 18 Q.B.D. 537.

unlawful wounding in which evidence that an unidentified woman was heard, immediately after the incident, to exclaim 'The man who threw the stone went in there' was excluded. The woman pointed to the door of the house in which the accused was found, and the case is admittedly not calculated to inspire confidence in the law of hearsay evidence, but I doubt whether the distinction taken by *Kenny's* editor is justified. He continues:

> If, however, the woman had been heard to say, as a man approached her, 'Hallo Mr Gibson where are you going' it would clearly have been permissible for the witness to have repeated this remark, just as he could have deposed that he heard the woman scream, or shout 'shame' or saw her run away or the like.[43]

The argument is that any of these things would be circumstantial evidence of phenomena created by the presence of the man and by what he was doing; they would have been reactions spontaneously forced from the woman by what she had seen. I have no quarrel with the argument so far as the scream, the cry of shame and the flight are concerned, although I would like to know what fact is sought to be proved by them before finally pronouncing on their admissibility; but I think that the 'Hallo Mr Gibson' must be treated as an infringement of the hearsay rule if tendered on the issue whether a Mr Gibson was present. 'Hallo Mr Gibson' means 'I recognize you Mr Gibson'. The remark is intended to be assertive to the same extent as, though less obviously than, 'The man who threw the stone went in there'. I won't add to your perplexity by considering the admissibility of utterances of this nature as part of the *res gestae* because, like many a better man before me, I know of no issue which is clarified by the use of that phrase.[44]

My second hypothetical case will be familiar to those who have studied the judgment of Parke B. in *Wright v. Doe d. Tatham*.[45] He considers the admissibility of 'the conduct of a deceased captain on an issue of seaworthiness who, after examining every part of a vessel, embarked on it with his family'. Parke B. concludes that, when deliberately considered with reference to the matter in issue, the case is an instance of inadmissible hearsay evidence, a mere statement not on oath but 'implied in or vouched for' by the conduct of the captain. With respect, I doubt the propriety of treating conduct which was not intended to be assertive as something to which the rule against hearsay applies. Admittedly many of the dangers against which the rule provides are present if the evidence of the behaviour of the deceased captain is received. He is not available for cross-examination, he may have been a very incompetent captain, or he may have had reasons for going aboard which were sufficiently pressing to make him take the risk attendant on the defects in the shop which he observed. On the other hand, one can say that the fact that deeds generally speak louder

[43] *Kenny's Outlines of Criminal Law* (19th ed. 1966) 500.
[44] See the invective cited in Cross, *Evidence* (3rd ed. 1967.) 33 n.l.
[45] (1838) 7 Ad. & E. 313, 387.

than words is sufficient justification for treating that which was not intended by the agent to be assertive as falling outside the ban on hearsay. To my mind, however, there is a far more cogent reason for adopting this course; if such conduct is to be treated as hearsay whenever it is proved as equivalent to an assertion by someone other than the witness who is testifying there will be no end to the situations to which the hearsay rule will apply. The behaviour of the sea captain was only one among several instances mentioned by Parke B. Among those not mentioned by him are the proof of the signature of the attesting witness as evidence that a deed was duly executed, inconsistently treated by him in another case as falling outside the ban on hearsay,[46] the proof of acts of ownership as evidence of title, the proof that a person acted in a particular capacity as evidence of his authority to do so, and the proof of treatment as evidence of legitimacy or illegitimacy. At least so long as we are dependent on case-law to determine whether the rule against hearsay applies to a particular situation, let us hope that our courts do all they can to keep it within reasonable bounds. This is something that some courts in the United States have proved to be unable to do, principally through having taken Parke B. too seriously; we can count ourselves fortunate in that, generally speaking, there has been little sign of an English or Australian court doing this.

McGREGOR v. STOKES[47]

The general approach of the Australian courts to the question whether non-assertive conduct comes within the rule against hearsay may be illustrated by *McGregor v. Stokes*.[48] The police raided the premises of the defendant who was suspected of unlawful betting. While the police were on the premises a number of phone calls came through. These were answered by the police and, in each instance, the caller attempted to place a bet. In holding that this evidence was admissible at the defendant's trial for unlawful betting, Herring J. decided that the rule against hearsay had not been infringed. A follower of Parke B. might have concluded that the rule had been infringed because the evidence was tendered as equivalent to an assertion, based no doubt on past experience, by the unknown callers that they believed the defendant's premises to be a place at which bets could be made. The answer to such an argument is that the callers were not seeking to convey information, but were uttering what are sometimes called 'operative words'; they were trying to make bets, not assertions.

HOLLOWAY v. McFEETERS[49]

There is, however, at least one case in which the temptation to equate non-assertive conduct with assertive words proved too much for the High Court of Australia. Is the fact that a motorist does not stop after running

[46] *Stobart v. Dryden* (1836) 1 M. & W. 615.
[47] [1952] V.L.R. 357.
[48] *Ibid.*
[49] (1956) 94 C.L.R. 470.

someone down admissible evidence of negligence on his part in proceedings to which he is not a party? The answer may well be 'No, because there are too many possible explanations of the conduct to render it sufficiently relevant', but, in *Holloway v. McFeeters*,[50] the High Court said 'No, because the conduct is in the nature of an admission which is only binding on the party making it and those claiming through him'. The case concerned a running-down action against the nominal defendant, and the High Court was divided on the question whether, as a matter of construction of s.47 of the Motor Car Act 1951 the motorist's admissions by words or conduct bound the nominal defendant. Does *Holloway v. McFeeters*[51] mean that, in a case in which it is virtually certain that a murder was committed by either A. or B. (who has disappeared), the fact that, on their being approached by the police shortly after the incident, B. took to his heels is inadmissible as evidence in favour of A. The situation is one that has troubled the American courts on more than one occasion. If the answer to my question is in the affirmative, and it is difficult to see why it should not be in the affirmative, I suggest that the High Court should think again should the opportunity arise.

THE NEED FOR REFORM

Holloway v. McFeeters[52] may well be something of an abberation, but I nonetheless submit that the foregoing discussion of cases on the periphery of the hearsay rule gives little ground for confidence in what case-law is likely to achieve in this sphere. *Gaio v. The Queen*[53] and *R. v. Rice*[54] show that the courts are all too prone to hold that the rule does not apply, rather than to hold that the case comes within an exception to it; this is not the purely pedantic criticism that it sounds because far greater uncertainty is likely to be produced by doubts concerning what a rule is than by doubts concerning the number of exceptions to it. *R. v. Mclean*[55] is the latest among many instances of results brought about by a consistent adherence to the hearsay rule which is abhorrent to common sense. The case of the hypothetical lady who said 'Hallo Mr Gibson' shows how two academics may disagree over the application of the rule, and there still hangs over us the possibility that one of our judges may take what Parke B. said in *Wright v. Tatham*[56] seriously. Isn't it time we put our house in order by legislation?

A step in this direction has been taken by the English Civil Evidence Act 1968 which, in effect, extends an amended s.55 of the Victorian Evidence Act to oral statements; but the pros and cons of this particular method of virtually abolishing the rule against hearsay and the merits of analogous legislation for criminal cases must be the subject of another article.

[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] (1960) 104 C.L.R. 419.
[54] [1963] 1 Q.B. 857.
[55] (1967) 52 Cr. App. R. 80.
[56] (1838) 7 Ad. & E. 313.