RECENT AND SUGGESTED REFORMS IN THE LAW OF EVIDENCE*

For many years proposals have been brought forward from informed persons in England, other Commonwealth countries and the United States of America for a complete revision of the law of evidence. Some piecemeal reforms have in fact been made—e.g. the Evidence Act 1938 (U.K.) and the Criminal Evidence Act 1965 (U.K.)—and in Australia the conference of Attorneys-General has been considering a proposed Uniform Evidence Act. In the writer's view the time is overdue for the introduction both of comprehensive reforms and of uniform legislation throughout the Commonwealth of Australia in this branch of the law.

In England The Lord Chancellor, a couple of years ago, requested the Law Reform Committee and the Criminal Law Revision Committee to undertake a review of the law of evidence. The Law Reform Committee brought out a Report in May 1966 entitled "Hearsay Evidence in Civil Proceedings". The Law Reform Commission of New South Wales is also undertaking a review of the law of evidence in both civil and criminal cases, and it is understood that the conference of Attorneys-General is awaiting the report of the New South Wales body before undertaking any further steps in this field.

Rules of evidence form part of the law of procedure or adjectival law as opposed to the rules of substantive law. It is not only lawyers who consider that many of the narrow and exclusionary rules of evidence are not in accord with the need in the modern world for speedier and better justice.

Are there not just two basic rules of evidence? First, that all relevant evidence is admissible to establish the factum probandum; second, that evidence to establish a fact should be the best that the nature of the case will allow. The end product must be a compromise between the two.

Do not, however, the exclusionary rules of evidence limit to an absurd degree the search for truth made by the court? It is agreed on all sides that hearsay should be accepted with caution, but much

---

* A paper read at the 1967 Law Summer School held at the University of Western Australia.

of the evidence on which men act in the course of their daily lives consists of hearsay. Such evidence is accepted by administrative tribunals, by legislative committees, and yet we bar it from the courts and even more strictly from jury trials. It is no wonder that the layman (including the man on the jury) becomes fed up at times with the procedure of the courts. If the strict rules of hearsay were applied in all cases a great deal of relevant evidence would be excluded because statements made by a witness concerning time, age, distance, etc. are based to a very large extent on hearsay. We all know that judges sitting without juries are not anxious to apply the rule strictly in circumstances where there is no real conflict as to the matter in dispute. Is not the layman fully aware of the unreliability of hearsay evidence? Why is the layman presumed to be more foolish than the lawyer in this regard?

It is not part of this paper to trace the origin and development of the rule excluding hearsay evidence and of the subsequent exceptions to that rule. Many judges and advocates have for a long time considered that a great deal more hearsay should be admitted in all courts—that this will not lengthen, impede or make more expensive the process of justice but will in fact speed it up, render it less expensive and less cumbersome.

Holdsworth in his History of English Law said:

> Primitive ideas on these matters have been the parents of long lived technical rules, which have only gradually changed their shape, as these primitive ideas have given place to changed conceptions and new rules more fitted to them. Thus the rules which flow obviously from the principles of reasoning have been overlaid by a mass of technical rules, which represent the ideas and needs of many different periods in the law of procedure. It is for this reason that the contents of the law of evidence present a variegated mass of rules which can be traced historically to all periods in the history of the law.[1]

Legal historians disagree among themselves as to the basis of the development of the rule excluding hearsay evidence. It is immaterial, in the context of the need for reform, whether such evidence was excluded as being unreliable so to mislead a jury or whether its reception would deprive a party of an opportunity to cross-examine the original maker of the statement.[2]

---

1 Vol. IX, 130.

2 See the discussion by Macpherson, *A Statutory Exception to the Hearsay Rule*, (1965) 5 U. OF QUEENSLAND L.J. 30.

Jerome Frank quotes an American writer as saying:

> Our law requires that all matters for the consideration of the jury shall be, as it were, predigested food for mental invalids, and so it strains this food through the most highly developed rules of evidence . . . . In short, we recognise in every imaginable way that the jury is the weakest element in our judicial system, and yet we ponder it as a sacred institution . . . . We . . . regard it, in all ways in which our regard can be measured, as wholly incompetent for the purpose for which we establish it.[3]

Frank goes on to suggest that if we are obliged to have the jury, let us abolish, or modify, most (not all) of the exclusionary rules, since they often shut out important evidence without which the actual past facts cannot be approximated.

If the modern rule excluding hearsay evidence is based upon the adversary theory of justice and is without regard to there being a jury or not, why should the judge intervene to exclude hearsay if counsel do not object? Is not the better view that inadmissible evidence if not objected to is to be considered and given its natural probative effect as if it were in law admissible?[4] Frequently in civil trials counsel, for good reason, do not object to the admissibility of hearsay evidence, and it would be going to absurd lengths to suggest that the judge or jury could not act upon such evidence in the event of its not being objected to. The rule seems to be that if a party tenders evidence not forbidden by statute but inadmissible under the ordinary rules of evidence, and the other party stands by and lets it in without objection, that other party cannot be heard to attack the decision because of its reception so long as the evidence so admitted was relevant.[5] However, the position in criminal cases seems to be different, and in a criminal case where prejudicial inadmissible evidence is admitted against the accused without objection the court on appeal may well consider it its duty to quash the conviction or to order a new trial.[6]

The Evidence Act 1938 (U.K.), which made important exceptions to the hearsay rule in the case of written statements, has been adopted substantially in New Zealand and in all the Australian States with

---

3 FRANK, COURTS ON TRIAL 144 (1949).

4 For expression of this view see WIGMORE, EVIDENCE 321 (3rd ed.), and Philp J. in O'Brien v. Clegg, [1951] St. R. Qd. 1, 7.

5 King v. Bryant (No. 2), [1956] St. R. Qd. 570, 583; Miller (Assignee of the Estate of Ram Kishen) v. Babu Madho Das, (1896) L.R. 23 Ind. App. 106; Walker v. Walker, (1937) 57 C.L.R. 630.

6 See Stirland v. D.P.P., [1944] A.C. 315, 327; R. v. Samuels, [1962] N.Z.L.R. 1036.

the exception of Western Australia. In the First Schedule to this paper, sections 1 and 2 of the Evidence Act 1938 are set out in full. When this Act was adopted by the New South Wales Legislature,[7] the provisions of the English Act were made applicable to all civil proceedings without a jury. The other Australian States and New Zealand made the statutory provisions applicable to all civil proceedings, but whereas s. 15(5) of the English Act provided that 'where the proceedings are with a jury, the court may in its discretion reject the statement . . .' the Victorian Act[8] omitted the words "and where the proceedings are with a jury". Consequently in Victoria there is a discretion in the court to reject the statement notwithstanding that the requirements of this section are satisfied, whereas in England, New Zealand and the other Australian States where the proceedings are before a judge alone the court has no discretion to reject the statement if the requirements of the section are satisfied.

In Queensland[9] the English Act was adopted with some significant alterations. In the Second Schedule to this paper are set out in full Sections 42A, 42B and 42C of the Evidence and Discovery Acts 1867-1962 (Qd.). The Queensland modifications to the English Act are as follows:

(1) Section 1(3) of the English Act, which renders inadmissible a statement made by an "interested person", is omitted from the Queensland Act.

(2) The requirement of the English section 1(1)(i)(b) that the person supplying information to the maker should have personal knowledge of the information supplied is omitted from the Queensland Act.

(3) The following words in section 1(2) of the English Act have been omitted in the corresponding Queensland section, viz. 'If having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused'.

(4) In the Queensland Act it is specifically provided that the court may admit a statement in evidence 'notwithstanding that the statement is tendered by the party calling the maker of the statement'.[10] This provision was not included in the English Act.

(5) The court in Queensland has an unfettered discretion to dispense with the production of the original document, and this ob-

7 Evidence Act 1898-1954 (N.S.W.), ss. 14A-14C.
8 Evidence Act 1958 (Vic.), s. 55(5).
9 Evidence Acts Amendment Act 1962 (Qd.), s. 6.
10 s. 42B (2) (a).

viates the difficulties which arose in *Bowskill v. Dawson.*[11] In that case it was held by Devlin J. that a typewritten copy (made by a police officer) of a signed statement by the plaintiff, which had been lost, was inadmissible in evidence as s. 1(1) of the Act of 1938 excluded the ordinary common law rule regarding secondary evidence of a lost document.

The English Act makes no exception to the strict rule against hearsay when the maker of a statement is called as a witness. In England the situation is that the maker of the statement need not be called if he is dead, physically or mentally unfit to attend as a witness, if he is beyond the seas and it is not reasonably practicable for him to be called, or if he cannot be found. However, the court may admit such a statement even if the maker of the statement is available and is not called provided that undue delay or expense would otherwise be caused. In Queensland the court has a discretion unfettered by the requirement of 'undue delay or expense' to admit such a statement in evidence at any stage of the proceedings. The words "at any stage of the proceedings" are important in that an interlocutory application may be made to the court for admission of evidence by way of such a statement at the subsequent trial.

It is not the purpose of this article to discuss all the case law which has developed upon the Act. Reference here can be made to leading works on evidence such as those by Cross or Phipson and to the article in the University of Queensland Law Journal by Macpherson which was referred to earlier.[12]

One important question is whether the provisions of the 1938 Act should be extended to criminal proceedings. The decision of the House of Lords in *Myers v. Director of Public Prosecutions*[13] shows that there is but a remote possibility that the courts will extend the exceptions to the hearsay rule. In that case the appellant was convicted with another man of a conspiracy to receive stolen cars and of conspiracy to defraud the purchasers of the stolen cars. Evidence was given at the trial that a number of wrecked cars had been purchased by the two men who had also received some stolen cars. Their procedure was to transfer the chassis numbers and the registration marks from the wrecked cars to the stolen one so that the latter could be sold to innocent purchasers. In order to prove that the cars which

11 [1954] 1 K.B. 288.
12 See n.2, above.
13 [1965] A.C. 1001.

were sold were stolen ones, the prosecution called employees of the manufacturers of the stolen cars who were able to produce records showing the engine, chassis and cylinder block numbers which had been recorded on a card as each car was made. At the trial the defence objected to the evidence given by the employees, who were in charge of the records, but had no part in making them, on the ground that the evidence was hearsay. The trial judge overruled the objection, the prisoner was convicted and the Court of Criminal Appeal confirmed the conviction. The House of Lords held, by a majority, that the records of the cylinder block numbers were tendered in evidence in order to prove the truth of the facts recorded, namely that the cylinder block of a particular car when manufactured bore a particular number, that this evidence was hearsay evidence which could not be brought within any established exception to the rule, that hearsay evidence was inadmissible, that the records were not public records and, although they had been made in the course of duty and contemporaneously, it was not shown that the persons who had made them had died.

The minority Judges in that case (Lords Pearce and Donovan) took the view that 'the common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds. Particularly is this so in the field of procedural law'.[14] Even the fact that the Lord Chancellor has now made a statement, on behalf of himself and the Lords of Appeal in Ordinary, that the House of Lords intends no longer to observe the principle of stare decisis in considering its own prior decisions gives one little hope for judicial reform in this branch of the law.

In *Patel v. Comptroller of Customs*[15] the Judicial Committee of the Privy Council stated that the decision of the House in the *Myers* case made it clear beyond doubt that the list of exceptions to the hearsay rule cannot be extended judicially.

However, in England legislative reform followed fairly swiftly upon the decision in the *Myers* case[16] and the *Patel* case.[17] The Criminal Evidence Act 1965 reads, inter alia, as follows:

> 1(i) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a docu-

14 Id. at 1047, per Lord Donovan.
15 [1965] 3 All E.R. 593.
16 [1965] A.C. 1001.
17 [1965] 3 All E.R. 593.

ment intending 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 matter dealt with in the information they supply;

(b) the person who supplied the information recorded in the statement in question is deceased, 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 be reasonably 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.

Other sections of that 1965 Act provide that the court may draw any reasonable inference from the document and from the form of the document etc., and that the court has a discretion to reject such evidence if justice requires it. The provisions of this 1965 English Act have been embodied in the N.S.W. Evidence Act.[18]

It is interesting to see that the Criminal Evidence Act 1965 has dispensed with the requirement of s. 1(3) of the 1938 Act which renders inadmissible 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. By s. 1(3) of the 1965 Act it is provided that the question of "interest" is to affect weight as opposed to admissibility. Nor under the 1965 Act is there any obligation to produce the original document as is required in the 1938 Act.

In the field of testator's family maintenance, legislatures have made significant changes regarding the admissibility of statements by a testator. In so far as statements by a testator are tendered to prove the truth of the matter stated, they are hearsay and inadmissible. In *In re Paulin*[19] Sholl J. held that evidence of the testator's reasons for excluding the applicant is admissible, not to prove the truth of the facts the testator alleged, but as showing the circumstances calling for explanation.[20] Section 11 of the Family Protection Act 1955 (N.Z.) provides that on a testator's family maintenance application the court

---

18 Evidence (Amendment) Act 1966 (N.S.W.).

19 [1950] V.L.R. 462.

20 For a general discussion of the cases, see DAVERN WRIGHT, TESTATOR'S FAMILY MAINTENANCE, Chapter 17 (2nd ed.).

may have regard to the deceased's reasons for making the dispositions made by his will or for not making any provision, as the case may be, and the court may accept such evidence of these reasons as it considers sufficient whether or not the same would be otherwise admissible in a court of law. Similar provision is made in the Tasmanian legislation.[21] Section 1(7) of The Inheritance (Family Provision) Act 1938 (U.K.) provides that the court may accept such evidence of a testator's reasons as it considers sufficient, including any statement in writing signed by the testator and dated. The courts have held that this section is not confined to evidence of the reasons given by the testator but may be extended to evidence of facts from which the court may infer the reasons of the testator for making the dispositions made by his will, or for not making any provision, or for any further provision, as the case may be.[22] In testator's family maintenance cases either written or oral hearsay is admissible in particular jurisdictions.

For many years written hearsay evidence has been admissible under legislation relating to the books of bankers.[23] These Acts provide that a copy of an entry in a bankers' book shall be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded. In *Re L. G. Batten Pty. Ltd. (in voluntary liquidation)*[24] Stable J. with some trepidation held that the words "bankers' books" included day books or diaries of the bank, and so held that an entry in a diary of a bank officer setting down the notes of a discussion between that officer and the managing director of a company was admissible in evidence under the Act.

On the question of uniform Commonwealth legislation, section 79 of the Judiciary Act 1903-1959 requires that 'the laws of each State, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State in all cases to which they are applicable.' In the absence of a Commonwealth Evidence Act dealing with the reception of evidence, rules of evidence applying to matters heard in the High Court and in other courts exercising federal jurisdiction vary from State to State. This in itself is a cogent argument not only for the introduction of a comprehensive Common-

21 Testator's Family Maintenance Act 1912 (Tas.), s. 8A.
22 See Re Smallwood (deceased), Smallwood v. Martin's Bank, [1951] 1 Ch. 369.
23 e.g. the Bankers' Books Evidence Act 1949 (Qd.).
24 [1962] Q.W.N. 2.

wealth Evidence Act but also for Uniform Evidence Acts in all States.

It is of interest to note that the Judicial Conference of the United States has resolved that the objective of developing federal rules of evidence is meritorious.[25]

After considerable research and careful study by lawyers in the United States there emerged the Uniform Rules of Evidence in 1953. These rules have been adopted by some of the American States but in several cases with modifications.

Rule 63 of the Uniform Rules provides that hearsay evidence is in general inadmissible unless it falls within one of the thirty-one exceptions which follow on. Several of the exceptions represent quite significant changes in relation to the admission of hearsay. For example, Rule 63(1) reads:

> A statement previously made by a person who is present at the hearing and available for cross-examination in respect of the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness.

Rule 63(4) is as follows:

> 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—
> . . . 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 any 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.

Rule 63(13) is as follows:

> Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein if a judge finds that they were made in the regular course of a business at or about the time

---

[25] See 1961 Judicial Conference Annual Report 31; also Degnan, *The Law of Federal Evidence Reform* (1962) 76 HARV. L. REV. 275.

> of the act condition or event recorded and that the sources of information from which made and the method and circumstances of their preparation was such as to indicate their trustworthiness.[26]

Though it is certainly undesirable to allow hearsay evidence to be admitted without any safeguards, particularly when much better evidence is available, one has on the other hand to consider such matters as availability of witnesses, delay and expense of trial, etc. Nevertheless, Rule 45 provides certain safeguards to these provisions. It reads as follows:

> Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will—
>
> (a) necessitate undue consumption of time; or
>
> (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury; or
>
> (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence could be offered.

Many lawyers contend that prior statements should not be admissible unless the witness had first given his account in the witness box in the usual and traditional manner. And of course, under such a rule, as also under the provisions of the Queensland Act, counsel may tender in evidence statements that have been prepared in a solicitor's office.

First of all one might ask, is this in all circumstances necessarily a bad thing? G. D. Nokes has said[27] that in a criminal case, if a witness's signed deposition of his evidence in the Magistrate's Court is to be admitted in examination-in-chief at a trial on indictment, something of a revolution in criminal procedure would have been accomplished. But the point is that surely it would be only in the most exceptional circumstances that the judge in the exercise of his discretion would admit statements made in a lawyer's office or depositions in a criminal trial. As the Queensland Act stands in its present form, a statement made in a lawyer's office could be admitted in civil proceedings if the circumstances set out in s. 42B apply, namely if the maker of the statement is dead or unfit, etc. Further, if the maker of the statement is called as a witness the prepared statement

---

26 Note the similarity of this exception to the provisions of the Criminal Evidence Act 1965 (U.K.).

27 NOKES, EVIDENCE 362 (3rd ed. 1962).

could be admitted—but counsel is scarcely likely to do this with any witness because the effect of his testimony in examination-in-chief would be to a very great extent lost on the tribunal. In criminal cases if the trial judge had discretion, could not the exercise of such discretion be relied on to have excluded statements prepared by lawyers or statements made at a time when the witness was aware that he would be called to testify either for the prosecution or the defence? Moreover, in many cases cross-examining counsel may well prefer to cross-examine upon a prepared statement put in through a witness than after such witness has given his evidence-in-chief in accordance with the well-established procedure of oral answers to oral questions.

It is clear that Rule 63(1) of the Uniform Rules will simplify the laws applicable to the manner in which a witness may refresh his memory from a document. At present when the memory of a witness has been refreshed prior to trial it is not necessary that the writing by means of which this is done should be produced at the trial, but if the witness has no independent recollection, apart from the document, the evidence, if of probative value, should not be excluded if no objection is taken to the oral evidence or its admission is otherwise assented to. If the evidence is objected to and there is a refusal to produce the writing the oral evidence must be rejected.[28] Where a witness refreshes or stimulates his memory from a writing while in the witness box, the writing must be produced, if requested, to the cross-examiner. What happens so 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. This may rightly be called a subterfuge.

Rule 63(20) of the Uniform Rules provides for the reception of 'evidence of a final judgment adjudging a person guilty of a felony to prove any fact essential to sustain the judgment'. Such judgment is, of course, only admitted as evidence and not as conclusive evidence.

The Law Reform Committee (U.K.) in its thirteenth Report[29] expressed the view that the ultimate aim of any review of the law of evidence is to produce a statutory code. It was pointed out that when a witness is not available to give oral evidence of a fact, hearsay is then the only and thus the "best" evidence probative of that fact which is available.

---

[28] King v. Bryant (No. 2), [1956] St. R. Qd. 570.
[29] Cmnd. 2964 (1966).

I want now to consider the matter of the admissibility of oral hearsay. Dr Cross has suggested[30] that legislation could well provide that the Judge could admit assertions by persons other than the witness who is testifying as evidence of the truth of that which was asserted whenever he is satisfied that it would not be practicable to call the person who made the assertion. He further suggests that it might well be thought desirable to enumerate such matters as contemporaneity with the events to which it relates, the existence of a duty to make the statement, the fact that it was against the declarant's interest, etc., as points to be taken into account by the Judge to determine the weight to be attached to the assertions.

In answer to that suggestion of Dr Cross, Mr Griew contended that when there is a jury or even a trial by lay justices there would be considerable difficulties because they would need guidance on the question of weight, and further that juries would still need to be told, in terms comprehensible to them, what pieces of evidence adduced before them were hearsay and for what purposes, and that this would add to the difficulties of the juries, to the complexity of trials and potentially to the number of appeals.[31] I do not hold such fears. I believe that juries are fairly familiar with what is meant by hearsay evidence, and that it is not a difficult problem for a trial judge to tell a jury just what evidence is hearsay, that such evidence, if disputed, has not been given by a person who is available to be cross-examined, and that they are therefore entitled to give it such weight as they feel it merits in the circumstances.

Mr Griew says that in the case of oral hearsay the risk which attends the non-appearance of the declarant for observation and cross-examination is coupled with the risk of faulty hearing, misunderstanding, misrecollection and motive to misrepresent on the part of the reporting witness. Would not cross-examination and common sense adequately answer these problems? My view is that oral hearsay should only be admissible in circumstances when it is relevant and is the best evidence available at the time. As Dr Cross points out, those who have qualms about the difficulties of making juries understand the significance of certain types of hearsay should consider what juries are called upon to do now. I need only mention Queensland, where juries are required to assess damages for personal injuries (other than in motor vehicle and

30 [1965] CRIM. L. REV. 68, 83.
31 Id. at 91.

master and servant cases) many of which are complex by reason of the difficult economic loss factor; to determine issues of fact arising in civil and commercial cases and in cases involving fraud, undue influence, lack of testamentary capacity, etc. In any event, I take the view that a written or oral statement should not be considered as hearsay if cross-examination as to it is available.

The Law Reform Committee has recommended that the categories of statements admissible under the 1938 Act be extended to oral statements and to written statements not authenticated in writing by the maker, but considers 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. The Committee has recommended the following procedural provisions for notice of intention to rely on hearsay:

(1) A party intending to rely upon any statement should give notice of his intention to the other party or parties, together with—

(A) a copy of the statement, if written, or full particulars of the words used and the person to whom the statement was made, if oral;

(B) the name and address (if known) and description of the maker of the statement and particulars specifying when, where and in what circumstances it was made; and

(C) a declaration (where applicable) that the maker of the statement is dead, unfit to be called as a witness, abroad, or unable to be found;

(2) any other party should be entitled to give a counter-notice that he requires the maker of the statement to be called at the trial;

(3) (A) where no counter-notice had been given, the statement would be admissible at the trial as evidence of any fact which it tended to establish;

(B) where any counter-notice had been given—

(i) the statement would not be admissible at the trial unless—

(a) the maker of the statement was called as a witness and the court, in its discretion, admitted such statement; or

(b) the court was satisfied that the maker of the statement was dead, unfit by reason of his bodily or mental condition to attend as a witness, or that he was beyond the seas and it was not reasonably practicable to secure his attendance, or that all reasonable efforts to find him had been made without success;

(ii) unless at the conclusion of the trial the court was of the opinion that there were reasonable grounds for

> requiring the maker of the statement to be called, the court should order that all costs of and occasioned by the counter-notice should be paid by the party giving it.[32]

A further recommendation is that the court have a discretion to admit a statement, notwithstanding no notice had been given, if it was not reasonably practicable to give such notice or it was otherwise expedient to admit the statement.

I want now shortly to discuss some of the problems which may be thought to arise if hearsay (oral and written) becomes admissible.

SELF-SERVING STATEMENTS

In *Hilton v. Lancashire Dynamo Nevelin Ltd.*[33] Megaw J. admitted a written statement which satisfied the statutory requirements of the 1938 Act even though it was put in at the commencement of examination-in-chief to a witness. Also in *Shepherd v. Shepherd*[34] Sholl J. decided that the witness's previous written statement, tendered in support of his present testimony, was admissible as not merely confirming his credit but as evidence of the facts therein stated. But is any problem really involved in the tendering of self-serving statements? Is it not always a question of the impression which is given to the court by this method and of the weight which the court (be it judge or jury) would in its common sense approach give to the statement?

I take the view that if all statements made by a witness at any time were able to be put to him either by his own counsel or by opposing counsel not only would no harm result but a great deal of uncertainty which presently arises from the rules concerning hostile witnesses, recent fabrication, etc. would be overcome.

PRIOR CONSISTENT STATEMENTS

I cannot see why there should be rules preventing the admissibility of prior consistent statements when one has the safeguard of cross-examination. Of course, the point is that a prior consistent statement may generally be irrelevant but when it is relevant surely it ought to be admitted. There are, of course, a number of exceptions to the present rule of exclusion, namely statements forming part of the res gestae, complaints in sexual cases and statements admissible under the rule

---

32 Cmnd. 2964 (1966).
33 [1964] 2 All E.R. 769.
34 [1954] V.L.R. 514.

relating to recent fabrication. In Queensland, where there is no prohibition against a statement being put in by an "interested" person, prior consistent statements may be tendered by the counsel calling the witness or by opposing counsel—although it is hardly likely that opposing counsel would wish to tender such a statement.

PRIOR INCONSISTENT STATEMENTS

Apart from those jurisdictions which have legislation corresponding to the 1938 English Act (applicable, of course, only to written statements), when prior inconsistent statements of a witness other than a party are admitted they are not admitted as evidence of the facts stated. In the case of witnesses who are parties such statements are admissible as proof of the facts therein stated on the basis of there being admissions or confessions. In Queensland the statutory rules relating to cross-examination of a witness as to credit are contained in sections 17 and 18 of the Evidence and Discovery Act 1867, and the only occasions in which the answers given by a witness in cross-examination to questions directed to his credit may be contradicted are in cases of previous contradictory statements and previous convictions of the witness. However, the Evidence Act 1962 (Qd.) permits an inconsistent statement in writing to be tendered, and it becomes proof of the facts stated in it and is not admissible solely as to credit. In this regard it is submitted that a similar principle should apply in criminal trials as well as in civil trials. Take the case of a prosecution witness who has put to him in cross-examination by defence counsel a previous inconsistent statement which he has made in writing, such as depositions before the magistrate which he has signed. Such statement is admissible not as evidence of the facts stated but only as to his credit, whereas one would think that the previous depositions should be admitted as truth of the facts stated therein.

IMPEACHING A PARTY'S OWN WITNESS

Apart from legislation analogous to the Evidence Act 1938 (U.K.), it is not permissible for counsel calling a witness to put to him in examination-in-chief or re-examination a statement inconsistent with his testimony without first having him declared a hostile witness. In *Cartwright v. Richardson & Co.*[35] counsel endeavoured to put in evidence a statement under the Act which contradicted the present testimony of the witness. Barry J. refused to allow counsel to do this,

[35] [1955] 1 W.L.R. 340.

stating that the Act was not intended to overrule the ordinary rules of procedure applicable in the trial of civil actions. However, in *Hilton v. Lancashire Dynamo Nevelin Ltd.*[36] counsel for the defendants called a witness and sought to put in evidence a statement in writing assumed to have been made and signed by the witness shortly after the accident. Megaw J. said: 'I have come to the conclusion here, with hesitation and with reluctance, that on the true construction of s.1 of the Evidence Act, 1938, Mr Dean's submission is right. It is not a matter of discretion for the court.'

It is respectfully submitted that the attitude of Barry J. reflects the attitude of members of the profession who have been familiar for many years with the old rules of evidence. It is the writer's view that, when a witness is there for cross-examination, it does not matter whether the statement sought to be put in evidence is a prior consistent statement or a prior inconsistent statement, or, for that matter, at what stage in the witness's evidence is put in. The fact that a prior inconsistent statement is put to the witness by the counsel calling him would not mean that the counsel calling him would be able to cross-examine him or to endeavour to discredit his evidence.[37]

VICARIOUS ADMISSIONS

All lawyers are familiar with those cases where a servant or employee makes admissions which are held not to be admissible against the master. By reason of this the "admitting" servant, who is the driver of a motor vehicle, is often joined as a defendant so that his admission of liability may be placed before the court.

The ninth exception mentioned in the Uniform Rules of Evidence of the United States provides for the reception, as against a party, of a statement which would be admissible if made by a declarant at the hearing if '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.' Consequently, if ever such rule were adopted, a servant's admission of liability may be tendered as against the master in an action brought against the latter based on his vicarious liability for the tort of his servant. At present, such statement is inadmissible unless it forms part of the res gestae. It seems to the writer unfortunate that servants' statements

36 [1964] 2 All E.R. 769.

37 As will be seen below, the Law Reform Committee has taken a different view as to the point in time during the evidence of a witness when such a statement should be put in.

cannot be admitted against the master in these circumstances. It might be very important on the question of the proof of the agency—and what the servants says could, of course, be contradicted by the master.[38]

The Law Reform Committee were all in agreement with the proposition that, if a previous statement of a witness who gives evidence at the trial is admitted at all as evidence of the facts contained in it, it should be so admitted only at the discretion of the judge. This recommendation is contrary to the opinion expressed by the writer and also would, if adopted, mean that the admissibility of statements under the 1938 English Act and the 1962 Queensland Act where the maker of the statement is called, should, to that extent, be limited.

By a narrow majority the Committee recommended that, whether consistent or inconsistent with the witness's oral testimony, a previous statement made by him should be admissible at the judge's discretion. It was said that a judge would not normally be expected to admit a proof of evidence taken from a witness for the purposes of the trial because of its small probative value.[39]

The Committee were all of the opinion that a previous statement made by a witness who is called at the trial, and which is, in the exercise of the judge's discretion, admitted on the application of the party calling him, should be so admitted only at the conclusion of his evidence-in-chief and before the cross-examination.

The Law Reform Committee has recommended that, while notice should be given to the adverse party of intention to rely upon a statement made by his servant or agent, the court should, in the exercise of its discretion, admit the statement without the maker of the statement being called unless the other party was himself prepared to call the maker as his own witness.

As the report of the Law Reform Committee, the Summary of Recommendation of which is set out in the Third Schedule of this paper, shows, a thorough reform of the law of evidence will, and should, also involve many necessary and consequential procedural amendments. This will mean some alterations to the Rules of Court, particularly in relation to the powers of the court on the hearing of a Summons for Directions or upon other interlocutory proceedings. It is desirable in the interests of the public and of the future of the profes-

---

38 See Cross, *Some Proposals for Reform in the Law of Evidence,* (1961) 24 MOD. L. REV. 32, 55.

39 Such a statement is, of course, admissible as of right under the Queensland Act.

sion that steps be taken to stream-line the laws of evidence and procedure.

For example, in England at the summons for directions under R.S.C. Ord. 30 the usual order which is made, in a case involving personal injuries, is that unless a medical report be agreed between the parties, medical evidence be limited to two witness on each side.[40] The object of such order is to ensure that matters of medical opinion shall, if possible, be agreed among medical men and so assist the administration of justice.

Although the 1962 Queensland Act has been in operation for four years it is noticeable that practitioners and judges have not applied it to the extent to which it may be used. Two recent Queensland cases are worth mentioning.

In *Re Hennessey's Self Service Stores Pty. Ltd. (in liquidation)*[41] Gibbs J. allowed certain stock books and stock sheets to be admitted in evidence under s.42B of the Queensland Act. The learned judge pointed out that if he excluded the statements on the stock sheets it would be necessary to call a great number of witnesses.

Gibbs J. considered that it was a reasonable inference that the person who was doing the writing on the stock sheets had some personal knowledge of the quantities of the stock which were being written down, since such person was close to the person who was calling out the particulars and it would have been impossible for him to have failed to observe that there was some stock. The accuracy of the maker's knowledge of the actual quantities of stock was, in His Honour's opinion, a matter which affected the weight of the evidence rather than its admissibility.

In *Lenahan v. Queensland Trustees Limited*[42] Hart J. pointed out how very wide in its terms was the Queensland Act. His Honour, in a jury trial, rejected a record of stock returns which would have been admissible before a judge without a jury, saying that as the contents of the record more probably than not were completely inaccurate the record should be rejected in the exercise of the discretion given by s.52B(4).

Apart from New South Wales and Victoria, there are very few civil cases in Australia which are jury trials, but those States, which still retain juries in the mass of motor vehicle and industrial accident

40 See Devine v. British Transport Commission, [1954] 1 W.L.R. 686; Harrison v. Liverpool Corporation, [1943] 2 All E.R. 449.

41 [1965] Qd. R. 576.

42 [1965] Qd. R. 559.

litigation, continue to say that juries are desirable and yet that they are so foolish and immature that they have to be hedged around with all sorts of restrictions concerning evidence. Indeed one hears, particularly from practitioners in those States, arguments in support of a jury's competence to decide even the most complicated technical issues. In the large number of administrative tribunals which have proliferated in recent years and which determine important rights of the citizen (and before which lawyers generally have the right to appear) hearsay evidence is admissible. Many politicians, government officials and laymen believe that such tribunals are more likely to do justice—and speedier justice—than are courts with their restrictive rules of procedure and of exclusion of evidence. This, of course, is a wrong, if excusable, view. But the reforms which have been suggested in the field of evidence will bring the procedures of the courts closer to those bodies which hold sway in the quasi-judicial field, and this in the modern context will be a sound thing.

In *Myer's* case[43] Lord Reid said: 'The only satisfactory solution is by legislation following on a wide survey of the whole field and I think such a survey is overdue. A policy of make do and amend is no longer adequate.'

In conclusion I venture to suggest:

(1) All Australian States should introduce legislation based on the 1938 English Act and incorporating the innovations embodied in the Uniform Rules (U.S.A.) and in the 13th Report of the Law Reform Committee. This would mean that "first hand" written and oral hearsay would be admissible with certain safeguards.

(2) Subject perhaps to more stringent safeguards (in the discretion of the court) there should be little difference between evidence admissible in criminal and civil proceedings.

(3) There should be a uniform and comprehensive code of evidence to be enacted by the Commonwealth and applied in all States.

(4) Failing early implementation of comprehensive reforming legislation, the State Parliaments should, on the initiation of the profession, continue to make piece-meal reforms in this field of lawyers' law—e.g. the Criminal Evidence Act 1965 (U.K.), the Evidence Act Amendment Act, 1966 (W.A.) (admissibility of photographic and microfilm copies of documents when originals destroyed).

W. B. CAMPBELL*

43 [1965] A.C. 1001.

* *Judge of the Supreme Court of Queensland.*

FIRST SCHEDULE

THE EVIDENCE ACT 1938

Sections 1 and 2

SECTION 1

(1) In any civil proceedings 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:

(i) if the maker of the statement either—

(a) had personal knowledge of the matters dealt with by the statements, or

(b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (insofar 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

(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 (1) 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.

(5) For the purposes of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions 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 circumstance, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate of a registered medical practitioner, and where the proceedings are with a jury, the court may in its discretion reject the 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.

SECTION 2

(1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, 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, 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.

(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 Act shall not be treated as corroboration of evidence given by the maker of the statement.

SECOND SCHEDULE

THE EVIDENCE AND DISCOVERY ACTS 1867-1962

(Queensland) Sections 42A, 42B and 42C

42A. INTERPRETATION AND SAVINGS

(1) In section 42B and 42C of this Act—

(a) "Document" includes books, maps, plans, drawings and photographs;

(b) "Statement" includes any representation of fact, whether made in words or otherwise;

(c) "Proceedings" includes arbitrations and references; and "court" shall be construed accordingly.

(2) Nothing in sections 42B or 42C of this Act shall prejudice the admissibility of any evidence which would, apart from the provisions of those sections, be admissible.

42B. ADMISSIBILITY OF DOCUMENTARY EVIDENCE AS TO FACTS IN ISSUE

(1) In any civil proceedings 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:—

(a) If the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) 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; and

(b) 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 out of the State and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success, or where no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness.

(2) In any civil proceedings, the court may at any stage of the proceedings order that such a statement as is mentioned in subsection (1) 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 statement is tendered by the party calling the maker of the statement;

(b) notwithstanding that the maker of the statement is available but is not called as a witness;

(c) notwithstanding that the original document is lost or mislaid or destroyed, or 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) 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.

(4) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, 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 registered medical practitioner, and where the proceedings are with a medical practitioner, and where the proceedings are with a jury, the court may in its discretion reject the 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.

42C. WEIGHT TO BE ATTACHED TO EVIDENCE

(1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by section 42B 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.

(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 section 42B of this Act shall not be treated as corroboration of evidence given by the maker of the statement.

THIRD SCHEDULE

RECOMMENDATIONS OF LAW REFORM COMMITTEE

(1) Any statement, whether made orally or in writing, which tends to establish a fact of which direct oral evidence could be given, should, as a general rule, be admissible to prove that fact if it is shown to have been made by someone who had personal knowledge of the matters dealt with in the statement.

(2) A written or mechanically-recorded statement tending to establish such a fact should also be admissible if made by a person in performance of a duty to record information supplied to him directly or indirectly by a person with personal knowledge of the fact so recorded.

(3) The Evidence Act 1938 should be amended to give effect to the recommendations summarised in paragraphs (1) and (2) above; for this purpose, the following limitations on the admission of hearsay statements at present imposed by the Act should be abolished:—

(a) the requirements in section 1 (1) that the statement should be in writing

and in section 1 (4) that a document should not be deemed to have been made by a person unless signed, initialled or otherwise recognised in writing by the maker as being his;

(b) the requirements in section 1 (1) that a statement made by a person without personal knowledge of the matters contained in it must, in order to be admissible as having been recorded in pursuance of a duty—

(i) form part of a *continuous* record, and

(ii) have been made in the performance of a duty to record information supplied *directly* to the maker by a person with personal knowledge of the relevant matters;

(c) the requirement in section 1 (3) that the statement must not have been made by a person interested.

(4) A party intending to rely on any statement made admissible by the Evidence Act 1938, as amended in accordance with the foregoing recommendations, should be required to give to other parties notice, containing adequate particulars, of his intention; and any other party requiring the maker of the statement to be called as a witness should be required to give a counter-notice to that effect.

(5) In the absence of a counter-notice, the statement should be admissible in evidence.

(6) On the service of a counter-notice, the statement should (subject to recommendation (8) below) not be admissible in evidence unless either—

(a) the witness is called and the court in its discretion admits the statement, or

(b) the maker is shown to be unavailable.

(7) The giving of a counter-notice without reasonable grounds for requiring the maker of the statement to be called should result in the court ordering the costs occasioned thereby to be paid by the party giving the notice.

(8) The court should have a residual discretion to admit a statement notwithstanding the failure to serve as notice, or to call the witness, though available, after service of a counter-notice.

(9) It should not be a breach of professional etiquette for a party to interview the maker of a statement which is the subject of a notice given by another party.

(10) Where the statement sought to be admitted was made by a witness in the course of previous legal proceedings, the court should have power to give directions, on the application of the party on whom the relevant notice is served, as to the conditions on which the statement should be admitted.

(11) A party intending to rely as against another party upon a statement made by that other party (or by a person authorised to make admissions on his behalf) should be entitled to do so without giving notice of his intention.

(12) If, as against defendant A, a plaintiff intends to rely on a statement made by defendant B, he should be required to give notice, and if defendant A gives a counter-notice but defendant B (the maker of the statement) does not give evidence on his own behalf, it should be within the discretion of the court whether to admit the statement.

(13) The notice and counter-notice procedure should apply where the statement sought to be relied upon was made by the servant of an adverse party, but in that case the court should be ready to exercise its discretion to admit the statement notwithstanding failure to call the maker.

(14) The credibility of the maker of the statement should be impeachable by an adverse party in the same way as if the maker had been called as a witness, but no evidence should be admissible for this purpose as to which the maker's denials in cross-examination would have been final had he been so called; a party who fails to serve a counter-notice should not be entitled to impeach the

credit of the maker if, as a result of the failure, the maker is not called as a witness.

(15) A previous statement made by a person who is called as a witness should not be admissible as evidence of the facts stated in it otherwise than with leave of the court.

(16) "Second-hand hearsay" should continue to be admissible in these exceptional cases where it is already admissible at common law or by statute, or where it consists of recorded information and is admissible under recommendation (3) (b), but not otherwise.

(17) Legislation implementing the above recommendations should—

(a) expressly abrogate all other rules admitting "first-hand" hearsay, save in so far as embodied in statutes or rules of court, and

(b) provide expressly for the exceptional cases in which "second-hand hearsay" is to be admissible.

(18) The same rules should apply irrespective of whether—

(a) the trial is by judge alone or by judge and jury, or

(b) the proceedings are in the High Court or a county court, subject to any procedural modifications that may be required for county courts.

(19) The initial rules of court, both for the High Court and county courts, should be scheduled to the amended Evidence Act but made capable of being amended by the rule-making authority.

(20) The recommended procedural safeguards should not apply to arbitrations.

(21) The existing rules about hearsay evidence should continue to apply, at any rate for the time being, to civil litigation in magistrates' courts.

(22) The amended Evidence Act should apply to other courts and tribunals exercising civil jurisdiction which are bound by the strict rules of evidence, any procedural safeguards being a matter for the appropriate rule-making authorities.