

THE LAW REFORM COMMISSION

THE RULE AGAINST HEARSAY

CHAPTER 1 THE PRESENT LAW

A. The rule against hearsay

The rule against hearsay is not defined in any statute. Professor Sir Rupert Cross, in his text book on the law of evidence, has offered as a statement of the rule that "a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated". (Cross on Evidence, p. 6 (4th ed. 1974)) In the latest edition of Phipson on Evidence, the standard practitioners' work, the following statement is given: "Former oral or written statements by any person, whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted". (para. 625 (12th ed. 1976)) Thus, in a trial for drunken driving, a police officer cannot give evidence that X, a publican, told him that he had served the accused with six large whiskies before he got into the car. Nor could a written statement by the publican to the same effect be adduced. Statements excluded by the rule may take many forms, ranging from informal oral remarks to formal written statements or sworn testimony in previous proceedings. The rule is applicable to signs, gestures, drawings, charts, photographs as well as to statements in the narrow sense. There is doubt as to whether the rule applies to implied assertions, i.e. statements or non-verbal conduct which are not intended by their maker to be assertive of the

fact they are tendered to prove. If it does, a witness could not testify that he heard someone say 'Hello X' to prove that X was in a particular place.¹

It is important to note the exact scope of the Rule. In Cullen v. Clarke [1963] I.R. 368, 378, the leading recent Irish case on the subject, Kingsmill Moore J. gave a full statement of its limitations:

"In view of some of the arguments addressed to the Court, it is necessary to emphasise that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule subject to many exceptions that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; This is the rule known as the rule against hearsay. If the fact that the words were spoken rather than their truth is what it is sought to prove, a statement is admissible."

¹ In an old English case, Wright v. Doe d. Tatham (1837) 112 E.R. 488, letters to a deceased testator treating him as a sane man were held not admissible as evidence of his sanity. This was followed in Ireland in Gresham Hotel Co. (Ltd.) v. Manning (1867) Ir. R. 1 C.L. 125 where evidence of complaints by potential customers was rejected on the issue whether an obstruction of light to a sensible and material extent was caused by the raising of the defendant's building. In Teper v. R. [1952] A.C. 480, the Privy Council held that an alibi of a shopowner on a charge of arson of his own shop could not be contradicted by the evidence of a policeman that he had heard someone in the crowd say: "Your place burning and you going away from the fire". More recently, in Ratten v. R. [1972] A.C. 378, the Privy Council upheld the reception, as not being hearsay, of a telephonist's evidence that an hysterical female voice said "Get me the police please" in a call from the accused's house about the time the accused's wife was shot by the accused's gun. When confining the rule against hearsay to express assertions, The Law Reform Commission of Canada claimed that their draft code "followed the better view of the present law". (Report on Evidence (1975) p. 69.)

Thus, where it is sought to prove that a workman could not obtain employment on account of an injury, evidence may be given that an employer to whom application was made for a job said "no". Similarly, in an action on a contract, the words used by a non-witness when making or accepting an offer may be narrated to the court. If the question is whether an assault by B upon A was provoked, the fact that, prior to the assault, B had made an insulting gesture or called A a liar would be admissible in evidence as relevant to the issue of provocation. The distinction highlighted here was illustrated in Subramaniam v. Public Prosecutor [1956] 1 W.L.R. 965, an appeal to the Privy Council from a conviction in Malaya where S was charged with being in possession of firearms without lawful excuse and his defence was that he was acting under duress in consequence of threats uttered by Malayan terrorists. The judge would not allow the accused to state what had been said to him by the terrorists and the Judicial Committee of the Privy Council advised that the conviction should be quashed because the statements excluded were admissible, the purpose of proving them having been to show the accused's apprehension of instant death if he refused to carry the arms and not to establish the truth of what was contained in them.

The rule against hearsay has its basis in the principle of orality according to which truth is best ascertained by the unrehearsed answers on oath or affirmation of witnesses who have actually perceived the relevant events and who are then subjected to cross-examination in the presence of the courts. A hearsay statement is by definition not made before the court and, if the maker does not testify, he cannot be cross-examined nor can his demeanour be observed or his credibility tested. Where the hearsay statement narrated is oral, there is a chance that it may be altered in the telling. Where it is made formally there is the danger

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that it will be tailored to the requirements of the party making it. A further reason sometimes given for the rule against hearsay is the possibility that a jury, where there is one, will be confused by a proliferation of evidence of little value.

The rule against hearsay, like other rules of evidence, is not binding on administrative tribunals (Kiely v. Minister for Social Welfare [1971] I.P. 21 at 26-7) However, there are circumstances where the admission of such evidence may lead a court to find that a hearing before a tribunal has not been conducted in accordance with natural justice. In Kiely v. Minister for Social Welfare (No. 2) [1977] I.R. 267, holding that an appeals officer was wrong to accept a written opinion of one doctor in rebuttal of the oral testimony of two others when considering a claim for a death benefit under the Social Welfare (Occupational Injuries) Act 1966, Henchy J. remarked:

"... Any lawyer of experience could readily recall cases where injustice would certainly have been done if a party or a witness who had committed his evidence to writing had been allowed to stay away from the hearing, and the opposing party had been confined to controverting him simply by adducing his own evidence ... Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice."
(pp. 281-2)

B. Exceptions to the rule against hearsay

The rule against hearsay is subject to exceptions. Confessions of crime and informal statements made by a party adverse to his own case, may be given in evidence as proof

of the facts stated² as may declarations of deceased persons (1) against their proprietary or pecuniary interest³ or (2) in pursuance of a duty to record or report⁴, (3) to the reputed existence of public rights⁵, (4) as to the pedigree of a blood relation⁶, (5) as to the cause of death in homicide cases⁷, or (6) as to the contents of their wills.⁸ Evidence of reputation may also be tendered to establish character or to prove marriage.⁹ Under the doctrine of res gestae contemporaneous spontaneous statements about a fact in issue or as to the state of mind of the maker at any relevant time are admissible as evidence of the truth of their contents.¹⁰ Public documents, i.e. entries made by authorised agents of the public relating to facts of public interest or notoriety are generally admissible at common law:¹¹ and statutory provision has been made by statute to put beyond doubt the admissibility of documents such as birth, marriage and death certificates as well as some private records such as bankers' books.¹² Published works, such as histories, scientific works, dictionaries and maps are admissible as

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- ² See pp. 129-43 infra.
³ See pp. 171-5 infra.
⁴ See pp. 77 sqq. infra.
⁵ See pp. 153-8, 171-5 infra.
⁶ See pp. 153, 182-4 infra.
⁷ See pp. 176-8 infra.
⁸ See pp. 178-80 infra.
⁹ See pp. 153 sqq. infra.
¹⁰ See pp. 144 sqq. infra.
¹¹ See pp. 160 sqq. infra.
¹² See pp. 169-70 infra.

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evidence of facts of a public nature stated in them.¹³ Evidence given in previous proceedings between the same parties may be read at a subsequent trial provided the issues are the same, the witness who made the statement is unavailable and the other side had the opportunity of cross-examination in the previous proceedings.¹⁴

The Criminal Procedure Act 1967 allows depositions taken by a district justice to be read at a trial on indictment in certain circumstances. Such depositions may be taken in the course of the preliminary examination before the district justice or at any other time where a justice is of opinion that a prospective witness may be unable to attend to give evidence at the trial.¹⁵ They may be read at the trial provided the deponent is unable to attend to give evidence, the deposition was taken in the presence of the accused and an opportunity was given for cross examination and re-examination of the deponent. However, except in cases where the deponent is dead, a deposition taken at a preliminary examination may not be read unless the accused consents and the trial judge has a residual discretion not to allow other depositions taken from persons still living to be read if he considers that to do so would not be in the interests of justice.¹⁶ Under Order 39 of the Rules of the Superior

¹³ See p. 163 infra for cases.

¹⁴ There is some authority in England that depositions taken before a Coroner's inquest are admissible under this heading (see Phipson on Evidence paras. 1621-2 (11th ed., 1970)) However, in Dwyer v. Larkin (1905) 39 I.L.T.R. 20 statements taken at a Coroner's inquest were rejected as evidence for the prosecution on a charge of serving a person while drunk contrary to section 13 of the Licensing Act 1872; in that case the persons who had made the statement were available and in court. The Coroners Act 1962 contains no provision on the matter.

¹⁵ Criminal Procedure Act 1967, sections 7, 14, 15; and Criminal Law (Jurisdiction) Act 1976, section 18.

¹⁶ Criminal Procedure Act 1967, section 15(2).

Courts, the Court may order that any witness whose attendance may be dispensed with shall be examined by interrogatories or otherwise before a commissioner or examiner; letters of request may be issued to the competent judicial authorities in other countries, and evidence may be taken before Irish consuls abroad. However, it is specifically provided that "the examination shall take place in the presence of the parties, their counsel, solicitors or agents, and the witnesses shall be subject to cross-examination and re-examination" (Ord. 39, r. 10) and except where "directed by the Court no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the Court is satisfied that the deponent is dead, or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions....". (Ord. 39, r. 17)¹⁷ Under Order 39, rule 1, the Court may also order that any particular fact or facts may be proved by affidavit but no such order will be made where the other party bona fide desires the production of a witness and he can be produced. It has been held that no such order should be made where the evidence goes to the gist of the action. (Northridge v. O'Grady and Thompson [1940] Ir. Jur. Rep. 19 following Cronin v. Paul (1881) 15 I.L.T.R. 121). Several classes of

¹⁷ The following Irish cases on the taking of evidence on commission should be noted: Cronin v. Paul (1881) 15 I.L.T.R. 121; Maiorana v. Graffeo (unreported, Supreme Court, Rec. No. 75/1935); Esmonde v. Esmonde [1936] Ir. Jur. Rep. 58; Independent Newspapers Ltd. v. Irish Press Ltd. (1938) 72 I.L.T.R. 11; Keane v. Hanley [1938] Ir. Jur. Rep. 16; Leonard v. Scofield [1938] Ir. Jur. Rep. 31; Butler and Ors v. Faller [1952] Ir. Jur. Rep. 50. In general, the evidence of a crucial witness may not be given in this way unless, not being compellable, he refuses to attend to testify.

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proceedings are generally heard on affidavit but the opposite party may always request the production of the deponent for cross-examination.^{17A} Unless the deponent is then produced, his affidavit may not be used as evidence unless by the special leave of the Court. This will only be granted in cases of absolute necessity as where the deponent is dead, or too ill to give evidence.¹⁸

^{17A} Rules of the Superior Courts, Ord. 37, r. 2; Ord. 38, r. 3; Ord. 40, r. 1.

¹⁸ The reception of evidence on affidavit and on commission in the Circuit Court is regulated by the Rules of the Circuit Court, Order 20 which provides:

1. In the absence of any agreement in writing between the Solicitors for all parties, and subject to these Rules and the law of evidence, the witnesses at the trial of any action shall be examined viva voce on oath and in open Court, but the Judge may at any time for such reasons as he thinks right order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the Judge may think reasonable, provided that where it appears to the Judge that the other party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit ...
3. In any action, proceeding, or matter, where it shall appear necessary for the purposes of justice, an order may be made for the examination upon oath before the Court, or before any officer in the Office and nominated by the County Registrar, or by the Judge, or before any other suitable person, and at any convenient place, of any witness or person, and the order may empower any party to any such action, proceeding, or matter, to give such examination or deposition in evidence therein on such terms, if any, as the Judge may direct.

There is no general provision for the reception of evidence on affidavit or the taking of evidence on commission in the District Court Rules, rule 6(1) of which provides:

Save where any enactment or rule otherwise provides the evidence of all witnesses in the District Court shall be given viva voce and on oath.

The exceptions to the rule against hearsay are explicable either in terms of the peculiar reliability of a particular type of evidence or of the unavailability of better evidence. But, as often happens, rules of law have become cut off from their original rationale and the exceptions have been restricted to the rigid categories stated, many of which are subject to still further limitations. In England, in Myers v. Director of Public Prosecutions [1965] A.C. 1001, the House of Lords has ruled that the exceptions to the hearsay rule cannot now be expanded on the basis that the evidence sought to be given is peculiarly reliable or is the best available. In Ireland, while no such rigid position has been taken, there has been no indication that the courts do not believe themselves in principle limited to the existing exceptions to the hearsay rule.

It is possible to list numerous examples of logically probative evidence which would be excluded by the operation of the rule against hearsay and would not fall within any of the existing exceptions. In R. v. Gray (1841) Ir. Circ. Rep. 76 a death bed confession by a third person that he, not the accused, had committed the murder charged was held inadmissible. In Donaghy v. Ulster Spinning Company Ltd. (1912) 46 I.L.T.R. 33 evidence of what a deceased had said to his doctor as to the cause of the fatal injury was rejected. In his judgment in the Court of Appeal, Cherry L.J. said:

"I was always under the impression that in such cases the best and, in many cases, the only evidence that can be obtained, as to the nature and effects of an injury, is the statement of the injured man himself, and that evidence as to the nature of the injury includes not only the physical fact of the injury but also the immediate cause. It is an additional part of the statement as to the nature of the injury. However, the English decisions that have been cited hold otherwise and must be followed by us. It will have the effect of shutting out hundreds of cases where no other evidence of the nature of the injury is obtainable."¹⁹

Another category of evidence excluded in such cases despite its undoubted probative value is the written report of a doctor, since deceased or otherwise unavailable. Examination of the English cases reveals other varied examples of the exclusion of logically probative evidence on the basis of the hearsay rule. In an old case on a mortgage deed, where the defendant pleaded that the deed had been fraudulently altered by one of the attesting witnesses who had since died, it was held that evidence of statements by the attesting witness in question admitting such alterations was inadmissible (Stobart v. Dryden (1836) 1 M. & W. 615). In an action for the price of goods sold, where infancy was the defence, a statement by the defendant's deceased father as to the infant's date of birth which had been made in an affidavit in a previous action between different parties was held not admissible (Haines v. Guthrie (1884) 13 Q.B.D. 818).²⁰

¹⁹ In this case the Court of Appeal distinguished its earlier judgment in Wright v. Kerrigan /1911/ 2 I.R. 301. See also Shea v. Wilson and Co. (1916) 50 I.L.T.R. 73.

²⁰ Distinguished in Palmer v. Palmer (1885) 18 L.R. Ir. 192.

In an abortion-manslaughter charge evidence was not allowed to be given that the deceased had said that she intended to operate on herself before the operation and that she said afterwards that she had in fact done so (R. v. Thomson [1912] 3 K.B. 19) Business records, although inherently reliable, have been excluded because the person who made the record could not be identified and so called to give evidence (Myers v. Director of Public Prosecutions [1965] A.C. 1001) A statement concerning the place of manufacture inscribed on goods was held inadmissible as evidence of that fact (Patel v. Customs Comptroller [1966] A.C. 356) More recently, there have been two cases where the only evidence identifying a car was a note made by a bystander of the registration number observed by an eye-witness (Jones v. Metcalfe [1967] 3 All E.R. 205; R. v. McLean (1967) 52 Cr. App. Rep. 80). In each case the eye-witness had forgotten the number at the time of the trial and it was held that neither the note nor the evidence of the bystander who made it could be given in evidence to identify the car. In Jones v. Metcalfe [1967] 3 All. E.R. 205 at p. 208 Lord Justice Diplock (as he then was) felt moved to remark that the law as to hearsay was "a branch of the law which has little to do with commonsense".²¹

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The disadvantages of the hearsay rule are in practice somewhat alleviated because the courts freely allow hearsay evidence which is of probative value to be given on behalf of the defence in criminal cases while, in civil cases, judges often discourage counsel from pressing points on hearsay or insist on hearing an item of hearsay evidence de bene esse. While there is in law no discretion to admit

²¹ Cf. R. v. O'Linn 1960 (1) S.A. 545, an Australian case, where it was held that X can refresh his memory from a note taken by Y provided Y swears he wrote down the exact words dictated by X.

inadmissible evidence either in civil or criminal cases, the wrongful admission of evidence will not necessarily result in a verdict being set aside on appeal, even in jury trials. In criminal cases an appeal may be dismissed if the appeal court considers that no miscarriage of justice has actually occurred notwithstanding its opinion that the point raised in the appeal should be decided in favour of the accused. (Courts of Justice Act 1928, Section 5(1)(a))²² On appeals to the Supreme Court from jury verdicts in civil cases, a new trial may not be granted on the ground of mis-direction or of improper admission or rejection of evidence unless, "in the opinion of the Supreme Court some substantial wrong or miscarriage has been occasioned in the trial".²³ On the other hand, there are very few reported Irish cases in the last fifty years, apart from those dealing with confessions, where evidence of any probative value has been shut out by the operation of the rule against hearsay. Nevertheless, the situation cannot be regarded as satisfactory. The exclusion of evidence at first instance is rarely reported, especially in jury trials, unless an appeal is brought. Also

²² Commenting on the equivalent English provision, which is commonly called 'the proviso', Professor Sir Rupert Cross remarks:

"Although the beneficial character of the provisions mentioned can hardly be disputed they may have had a bad effect on the development of the law of evidence for they account, to some extent, for its being a body of rules which is nearly as much honoured in the breach as the observance." (Cross on Evidence, p. 71 (4th ed. 1974))

This may be less true of Ireland where 'the proviso' has seldom been applied as the Court of Criminal Appeal has invariably ordered a re-trial where there is a fault in the trial. (See Michael Knight, Criminal Appeals, pp. 155-6.)

²³ Rules of the Superior Courts, Ord. 58, r. 7(2).

undue expense and inconvenience may result from the necessity to comply with unreasonable exclusionary rules, even if they are not, in the event, insisted upon in most cases. As was well said by the English Law Reform Committee in their Report on Hearsay Evidence in Civil Proceedings published in 1966:

"It is unsatisfactory that the application of the rules of evidence should depend upon the willingness of the individual judge to discourage the observation of what are still rules of evidence and the forcefulness with which he does so; and whatever erosion there be at the hearing, counsel, solicitors and counsel preparing a case for trial must do so on the assumption that the rules of evidence may be applied strictly at the hearing. It would be too risky not to do so".²⁴

The Irish Courts could reject the rigid position adopted by the House of Lords in Myers v. Director of Public Prosecutions [1965] A.C. 1001 and expand the exceptions to the hearsay rule piecemeal to cover other categories of case where hearsay evidence is of peculiar reliability. There is ample precedent for such an approach in other common law countries.²⁵ Even if this were done there would be a long period of uncertainty while new exceptions were being evolved judicially. As it is desirable that parties to litigation should know where they stand as regards the rules of evidence, it is difficult to disagree with the conclusion

²⁴ Thirteenth Report of the Law Reform Committee, para. 11.

²⁵ See, for example Ares v. Venner (1971) 14 D.L.R. (3d) 4 (Canada); Transport Ministry v. Garry [1973] 1 N.Z.L.R. 120 at 123, where a New Zealand judge advocated the creation of new exceptions as the best way of preserving the hearsay rule against "the impious hands of the would-be reformer".

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of Lord Reid in Myers v. Director of Public Prosecutions
[1965] A.C. 1001 at 1022, when declining to create a new
exception to the hearsay rule:-

"The only satisfactory solution is by legislation
following on a wide survey of the whole field; and
I think that such a survey is overdue. A policy of
make do and mend is no longer adequate."²⁶

²⁶ In fact a new statutory exception to the rule against
hearsay was created in England subsequent to this
decision by the Criminal Evidence Act 1965. See p. 84,
fn. 117 infra.

CHAPTER 2 GENERAL SCHEME OF REFORM

Whereas other parts of the law of evidence, such as those relating to privilege or excluding previous convictions of accused persons, are designed to reconcile other policy ends with that of ascertaining the truth in the individual case, no such complication arises in the consideration of the rule against hearsay. The problem is essentially a technical one of designing rules best calculated to assist in the ascertainment of the truth.

In reforming the law it should be borne in mind that it will have to be applied in courts of every level and questions will often arise in circumstances where the relevant authorities are not to hand. It is, therefore, desirable to avoid rules which are over refined or subject to subtle qualifications such as exist in the present law.

In other common law jurisdictions more hesitation has been felt about relaxing the hearsay rule in criminal than in civil cases. In England, for instance, the Civil Evidence Act 1968 made first hand hearsay generally admissible in civil cases but no similar provision has yet been made for criminal proceedings despite the recommendations in the Eleventh Report of the Criminal Law Revision Committee (1972). Certainly, it cannot be denied that special considerations apply to criminal proceedings. The standard of proof beyond reasonable doubt which is applicable in such proceedings demands that convictions should be sustained only on the basis of evidence of undoubted reliability. Whereas, in civil cases, neither side has an incentive to confuse the tribunal by adducing a proliferation of evidence of little value, the defence in criminal cases may seek to create a doubt by this tactic, especially in jury trials. Also, the

tendency to fanciful defences, already a cause of concern in England since the introduction of criminal legal aid, would be accentuated. Laxer standards would also give more scope for the fabrication of evidence consisting of statements of absent persons, which might be availed of by the professional criminal. It is of interest that the New South Wales Law Reform Commission in their very comprehensive Report on the Rule against Hearsay published in 1978 argued that admissibility of such evidence should be more restricted in criminal cases:-

"We think it proper to strike the balance at a different point in civil and criminal proceedings. Such distinctions have been traditional, the different standards of proof being a striking example, and have been justified by the particular tenderness of the law for the liberty of the subject. We share this attitude and see other relevant factors as well. Despite the growth of legal aid, it is not generally available in summary or committal proceedings and even in proceedings on indictment it makes little provision for investigation. Certainly the investigatory resources of the police and the other law enforcement agencies, including their reciprocal arrangements with agencies outside the State, usually far outweigh those available to an accused. Still another factor is that we have not found (despite discussions with representatives of police, prosecutors and defenders) any marked desire for liberalisation of the law in criminal proceedings. The general attitude was that any widening of admissibility would be likely to be used more by the prosecution than the defence, and it was not pressed on us that the present state of the hearsay rule was in any marked degree responsible for acquittal of guilty persons. In all the circumstances we have thought it right to proceed more cautiously in the criminal field. Against the risk that the failure to widen the exceptions might prevent the accused using important evidence, we have given the court a discretion in s. 74(2) to prevent injustice." (P. 84)

However, it must be said that if the present rule against hearsay were to be retained in criminal cases while being relaxed in civil cases anomalies could result; for example, a person sued for fraud might be found not liable in tort on the basis of hearsay evidence while being convicted in criminal proceedings for the same act because this evidence

was excluded. In justice it is difficult to defend the exclusion of any logically probative evidence exculpating an accused. As regards evidence for the prosecution it may be argued that the public interest is not protected fully if any logically probative evidence is withheld. While it would seldom be appropriate to convict on the basis of hearsay evidence alone, such evidence might be valuable in corroborating the testimony of other witnesses.

Any reform of the law should be designed to ensure that all evidence which is logically probative is admissible, at the same time endeavouring to exclude evidence of little or no value, especially where its proliferation is likely to confuse the issues. But it is desirable that the evidence before the court should not only be logically probative but also the best available. For this reason those who perceived facts in dispute should be examined, where possible, so that the veracity and reliability of their recollection can be tested by examination as well as by observation of their demeanour, and so that error arising from the tailoring of a proof of evidence to the requirements of the party taking it or from the inaccurate reproduction of a story by third persons may be avoided.

The most simple solution would be to retain the present rule but to give the court a discretion to admit otherwise inadmissible hearsay evidence. This approach was adopted to some extent in the Federal Rules of Evidence in the United States.²⁷ These rules contain two groups of exceptions to a general prohibition of hearsay. The first group, comprising 23 exceptions, apply even though the maker of the hearsay statement is available as a witness. The second group, comprising 4 exceptions, apply only where the maker of the hearsay statement is not available as a witness. Both groups conclude with an omnibus exception as follows:

²⁷ See Appendix 1.

"(A) statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

The objections to an inclusionary discretion such as that embodied in the Federal Rules were thus stated by the English Criminal Law Revision Committee in their Report on Evidence (General):

"This course has the obvious attraction that the provision would be of the simplest. But we do not think it should be adopted, because it seems to us to involve four serious difficulties. First, with the differences of opinion about the value of hearsay evidence there would be bound to be large differences in practice between different courts. Second, there would be an almost inevitable tendency to allow hearsay evidence freely for the defence while restricting it when offered on behalf of the prosecution, and the committee generally are opposed to making distinctions between the parties in this way. Third, it would make it more difficult for the parties to prepare their case, because there would be no way of knowing in advance whether a court would allow a particular piece of hearsay evidence. Fourth, in summary trials the court would ordinarily have to hear the statement in order to decide whether to exercise the discretion to admit it." (Para. 246)

An additional objection not mentioned by the Committee is that the present exceptions to the rule against hearsay are not satisfactory in their detail.²⁸ To superimpose an inclusionary discretion on them would perpetuate them in their imperfections and argument would still have to be joined on

²⁸ Cross on Evidence, Chapter XVIII (3rd ed. 1967); New South Wales Law Reform Commission, Report on the Rule against Hearsay (1978), pp. 43-50. See also Chapter 6 infra.

their scope in order to determine whether a particular item of hearsay evidence was admissible as of right or merely at the discretion of the court.

Any scheme providing for a general prohibition of hearsay followed by specific exceptions would be bound, in the absence of an inclusionary discretion, to result in the exclusion of logically probative evidence in some cases. For this reason most suggestions for reform have proceeded by way of a general permission followed by specific qualifications. The Model Code of Evidence proposed by the American Law Institute (1942), the draft Act attached to the Report of the Ontario Law Reform Commission on the Law of Evidence (1976) and the English Civil Evidence Act 1968, all of which make admissible the out-of-court statements of unavailable witnesses, limit this admissibility to first-hand hearsay. Consequently, where the hearsay statement sought to be admitted is oral, it has to be proved by the testimony of the person who heard it and it is also necessary that the statement itself should be made from personal knowledge. Where the statement is written, personal knowledge on the part of the maker is also necessary but the authorship and authenticity of the document may be proved in the ordinary way. The exclusion of second-hand hearsay which is, it should be noted, subject to some exceptions was justified as follows in the Thirteenth Report of the English Law Reform Committee, upon whose recommendations the Civil Evidence Act 1968 was based:

"In recommending in the preceding paragraph that oral statements should be admissible we had in mind that the reporter of the oral statement would be called to prove it and that the circumstances in which it was made and the accuracy of recollection of the reporter could be proved in cross-examination. But where John gives evidence of what George said that William (who alone had personal knowledge of the matter) said, the honesty and accuracy of recollection of George is the necessary link in the chain upon which the probative value of

William's statement depends. There was no way of estimating the strength of that link unless George is called as a witness. The Court thus lacks the material upon which to estimate the weight to be attached to William's statement as probative of the fact in issue. Second-hand hearsay in the form of a written statement by John of what William, who was under no duty to report to John, had said to him about events that William said had occurred depends for its probative value not only upon the accuracy of John's report of what William had said to him but also upon the accuracy and veracity of William, who was under no duty to be either accurate or veracious and may have been reporting what he himself had heard. To admit John's written statement as evidence of the fact stated to have been reported to him would open the door to the admission of all sorts of rumours and involve the risk of proliferation of hearsay evidence of minimal probative value." (Para. 15)

The New South Wales Law Reform Commission Report on the Rule against Hearsay (1978), which is the most thorough modern survey of the subject, recommended that a more permissive attitude might be adopted towards multiple (i.e. second-hand and more remote) hearsay statements contained in documents:-

"In our view, while oral multiple hearsay is a highly dangerous form of evidence because of the danger of mishearing, exaggeration, unclear reporting, and general inaccuracy through repetition, entirely documentary multiple hearsay or first-hand oral hearsay followed by a chain of documents is less dangerous. The dangers of misreading or inaccurate expression are much less; the temptation to exaggerate is less because of the greater risk of detection." (P. 77)

Accordingly, they proposed that certain documentary hearsay statements, whether first-hand or not, should be admissible in the same way as first-hand oral hearsay statements.

"This recommendation applies to two kinds of 'documentary hearsay' statements.

1. The first kind includes:

(a) a hearsay statement made in a document;

- (b) a document reproducing, extracting or summarizing the original documentary hearsay statement; and
 - (c) a document which is a member of a series of documents of which the first member is a document of the kind described in (b), and each later member of which is a reproduction, extract or summary of the preceding member.
2. The second kind includes:
- (a) a document recording a hearsay statement which was made orally;
 - (b) a document reproducing, extracting or summarizing the document described in (a); and
 - (c) a document which is a member of a series of documents of which the first member is a document of the kind described in (b), and each later member of which is a reproduction, extract or summary of the preceding member." (p. 28)

The difference between the New South Wales Law Reform Commission proposal and the English Civil Evidence Act 1968 is illustrated by a case where C, having overheard A telling B the number of a car, writes the number down, and A, B and C die. This would be inadmissible in England because it is second-hand oral hearsay but would be admissible as documentary hearsay of 'the second kind' under the New South Wales proposal. In support of the latter it was argued as follows:

"One justification is that if C, the hearer of the statement, had been available to testify, he could refresh his memory from the document, as he made it; it is not a large step to permit the document to be admitted when he cannot testify. A further justification is that the danger of errors arising through repetition is much less in the case of pure documentary hearsay, and less where the statement is made orally but thereafter a record is made of it and a member of a chain of records stemming from it is tendered. Admittedly there is a risk of manufacture, but if the maker of the document is disinterested the risk is so much less than that of accidental errors in transmitting oral statements that it should not in our view be a bar

to admissibility. The chain must not however be broken by oral retailing of hearsay, as where B tells C orally what A said (orally or by letter) and C writes to D. In this event, in our view, if the Court cannot hear the maker of the statement being cross-examined, and cannot hear B cross-examined as to his powers of hearing and comprehension, the evidence should be inadmissible.... This line is one which seems to us to be a practical one to draw." (P. 78)

There is, however, the serious practical difficulty about drawing a line at first hand hearsay that it will usually be impossible to establish independently that the maker of the out-of-court statement had personal knowledge of the facts asserted. The New South Wales Law Reform Commission recognised this problem and suggested that it should suffice if the maker is in a position to have personal knowledge.²⁹ It may be doubted if a limitation which depends on so uncertain a test is very meaningful.

The New South Wales Law Reform Commission suggested some further restrictions on the admissibility of hearsay to guard against manufactured evidence in criminal cases. They recommended that statements in proofs of evidence taken for the purpose of indicating testimony which the declarant would be able to give in contemplated legal proceedings should not be generally admissible.

".... Proofs obtained by the prosecution will normally be obtained by skilled interrogators who are accustomed to converting jumbled and half-coherent answers into passages of connected prose. Whether or not there is any ill-will involved, and the desire of the police for witnesses to come up to proof will help to ensure that there is not, the utterances of an uncertain and perhaps unreliable declarant may be converted into an impressive, confident and internally self-consistent document. If that declarant subsequently cannot testify, to admit the document may cause a miscarriage of justice." (P. 127)

²⁹ Report on the Rule against Hearsay (1978), p. 98.

The manufacture of fabricated hearsay evidence on behalf of an accused has also been a cause of concern to reformers. The New South Wales Law Reform Commission followed the earlier Report of the English Criminal Law Revision Committee on Evidence (General) in recommending the exclusion of out-of-court statements made after the accused had been summoned, charged or informed that he might be prosecuted.

Professor Glanville Williams, who was a member of the English Criminal Law Revision Committee, explained their preoccupations thus:-

"A special difficulty in criminal matters is that the defendant may be a professional criminal who has large funds, no scruples and a great deal to lose by being convicted. Generally there are one or two "bent" solicitors who are ready to connive at deceptions practised by such defendants. If hearsay were admitted without restriction, it would be possible to give evidence that some third person (who has since conveniently disappeared) called at the defendant's solicitor's office and confessed to the crime. Or it would be possible to put in a written statement by a third person (who has since been "called abroad on pressing business") giving the defendant an alibi. The witness could not be cross-examined; and if it were alleged that his identity was unknown, the prosecution could not investigate whether he had a criminal record. The jury, pressed with the rule that they must be satisfied of guilt beyond reasonable doubt, might be sufficiently impressed by such evidence to say that they had a doubt."³⁰

The possibility of such manufactured evidence led the Committee to recommend that no hearsay statement should be admissible on the ground that the maker is abroad, unidentifiable or unfindable if the statement was made after the accused had

³⁰ Williams, "The Proposals for Hearsay Evidence" [1973] Crim. L.R. p. 76 at pp. 76-7.

been summoned, charged or informed that he might be prosecuted. If, on the other hand, he is dead or unable by virtue of his health to attend court, his statement would be admissible.

The difficulty about these or other proposals restricting the categories of hearsay evidence which are admissible is that there will inevitably be cases where valuable evidence is excluded. Glanville Williams suggested the following illustration of where the exclusion of second-hand hearsay would cause injustice:

"A and B, aged sisters, are both lying ill when they hear that their acquaintance X has been arrested on a serious charge; A realises that she saw X board a train at a place and time which were inconsistent with his guilt, and she tells this to B just before dying. B communicates it to C, the parson, just before she too dies. The information chimes exactly with X's alibi defence at the trial."³¹

Despite its reliability, A's statement would not be admissible either under the English Civil Evidence Act 1968, or the proposals of the English Criminal Law Revision Committee or of the New South Wales Law Reform Commission. Similarly excluded under both the latter two proposals would be a statement exculpating an accused made by a person who has since disappeared, perhaps because he has been intimidated by the real offender who remains at large. But the New South Wales Law Reform Commission argued that the exclusion of such statements should be subject to the court's inclusionary discretion in exceptional cases. Criticising the proposal for automatic inadmissibility made by the English Criminal Law Revision Committee they said:

³¹ Ibid. at p. 86.

"... we oppose this proposal for three reasons. First, it will not really prevent manufactured evidence: if a declarant can be procured to lie, he can be procured to falsify the date on his statement. Secondly, it will be harsh on the accused: he may have no power or persuasive capacity to prevent his witnesses disappearing, particularly if his trial is delayed. Thirdly, the prosecution is made better off than the accused, for statements taken before the accused is charged are more likely to be those of prosecution witnesses than of witnesses for the accused. The possibilities of falsification are the same though no doubt for the accused the temptation is greater. Instead of a mandatory rule of exclusion we therefore propose that such statements only be admissible with the leave of the court." (P. 107)

Consequently, the New South Wales Law Reform Commission recommended that the court should have a more general inclusionary discretion to admit an inadmissible statement where there are reasonable grounds for thinking it may be reliable or where, in a criminal case, it tends to support the acquittal of an accused person.³² If such an inclusionary discretion is necessary even in the context of liberal rules for the admissibility of out-of-court statements, such as those proposed by the New South Wales Commission, it must be doubtful if it is desirable to maintain rigid exclusionary rules based on hearsay at all.

The danger of such a complete abolition of the rule against hearsay is that mere rumour, the unsubstantiated statements of unidentified witnesses and much other evidence of little or no probative value would be let in. This is probably not a real danger in civil cases or for the prosecution in criminal cases because confusion is unlikely to assist the party creating it. However, the defence in a criminal case may be

³² Report on the Rule against Hearsay (1978) pp. 117-24; Bill, section 74.

able to create the doubt necessary to acquittal in the minds of the jury by means of such confusion. To guard against this, it is considered that the judge should have a discretion to exclude any out-of-court statement which is of insufficient probative value.³³ This together with the further safeguards suggested infra should be adequate to prevent a proliferation of evidence of negligible value.

The first safeguard is to make the admissibility of out-of-court statements conditional upon the maker or the person from whom the information derived, where the maker had not personal knowledge of the facts asserted, being called and subjected to cross-examination whenever he is available. It cannot be taken for granted that a party will always desire his witnesses to testify in court because their statements are likely to carry more weight if they do so. He may, for

³³ Section 100(1) of the draft Bill proposed by the New South Wales Law Reform Commission in their Report on the Rule against Hearsay (1978) contains a fully worked-out provision along these lines. It reads:-

- (1) Where a party tenders any evidence under this Part, and it appears to the court -
 - (a) that the weight of the evidence is too slight to justify its admission;
 - (b) that the utility of the evidence is outweighed by the tendency of the evidence -
 - (i) to prolong the proceedings unduly;
 - (ii) to operate unfairly against any other party;
 - or
 - (iii) to mislead the jury (if any);
 - (c) that the tender of the evidence is an abuse of the process of the court; or
 - (d) that the evidence would unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered,

the court may reject the evidence or, if it has been received, exclude it, or may admit it in relation to one party but not another, or may admit it on such terms and conditions as it thinks fit.

instance, be happy with the content of a witness's out-of-court statement but apprehensive of the answers on those or other points which that witness might give under cross-examination.

To ensure that direct evidence of facts in dispute is given where it is available the English Civil Evidence Act 1968 requires advance notice of an out-of-court statement proposed to be tendered in evidence to be served on the opposing party who can, by counter-notice, require the maker of the statement to attend in court to give evidence. If he does not attend, his evidence is admissible as of right only if he 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 be reasonably expected to have any recollection of matters relevant to the accuracy of the statement. The court is, however, given a residual discretion to admit a particular item of hearsay evidence even where none of these pre-conditions is applicable to the maker of a statement or where no notice has been given of it. If the opposing party requires the attendance of a person unnecessarily he may be penalised in costs.³⁴ The thinking behind this scheme was set out as follows by the English Law Reform Committee in their Thirteenth Report:

"We think that the effect of this procedure would be to restrict reliance upon hearsay evidence to what we regard as its proper sphere, i.e. to cases where the maker of the statement is not available as a witness and to cases where the facts which the statement tends to establish are not seriously in dispute although they have to be proved. There would be little inducement to parties to seek to use statements instead of oral evidence to prove any fact which was genuinely in dispute if the maker of the statement was available to be called. To do so would, in effect, disclose the

³⁴ Rules of Supreme Court, Ord. 38, r. 32.

identity and truth of the party's own witnesses without any countervailing advantage, for it would merely invite a counter-notice. On the other hand, the sanction of costs in respect of an unnecessary counter-notice should prevent a party from insisting on the calling by his adversary of oral evidence of facts not genuinely in dispute. We attach considerable importance to this sanction and for this reason we have laid upon the party serving a counter-notice the onus of justifying it. Where it is declared in the notice that the maker of the statement is dead or unfit to be called as a witness or abroad and unable to be found the adverse party will have an opportunity of making his own enquiries as to the accuracy of this declaration before the trial." (Para. 26)

The system of notice and counter-notice may be criticised as cumbersome.³⁵ The same end can be achieved by providing for the admission of facts pursuant to a notice to admit, the admission of out-of-court statements by agreement, and making out-of-court statements admissible whenever the maker is not available. The English Criminal Law Revision Committee, believing that a system of notice and counter-notice was not feasible in criminal proceedings, recommended that an out-of-court statement of any person should be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible, if -

- (a) he has been or is to be called as a witness in the proceedings; or
- (b) being compellable to give evidence on behalf of the party desiring to give the statement in evidence, he attends or is brought before the court but refuses to be sworn;
- (c) it is shown with respect to him -
 - (i) that he is dead, or is unfit by reason of his bodily or mental condition to attend as a witness; or

³⁵ See Ontario Law Reform Commission, Report on the Law of Evidence (1976) pp. 14-15.

- (ii) that he is beyond the seas and that it is not reasonably practicable to secure his attendance; or
- (iii) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to give evidence on behalf of that party; or
- (iv) that all reasonable steps have been taken to identify him, but that he cannot be identified; or
- (v) that, his identity being known, all reasonable steps have been taken to find him, but that he cannot be found.³⁶

The Ontario Law Reform Commission proposed that a statement otherwise inadmissible as hearsay should nevertheless be admissible as evidence of any fact stated therein of which direct evidence would be admissible:

- (a) if the parties to the proceeding agree to its admission with or without admission of the truth of facts; or
- (b) if the maker of the statement could have testified from personal knowledge and
 - (i) he has died, or
 - (ii) he is too ill to testify, or
 - (iii) he cannot with reasonable diligence be identified or found.³⁷

In 1978 the New South Wales Law Reform Commission recommended that an out-of-court statement of a declarant should be admissible as evidence of facts asserted if the declarant is called as a witness or the party tendering the statement has justification for not calling the declarant as a witness. More restricted standards of justification were suggested for

³⁶ Eleventh Report: Evidence (General) (1972), Draft Criminal Evidence Bill, section 31.

³⁷ Report on the Law of Evidence (1976), Draft Evidence Act, section 22(2).

criminal than for civil proceedings. Accordingly, in their draft Bill it was provided that in any legal proceedings a party has justification for not calling a person as a witness where -

- (a) he is dead, or is unfit by reason of his bodily or mental condition to testify;
- (b) he is compellable to testify but refuses to be sworn;
- (c) reasonable steps have been taken to identify him, but he has not been identified;
- (d) it is not reasonably practicable to identify him;
- (e) his identity is known, but reasonable steps have been taken to find him and he has not been found; or
- (f) his identity is known, but it is not reasonably practicable to find him.³⁸

In a civil legal proceeding a party also has justification for not calling a person as a witness where -

- (a) he is outside New South Wales and reasonable steps have been taken to procure his testimony, but his testimony has not been procured;
- (b) he is competent but not compellable to testify and refuses to testify;
- (c) having regard to the relations at any time between the person (whether or not he is a party) and any party, it is unreasonable to expect the party who tenders the statement to call the person as his witness;

³⁸ Report on the Rule against Hearsay (1978), Appendix A, Bill, section 62(2).

- (d) undue delay, expense or inconvenience would be caused by calling him as a witness, or by seeking to identify or find him; or
- (e) he cannot reasonably be expected to have a useful recollection of the matter dealt with in the statement.³⁹

These various solutions have been set out here in some detail because they illustrate an unanimity of view on the desirability of admitting the out-of-court statements of unavailable witnesses together with differences of approach as to the exact circumstances when a witness should be deemed to be unavailable. Clearly no problem arises where the maker of a statement is dead. But, in cases where ill-health prevents his attendance in court, it is considered he should not be regarded as unavailable if it is possible to have him examined on commission or, in criminal cases, to take his evidence by way of sworn deposition under section 14 of the Criminal Procedure Act 1967; in either case the deponent may be cross-examined on his evidence by the other side. The admission of the statements of unidentifiable or untraceable persons is more problematical. The English Criminal Bar Association, commenting on the recommendation of the Criminal Law Revision Committee that such statements should be admissible, cited as examples the case of a prosecution witness in an assault charge who states that immediately after the assault a man, whose name he knows but who has since disappeared, told him that it was the defendant who committed the assault; or conversely a defence witness who testifies that he was approached by a man, whose name he was unable to obtain, but whom he can describe, who told him that the defendant could not be guilty because

³⁹ Ibid., section 62(3).

he, the informant had, in fact, committed the assault. Such evidence which is easily manufactured and cannot of its nature be tested might, argued the Bar Association, have a strong effect on lay magistrates or a jury. They were of opinion that no safeguards could be designed which would avoid these dangers or prevent the resulting injustice.⁴⁰ Professor Sir Rupert Cross, who was a member of the Criminal Law Revision Committee which recommended that the out-of-court statements of unidentifiable and untraceable witnesses should be admissible in criminal cases, later conceded that their draft Bill may have gone too far in allowing the reception of such statements and suggested that these might be confined to res gestae cases.⁴¹ It is considered that no such limitation is necessary if the judge is given discretion to exclude valueless evidence in the individual case. The professionally trained district justices who try summary offences in Ireland should be less prone to the mistakes predicted for lay magistrates by the Criminal Bar Association in England. Cases may arise where a statement of an unidentifiable or untraceable person has probative value, especially in the context of the other evidence, and should be considered by the jury. Such a case was R. v. Gibson (1887) 18 Q.B.D. 537, a case of unlawful wounding, where evidence was given that immediately after the wounding stone

⁴⁰ General Council of the Bar of England and Wales, Evidence in Criminal Cases, Memorandum on the Eleventh Report of the Criminal Law Revision Committee: Evidence (General), para. 182.

⁴¹ "The Evidence Report: Sense or Nonsense" [1973] Crim. L.R. p. 329 at p. 340. This was the solution recommended by the Criminal Law and Penal Methods Reform Committee of South Australia in 1975.

was thrown, an unidentified woman said, pointing to the prisoner's house: "The man who threw the stone went in there". In the case of many records of undoubted reliability, the maker of an entry in the records may not be known.

The Law Reform Commission of Canada, reporting in 1975, suggested that a hearsay statement of an unavailable person should not be admissible if "the unavailability of the person who made it was brought about by the proponent of the statement for the purpose of preventing the person from attending or testifying".⁴² The New South Wales Law Reform Commission included in their draft Bill a provision preventing the admission of statements by persons who have refused to disclose or who have deliberately withheld or concealed their identity.⁴³ It is considered that these situations are best dealt with by the exercise of a general exclusionary discretion based on lack of probative value and on abuse of the process of the court. It is conceivable that a person who has deliberately withheld his identity may have made a statement of genuine probative value.

The treatment of the out-of-court statements of persons who do not testify and either do not have or could not be expected to have any recollection of the matters stated therein has varied in different jurisdictions. Within a single jurisdiction differences occur as between civil and criminal cases. Thus such statements are admissible as of right under the English Civil Evidence Act 1968 but the draft Bill annexed to the subsequent Report of the Criminal Law

⁴² Report on Evidence (1975), Draft Code, section 29(3).

⁴³ Report on the Rule against Hearsay (1978), p. 83; Bill, section 73(10). This Report (p. 91) rejected the provision suggested by the Law Reform Commission of Canada.

Revision Committee has recommended admissibility in these circumstances only where the statement is part of a business record.⁴⁴ A similar difference of treatment as between civil and criminal cases has been noted in the recommendations of the New South Wales Law Reform Commission Report on the Rule against Hearsay.⁴⁵ If such statements are not admitted, it will mean that the maker of the statement will have to be called to make them admissible. It may be considered futile to require witnesses to be called who cannot recollect the facts asserted in a statement made by them which it is sought to tender in evidence. To insist that persons involved in making a business record should testify whenever such a record has to be proved may be unduly burdensome, especially where the record is the result of information supplied by a number of persons. However, the best evidence of a person's lack of recollection is his own testimony to that effect and ideally the other party should be entitled to require this to be given in court. Observation of the demeanour of the maker of a statement may be helpful in assessing his reliability and examination of his habits as regards checking such statements may also be of value. On balance, it is considered that lack of recollection on the part of the maker of an out-of-court statement should not entitle a party to prove such a statement in evidence without calling the maker. Special provision may be required, however, for statements in business records where information is supplied by a number of persons and there is other evidence as to the reliability of the system of record-keeping.

⁴⁴ Eleventh Report: Evidence (General) (1972), Draft Criminal Evidence Bill, section 31(1), 34(2)(c)(vi).

⁴⁵ See pp. 30-1 supra.

Another class of witness whose testimony is, in practice, unavailable are those who though competent and compellable, refuse to be sworn or to answer questions, once sworn. Such a refusal is most likely to arise in the context of a criminal trial where a witness who has made a statement is subject to intimidation and is prepared to risk punishment by the court rather than to testify. The standard case is where a prosecution witness is 'got at' by the accused or his associates. It may also arise in the case of defence witnesses, especially where there are several accused and the statement exculpates one at the expense of another. Alternatively, a witness who has made a confession or an admission exculpating the accused may not be willing to repeat it in court. To meet this problem, the English Criminal Law Revision Committee recommended that an out-of-court statement should be admissible whenever the maker, being a compellable witness, "attends or is brought before the court but refuses to be sworn".⁴⁶ This proposal was criticised roundly in the memorandum of the Criminal Bar Association which referred to the problem of the intimidation of witnesses:

"The way to get over this problem is by administrative measures - such as, out-of-court protection and in-court anonymity - not by opening the door to the manufacture of evidence or to the perpetuation of previously told lies or inaccuracies. It is far more likely that a witness will be unwilling to give evidence for reasons connected with his own dishonesty or the dishonesty of the case he is called to support, than that he is in fear. There does not seem to us to be any valid argument for breaking the "best evidence" rule in these circumstances." (Para. 186)

⁴⁶ Eleventh Report: Evidence (General) (1972), Draft Criminal Evidence Bill, section 41(1)(b). A similar provision was recommended by the New South Wales Law Reform Commission which remarked that the recalcitrant witness's "liability to punishment for contempt is small comfort to the party who wants to tender his evidence". (Report on the Rule against Hearsay (1978) p. 82.)

The Bar Association's contention that dishonesty and not intimidation is the most likely reason why a compellable witness would decline to testify and so lay himself open to punishment for contempt of court is not convincing. Even if it were, it would not follow that a party should be deprived of the use of that person's out-of-court statement in evidence. It is only where the party tendering the evidence was privy to the intimidation or dishonesty that there would be justification for keeping the evidence out. It is considered therefore that the out-of-court statement of a person who, being competent and compellable, refuses to testify, should be admissible.

In some of the proposals which have been considered, the maker of a statement is regarded as unavailable where he is outside the jurisdiction and a party is then entitled to tender the statement in evidence. Holding that there was no discretion to exclude a statement of a person "beyond the seas" under the English Civil Evidence Act 1963, Mr Justice Finer remarked:-

"... where the whereabouts of an important witness in a substantial case are known or can easily be ascertained, but the party relying on his evidence nevertheless adopts a method of adducing it by means which does not permit of cross-examination, no doubt the court would pay little attention to it."⁴⁷

It may be doubted if the statement of a person who is abroad should be admitted at all unless it is impossible to obtain his testimony on commission or pursuant to a letter of request. The fact that it may be costly to secure

⁴⁷ Rasbool v. West Midlands Passenger Transport Executive /1974/ 3 All E.R. 638. See also Piermay Shipping Co. S.A. v. Chester /1978/ 1 W.L.R. 411 /1978/ 1 All E.R. 1233.

the attendance of such a witness is insufficient reason for regarding him as unavailable as this may be equally true of witnesses within the country. While it may appear arbitrary to draw a line according to whether the maker of a statement is in a country where he can be compelled to testify at the instance of an Irish court, this is, in fact, the true division between availability and unavailability of an unwilling witness.

It may be questioned if it is over-rigid to exclude an out-of-court statement of a person whom it is unduly costly to call as a witness, especially where the facts asserted are of marginal importance or are not seriously disputed. The New South Wales Law Reform Commission recommended that it should be permissible to tender in evidence in civil cases an out-of-court statement of such a witness without calling him as a witness.⁴⁸ In England, under the Civil Evidence Act 1968, a party who unreasonably requires the presence of a person whose out-of-court statement is to be given in evidence may be penalised by having to pay the costs occasioned thereby.⁴⁹ As there are no reported cases on the interpretation of the relevant rule it is not clear how it has operated in practice.⁵⁰

It is considered that the problem of costly witnesses is best met by permitting the reception of out-of-court statements by agreement and the extension of the power of the courts to admit evidence taken on commission and statements on affidavit. As depositions under the Criminal Procedure Act

⁴⁸ Report on the Rule against Hearsay (1978), Bill, section 62(3)(d).

⁴⁹ Rules of the Supreme Court, Ord. 38, r. 32.

⁵⁰ The Supreme Court Practice (1979), p. 620.

1967 cannot be taken outside the State, evidence on commission should be made admissible in all proceedings, civil and criminal. At present the facility for taking evidence on commission is not really effective to avoid expense as the parties and their lawyers are entitled to attend such a hearing.⁵¹ Accordingly, it is considered that where it appears that it would cause undue expense or inconvenience if a witness is to be examined by the parties, the court should be empowered to order the taking of evidence without allowing any such examination. This would necessitate the amendment of the relevant Rule of Court. It should also be permissible to receive evidence on affidavit in the absence of a deponent where his presence would involve undue expense or inconvenience. However, it is considered that statements on affidavit should only be admissible for this reason when made from personal knowledge. These powers to admit evidence taken on commission and statements on affidavit are likely to be of particular importance in proceedings in the lower courts where criminal charges are less serious and the amounts involved in civil cases are small. The existing procedure by which one party may call on another to admit a specific fact under pain of having to pay the costs if the refusal is unreasonable, should, it is considered, be extended to District Court proceedings.

The second safeguard recommended to prevent a proliferation of evidence of negligible value is a requirement that an out-of-court statement of an unavailable person should be proved by the best available evidence. Thus an oral statement should be proved by a witness who heard it, if one is available, and a statement in a document should be proved by production of the original document if this is available. The New South Wales Law Reform Commission, which recommended

⁵¹ Rules of the Superior Courts, Ord. 40, r. 10.

that several forms of second-hand hearsay should be admissible, included in their draft Bill elaborate provisions designed to ensure that the best evidence of an out-of-court statement would be before the court. Basic to their scheme was the distinction between an immediate and a remote record in section 61 of their draft Bill which reads:

- "(1) In this part, "immediate records" means, in relation to a statement of a declarant, a record of or taken from the statement, being a record made by the declarant or by a person who heard, saw or otherwise perceived the declarant make the statement and, where the statement is made in a document, includes the document.
- (2) In this part, "remote record" means, in relation to a statement -
 - (a) a record taken from an immediate record of the statement; or
 - (b) a record which is a member of a series of two or more records, where -
 - (i) the first member of the series is taken from an immediate record of the statement; and
 - (ii) each later member of the series (up to the member of the series tendered in proof) is taken from the next earlier member of the series.
- (3) For the purposes of subsections (1) and (2), a record (in this subsection called the record in question) is taken from a statement or from another record, if the record in question is -
 - (a) a copy, transcription, or other fair reproduction of; or
 - (b) a fair extract from or fair summary of, the statement or other record, as the case requires.
- (4) In subsection (3), "fair" means fair having regard to the purpose for which the statement is tendered."⁵²

⁵² See Report on the Rule against Hearsay (1978), pp. 76-81.

Section 73 (2) and (3) of their draft Bill provides as follows:

- "(2) Where a statement is made in a document, the statement may be proved
- (a) by the document or by admissible secondary evidence of the contents of the document.
 - (b) if it is not practicable to prove the statement by the document, by an immediate or remote record of the statement, or by admissible secondary evidence of the contents of such a record.
- (3) Where the statement is made otherwise than in a document, the statement may be proved
- (a) by testimony of the declarant or of a person who heard, saw or otherwise perceived the declarant make the statement; or
 - (b) if
 - (i) no person heard, saw or otherwise perceived the declarant make the statement;
 - (ii) a person who heard, saw or otherwise perceived the declarant make the statement is called or is to be called as a witness in the legal proceedings; or
 - (iii) there is, as regards each person who heard, saw or otherwise perceived the declarant make the statement justification for not calling him as a witness,by an immediate or remote record of the statement or admissible secondary evidence of the contents of an immediate or remote record of the statement."

It is considered that such elaboration would not be necessary in legislation not restricting the categories of out-of-court statements which are admissible and it would be preferable to provide in general terms that an out-of-court statement must be proved by the best available evidence.

The third safeguard is that advance notice should be given of any out-of-court statement which it is proposed to tender in evidence. This requirement is to be found in the Rules of

Court under the English Civil Evidence Act 1968,⁵³ in the Federal Rules of Evidence in the United States,⁵⁴ and in the proposals of the English Criminal Law Revision Committee,⁵⁵ the Law Reform Commission of Canada⁵⁶ and the Ontario Law Reform Commission.⁵⁷ It has the advantage that it enables the other side to make enquiries about the source of a statement and is likely to act as a deterrent to fabricated or worthless hearsay.

The English Criminal Law Revision Committee, while recommending a notice procedure for out-of-court statements in trials on indictment suggested that there should be no similar requirement for summary trials. They expressed themselves influenced by the need to keep the procedure in the magistrates' courts simple and the fact that there is unlikely to be "the same elaborate falsification of evidence as sometimes occurs in cases before the higher courts".⁵⁸ It is submitted that the complication of procedures involved

⁵³ Rules of the Supreme Court, Ord. 38, rr. 21-4.

⁵⁴ Rules 803(24), 804(5).

⁵⁵ Eleventh Report: Evidence (General) (1972), Draft Criminal Evidence Bill, section 32(4).

⁵⁶ Report on Evidence (1975), Evidence Code, section 29(4).

⁵⁷ Report on the Law of Evidence (1976), pp. 16-7, Draft Evidence Act, section 22(3).

⁵⁸ Eleventh Report, op. cit., pp. 148-9.

in giving notice has the positive advantage that it will tend to limit the use of out-of-court statements to cases where they are of special value. In this way the actual hearing will be simplified. A requirement of notice is likely to cause hardship only where there are unrepresented litigants. This latter case can be met by adjourning proceedings whenever the other side may be prejudiced by the reception of out-of-court statements of which no notice has been given.

The New South Wales Law Reform Commission rejected the adoption of a compulsory notice procedure altogether.⁵⁹ They pointed out that the desirability of tendering a particular piece of hearsay might not become apparent until shortly before, or indeed, during the trial itself. There was also the danger that a party who has to give notice of a hearsay statement might find that the other side's witnesses tailor their case to meet it. "The conflict between avoiding surprise and avoiding manufacture," remarked the Commission, 'is difficult to reconcile.'⁶⁰ But they were sufficiently conscious of the desirability of notice to suggest that the court should be empowered to reject evidence where it would unfairly surprise a party who has not reasonable ground to anticipate that such evidence would be offered.⁶¹ It is considered that it would be preferable to make notice compulsory while allowing the court to waive it where the other side is not prejudiced thereby or where the necessity to give evidence of an out-of-court statement could not have been foreseen.

One difficulty which may arise with the requirement of notice under present procedures in civil cases should be noted. It may be impossible to give notice because a witness

⁵⁹ Report on the Rule against Hearsay (1978) pp. 193-7.

⁶⁰ Ibid. p. 196.

⁶¹ Ibid., Bill, section 100(1)(d).

refuses to make a statement or to produce a document in advance of the actual trial. In prosecutions on indictment such a witness may be compelled to give evidence on deposition before the trial under section 7 of the Criminal Procedure Act 1967 but there is no similar procedure in summary trials or civil litigation. This already gives rise to problems in any case where a party to litigation has to rely on the testimony of or documents in the possession of a third person who is not well-disposed or who is under pressure not to seem to co-operate.

In their Third Interim Report submitted in 1965 the Committee on Court Practice and Procedure recommended that a witness who has refused to give a statement of evidence to the party approaching him should be compellable by order of the court to furnish it in the form of a sworn statement if he has refused to give an ordinary statement in the first instance.⁶² But no action has been taken on this recommendation. Unless some provision along these lines is made, it may be difficult to insist on the requirement of notice in cases where the refusal of a prospective witness to give an account of an out-of-court statement of another person or to produce a document prevents adequate notice from being given. In such a case the only satisfactory solution may be to grant an adjournment but this could increase costs and would be unworkable in jury trials.

It is common practice to admit hearsay evidence if the other party does not object. There is some doubt as to whether this is in accordance with the law.⁶³ It is considered

⁶² The Committee on Court Practice and Procedure, Jury Trial in Civil Actions (Prl. 8577), para. 42.

⁶³ Harrison, "Hearsay Admitted Without Objection" (1955) 7 Res Judicatae 58.

that express provision should be made for the admissibility of out-of-court statements where the other party does not object. To cover the case of unrepresented persons or failure to object by legal advisers, the court should have discretion to exclude an inadmissible out-of-court statement to which no objection is raised.⁶⁴

In framing legislation it will be necessary to decide whether the provisions applying to out-of-court statements should extend beyond express assertions to implied assertions i.e. statements or non-verbal conduct which are not intended by their maker to be assertive of the fact they are tendered to prove and non-verbal conduct not intended to be assertive of the fact it is tendered to prove.⁶⁵ Implied assertions are less likely to be insincere than express ones and it might be felt that there is less reason to guard against their falsity. In several codes, e.g. the American Uniform Rules of Evidence (1953), the draft Evidence Code of the Law Reform Commission of Canada (1975), they are not treated as hearsay. But these are codes which prohibit hearsay generally. Where out-of-court statements are generally admissible, albeit

⁶⁴ The New South Wales Law Reform Commission recommended a provision making admissible an out-of-court statement not objected to. But they included in the draft Bill annexed to their Report a sub-section saving the existing situation in criminal cases whereby an unrepresented accused person who does not object may still appeal against the admission of inadmissible evidence, and a represented accused person may do so in some circumstances. (Report on the Rule against Hearsay (1978) p. 179, Bill, section 89.)

⁶⁵ An example of the first kind of implied assertion would be provided by a case in which efforts are made to establish X's presence at a particular place by calling a witness to swear that he heard someone say "Hello X" at that place. An example of the second kind of implied assertion would be provided by a case in which it is sought to show that X was dead at a particular time by calling a witness to swear that he saw a doctor cause X's body to be placed on a mortuary van after examining him at that time. (Cross on Evidence, pp. 406-7 (4th ed. 1974))

subject to procedural pre-conditions, there is less reason to adopt a restrictive definition. It is considered that out-of-court statements should be defined to include conduct which is intended to be assertive and all statements, whether or not they are intended to be assertive. But there is no reason why conduct not intended to be assertive should be treated differently from other circumstantial evidence and regarded as a statement.⁶⁶

In certain cases, corroboration is required as a matter of law.⁶⁷ For example, a person may not be convicted of perjury solely upon the evidence of one witness as to the falsity of the statement alleged to be false; in affiliation proceedings or proceedings for breach of promise of marriage the plaintiff cannot succeed unless her testimony is corroborated by some other material evidence. In addition, there are a number of cases where there is a rule of practice that the judge must warn the jury of the danger of acting on uncorroborated evidence and, where there is no jury, the tribunal must warn itself of this danger. However, subject to giving such a warning they may, in such cases, act on the evidence despite the absence of corroboration. The most important of these are cases where it is sought to sustain a conviction on the uncorroborated evidence of an accomplice or of a child.

⁶⁶ It should be noted that New South Wales Law Reform Commission rejected the view that a distinction should be drawn between statements not intended to be assertive and conduct not intended to be assertive for the purposes of the hearsay rule. (Report on the Rule against Hearsay (1978) p. 69.)

⁶⁷ See Law Reform Commission Working Paper No. 6, The Law Relating to Seduction and the Enticement and Harboring of a Child pp. 11-13 for a statement of the law relating to corroboration in Ireland.

Corroboration is a separate item of evidence implicating the person against whom the testimony is given in relation to the matter concerning which corroboration is necessary. Of its nature it must necessarily be extraneous to the witness whose evidence is to be corroborated. It is established that a person's own out-of-court statement cannot constitute corroboration of his testimony. The English Civil Evidence Act 1968 section 6(4) has made specific provision to this effect. But nothing is said in that statute about the case where an out-of-court statement of another person is tendered to corroborate the testimony of the witness who narrates it. However, the Ontario Law Reform Commission in their Report on the Law of Evidence (1976) included the following provision in the draft Evidence Act which they proposed:-

"Where corroboration is required by law, a statement admitted under this section shall not be taken to be corroborative of the evidence of a witness called to prove the statement." (Section 22(4))

It is considered that a similar provision should be adopted in Ireland but it should be extended to cover cases where a warning as to the danger of acting without corroboration is required by practice, as well as those where corroboration is required by law; it might also be extended to cases where the evidence sought to be corroborated is that of a person who relayed it from the maker of the statement to the witness who proves it in court. It is considered that it would also be appropriate to follow the English example of giving statutory formulation to the existing rule that the out-of-court statement of a person does not constitute corroboration of his testimony in court.

Statements of opinion and statements based on hearsay, which would normally be inadmissible, are admissible in evidence if made by an expert witness in the course of his testimony. The

question arises how the out-of-court statement of a qualified expert should be treated. The cross-examination of expert witnesses is important in view of the latitude they are allowed and there might be objection to allowing them the same latitude in out-of-court statements when they are not subject to cross-examination. It might be argued that any informants on whom they base statements of facts not within their personal knowledge should be called to testify if available. This would be consistent with the general scheme of legislation proposed and would have much merit in cases where a particular statement of fact was obviously fundamental to an opinion expressed by an expert. However, it is suggested that this question is best tackled in the general context of expert evidence. It is considered, therefore, that a provision should be included excluding expert evidence from the application of the proposed legislation. (See Chapter 10 infra.)

Accordingly it is considered that in civil cases at least the law should provide as follows:

- (1) An out-of-court statement should be admissible as evidence of any fact therein of which direct oral evidence by the maker would be admissible if -
 - (a) the maker, and where he had not personal knowledge of the facts asserted, the person from whom the information derived,
 - (i) are dead;
 - (ii) are unable by reason of their health to testify;
 - (iii) cannot be identified or found; or
 - (iv) being competent or compellable witnesses, refuse to be sworn or to testify.

- (b) advance notice is given to the other party, a requirement which may, however, be waived in the discretion of the court if the other party is not prejudiced by the failure to give him notice or if that failure has resulted from factors outside the control of the party tendering the out-of-court statement.
 - (c) the statement is proved in court by the best evidence available.
- (2) A statement should be defined to include conduct which is intended to be assertive and any verbal utterance or statement in a document whether or not it is intended to be assertive.
 - (3) An out-of-court statement should be admissible as evidence of the facts therein when no objection is made to its admission.
 - (4) The judge should have discretion to exclude an out-of-court statement if it is of insufficient probative value or if its admission would operate unfairly against any party.
 - (5) The judge should have discretion to admit depositions, evidence taken on commission and statements on affidavit where the importance of the evidence does not justify the expense of bringing a witness to court.
 - (6) An out-of-court statement of a witness should not be taken as corroboration of his testimony or that of any witness called to prove the making of the statement.

If it is decided to retain the rule against hearsay in criminal cases even when the maker of the statement is dead or otherwise unavailable, consideration will have to be given to the exact scope of the existing exceptions to that rule to decide if they

should be amended. The law relating to the admissibility of business and administrative records has been amended in other common law jurisdictions where the rule against hearsay has been retained. This matter is considered in Chapter 4 of this Working Paper. The other existing exceptions to the rule against hearsay are considered in Chapter 6.

The hearsay rule excludes the out-of-court statements of witnesses in so far as they are tendered as evidence of the facts asserted. However, such a statement may also be relevant to the credibility of the witness in that it reveals consistency or inconsistency with his testimony in court. But even if it is sought to be proved only for this limited purpose, it may be excluded by the rule against self-corroboration, sometimes called the rule against narrative. According to this, a witness may not give evidence that, on a past occasion, he made a statement consistent with his testimony in court and other witnesses may not be called to prove that he made any such statement. Any previous statement inconsistent with his testimony in court may be proved but such a statement may only be used to discredit the witness's sworn testimony and is not evidence of the facts asserted in it.

Certain exceptional cases where the prior consistent statements of a witness may be tendered in evidence must be noted. Firstly, in prosecutions for sexual offences, a complaint made voluntarily by the victim as soon as could reasonably be expected after the incident is admissible to support the complainant's credibility and as evidence of lack of consent, where this is in issue, but it does not amount to corroboration where this is required as a matter of law.⁶⁸ This exception was described by Oliver Wendell Holmes, in a Massachusetts case^{68A} as "a perverted survival of the ancient

⁶⁸ See The People v. O'Sullivan [1930] I.R. 532; The People v. McLoughlin (1931) 71 I.L.T.R. 247.

^{68A} Commonwealth v. Clery (1898) 172 Mass. 175.

requirement that a woman should make hue and cry as a preliminary to an appeal of rape". While it has been stated in the Court of Criminal Appeal in England that the fact of a complaint having been made but not its contents may be proved even if the victim does not testify (R. v. Wallwork (1958) 42 Cr. App. Rep. 153) the better view seems to be that no evidence of the complaint may be given when the victim does not testify.⁶⁹ There is some authority in England that this exception to the rule against self-corroboration is applicable in all cases of personal violence, not just sexual cases (Cross on Evidence, p. 241 (5th ed. 1979)) Secondly, a prior consistent statement may be admitted as part of the res gestae when it is made contemporaneously with the event in issue. Thirdly, and most important, a prior consistent statement may be adduced where "counsel on the other side impute a design to misrepresent from some motive of interest or relationship; in that case, perhaps, in order to repel such an imputation, it might be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts".⁷⁰ These words were quoted by Molony L.J. in an entertaining Irish will suit Flanagan v. Fahy [1918] 2 I.R. 361 at 392, described by Lord Radcliffe in a House of Lords case in 1960 as "perhaps the best example of the way in which the exception can properly be invoked and applied".⁷¹ In Flanagan v. Fahy

⁶⁹ Cross on Evidence, pp. 242-3 (5th ed. 1979); Kilby v. R. (1973) 129 C.L.R. 460. In R. v. Burke (1912) 47 I.L.T.R. 111 the headnote states that the fact that a complaint was made by an imbecile girl who did not testify may be proved but this is not borne out by examination of the actual report.

⁷⁰ Phillips on Evidence, Vol. II, p. 523.

⁷¹ Fox v. General Medical Council [1960] 3 All E.R. 225 at 230.

it was alleged that the plaintiff had forged the will sought to be propounded. One Patrick Ryan, called for the defence, testified that he had seen the will forged and had been offered a sheep as a bribe to secure his silence. In cross-examination, Ryan was asked about hostility between the plaintiff and himself arising out of the fact that he had refused to marry the plaintiff's daughter having made her pregnant. In rebuttal of the implicit suggestion that Ryan had given false testimony on account of the resulting enmity, the defence were allowed to prove that he had told the story to another person before any enmity arose. It has been suggested recently in England that evidence may be adduced of a prior consistent statement of a witness whenever the other side raises an inconsistent statement of that witness⁷² but this proposition conflicts with earlier English authority as well as the bulk of United States case law and was expressly disavowed in Ireland in *R. v. Coll* (1889) 24 L.R. Ir. 522. It seems there must at least be an implicit suggestion by the other side that the witness had recently made up the story in his testimony. In addition to these three recognised exceptions, the prohibition on prior consistent statements is disregarded, as a matter of practice, in criminal cases where everything said by the accused when charged is proved even if this consists wholly or partly of statements corroborating his testimony in court.⁷³ Statements by an accused explaining the possession of goods found on him or on his premises are admitted on the same basis provided they are made at the time of discovery. In Canada such admissibility has been justified by reference to the doctrine of *res gestae*.⁷⁴ Evidence of identification of a person before the trial is also given regularly even though it may involve corroboration of testimony given in court.⁷⁵

⁷² *Ahmed v. Brumfit* (1967) 112 Sol. Jo. 32.

⁷³ *R. v. Storey* (1968) 52 Cr. App. Rep. 334 at 347.

⁷⁴ *R. v. Graham* [1974] S.C.R. 206; *R. v. Risby* [1978] 2 S.C.R. 139.

⁷⁵ See pp. 167-9 *infra*.

As the person who made the statement is present in court and subject to cross-examination on its contents and the circumstances in which it was made, the main objection to the reception of out-of-court statements has no application to the previous statements of a witness. The first reason usually given for the exclusion of such previous statements is that an unsworn statement out of court generally adds little or nothing to testimony to the same effect made on oath and is, therefore, superfluous. "Generally speaking", said Lord Radcliffe in Fox v. General Medical Council [1960] 3 All E.R. 225 at 230, "such confirmatory evidence is not admissible, the reason presumably being that all trials, civil or criminal, must be conducted with an effort to concentrate evidence on what is capable of being cogent." The admission of the out-of-court statements of witnesses might give rise to a multitude of side-issues on such matters as the precise terms and circumstances in which they were made. While these considerations may be valid for the general run of the out-of-court statements of witnesses, there are cases where the circumstances in which such a statement was made give it a guarantee of veracity additional to or superior to sworn testimony in court. The most common example is where a statement is made soon after an incident by a witness whose recollection of the matter has since become hazy or even non-existent. At present, unless the previous statement comes within the limited category of documents from which a witness may refresh memory in court, its contents cannot be put in evidence.⁷⁶ Statements made by a party before he has any interest in misrepresenting the facts may also have a special value. The loss liable to be caused by their exclusion was exemplified in the Kenyan case

⁷⁶ On this see pp. 58 sqq. infra.

Gillie v. Posho Ltd [1939] 2 All E.R. 196, where the issue was whether a contract was made before or after the publication of an advertisement containing allegedly fraudulent misrepresentations. It was held by the Privy Council that a witness who swore that the offer made by him was accepted before publication of the advertisement should not have been allowed to prove a letter written by him before publication referring to the contract although the contents of the letter, written before any dispute could have been anticipated, greatly enhanced the veracity of his evidence in Court. The consistency of out-of-court statements of different persons made before the authors could have concocted a story together may also be significant. Thus, a man, when arrested for assault, states that he was acting in self-defence; his wife witnessed the incident and, without having had the opportunity to know what her husband has said, corroborates his account precisely.⁷⁷ Clearly the circumstances of these statements enhance the veracity of similar testimony given later in court but under the present law evidence of the wife's earlier statement may be given only if a suggestion of recent fabrication is made by the other side.

The second reason given for the exclusion of the previous statements of a witness is the danger of fabrication. If proofs of evidence taken at the instance of one of the parties or his lawyers were tendered as evidence instead of oral testimony, these would inevitably reflect the preoccupations of the questioner. As the California Law Revision Commission argued in 1962:

⁷⁷ Glanville Williams, "The Proposals for Hearsay Evidence" [1973] Crim. L.R. p. 76 at p. 78.

"[it] would permit a party to put in his case through written statements carefully prepared in his attorney's office, thus enabling him to present a smoothly coherent story which could not be duplicated on direct examination of the declarant. The prohibition against leading questions on direct examination would be avoided and much of the protection against perjury provided by the requirement that in most cases testimony be given under oath in court would be lost."⁷⁸

The oral examination of a witness by counsel for the side calling him, called the examination in chief, has a special value in eliciting the truth. Contrary to what is commonly supposed by laymen, the way in which a witness responds to it is often much more informative as regards his reliability than his reaction to cross-examination by the opposing side. However, it is not necessary to exclude all previous statements to ensure that such oral examination-in-chief of witnesses takes place. Under the English Civil Evidence Act 1968 previous statements of a witness are generally only admissible at the conclusion of his examination-in-chief and then only with the leave of the court. The Law Reform Committee, upon whose report the Act was based, anticipated that the provision would work thus:

"A proof of evidence taken from a witness for the purposes of the trial is of small probative value and they would not normally expect a judge to admit it, except in rebuttal of suggestions made in cross-examination; but a statement made by an eye-witness shortly after the event that he has witnessed is sometimes more likely to be accurate than his recollection of the event extracted from him in the witness box years later They would expect

⁷⁸ Tentative Recommendations and a Study Relating to the Uniform Rules of Evidence, Article VIII, Hearsay Evidence.

statements made while the witness's recollection was still fresh to be freely admitted by the judge as evidence of the facts which they tended to establish..."⁷⁹

The same objective is sought to be achieved by the draft Criminal Evidence Bill proposed by the English Criminal Law Revision Committee. Under this, the out-of-court statements of witnesses are declared generally admissible but the leave of the court is required before the admission of a proof of the witness's evidence. Section 32(3) of the draft Bill, which governs the matter provides:

"Where a document setting out the evidence which a person could be expected to give as a witness has been prepared for the purpose of any pending or contemplated proceedings, whether civil or criminal, then in any criminal proceedings in which that person has been or is to be called as a witness a statement made by him in that document shall not be given in evidence by virtue of Section 31(1)(a) of this Act without the leave of the court; and the court shall not give leave under this sub-section in respect of any such statement unless it is of the opinion that, in the particular circumstances in which that leave is sought, it is in the interests of justice for the witness's oral evidence to be supplemented by the reception of that statement or for the statement to be received as evidence of any matter about which he is unable or unwilling to give oral evidence."

⁷⁹ Thirteenth Report of the Law Reform Committee (1966), para. 37. The Committee also suggested (para. 39) that evidence of an out-of-court statement of a witness might, at the court's discretion be given before the conclusion of his examination-in-chief when the evidence is supplied by another witness or when to do otherwise would prevent a witness from telling his story in the natural way and sequence.

"It only confuses a witness and makes the law look silly when he is asked: "Did your wife say something to you - Don't tell us what she said, just answer Yes or No." As a result of what she said, did you do something?" We hope that the judge will let the witness say what his wife did say, and will also let the witness tell what he said to his wife, if that is the natural way for him to tell his story of what happened."

The Model Code of Evidence approved by the American Law Institute (1942), the Uniform Rules approved by the Commissioners for Uniform State Laws (1953), the draft Evidence Code proposed by the Law Reform Commission of Canada and the Bill attached to the New South Wales Law Reform Commission Report on the Rule against Hearsay (1978) all provide that an out-of-court statement of a witness who is present and subject to cross-examination should be admissible.⁸⁰

The admission of the previous statements of a witness would also have the incidental advantage of sweeping away the artificial distinctions that have become embedded in the exceptions to the present rule against self-corroboration between sexual and non-sexual assaults. Accordingly, it is considered that an out-of-court statement of a witness should be admissible as evidence of the facts asserted subject to the proviso that any such statement should not be given in evidence before the conclusion of the examination-in-chief of the witness who made it, without the leave of the court. Like other out-of-court statements they should be liable to exclusion at the judge's discretion.

Neither the Civil Evidence Act 1968 in England nor the draft Criminal Evidence Bill proposed by the English Criminal Law Revision Committee in 1972

⁸⁰ American Law Institute, Model Code of Evidence (1942), Rule 503; National Conference of Commissioners on Uniform State Laws, Uniform Rule of Evidence (1953), Rule 63; Law Reform Commission of Canada, Report on Evidence (1975), Evidence Code Section 28; New South Wales Law Reform Commission, Report on the Rule against Hearsay (1978) p. 100, Bill, section 73(1)(b). However, Rule 801 of the United States Federal Rules of Evidence limits the admissibility of prior statements of witnesses to inconsistent statements, statements rebutting fabrication by the witness and statements of identification of a person made after perceiving him. The Ontario Law Reform Commission in their Report on the Law of Evidence (1976) recommended (p. 54) that a previous consistent statement of a witness should be admissible only to rebut a suggestion that his testimony had been fabricated.

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require that prior notice should be given of a previous statement of a witness proposed to be tendered in evidence. No reasons have been advanced for this. It would be valuable for the other side to be able to investigate the circumstances and terms of such a previous statement. The requirement of notice would discourage parties from relying on previous statements which do not add materially to the testimony in court. As in the case of any other out-of-court statement, notice should be waived where it becomes relevant as a result of factors outside the control of the party tendering it. Thus, for example, no notice should be required where it is desired to prove a previous statement of one's own witness to counter an allegation in cross-examination that his recollection has become hazy with lapse of time.

A provision making previous statements of witnesses admissible would enable the side calling a witness to adduce evidence of statements supplementing his testimony as well as statements to the same effect confirming it. This is likely to be of importance in cases where a witness no longer has a full recollection of events which he perceived and about which he is called to testify. At present this situation is governed largely by the somewhat complex rules relating to the refreshing of a witness's memory. According to these, a witness may refresh his memory by referring in court to a document made or, at least, verified by him at the time of an incident. Kennedy C.J. dealt with this matter in his judgment in Northern Banking Company v. Carpenter [1931] I.R. 268 at 276, a case where a sub-manager of the Ball's Bridge branch of the bank was allowed to refresh his memory that title deeds were deposited as security by referring to a standard form deed signed by him at the time:

"The rule of evidence which permits of a witness under examination refreshing his memory by reference to a note made by himself is quite well defined by authority. The first requisite is that the written note should have been made at the time of the matter to which it refers or within such time afterwards that, in the opinion of the Judge, recollection of the facts will still have been fresh.... It is not necessary that the witness should have any independent recollection of the transaction to which the note relates nor even that the note should literally refresh the memory of the witness, or awaken actual recollection. If the witness can say that, from seeing his own writing, he is sure of the fact stated therein, such statement by him is admissible in evidence of the fact."

In the earlier Irish case Lord Talbot de Malahide v. Cusack (1864) 17 Ir.C.L.R. 213 it had been recognised that this principle had "been extended to the case of entries which though not in the witness's handwriting, were either made in his presence, and read by him at the time of the transactions, or were read and examined by him shortly afterwards when the facts were fresh in his recollection and when he was enabled to ascertain that the facts stated in the entries were true".⁸¹

Wigmore in his great treatise on the Anglo-American system of Evidence has suggested that in cases where the recollection of a witness is not revived and he is merely "giving credit to the truth and accuracy of his habits" the document itself is evidence.⁸² But this view has been rejected in England⁸³

⁸¹ 17 Ir. C.L.R. 213 at 217 (per O'Brien J.). In The People (A.G.) v. Charles Wilson (26 July 1967, unreported) the Court of Criminal Appeal held it permissible to allow a witness to refresh his memory from a statement transcribed by the police on the basis of his statement.

⁸² Wigmore, A Treatise on the Anglo-American System of Evidence Vol. II, Ch. 28, (3rd ed. 1940).

⁸³ Cross on Evidence P. 206, (4th ed. 1974).

and there is no indication that it would be accepted here. However, a distinction is drawn between cases where memory is genuinely revived and those where a witness merely swears to a fact because it is in a document in that the original must be produced in the latter case (unless it has been lost) whereas a copy will suffice in the former.⁸⁴ But, whether or not memory is genuinely revived, the document refreshing memory may be inspected by the jury and by the other side, who may cross-examine the witness by reference to it. But such cross-examination does not make the document evidence in its own right unless the cross-examiner so wishes. However, if the latter cross-examines on parts of a document other than those used to refresh memory, the side calling the witness may put it in evidence.^{84A}

These complex rules may be characterised as of a type which get the law of evidence a bad name. But, in their tortuous way, they are effective to bring before the court most out-of-court statements of witnesses which possess probative value additional to their oral testimony, although it must be said that they are not much utilised except by police witnesses referring to their notebooks. The acceptance of the practice of reading over previous statements to revive recollection before giving evidence also reduces the gaps in testimony arising from hazy recollection. But it remains possible to envisage situations where a previous statement made by a witness which is of some probative value cannot be used. For example, the note recording the recollection of the witness whose memory is not revived may not be sufficiently contemporaneous, or it may not have been reduced to writing or checked by him at the time. But perhaps most

⁸⁴ Lord Talbot de Malahide v. Cusack (1864) 17 Ir.C.L.R. 213 at 218.

^{84A} See R. v. Virgo (1978) 67 Cr. App. Rep. 323. on the purposes for which it may be put in evidence.

objectionable is the artificiality introduced into the law.
As Glanville Williams has written:-

"The practice of refreshing memory is rather a dodge, because it may be adopted in circumstances where the witness has no memory of the incident beyond what is in his note. It is unsatisfactory in such circumstances that the theoretical evidence should be what the witness says in the witness box, not his note."⁸⁵

It is even more unsatisfactory if, as has been held permissible by the English Court of Appeal in R. v. Richardson [1971] 2 Q.B. 484, a witness may refresh his memory by a previous statement never brought to the notice of the court. It is considered that the other side should be given advance notice of any documents used to refresh the memory of a witness either before or while he is testifying.

Accordingly, it is suggested that where the memory of a witness is refreshed by referring to any statement, whether made by himself or by another, notice of the statement should be served on the other side, who should be entitled to put it in as evidence of the facts asserted. But where a witness refreshes his memory by referring to a statement made by another, the party calling the witness should not be entitled to put that statement in evidence unless it is otherwise admissible or unless the statement - or some part of it - is read out in cross-examination by the other party.

At present, as has been noted, a cross-examiner may call for a document from which a witness refreshes memory and may cross-examine him on parts other than those from which his memory is refreshed. This is an exception to the general

⁸⁵ Williams, "The New Proposals in Relation to Double Hearsay and Records" [1972] Crim. L.R. p. 139 at p. 143.

rule that cross-examination with reference to inadmissible evidence is not allowed but it entails the disadvantage for the cross-examiner that the material cross-examined upon becomes evidence at the option of the side calling the witness. If all previous statements of witnesses are admissible there is no reason why a witness should not be cross-examined on any such statement even if he does not refresh his memory from it. But where memory is refreshed from the statement of another, it is considered that cross-examination should not be allowed from parts of it other than those from which the witness refreshes his memory unless these are admissible in evidence in their own right as out-of-court statements.

It has been argued that there should be some restriction on the documents used to refresh a witness's memory out of court.⁸⁶ But it is an objection to any such restriction that it would be difficult to police. In these circumstances it is anomalous that the classes of documents used to refresh memory in court should be restricted, especially as such a restriction can be evaded simply by refreshing memory out of court. The requirement that the document refreshing memory should have been made contemporaneously would be over-rigid if, as is suggested, the out-of-court statements of witnesses are made generally admissible in their own right. The requirement that the document should have been checked by the witness at the time it was made where it was made by another is over-stringent in cases where memory is genuinely revived. Any effort to draw a distinction between genuine revival of recollection and cases where the witness swears to a fact because it is in a document, such as is now required for the purpose of

⁸⁶ M.N. Howard, "Refreshment of Memory out of Court" [1972] Crim. L.R. p. 351.

deciding if an original should be produced, is fraught with difficulty. Accordingly, it is considered that the rules limiting the documents from which a witness may refresh memory in court should be abolished. The obligation to disclose all such documents to the other side should be an adequate safeguard against pseudo-revivals of memory on the basis of inadequate material.

The reasons for excluding prior consistent statements of witnesses, namely that they are superfluous or are likely to be fabricated by the side calling him, are not applicable to the out-of-court statements of a witness which are inconsistent with his testimony in court. But strict limitations are placed on the admissibility of such inconsistent statements and the use that can be made of them. These limitations arise, in part, from the rules governing the examination and cross-examination of witnesses according to which a party calling a witness is not permitted to impugn the credit of that witness. One aspect of this is that a previous out-of-court statement of a witness which is inconsistent with his testimony in court may not be proved by the party calling him. An exception is made in the case of a hostile witness, defined as one not desirous of telling the truth at the instance of the party calling him, who may be cross-examined by the party calling him and evidence given of his previous statements inconsistent with his testimony in order to discredit him.

The rules governing cross-examination are rooted in the theory that a witness is on the side of the party calling him and this party must be taken to guarantee the trustworthiness of those whom he calls to prove his case. In reality a party often has to call witnesses not favourably disposed to him to prove facts essential to his case. It can be a grave disadvantage to him not to be permitted to cross-

examine such a witness especially if he has declined to provide a proof of evidence from which to be examined in chief. In the case of a witness who has made a statement inconsistent with his testimony, proof of this fact is often sufficient to have him regarded as hostile, and he can then be cross-examined by the party calling him and any previous inconsistent statement he has made adduced to discredit him. In the only recent reported Irish case on the subject The People v. Taylor [1974] I.R. 97, a witness who had told the police that the accused attacked the deceased with a knife and who then gave evidence that the weapon used was a scissors, was, by virtue of this discrepancy, allowed to be treated as hostile by the prosecution. Whether this equation of inconsistency with hostility is typical is difficult to ascertain as it is a matter on which the decision of the trial judge can be challenged only in exceptional circumstances.⁸⁷ But it is hard to dispute the view of the English Criminal Law Revision Committee that "it seems difficult to regard the inconsistency as sufficient in itself to show that the witness is a hostile witness" and their conclusion that it is "artificial to base the admission of the previous statement ... on the idea that the witness made it shows that he is now hostile".⁸⁸ They recommended that whenever a witness gives evidence inconsistent with a previous statement of his, the party calling him should be entitled to seek the leave of the court to cross-examine him and prove his inconsistency. In Canada, the Evidence Act was amended in 1969 to enable the court to permit cross-examination by a party of his own witness without proof of adversity where that witness has

⁸⁷ The People v. Hannigan [1941] I.R. 252.

⁸⁸ Eleventh Report: Evidence (General) para. 164.

made an inconsistent statement in writing, or reduced to writing, inconsistent with his testimony. Many United States jurisdictions have removed any requirement of adversity as a pre-condition of cross-examining one's own witness and the Federal Rules provide simply that "the credibility of a witness may be attacked by any person, including the party calling him".⁸⁹ While the tendency to accept inconsistency as conclusive evidence of hostility under the present law may make this change unimportant, it would be more satisfactory to make the prior inconsistent statement of a witness admissible at the option of the party calling him without making any imputation of deliberate untruthfulness against that witness. It would also be more consistent with a general scheme of legislation making the out-of-court statements of witnesses generally admissible as evidence of the facts asserted.

Even where a prior inconsistent statement of a witness is allowed to be proved it may, under the present law, be used only to discredit him and so neutralize his testimony in court; as was stated by Walsh J. delivering the judgement of the Court of Criminal Appeal in The People v. Taylor /1974/ I.R. 97 at 102:-

"... it must at all times be made clear to the jury that what the witness said in the written statement /to the police/ is not evidence of the fact referred to but is only evidence on the question of whether or not she said something else - it is evidence going only to her credibility."⁹⁰

⁸⁹ Federal Rules of Evidence (1978), Rule 607.

⁹⁰ See also The People v. Cradden /1955/ I.R. 130.

One reason given for the rule is that an unsworn statement should never be allowed to outweigh sworn testimony. Fears have also been expressed that evidence might be fabricated by means of prior inconsistent statements. As was stated by the English Criminal Bar Association in their observations on a proposal by the Criminal Law Revision Committee to make such statements evidence of the facts asserted:

".... we can foresee a situation in which a dishonest investigator, on either side, who desires to subvert the course of justice will have to say, only, that on some previous occasion a witness who gives evidence against his cause or his client said something different from that evidence, for the jury to be directed that, if they accept the investigator's account of the previous statement, they may accept it as truly stating the facts. Such a situation would make the trial more rather than less of a lottery and would widen rather than concentrate the area of the jury's consideration."⁹¹

However, the rule so stoutly defended has been roundly criticised by eminent authorities. The English Criminal Law Revision Committee maintained that it involved a distinction which was over-subtle and not easily understood.⁹²

Professor Sir Rupert Cross, the author of a standard textbook on the Law of Evidence, has expressed the view that it constitutes one of the absurdities of the present law and involves judges in "talking gibberish" when instructing juries.⁹³ There are cases where the previous

⁹¹ General Council of the Bar of England and Wales, Evidence in Criminal Cases, Memorandum on the Eleventh Report of the Criminal Law Revision Committee: Evidence (General), para. 185.

⁹² Eleventh Report: Evidence (General), (1972), para. 257.

⁹³ "The Evidence Report: Sense or Nonsense" [1973] Crim. L.R. p. 329 at pp. 332 sqq.

statement of a witness has a higher probative value than his testimony in court and this should be assessed in the individual case by the judge or jury untrammelled by any artificial restrictions. A statement made nearer the time of an event is, for instance, less likely to be affected by loss of memory than one made years later in court and should not be deprived of its logical weight in determining the facts. Professor Cross has provided another example:

"A swears at the trial that he did not see the accused on January 1; in his deposition or statement to the police he said that he did see the accused that day. At this point all we know is that A was lying in one of the statements and, if nothing else appears, the judge can do no more than direct or hold that there is no acceptable evidence on the question whether A saw the accused on January 1. But what if the demeanour of the witness were to lead irresistibly to the conclusion that he was lying at the trial? What if there was evidence that A had been "got at" by the defence after he made the first statement."⁹⁴

Despite such examples the matter is not clear cut. It was only by a narrow majority that the English Law Reform Committee recommended that prior inconsistent statements should be evidence of the facts asserted.⁹⁵ The Ontario Law Reform Commission, reporting in 1976, recommended that such prior statements should be evidence if proved against a witness on the other side but not if proved in respect of one's own witness.⁹⁶ They were influenced in their recommendation by the fact that a party might intimidate his own witnesses by the threat of discrediting them if they failed to come up to proof.

⁹⁴ Ibid., p. 332. A similar argument is put forward in the New South Wales Law Reform Commission Report on the Rule against Hearsay (1978), pp. 52-3, 130-3.

⁹⁵ Thirteenth Report (Hearsay in Civil Proceedings) (1966), para. 37.

⁹⁶ Report on the Law of Evidence, p. 205.

However, provided that a witness called by his own side can only be discredited by proof of prior inconsistent statements, as with hostile witnesses at present, and not in other ways, this threat is unlikely to count for much. A further argument in favour of making prior inconsistent statements of a witness evidence of the facts asserted is that it will avoid the difficulty which would otherwise arise where the testimony given in court by a witness is partly consistent and partly inconsistent with an out-of-court statement of his.

The need to give evidence of a prior inconsistent statement of a witness would not generally become apparent until that witness had testified. For this reason any requirement of advance notice would often be impossible of fulfilment. Accordingly, it is considered that the prior inconsistent statements of a witness should be admissible as evidence of the facts asserted at the instance of any party without any requirement of advance notice.

There are rules governing the use of prior inconsistent statements in the cross-examination of a witness which were described recently by the New South Wales Law Reform Commission as "shrouded in obscurity and complication which is exceptional even by the standards of the law of evidence".⁹⁷ The failure to observe these rules resulted in a conviction for murder being set aside as recently as 1974 in The People v. Taylor [1974] I.R. 97, where the Court of Criminal Appeal held that no proper foundation had been laid for the introduction of a prior inconsistent statement of a witness. In that case, as has been noted, a prosecution witness having previously made a statement

⁹⁷ Working Paper on The Course of The Trial (1978), p. 116.

to the police that the accused had stabbed the deceased with a knife testified at the trial that a scissors was the weapon used. The difference was important as the defence was provocation. As a result, the jury having withdrawn, the prosecution proved the previous inconsistent statement and were allowed to treat the witness as hostile. The subsequent cross-examination began by counsel reading out the previous statement. Allowing an appeal on the ground that the procedure had been telescoped, the Court of Criminal Appeal stated:-

"The proper procedure, if it is desired to have a witness treated as hostile is to make the application to the judge and put before him the material upon which it is sought to have the witness declared to be a hostile witness. This, of course, should be done in the absence of the jury and if the judge rules that the witness may be treated as hostile, then the witness may be cross-examined. That is something quite different and distinct from the rules and procedure which govern the admissibility of written statements in cross-examination. This particular witness had been allowed to be treated as hostile and when the jury were recalled to court, the proper procedure for the prosecution was to have put to the witness that she had on another occasion made a statement which differed materially from or contradicted the one she was making in the witness box. If she were to deny that, then the proper procedure would have been to have her stand down from the box and to prove in fact that she did in fact make a statement by putting into the box the person who took the statement, proving it in the ordinary way without revealing the contents of the statement at that stage. The earlier witness should then have been put back in the box and the statement put to her for identification, and then her attention should have been directed to the passage in which the alleged contradiction or material variation appears. If she had agreed that there was such a contradiction or material variation, that should have been the end of the matter in so far as the question of impugning her credibility was concerned because there would then have been before the jury an admission from the witness to the effect that she had made contrary statements on the same matter. The

statement might then be put in evidence though that would not be strictly necessary at that stage when the admission had been made. If she persisted in denying the contradiction then the statement having already been proved would have gone in as evidence of the fact that the witness had made a contrary statement."⁹⁸

The law relating to the use of prior inconsistent statements of a witness in cross-examination is contained in Sections 3, 4 and 5 of the Criminal Procedure Act 1865 (Denman's Act), which notwithstanding its title, applies to civil as well as criminal proceedings. They provide as follows:-

"3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

5. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such

⁹⁸ [1974] I.R. 97 at 100. See also The People v. Cradden
[1955] I.R. 130 at 137-8.

contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."

Cross-examination with reference to a prior inconsistent statement of a witness may take a number of forms. The cross-examiner may merely show the witness his previous statement in writing without reading it to the court and ask him if in the light of it he adheres to his testimony. In that case the statement has not been put in evidence nor is the other side entitled to see it or to have it put in evidence. However, the judge may, under Section 5 of the Criminal Procedure Act 1865, call for the document and make such use of it, including putting it in evidence, as he thinks fit. This is to meet the possibility of a "very tricky practice" outlined by Baron Alderson in R. v. Ford (1851) 2 Den 245 at 248, 169 E.R. 491, at 493:-

"Suppose the witness to have made precisely the same statement in Court with that contained in his deposition, and the counsel to put the deposition in his hand, and to ask him whether he still persisted in the statement which he had just made in Court; and the witness to do so; in that case the jury would naturally conclude that the statement and deposition materially differed, and, unless the deposition was used in court, they would remain under the false impression and give their verdict under a complete misconception of the facts.

The cross-examiner may go no further than asking if the witness has said the contrary to that to which he testifies on any occasion. If the witness does not admit it, the cross-examiner may drop the matter. But if the cross-examiner wishes to prove a prior inconsistent statement he must point out to the witness the circumstances of the

supposed statement sufficient to designate the occasion or, if the previous statement was in writing or has been reduced to writing, the witness is entitled to have those parts of the prior statement which are to be used to contradict him drawn to his attention. If the witness agrees that he made an inconsistent statement it is not permissible to put it in evidence.⁹⁹ If the witness does not so agree, the statement may be proved but the witness must be given an opportunity to explain any inconsistency between his testimony and the statement. The latter is then relevant only to the credibility of the witness and is not evidence of the facts asserted.

As regards the right of the party calling a witness to put in evidence documents used by the other party in the cross-examination of that witness, there seems to be little or no recent reported authority in this country, or indeed, in England. It appears to have come up more frequently in Australia. The New South Wales Law Reform Commission in their Working Paper on The Course of the Trial argued that such a right exists provided that such cross-examination went beyond calling the witness's attention to his previous statement without reading it out or proving it.¹⁰⁰ There was conflicting authority, they opined, on whether cross-examination on a prior statement let in the whole document containing the statement or only those parts explaining or qualifying the statement.

⁹⁹ The People v. Cradden [1955] I.R. 130 at 138.

¹⁰⁰ Op. cit. p. 118.

Much of the point of the rules relating to the proof of prior inconsistent statements disappears if the out-of-court statements of a witness are made generally admissible as evidence of the facts asserted. There is then no reason in principle why any party should not be free to tender such a statement in evidence. Sections 3 and 4 of the Criminal Procedure Act 1865 could be repealed as redundant as their purpose is to make prior inconsistent statements admissible in certain circumstances and subject to certain conditions. Section 5 might be retained in a modified form to allow for cross-examination on a previous statement without showing it to the witness beforehand and to protect the right of a witness to explain any discrepancy between his testimony and a previous statement tendered in evidence. The difficult point is how far the side calling a witness should be entitled to see and put in evidence previous statements of that witness put to him but not read out in the course of cross-examination. It may be felt that a cross-examiner should be entitled to show a witness an out-of-court statement, or ask him about it in general terms while not revealing its contents, for the purpose of getting an admission of inconsistency or a different answer in court without having the whole document containing the statement (which his opponent may not have) tendered in evidence. But the complications and distinctions involved in such rules would be endless. In principle, all previous statements of witnesses, being admissible in evidence, should be available to every side in litigation. If one side has evidence of such a statement and uses it in cross-examination it should be made available to the other side who should then be free to decide whether to put it in evidence.

It is considered, therefore, that an out-of-court statement of a witness used during cross-examination of that witness should be made available to the other party (or parties) to

the litigation immediately it is introduced. But it should remain permissible to cross-examine a witness about a previous statement in general terms before drawing his attention to its exact contents or any document containing it. Where a previous statement has been used in cross-examination of a witness, that witness should be entitled to comment thereupon and explain any discrepancy between it and his testimony in court and evidence would then be admissible without notice of other previous statements explaining or qualifying any inconsistency.

The suggestions made in this chapter may be summarised as follows:-

- (1) (a) An out-of-court statement of a witness should be admissible as evidence of the facts therein. However, unless the court gives leave no such statement should be given in evidence before the conclusion of the examination-in-chief of the witness who made it.
- (b) Advance notice should be given of an out-of-court statement of a witness as for out-of-court statements of persons who do not testify.
- (2) (a) A witness should be entitled to refresh his memory either before or at the time he testifies, by referring to any previous statement made either by him or by another.
- (b) Advance notice of such statement should be served on the other party, who should then be at liberty to tender the statement as evidence of the facts therein. But where a witness refreshes his memory by reference to a statement made by another, the

party calling the witness should not be entitled to put that statement in evidence unless it is otherwise admissible or unless the statement is read out during cross-examination.

- (c) Cross-examination should not be permitted from parts of a document used to refresh memory other than those actually used to refresh memory unless the statements referred to in cross-examination are admissible in evidence in their own right.
- (3) Prior inconsistent statements of a witness should be admissible as evidence of the facts therein without any requirement that advance notice should be given to the other party.
- (4) Sections 3, 4 and 5 of the Criminal Procedure Act 1865 should be repealed and as the following provisions applied to the cross-examination of a witness on his previous statement:
- (a) Any previous statement of a witness used in cross-examination should be made available to the other party to the litigation.
 - (b) Notwithstanding (a), it should remain permissible to cross-examine a witness about a previous statement made by him before his attention is drawn to its exact contents or any document containing it.
 - (c) Where a previous statement of a witness is used in his cross-examination, he should be entitled to comment thereon and explain any discrepancy between it and his testimony in court; and evidence should then be

admissible without notice of other previous statements explaining or qualifying any inconsistency.

- (d) A party producing a witness should not be permitted to give any evidence adverse to that witness's credibility except evidence of a previous inconsistent statement made by that witness.

CHAPTER 4 BUSINESS AND ADMINISTRATIVE RECORDS

Records are admissible under a common law rule - which may antedate the hearsay rule itself - according to which an oral or written statement of a deceased person made in pursuance of a duty to record and report is admissible on certain conditions. It was under this rule that entries in marriage registers were admitted in Ireland in cases where registers were not kept pursuant to any statute. Delivering judgment in Malone v. L'Estrange (1839) 2 Ir. Eq. Rep. 16, a case relating to the will of the great advocate Anthony Malone, Lord Chancellor Plunket declared that the books of Roman Catholic Chapels containing entries of marriages and baptisms were admissible:-

"They contain the entries of deceased persons made in the exercise of their vocation, contemporaneously with the events themselves, and without any interest or intention to mislead."¹⁰¹

More recently notes made by solicitors of negotiations with third parties on behalf of a client and of instructions taken from a client have been held admissible as being necessary to the discharge of the solicitor's duties to the client.¹⁰²

¹⁰¹ Followed in Dillon v. Tobin (1879) 12 I.L.T.R. 32. See also Farrell v. Maguire (1841) 3 Ir. L.R. 187; Ryan v. Ring (1890) 25 L.R. Ir. 184; Miller v. Wheatley (1890) 28 L.R. Ir. 144; Mulhern v. Clery [1930] I.R. 49.

¹⁰² Harris v. Lambert [1932] I.R. 504; Somers v. Erskine (No. 2) [1944] I.R. 368 at 385. See, however, Mercer and Smyth v. Mercer [1924] 2 I.R. 50 where the Court of Appeal in Northern Ireland held that a deceased solicitor's notes of an interview with a client were not admissible.

However, the limitations of this rule are such as to exclude records which may have probative value. In Miller v. Wheatley (1890) 28 L.R. Ir. 144 an entry in a marriage register was rejected because there was no proof of the handwriting in the entry, the official position of the writer or of his duty to record such facts. This was, as was stated in a dissenting judgment of O'Brien J., to impose a condition of proof impossible in nature for documents of some antiquity¹⁰³ especially, since as was held by FitzGibbon J. in Mulhern v. Clery [1930] I.R. 649 at 688, "there is no presumption, in the absence of all evidence, that the handwriting is that of the person by whom the entry ought to have been made". Statements relating to the legitimacy of an infant in a baptismal register have been excluded because there was no duty to record that matter and it was not within the personal knowledge of the writer.¹⁰⁴ In England the concept of duty has been interpreted restrictively so as to exclude a broker's entry as to the purchase of shares and a doctor's record of his patient's condition, it being held that they were both made for the deceased writer's own convenience and not pursuant to any specific duty to the client or patient.¹⁰⁵ In rejecting an entry in a ship's log book by a deceased mate as to the navigation of another ship, the Court of Admiralty in The Henry Coxon (1878) 3 P.D. 156 at 158 held that:

".... entries in a document made by a deceased person can only be admitted where it is clearly shown that the entries relate to an act or acts done by the deceased person and not by third parties."

¹⁰³ 28 L.R. Ir. 144 at 159.

¹⁰⁴ Ryan v. Ring (1890) 25 L.R. Ir. 184; Mulhern v. Clery [1930] I.R. 649.

¹⁰⁵ Massey v. Allen (1879) 13 Ch. D. 558; Dawson v. Dawson (1906) 22 T.L.R. 52.

In another case about the same time it was laid down that the entry must relate not to something ascertained by the person making the entry but to something done by or to him.¹⁰⁶ In New South Wales, the Law Reform Commission expressed the view that a business record kept or processed by machines would not be admissible as it was neither written, initialled nor signed by any person.¹⁰⁷ The requirement that the declarant must be deceased was held by the House of Lords in Myers v. Director of Public Prosecutions [1965] A.C. 1001 to exclude a record made by an unidentifiable person who could be alive. In that case the cars alleged to have been stolen had log books of wrecked cars purchased by the accused but the prosecution called an officer in charge of the records of the manufacturers of the stolen cars to prove that the numbers of those cars coincided with those on the cylinder blocks in the cars sold by the accused. The trial judge admitted the evidence of the officer in charge of records and the schedule of microfilms produced by him, the cards filled in by the workman having been destroyed after being copied. But the majority in the House of Lords considered that the records ought not to have been admitted because "the entries on the cards were assertions by the unidentifiable men who made them that they had entered numbers which they had seen on the cards".¹⁰⁸ Subsequently Glanville Williams wrote that "one of the most pedantic aspects of the common law relating to hearsay was its exclusion of routine reports".¹⁰⁹

¹⁰⁶ Polini v. Gray (1879) 12 Ch. D. 411 at 426

¹⁰⁷ Report on Evidence (Business Records) (1973), Appendix E, para. 3.

¹⁰⁸ [1965] A.C. 1001 at 1022 per Lord Reid.

¹⁰⁹ Williams, "The New Proposals in Relation to Double Hearsay and Records" [1973] Crim. L.R. p. 139 at p. 145.

However, in other Common Law jurisdictions a less restrictive approach to the admissibility of records has prevailed than in England. In Potts v. Miller (1940) 64 C.L.R. 282, a case not cited to the House of Lords in Myers v. Director of Public Prosecutions, the High Court of Australia held that "books of accounts kept according to an established system in organized business are receivable in evidence as proof, not of the occurrence of some particular fact recorded or indicated by a specific entry or narration, but of the financial progress or result of business operations conducted on a large scale".¹¹⁰ In Canada, in Ares v. Venner [1970] S.C.R. 608 the Supreme Court declined to follow the Myers case and held that the hearsay rule, in so far as it related to records, needed "to be restated to meet modern conditions".¹¹¹ They ruled that "hospital records including nurses' notes made contemporaneously by someone having personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein".¹¹² The principle stated is clearly applicable to other classes of records. Having regard to the lack of recent Irish authority in this area our courts might well follow this Canadian decision rather than the House of Lords decision in the Myers case.^{112A}

¹¹⁰ 64 C.L.R. 282 at 303.

¹¹¹ [1970] S.C.R. 608 at 626.

¹¹² Ibid.

^{112A} The Criminal Evidence Act 1965 was passed to reverse the effect of the decision in the Myers case.

Records may be admissible under other headings. First, as has been noted, a witness may refresh his memory by referring to a note made or verified by him at the time of the event noted provided that he had personal knowledge of the facts recorded. As the note may be inspected and put in evidence by the other side, the record is effectively available to the court. But this device is not effective where, as frequently occurs in modern record-keeping systems, the person who supplied the facts recorded cannot be identified or where the record was not verified by him. Secondly, records may be admissible as admissions if they are adverse to the case of the party making them. In Australia, in a case against a hospital for negligence arising out of medical treatment, entries by servants in the records of the hospital sued were admitted as evidence of the facts recorded on the basis that they were adopted by their employer.¹¹³ It is not certain that this line of reasoning would be followed in Ireland as there is authority that an admission made by an agent or servant only binds his principal if it is made to a third person.¹¹⁴ Even if it were followed, it would only make records admissible at the behest of a party other than the person keeping the record. Thirdly, records may be admissible where they rank as public documents.¹¹⁵ Finally, statutory provision has been made for the admissibility of certain classes of records, such as registers of births, marriages and deaths and bankers' books.

¹¹³ Warner v. The Womens Hospital [1954] V.L.R. 410.

¹¹⁴ Swan v. Miller, Son and Torrance [1919] 1 I.R. 151.

¹¹⁵ See pp. 161-6 *infra*.

The increasing size and complexity of modern administration has rendered obsolete the old archetype of records being made in writing by identifiable persons with personal knowledge of the facts recorded. Frequently, the person making the record does so on information supplied and has no personal knowledge of the content or any recollection of the source of the facts recorded. The records kept may not reproduce the information actually supplied by individuals but only contain facts derived from this information or facts recorded automatically by machines. This is especially true in the case of computers which are now used widely both in business and administration. Reliability in such cases depends not only on the veracity of those supplying the information but also on the thoroughness of checks and the efficiency of the machines producing the records. Legal rules must be framed to take account of these technological developments.

If, as has been proposed supra, out-of-court statements are made admissible as evidence of the facts asserted subject to (i) the maker of the statement or the person from whom the information was derived being called to testify, if he is available, and (ii) a requirement of notice, business records would become generally admissible, albeit subject to procedural requirements. The question arises whether any special provision need be made for such records different from those applying to out-of-court statements generally.

In the case of records it is likely that those supplying or recording information will have done so as a matter of routine and will have no present knowledge or recollection of the matters recorded; and it may be questioned whether it is appropriate to insist on their being called as the makers of the statement where they are identifiable and available. If the system of recording had been anonymous, they could not be identified to be called and it may be considered

anomalous that a more personalised recording system should be subject to stricter scrutiny before its statements are admitted. Records are often compiled from information supplied by a number of people and the expense and trouble of calling all of them may be disproportionate. Moreover, the real guarantee of their veracity lies in the reliability and checks of the system according to which they are compiled; and it is likely to be more helpful to examine a person who can testify to this than the people who supplied or recorded particular items of information of which they cannot reasonably be expected to have any present recollection. In the vast majority of cases the trouble and expense of identifying and calling the latter as witnesses to testify to their lack of recollection or proving that they are not identifiable or otherwise unavailable, would not be justified by the likely value of their testimony. It may be instructive to consider how this problem has been tackled in the legislation of other Common Law jurisdictions.

In England the admissibility of records is now governed by the Criminal Evidence Act 1965 and the Civil Evidence Act 1968.¹¹⁶ Both stipulate that the record must have been compiled from information supplied either directly or indirectly by persons who had or may reasonably be supposed to have had personal knowledge of the matters dealt with in that information. In criminal cases, admissibility is conditional upon the unavailability

¹¹⁶ The similar legislation in Northern Ireland, the Criminal Evidence Act (Northern Ireland) 1965 and the Civil Evidence Act (Northern Ireland) 1971 is set out in Appendix 2 to this Working Paper.

of the person who supplied the information or its not being reasonable to expect him to have any recollection of the matters dealt with in the information.¹¹⁷

In civil cases, the scheme of the legislation is more complex. Section 4(1) of the Civil Evidence Act 1968 provides:

"Without prejudice to section 5 of this Act, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty."¹¹⁸

¹¹⁷ The Criminal Evidence Act 1965, section 1(1), provides:

"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."

¹¹⁸ See the almost identical Section 1(1) of the Civil Evidence Act (Northern Ireland) 1971, p. 235 infra.

Under the rules of court, notice must be given to the other side before a statement contained in a record may be received in evidence.¹¹⁹ The other party may, by counter-notice, require the attendance of the person compiling the record, the person who originally supplied the information and any other person through whom that information was supplied to the compiler of the record.¹²⁰ If the persons whose attendance is requested are dead, unavailable or cannot reasonably be expected to have any recollection of matters relevant to the accuracy of the statement in question it is admissible. If they attend as requested, the statement is admissible but, in the case of the person who originally supplied the information from which the record containing the statement was compiled, the statement cannot be given in evidence without the leave of the court and then generally only after the person who supplied the information has testified.¹²¹ Even in cases where notice has not been given, or a person whose attendance is requested being available, fails to testify, the court has a residual discretion to admit the statement if it thinks it just to do so.¹²² Apart from these statutory provisions, in both criminal and civil cases, if the person who supplied the information testifies, he may, if he checked the record at the time, refresh his memory by reference to it so, in effect, bringing its contents before the court.

¹¹⁹ Rules of the Supreme Court, Ord. 38, r. 23.

¹²⁰ Ibid. Ord. 38, rr. 23, 26(1).

¹²¹ Civil Evidence Act 1968, section 4(2).

¹²² Rules of the Supreme Court, Ord. 38, r. 29.

The Civil Evidence Act 1968 also makes separate provision for statements produced by a computer which is defined as "any device for storing and processing information". The only conditions attached to the admissibility of such a statement to be found in the Act itself are that the computer is in regular use in the business for the receipt of information of the kind supplied and has been operating properly.¹²³ However, by virtue of rules of court, the other party may by counter-notice require the party tendering the computer statement in evidence to call as witnesses any persons who occupied a responsible position either in relation to the management of the activities for which the computer was used, the supply of information to the computer or the operation

¹²³ The Civil Evidence Act 1968 section 5(1) and (2) provide:

- (1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.
- (2) The said conditions are -
 - (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;
 - (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
 - (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
 - (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

of the computer.¹²⁴ If the persons whose attendance is requested testify or are dead, unavailable or cannot reasonably be expected to have any recollection of matters relevant to the accuracy of the statement in question, the statement is admissible. As with other hearsay evidence, even where notice has not been given or where a person whose attendance is requested, being available, fails to testify, the court has a residual discretion to admit a statement if it thinks it just to do so.

One consequence of the English provisions relating to statements produced by computers is that such a statement may be given in evidence without calling as a witness the person who supplied the information although he is available and has a recollection of the subject-matter of the information. It was this preferential treatment over records produced other than by computer that caused disquiet to the New South Wales Law Reform Commission, whose Report on Evidence (Business Records) published in July 1973 is the most thorough official study yet published on the law relating to business records. Having referred to the English Civil Evidence Act 1968 and to similar legislation in Victoria and in the Australian Capital Territory the Commission goes on:

"We thought initially that we might recommend the adoption of a like provision in this State, but, we are now satisfied that this is not the best course to follow. It would have the effect of making a document admissible if it was produced by a computer, but inadmissible if it was produced by other reliable means. There is, we think, no justification for that result. We were led, therefore, to consider the admissibility of statements in business records, whether the records are kept or produced by computers or by other reliable means." (Para. 4)

¹²⁴ Rules of the Supreme Court, Ord. 38, r. 24.

They recommended that statements in such records should be admissible in civil proceedings notwithstanding the rule against hearsay without it being obligatory to call the person who supplied the information originally or any other person involved in the making of the statement. They justified their position thus:

"We think that experience indicates that in nearly all cases in which a fact can be proved either by the testimony of a witness who is available, and by a statement in a business record, and the fact is of any importance in the proceedings, the witness will be called if it is practicable to do so. He will be called either because oral testimony will carry the most conviction in the mind of the tribunal of fact, or to avoid damaging comment on the failure to call a relevant witness, or to avoid any risk that the statement may be rejected or excluded.... Sometimes, of course, a party might for tactical reasons decide not to call an available witness but seek to tender in evidence and rely on a statement in a business record. In order to prove that the statement was admissible, it would, under the legislation we propose, be necessary to lead evidence to prove that the conditions of admissibility have been fulfilled.¹²⁵ In the light of that evidence, and of cross-examination, it is highly unlikely that such a manoeuvre would not become evident to the court with a resulting adverse effect on the case of the party concerned, which would more than balance any benefit sought to be achieved. However, there may be circumstances of this or some other kind in which it would be unfair to admit a statement. Accordingly, we recommend that a court have power, in the exercise of a discretion, to reject

¹²⁵ Roughly speaking these conditions were that the statement was made or derived from statements made in the course of or for the purpose of the business or by a person engaged in the business who had personal knowledge of the fact or was an expert qualified to express an opinion or reproduced or derived from information supplied by recording or measuring machines.

a statement otherwise admissible. This safeguard should, we think, make a party hesitate not to call available oral evidence but rely solely on a business record when such oral evidence would be, or might be thought to be, likely to assist the court." (Paras. 52, 53)

It is submitted that the Commission may have been over-sanguine in their view of the efficacy of cross-examination to ensureing that a party will always call the person (or persons) who supplied information on which a record is based, whenever that person has any relevant contribution to make. If it is accepted as desirable that a witness with personal knowledge of a disputed fact should testify, if available, the most effective way to achieve this is not to admit statements in business records unless those who supplied the information testify to those facts from their personal knowledge or recollection if they are in a position to do so. The New South Wales Law Reform Commission itself was not prepared to make business records admissible in criminal proceedings unless:

- (1) each of the persons who supplied the information is called as a witness;
- (2) no opposing party requires him to be called;
- (3) he is not available or cannot be expected to have recollection of the matters in question; or
- (4) it appears to the court that undue delay or expense would be caused by requiring him to be called.

This more rigorous standard of admissibility in criminal cases was justified by reference to certain special features of criminal proceedings, viz. the standard of proof beyond reasonable doubt required, the basically oral nature

of proceedings, the absence of interlocutory procedures, the difficulty of granting adjournments in trials with a jury, the fact that some prosecutions are conducted privately and the substantial number of prosecutions in Petty Sessions in which the accused is not represented.¹²⁶

It is considered that it is equally desirable that the best possible evidence should be available in civil proceedings. Indeed, it is submitted that the New South Wales Law Reform Commission's proposal for criminal cases (which was duly enacted into the Evidence Act 1898 by the Evidence (Amendment) Act 1976) may even be too lax in admitting records without the person supplying information being called, merely because undue delay and expense would be caused by calling him. If there is a witness involved in the making of the record who had personal knowledge and has a recollection of the facts therein it is clearly appropriate that he should testify. But if there is no such witness, then it should be permissible to give in evidence a statement in a record provided that testimony is offered supporting its reliability. It is considered that such testimony should be made available in advance to the other side so that they can make their own investigations. And provision might also be made along the lines of section 30(9) of the Canada Evidence Act which provides:-

¹²⁶ New South Wales Law Reform Commission, Report on Evidence (Business Records) (1973) paras. 30, 57.

"... any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with the leave of the court, be examined or cross-examined thereon by any party to the legal proceedings".¹²⁷

It is considered, therefore, that an out-of-court statement contained in a business or administrative record should be admissible not only where the persons who supplied the information testify or are unavailable but also where they have not any recollection of the facts supplied or recorded. It should be permissible to establish such lack of recollection by evidence on affidavit or to infer it from the circumstances of the case. In cases where a record is derived from information supplied from several sources, the unavailability or lack of recollection of some of those contributing to the record may make it futile to attempt to establish the truth of its contents by direct oral testimony. Then the record should be admissible without requiring such testimony. Where a fact is sought to be proved by reference to a statement contained in a record or produced from a record ordinary principles of proof would seem to require that evidence should be tendered supporting the reliability of the system of compiling the record in question. It is

¹²⁷ See also Rule 803(6) of the Federal Rules of Evidence (1978) in the United States of America. Section 5(4) of the English Civil Evidence Act 1968, which makes provision for the admission of statements produced by computer requires that a person occupying a responsible position in relation to the relevant activities must tender evidence by certificate as to the efficiency of the computer system and, under the Rules of Court, must be made available for cross-examination at the request of the opposing party.

considered that there should be provision requiring such evidence of reliability to be made available in advance of the trial to the other side so that they can make appropriate investigations.

In their Report on Evidence published in July 1972, the English Criminal Law Revision Committee suggested that, unlike other out-of-court statements, advance notice should not be required of statements in records tendered in evidence:-

"The purpose of the requirement to give notice is to enable the other party to check, so far as possible, the reliability of the statement and the reasons why it is claimed that the maker cannot be called as a witness. But in order that a statement contained in a record should be admissible it will be necessary, as mentioned above, that the record should have been compiled by a person acting under a duty or otherwise in a responsible position as mentioned, and this fact seems to us to make the likelihood that the statement is reliable great enough to justify dispensing with the requirement to give notice of intention to give the statement in evidence." (Para. 258)

The Committee might also have relied on the fact that under various statutory provisions, statements in records, such as birth, marriage and death registers and in bankers' books may be tendered in evidence at present without having to give notice. Despite this, it is considered that the Committee's recommendation should not be followed. Business records, however defined, are not of such universal reliability that the other party should be denied the opportunity of investigating them in advance of the trial. In civil cases in England, advance notice is generally required of statements in records sought to be given in evidence under the Civil Evidence Act 1968. The Canada Evidence Act, section 30(7) provides that "unless the court orders otherwise, no record or affidavit shall be received in evidence under this section unless the party producing the record or affidavit has, at least seven days before its

production, given notice of his intention to produce it to each other party to the legal proceedings and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by such party".¹²⁸ The New South Wales Evidence (Amendment) Act 1976, section 14 CU, provides for the giving of notice before business records are tendered in evidence. Commenting on this matter, the New South Wales Law Reform Commission Report on Evidence (Business Records) (1973), upon whose recommendations the legislation was based, remarked:-

".... notice should not be required in types of cases where it is usual to rely on business records. In the lower courts it may be better to leave any question of prejudice arising from the tender of business records to be dealt with by adjournment rather than to require notice to be given in all cases."
(Appendix B, paragraph 90)

It is considered that the requirement of notice is of particular importance in the case of records, as an opposing party should be given an adequate opportunity to investigate the reliability of the system on which the court is asked to rely. Notice should also be given of the evidence to be tendered in support of the reliability of a system of records so that this too may be investigated. It is considered that any discretion to waive notice should be exercised only in cases where the other party is not prejudiced by the lack of notice and where it is not the fault of the party tendering the record. As in the case of out-of-court statements generally, such a discretion, exercisable within clearly defined limits, would not open the way to a general disregard for the indispensable requirement of notice.

¹²⁸ However no notice is required in the draft Evidence Code proposed in the Law Reform Commission of Canada's Report on Evidence (1975).

There is an increasing tendency for statements in business records to be based wholly or partly on information collected and supplied by automatic measuring and recording devices. In New South Wales, the Evidence Act, section 14CE makes statements admissible which reproduce or are derived from "information from one or more devices designed for, and used for the purposes of the business in or for recording, measuring, counting or identifying information, not being information based on information supplied by any person". It is doubtful if such a provision is necessary to make the evidence in question admissible. If a mechanical device records information without the intervention of any person, the resulting statement is not excluded by the rule against hearsay, not being derived from a statement made by a person not testifying. It would be admissible on the same basis as tape-recordings and cinematograph film strips have been held admissible in decided cases.¹²⁹ However, it is considered that evidence of this kind should be available to the other party in advance of trial so that they may have adequate opportunity for examination and inspection. This can be achieved by making its admissibility subject to the same requirement of notice as out-of-court statements. As in the case of other records, evidence supporting its reliability should be made available to the other party in advance of the trial.

It will be necessary to enact consequential provisions to facilitate the reception of evidence of records not kept in words or figures, by allowing an explanation to be tendered in evidence. This has been done in New South Wales by section 14CN(1)(c) of their Evidence Act which provides:-

¹²⁹ See The Statue of Liberty [1968] 2 All E.R. 195; R. v. Senat, R. v. Sin (1968) 52 Cr. App. Rep. 282.

"A statement in a record of information made by the use of a computer may be proved by the production of a document produced by the use of a computer containing the statement in a form which can be understood by sight."

Section 39(5) of the draft Evidence Act proposed in the Ontario Law Reform Commission Report on the Law of Evidence (1976) goes further in providing for explanations of computer records produced by human agency rather than the use of a computer. It provides:

"Where production of a record or of a copy of a record described in subsection 2 or 3 would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make an explanation, accompanied by an affidavit of that person setting forth his qualifications to make an explanation, and attesting to the accuracy of the explanation is admissible in evidence under this section as if it were the original record."

Finally, for the removal of uncertainty it would be advisable to provide for the situation where it is sought to prove that an event did not happen with reference to records covering all events of a given description.

Accordingly it is considered that if the arguments put forward in previous chapters in favour of the admissibility of out-of-court statements are accepted, the following special provisions should be enacted in respect of statements contained in or produced by business or administrative records.

- (1) An out-of-court statement contained in a business or administrative record should be admissible as evidence of any fact therein, provided the court is satisfied that there is no person who was concerned in making the record who has any recollection of the facts stated therein.

- (2) Whenever a fact is sought to be proved by reference to a statement contained in a business or administrative record, or produced from such a record, whether or not such information was collected or processed by any mechanical device, evidence must be given by a responsible person as to the reliability of the system of compiling those records and notice of such evidence given to the other party.
- (3) Where a statement in a business or administrative record, or produced from such a record, is not in a form comprehensible to a layman, an explanation by a qualified person should be admissible.
- (4) The absence of a record should be evidence that an event did not happen where in the course of business a system has been followed to make or keep a record of the happening of all events of a given description.

If, on the other hand, it is decided to retain the rule excluding out-of-court statements as evidence of the facts stated either generally or for criminal cases, it would be illogical not to limit admissible records to those possessed of some guarantee of trustworthiness comparable to direct oral evidence or admissible hearsay. However, the generally recognised common law exceptions are not wide enough to cover some records of undoubted trustworthiness. Most of the major common law jurisdictions have made some statutory provision to extend their scope by making reliable records admissible.

The justification for making such records admissible is that the obligations of employment or the exigencies of business make it likely that records will be kept accurately and

impose a sanction comparable to an oath and cross-examination. Statutory provisions have generally made it a prerequisite of admissibility that the record should be made in the course of business which is defined to include public administration and other undertakings not carried on for profit. In England the Civil Evidence Act 1968 stipulated that the record should be compiled by a person acting under a duty which was defined to include a person "acting in the course of any trade, business, profession or other occupation in which he is engaged for the purposes of any paid or unpaid office held by him".¹³⁰ This is apt to cover records kept by a person on his own account pursuant to trade and professional practice as well as those kept pursuant to a contractual duty. In some jurisdictions it is necessary that it should be the regular practice in that business activity to make such a record.¹³¹ However, this might exclude a reliable record simply because it is not part of a series of records. What is necessary is that the particular record should be made by a person under the restraint of some duty to record accurately. For this reason it is considered that it would be inappropriate to follow the New South Wales example¹³² of admitting any statement made in the course of business provided it finds its way into the records of the business; there should be a consciousness of an obligation to record accurately, if a statement is to be treated on the same footing as sworn testimony.

¹³⁰ Civil Evidence Act 1968, section 4.

¹³¹ See, for example, The Evidence Act (Ontario), section 36; The United States Federal Rules of Evidence (1978), Rule 803(6).

¹³² Evidence Act, section 14CE (added by Evidence (Amendment) Act 1976 section 4).

The next question is what personal knowledge of the facts asserted should be required of the maker of a record if statements in it are to be admissible. Clearly the most acceptable situation is where the person making the record also has personal knowledge of the facts recorded. Under legislation in several common law countries, records are admissible where they are made from information supplied by persons who have personal knowledge of the matters dealt with in the information.¹³³ This would make admissible a record based on information supplied by persons who are under no duty to be accurate and are not therefore subject to any sanction to tell the truth comparable to that imposed by the oath. The New South Wales Evidence (Amendment) Act 1976 only admits records based on information supplied by those involved in the business keeping the records. Thus a hospital record based on information within the personal knowledge of a doctor or nurse would be admissible but not the "history" given by a patient. While involvement in the business might be expected to provide a sanction against inaccuracy it would perhaps be more appropriate to require that information should have been supplied pursuant to a duty by a person with personal knowledge either directly or via persons under a duty to relay the information.

In Ares v. Venner,^{133A} the Canadian case where the exceptions to the rule against hearsay were extended to include hospital records, it was stated that the records should be made contemporaneously and under a duty by someone having

¹³³ The United States Federal Rules of Evidence (1978), Rule 803(6); Criminal Justice Act 1965 (England), section 1(1); Criminal Evidence Act (Northern Ireland) 1965, section 1(1); Civil Evidence Act 1968 (England), section 4.

^{133A} [1970] S.C.R. 608 quoted supra p. 80.

personal knowledge. It is considered that contemporaneity should go only to weight. Just as direct evidence is admissible although given long after an event, so an entry in a record should be admissible although not made contemporaneously. A further argument has been advanced by the Ontario Law Reform Commission:

"In some businesses, permanent records are made a considerable time after temporary records are made, at which time the latter are destroyed. I/t may be difficult for the permanent records to satisfy the requirements of contemporaneity despite the fact that they may be as fully trustworthy as the temporary records made immediately after the event."¹³⁴

If the admissibility of records is confined to those compiled under a duty from information supplied pursuant to a duty, either directly or indirectly, by persons with personal knowledge, certain consequential provisions will be required. The admissibility of a statement from any system of records or produced by means of a mechanical device should be conditional on evidence being given in support of their reliability by a responsible person. Provision should be made for the reception of statements derived by mechanical or logical processes from admissible statements and explanations of statements made otherwise than in words or figures. The absence of a record should, in appropriate cases, be evidence that an event not recorded did not happen. Admissible expert evidence should be treated on the same basis as a statement made by a person from personal knowledge. Despite the higher threshold of admissibility, advance notice should be given not only of statements in records tendered in evidence but

¹³⁴ Report on the Law of Evidence (1976), p. 185.

also of the evidence proposed to be tendered in support of the reliability of the system of records itself. If it is stipulated generally that the person who supplied information must be called as a witness if he is available, an exception should be made in the case of records derived from information supplied by several persons provided that their lack of recollection of the information is proved by affidavit.

CHAPTER 5 INCOMPETENT AND NON-COMPELLABLE WITNESSES

Special problems arise in respect of the out-of-court statements of witnesses who do not testify because they are not competent, or who, not being compellable, decline to give evidence. These fall into five categories; (1) children, (2) persons of defective intellect, (3) diplomats, (4) accused persons, (5) spouses of accused persons. Whether the out-of-court statement of an incompetent or non-compellable witness would now be admissible if it came within one of the exceptions to the rule against hearsay is uncertain. There is ancient authority in England that "what the wife said immediate upon the hurt received and before she had time to devise or contrive anything to her own advantage" might be given in evidence, although she would have been incompetent as a witness.¹³⁵ Similarly it was held that an out-of-court statement admissible as a declaration against interest was not excluded because the maker of the statement would have been incompetent as a witness.¹³⁶ On the other hand, otherwise admissible dying declarations have been disallowed because the declarant would have been incompetent.¹³⁷

A. Children

The general common law rule is that no child is competent to give evidence unless he understands the nature and consequences of an oath.^{137A} In criminal cases, by virtue of

¹³⁵ Thompson v. Trevanion (1693) Skin. 402.

¹³⁶ Gleadow v. Atkin (1833) 1 Cr. & M. 410.

¹³⁷ R. v. Drummond (1784) 1 Leech 338; R. v. Pike (1829) 3 C. & P. 598.

^{137A} See R. v. Hayes [1977] 2 All E.R. 288 where a more secular test was adopted.

section 28(2) of the Criminal Justice Administration Act 1914, a child of tender years may give unsworn evidence provided that he is possessed of sufficient intelligence to justify the reception of the evidence and he understands the duty of speaking the truth. Under the present law, an out-of-court statement of a child, like that of any other person, is generally inadmissible as evidence of the facts asserted. Thus in Sparks v. R. [1964] A.C. 964, a case of indecent assault on a four-year-old child, which was appealed to the Privy Council, it was held that the court had rightly rejected evidence by the mother on behalf of the accused, who was white, of a statement made to her by the child, who did not testify, that the assault had been committed by a coloured boy.¹³⁸

There is no provision in Irish law similar to sections 42 and 43 of the Children and Young Persons Act 1933 in the United Kingdom which allow the deposition of a child or young person to be taken out of court for use at a trial for certain offences where the child's attendance in court would be likely to cause serious danger to his life or health. However, such a deposition could be admitted under the Criminal Procedure Act 1967, sections 14 and 15 of which provide for the taking of depositions before a district justice whenever a prospective witness may be unable to attend to give evidence at the trial.

It is impossible to consider the admissibility of the out-of-court statements of children apart from the more general question of their competence to testify, as it would be

¹³⁸ See also R. v. Cuffe (1904) 4 New Ir. Jur. Rep. 144; The People v. Dominic Casey [1961] I.R. 264 at 274.

somewhat illogical to admit the out-of-court statement of a person who is not considered reliable enough to give sworn or unsworn evidence in court.^{138A} Yet, even if a child does not understand the nature of an oath nor the duty or importance of telling the truth, what he says, especially in the immediate aftermath of an event, may be worthy of account or even convincing. In a case such as Sparks v. R. it may give rise to such legitimate doubts as to make conviction inappropriate. In England, the Criminal Law Revision Committee was sufficiently impressed by these considerations to recommend that the out-of-court statement of a child who is incompetent to testify should "be admissible as evidence of any fact stated therein if (a) it directly concerns an event in issue in those proceedings which took place in the presence, sight or hearing of that person; and (b) it was made by him as an immediate reaction to that event".¹³⁹ However, this proposal would allow in the statement of an incompetent child without any opportunity being afforded to the court to examine the child at first hand, which must surely be objectionable.

It is considered that the only satisfactory solution is to make the testimony of children generally admissible. Also consideration might be given to extending the application of section 28 of the Criminal Justice Administration Act 1914 so as to enable a child to give unsworn testimony in

^{138A} "The matter is as clear as daylight. How can the secondary evidence of her evidence be good if her own testimony be deemed unfit for credence." per Dodd J. in R. v. Burke (1912) 47 I.L.T.R. 111.

¹³⁹ Criminal Law Revision Committee, Eleventh Report; Evidence (General): Draft Criminal Evidence Bill, clause 37. Under the Civil Evidence Act 1968, which governs admissibility in civil cases in England, a statement of an incompetent child would appear not to be admissible.

civil cases if he does not understand the nature and consequences of an oath. Provision might also be made for the taking of evidence from children out of court. It might be appropriate to vest in the judge a discretion to carry out any questioning himself and to exclude the evidence of a child altogether where he considers it to be of insufficient probative value.

If the law relating to the admissibility of the evidence of children were amended in this way there would be less need to make any special provision for their out-of-court statements, as a child could be called to give evidence in the appropriate manner. If the child is unavailable because, for example, he is dead, his out-of-court statement would be admissible but it would normally be of little probative value and so liable to exclusion at the discretion of the judge.

Pending a review of the law governing the competence of children to testify it is considered that an out-of-court statement of a child who is not competent to give sworn or unsworn evidence should be inadmissible except, perhaps, for the accused in criminal cases.

B. Persons of Defective Intellect

Persons of defective intellect are incompetent as witnesses if they do not understand the nature of an oath. Yet it is possible to envisage circumstances in which an out-of-court statement of such a person might be of some probative value. Where a person has become mentally ill after making a statement, the reason for his incompetence is not a logical reason for excluding the statement, although it may cast grave suspicion on its value.

As in the case of children, it is impossible to consider the admissibility of the out-of-court statements of persons of defective intellect apart from the more general question of their competence to testify. It is considered that provision should be made for the reception of unsworn testimony and for the examination without oath of such persons. Out-of-court statements could then be admissible in accordance with the usual principles - a witness who was suffering from mental illness making his testimony unprocurable being treated as unavailable. Expert testimony supporting the credibility of a person of defective intellect or disturbed mind should be admissible as well as similar testimony impugning credibility which is already admissible for all witnesses.¹⁴⁰ This would be particularly important for out-of-court statements where the credibility of the maker at another time would be crucial.

Pending review of the law relating to the competence of persons of defective intellect and disturbed mind to testify, it is considered that the out-of-court statement of a person who is incompetent on these grounds should not be admissible except, perhaps, for the accused in criminal cases, unless there is evidence that the maker of the statement would have been competent to testify when he made the statement.

¹⁴⁰ Toohy v. Metropolitan Police Commissioner [1965] A.C. 595.

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C. Diplomats

According to Article 31.2 of the Vienna Convention on Diplomatic Relations which has been given the force of law in the State by section 5 of the Diplomatic Relations and Immunities Act 1967, a diplomatic agent is not obliged to give evidence as a witness. Other persons having diplomatic immunity enjoy a similar or lesser exemption. There are no reported cases whether, under the present law, an admissible hearsay statement of such a person may be given in evidence.

It might be questioned if diplomatic immunity is fully respected where an out-of-court statement of a diplomat is narrated in court without his consent, especially as this may sometimes act as a form of pressure to testify. However, on balance, it is considered that it would not be appropriate to grant to such persons an immunity which goes beyond what is required under international law when the effect would be to withhold logically probative evidence with possible injustice to the parties to litigation. It cannot be said that a witness is available in any real sense if, not being compellable, he refuses to testify when requested to do so.

Consequently it is considered that the out-of-court statements of diplomats who decline to testify should be admissible in the same way as those of other witnesses who refuse to be sworn.¹⁴¹

D. An Accused

Under the Criminal Justice (Evidence) Act 1924 an accused is a competent witness on his own behalf and also competent although not compellable for anyone being tried jointly with him. But the common law rule that he is not competent to give evidence for the prosecution remains intact; the effect of this rule in joint trials is that one co-accused cannot be called by the prosecution to give evidence against another.¹⁴²

¹⁴¹ The New South Wales Law Reform Commission in their Report on the Rule against Hearsay (1978) at p. 84-5 recommended that an out-of-court statement of a competent non-compellable witness who refuses to be sworn should be admissible in civil cases. The English Criminal Law Revision Committee made a similar recommendation for criminal cases. But in none of these reports was the position of diplomats considered specifically. (Eleventh Report: Evidence (General) (1975) p. 237) The Criminal Law and Penal Methods Reform Committee of South Australia, reporting in 1975, opposed the admission of hearsay statements made by persons who, though competent or even compellable, decline to testify. They argued that a party against whom evidence is tendered should have the right to cross-examine the source of that evidence if he is available. (3rd Report on Court Procedure and Evidence (1975), Chapter 8, para. 3.3)

¹⁴² See further Attorney-General v. Ingham and Ors (1947) 82 I.L.T.R. 79; Attorney-General (Supt. Ryan) v. Egan (1948) 83 I.L.T.R. 127; Hedley v. Sparrow [1964] N.I. 7.

Out-of-court confessions or admissions made by an accused may be proved against him under an exception to the rule against hearsay, irrespective of whether he gives evidence, and are sufficient to sustain a conviction.¹⁴³ But such a statement is not evidence against a co-accused and, in the case of a jury trial, the jury must be instructed that it is only evidence against the person making it.¹⁴⁴

Professor Sir Rupert Cross characterised an instruction along these lines as gibberish, which might involve the surprising assertion at a trial of a brother and sister for incest that the brother's out-of-court admission of intercourse is enough to justify his conviction, although it is not even evidence against the sister that she had intercourse with him.¹⁴⁵ The English Criminal Law Revision Committee, of which Professor Cross was a member,

¹⁴³ R. v. Sullivan (1887) 16 Cox C.C. 347

¹⁴⁴ The fact that a statement of one accused intended to be given in evidence incriminates another is a ground upon which a judge may be asked to exercise his discretion to grant a separate trial. (The People (Attorney General) v. Sykes [1958] I.R. 355 at 363).

¹⁴⁵ "The Evidence Report: Sense or Nonsense" [1973] Crim. L.R. p. 329 at p. 334.

recommended that any statement made out-of-court by one co-accused about the part played by another co-accused in the events in question should be admissible in evidence for the prosecution, irrespective of whether the maker of the statement gives evidence. Apart from the desirability of having all relevant evidence before the court they advanced two arguments in favour of their proposal:

"First, if the maker of the statement in question should have died or become unavailable ..., the statement would be admissible in any event. Second, to make the statement admissible (and so evidence of what is said in it) gets rid of the absurd situation which occurs under the present law that, when A has made a statement implicating himself and B, it is necessary to direct the jury that the statement is admissible in evidence against A but not against B. This is a subtlety which must be confusing to juries, and in reality they will inevitably take the statement into account against both accused." 146

It is always difficult to justify the exclusion of logically probative evidence but a statement of one co-accused implicating another has a peculiarly unreliable quality because of the natural inclination of an accused person to shift the blame from himself. There is serious objection to the admission of such a statement without affording the party whom it implicates an opportunity to cross-examine the maker.

146 Eleventh Report: Evidence (General) para. 251

But such an opportunity for cross-examination could only be achieved in a joint trial by making the co-accused who made the statement a compellable witness which would involve a radical transformation of our criminal procedures. Under our present system, where an accused is not compellable, the prosecution retains the option of having separate trials in which case a potential co-accused becomes a compellable witness. If the prosecution opts for a joint trial, it ill becomes them to complain of the disadvantages entailed by their choice.

While dissenting from the solution suggested by the English Criminal Law Revision Committee, it is considered that their criticism of the present law as involving an unobservable subtlety is justified. It may well be true that juries inevitably disregard it and take the statements of one co-accused into account against another. This led the United States Supreme Court to hold that a confession implicating a co-accused cannot be proved at a joint trial, however emphatically the judge directs the jury that the statement is only evidence against its maker.¹⁴⁷ It is considered that this rule should be adopted, at least in cases where the person making the confession does not testify.

¹⁴⁷ Bruton v. U.S. 391 U.S. 123 (1968).

Cases where a conspiracy is alleged against the accused merit special consideration. The declarations of any conspirator in furtherance of the common design are admissible in evidence against any other conspirator when the charge is one of a crime committed in pursuance of a conspiracy whether the indictment contains a count of conspiracy or not. It makes no difference to the admissibility of the declaration whether the declarant is indicted or not. (R. v. Meany, 10 Cox C.C. 506; R. v. McCafferty, 10 Cox C.C. 603) But before such a declaration is admitted there must be other evidence giving rise to a real possibility that an agreement exists. What one alleged conspirator "may have said, not in furtherance of the plot, but as a mere relation of some past transaction or as to the share which some of the others have had in the execution of the common design, cannot it is conceived, be admitted in evidence to affect other persons".¹⁴⁸

It is considered that the existing law relating to the statements of conspirators should be maintained. It may work injustice in cases where a number of substantive charges are tried jointly with a conspiracy charge "where juries are unable to grasp the subtleties of the situation when they are charged that evidence inadmissible against the accused on the substantive count may be admissible against him on the conspiracy count once he is shown to be a conspirator".^{148A} But the remedy for this is to ensure that the conspiracy count is tried separately to the substantive counts.

At present, as has been noted, one accused cannot compel a co-accused to give evidence. On the other hand, he may presumably rely on an out-of-court statement admissible under one of the existing exceptions to the hearsay rule such as a confession or admission.

¹⁴⁸ Phillips on Evidence (1820) cited with approval in Archbold, Pleading, Evidence and Practice in Criminal Cases, Para. 1399 (38th ed. 1973).

^{148A} R. v. Griffiths [1965] 2 All E.R. 448 at 450.

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If out-of-court statements of unavailable witnesses are made generally admissible, it is considered that one accused should be entitled to rely on an out-of-court statement of a co-accused, whether or not that co-accused gives evidence. This difference of treatment as between the prosecution and defence may be justified on the grounds that (1) it is intolerable that any evidence exculpating an accused should be excluded and (2) the choice of a joint trial does not rest with the accused who seeks to tender his co-accused's out-of-court statement in evidence.¹⁴⁹

It has been noted that the prosecution may prove an out-of-court statement of an accused as a confession or admission. In that case the whole statement, even those parts favouring the case of the accused, is admissible. Moreover, it has been held in England that any statement made by the accused at the time he is charged is admissible,¹⁵⁰ and this has been applied by the

¹⁴⁹ The New South Wales Law Reform Commission in their Report on the Rule against Hearsay (1978) at pp. 127-9, suggested that an out-of-court statement of an accused person should not be admissible in relation to any co-accused unless that other co-accused tenders the statement or consents to its tender in relation to him. No special provision was made for charges of conspiracy.

¹⁵⁰ R. v. Storey (1968) 52 Cr. App. Rep. 334

Supreme Court of Canada to a statement made when stolen goods were recovered.¹⁵¹ If, as is suggested, the out-of-court statements of witnesses are made generally admissible, any such statement made by an accused who testifies should be admitted. However, in cases where an accused declines to advance his story in sworn testimony, it is considered that his out-of-court statements should not be admissible. While this may involve a more restrictive rule than exists under the present law, it may be justified as discouraging accused persons from withholding their testimony.¹⁵² Accordingly, as long as an accused remains a non-compellable witness it is considered:-

- (1) that an out-of-court statement of an accused should be admissible for the prosecution against the accused.
- (2) that an out-of-court statement of an accused should be admissible for himself provided that he testifies.
- (3) that an out-of-court statement of one accused implicating a co-accused should not be admissible for the prosecution unless the accused who made the statement testifies.

¹⁵¹ R. v. Graham [1974] S.C.R. 206; Cross on Evidence, p. 218 (4th ed. 1974).

¹⁵² See New South Wales Law Reform Commission, Report on the Rule against Hearsay (1978) pp. 109-110 for a similar recommendation.

- (4) that notwithstanding (iii) an out-of-court statement of one conspirator should be admissible for the prosecution against all the other conspirators as heretofore.

If the out-of-court statements of unavailable witnesses are made admissible, an out-of-court statement of one accused should be admissible for a co-accused whether or not the accused who made the statement testifies.

E. The Spouse of an Accused

The treatment of the out-of-court statement of the spouse of the accused is a more complex matter. The root of the difficulty lies in the rules governing the competence and compellability of spouses as witnesses. The same rules apply to husbands as to wives but, for ease of exposition, it is proposed to assume the case of the wife as witness and the husband as party to the case.

In civil proceedings the wife is competent and compellable as a witness on behalf of her husband or of any other party to the action. In criminal proceedings the general rule is that the wife of an accused is not competent to testify for the prosecution and is competent but not compellable on behalf of her accused husband. In a joint trial, a wife cannot testify for the prosecution even when her evidence only inculcates those co-accused with her husband; the wife of one accused is, however, competent, but not compellable, to testify on behalf of a co-accused provided that her accused husband consents.

In cases of personal violence against a wife, the common law made the wife competent to testify for the prosecution. In some common law jurisdictions, including England, it was believed that the wife was also compellable in such cases but the House of Lords has recently held otherwise in Hoskyn v. Commissioner of Police for the Metropolis [1978] 2 All E.R. 136. There is no reported decision on the question in Ireland. The former assumption that in cases of personal violence a wife was also compellable for her accused husband or for a co-accused without the husband's consent must now also be considered doubtful. In the case of offences under certain enactments, most of which are offences against the property of the wife and cruelty to children,¹⁵³ the wife is competent, though not compellable, for the prosecution

¹⁵³ These enactments which are set out in the Schedule to the Criminal Justice (Evidence) Act 1924 are (i) the Vagrancy (Ireland) Act 1847, section 2, (ii) the Offences against the Person Act 1861, sections 48, 52, 54, 55. (iii) the Married Women's Property Act 1882, sections 12, 16 (now repealed) and (iv) the Prevention of Cruelty to Children Act 1904. Subsequently the Public Assistance Act 1939, section 83, was added. Despite the terms of the Act, the list in the Schedule is not exhaustive. In MacGonagle v. MacGonagle [1951] I.R. 123 it was held by the Supreme Court that the wife of an accused was competent to give evidence for the prosecution by virtue of section 133 (28) of the Children Act 1908, which made a spouse competent for offences under Part II of that Act or for any of the offences listed in the First Schedule to the Act. The offences listed are any offence under Sections 27, 55 or 56 of the Offences against the Person Act 1861; any offence against a child or young person under sections 5, 42, 43, 52 or 62 of that Act or under the Criminal Law Amendment Act 1885; any offence under the Dangerous Performances Acts 1879 and 1897 and any other offence involving bodily injury to a child or young person. Section 9 of the Married Women's Status Act 1957 makes a spouse competent in proceedings against the other spouse for the protection and security of his or her property. Section 28(3) of the Criminal Justice (Administration) Act 1914 making one spouse competent on a charge of bigamy against the other was not applicable to Ireland.

and also for a co-accused of her husband, without the husband's consent in either case. The common law position, by virtue of which a wife was competent but not compellable for her accused husband, remains in respect of trials for such offences.

The interaction of the rule against hearsay and its exceptions with these rules on the competence and compellability of spouses has not, as we have seen, been the subject of any recent reported decisions. It is uncertain, therefore, whether the out-of-court statement of a spouse who is not or would not, if alive, be competent or compellable may be given in evidence if it comes within one of the existing exceptions to the rule against hearsay.

These rules as to the evidence of spouses apply to matters occurring before as well as after marriage. In England they have been held to be unaffected by the judicial separation of the spouses.¹⁵⁴ According to another English case,¹⁵⁵ if the spouses have been divorced or if their marriage, being voidable, has been annulled, the former wife is

¹⁵⁴ Moss v. Moss [1963] 2 Q.B. 799:

¹⁵⁵ R. v. Algar [1954] 1 Q.B. 279

incompetent to give evidence for the prosecution about a matter which occurred during the marriage, at least if she would have been incompetent to do so had the marriage still subsisted; the position as to matters occurring before the marriage in such a case was not clarified. There are no reported cases in Ireland on the effect of separation or divorce on the competence and compellability of a spouse.

Where a wife is incompetent to give evidence for the prosecution or where she is not competent to give evidence for a co-accused without the consent of her spouse, it is logical to exclude out-of-court statements made by her subsequent to the marriage. However, the rules making a spouse incompetent have themselves been the subject of telling adverse criticism, and the Criminal Law Revision Committee in England had no hesitation about recommending that the spouse of an accused person should always be competent, though not compellable, for the prosecution or for a co-accused without the consent of the accused spouse:-

"If (the wife) is willing to give evidence we think that the law would be showing excessive concern for the preservation of marital harmony if it were to say that she must not do so. There is only one argument of any substance which we can think of against making the wife competent in all cases. This is that as we are not proposing to make her compellable for the prosecution in all cases, it would be a mistake to make her competent without being compellable. The argument is that compellability saves her from the embarrassing choice between her duty to the public to give the evidence and her loyalty to her husband. It is said that if her husband is convicted on her evidence she can answer his reproaches by saying that she could not avoid giving the evidence but we do not think that much can be made of this argument.

It may perhaps have some force in the case of a minor offence, but in the case of a serious offence it seems to us too subtle to be likely to be advanced by the wife or appreciated by her husband."¹⁵⁶

If the wife is merely non-compellable and not incompetent, the argument against the admissibility of her out-of-court statements is, as a matter of logic, less coercive. The main reason for making a wife non-compellable is to avoid placing her in a dilemma where she has to commit contempt of court or perjury if she is not to give evidence helping to have her husband convicted. No such intolerable dilemma is presented to her if some out-of-court statement she has made is proved by another. Moreover, as out-of-court statements made by an accused person may be proved against him even when he does not testify, it is not obvious why out-of-court statements made by his wife should be treated differently. The most persuasive reason for excluding the out-of-court statement of a wife is to discourage questioning designed to extract from her evidence incriminating her husband as such questioning would be inconsistent with respect for her right not to give away her husband. This is not, however, justification for excluding all out-of-court statements made by a wife. It is considered, therefore, that any exclusion of the out-of-court statements of a wife in cases where she is competent but not compellable should be confined to statements made subsequent to marriage in response to questioning by or on behalf of parties after the dispute arose. This exclusion should not extend to cases where the

¹⁵⁶ Eleventh Report: Evidence (General), para. 148.

wife testifies or where evidence is given of another of the wife's out-of-court statements inconsistent with that sought to be tendered.

If, as was generally thought prior to Hoskyn v. Commissioner of Police for the Metropolis, the wife is a compellable witness for the prosecution in cases of personal violence against her, the problem of how to treat her out-of-court statements when she refuses to testify is less likely to arise in such cases. If it does, there is no reason why they should not be admitted on the same basis as the out-of-court statements of any other compellable witness who refuses to testify. It is, therefore, relevant to note that there is formidable authority in favour of such compellability both in decided cases in other common law jurisdictions and among reformers. In 1972 the English Criminal Law Revision Committee expressed the view "that the public interest in the punishment of violence requires that compellability should remain".¹⁵⁷ They felt that "compellability should make it easier to counter the effect of possible intimidation by her husband and to persuade her to give evidence". This Committee, in fact, went even further and suggested that the wife should be compellable in trials for offences of violence towards a child under the age of 16 belonging to the same household as the accused:

¹⁵⁷ Ibid. para. 157.

"The seriousness of some of these cases seems to us to make it right to strengthen the hand of prosecuting authorities by making the wife compellable, especially as the wife may be in fear of her husband and therefore reluctant to give evidence unless she can be compelled to do so. In the case of violence towards the children compellability seems to us even more important than in cases of violence towards the wife herself. For although violence towards children may be easier to detect than violence towards the wife, it is likely to be harder to prove it in court against the spouse responsible, especially if the child is unable to give evidence. Another reason for giving the wife no choice whether to give evidence is that she may have been a party to the violence or at least have acquiesced in it, although it is not proposed to prosecute her. For similar reasons we think that the wife should be compellable on a charge of a sexual offence against a child under 16 belonging to the accused's household. We considered an argument that this would be unnecessary because some of these offences may not be serious and it may be better for all those concerned, parent or child, that the offence should be overlooked than that it should be exposed in court and the offender punished, especially as the marriage might as a result be broken up. It has been argued that for this reason it is better to leave it to the wife to judge whether she should give the evidence. On the other hand, some sexual offences may have worse effects than all but the most serious offences of violence. On balance we concluded that it was right to draw no distinction in relation to compellability between sexual offences and offences of violence."¹⁵⁸

If a wife is made compellable to testify on behalf of a co-accused of her accused husband without the latter's consent, the problem of the admissibility of her out-of-court statements at the instance of a co-accused is also less likely to arise and, where it does, such a statement should be admitted on the same basis as an out-of-court statement of any

¹⁵⁸ Ibid. para. 150.

other compellable witness who refuses to testify. It is, therefore, relevant to note that the English Criminal Law Revision Committee, while having no hesitation in recommending that an accused should have no right to prevent his wife giving evidence for a co-accused if she wished to do so, considered that the arguments for and against making a wife compellable for a co-accused in all cases were evenly balanced:

"In favour of making her so it is argued that the interests of justice require that B should be able to compel anybody not being tried with him to give evidence on his behalf and that the fact that the witness happens to be A's wife should make no difference; even though the result might be her incriminating A. Against this it is argued that, since the prosecution cannot call Mrs. A as a witness in order that she may incriminate A, it is wrong that they should be able to compel her to incriminate him by cross-examination if she is called by B. We think that the argument against compellability is the stronger."¹⁵⁹

In the case of a wife's out-of-court statement, it should be possible to predict in advance if it would inculcate her husband. If it does not do so, there is no reason why it should be excluded. Even if it inculcates the husband it should be admissible for a co-accused, as it is for the prosecution, where it is not made in response to questioning after the dispute arose, especially as it is a serious injustice to exclude any evidence which tends to exculpate an accused person. Similarly an out-of-court statement of a wife should be admissible where she

¹⁵⁹ Ibid. para. 155

testifies or where evidence is given of another of her out-of-court statements inconsistent with it. In cases where an accused person is not allowed to give evidence of an out-of-court statement made by a wife of a co-accused, he should be entitled to a separate trial on this ground.

There can be no justification for denying to an accused husband any testimony or statement of his wife which may tell in his favour. It is not surprising that the English Criminal Law Revision Committee recommended that a wife should be compellable and not, as at present, merely competent in favour of her husband.¹⁶⁰ Similarly, if she declines to testify, being competent or even compellable, it is considered that any out-of-court statement should be admissible on behalf of the husband. While the problem of the wife declining to testify is most likely to arise in cases of estrangement it may occasionally be a contrivance to get in a wife's out-of-court statement without running the risks of cross-examination under oath. Where such contrivance is present, it would be proper that the court should be empowered to disallow the statement to be given in evidence. The possibility of such a stratagem, which would be difficult to detect, is a further argument for making a wife compellable for the defence.

The treatment of the statements of divorced and separated spouses is a matter of some difficulty. The English Criminal Law Revision Committee recommended that divorced spouses should be treated as if they had never married for the purposes of the rules regulating competence and compellability.¹⁶¹

¹⁶⁰ Ibid. para. 153.

¹⁶¹ Ibid. para. 157.

Consequently a divorced wife would be compellable to testify for the prosecution at the trial of her former husband, even as regards events occurring while they were still married. Her out-of-court statements, whenever made, would be admissible as if they had been made by any other person.¹⁶² The question is of marginal significance in Ireland as there is no domestic divorce jurisdiction, and foreign divorces may be recognised only when the parties are domiciled outside Ireland at the time of the divorce.^{162A} However this question of the compellability of spouses is resolved, it is considered that for the purpose of the admissibility of out-of-court statements a divorced spouse should be treated as if she were still married except where the statement was made before the marriage or after the divorce and relates to matters occurring either before the marriage or since the divorce.

The position where spouses are separated is more important in Ireland. The English Criminal Law Revision Committee, which found itself in difficulty in drawing a distinction between different forms of separation, ranging from judicial or legal separation to mere non co-habitation, decided to recommend that the judicial separation of spouses should not affect their competence and compellability.¹⁶³ The problem is of marginal significance in England where the existence of a divorce jurisdiction results in judicial separation being

¹⁶² To the same effect, see New South Wales Law Reform Commission Report on the Rule against Hearsay, (1978) pp. 102-104.

^{162A} Gaffney v. Gaffney [1975] I.R. 133.

¹⁶³ Eleventh Report: Evidence (General), para. 156.

comparatively rare. It is otherwise in Ireland. It is considered that a satisfactory distinction can be drawn between legal separation and other forms of separation and that legal separation should be treated on the same basis as divorce. Consequently the out-of-court statement of a legally separated spouse should be admissible on the same basis as if she were not separated except where the statement was made before the marriage or after the separation and relates to matters occurring either before the marriage or since the separation. Similar provision should be made for annulled marriages.

Whatever decisions are made on the law governing the competence and compellability of spouses, the treatment of their out-of-court statements should be logically consistent with them. Accordingly, if the arguments put forward in this Paper in favour of the admissibility of out-of-court statements are accepted, it is considered that the following provisions should be enacted in respect of statements made by the spouse of a party:

- (1) An out-of-court statement made by a spouse at a time when he or she would have been incompetent to testify in a case to which the other spouse is party should be inadmissible.
- (2) An out-of-court statement made by a spouse at a time when he or she would have been incompetent to testify without the consent of the other spouse should be inadmissible without the consent of that other spouse.

- (3) An out-of-court statement made by a spouse at a time when he or she would have been compellable to testify in a case to which the other spouse is party should be admissible when the spouse who has made the statement testifies, refuses to testify or is unavailable to testify.
- (4) (a) An out-of-court statement made by a spouse at a time when he or she would be competent but not compellable in a case to which the other spouse is party should be admissible;
- (b) No statement of the kind referred to in paragraph (a) should be admissible for the prosecution, or for a co-accused of the other spouse, where it implicates that other spouse and is made in response to questioning in contemplation of legal proceedings, unless the spouse who made the statement testifies or it is inconsistent with another out-of-court statement of the spouse tendered on behalf of the accused;
- (c) An accused person should be entitled to be tried separately where he is exculpated by an out-of-court statement excluded by paragraph (b).

If the tentative suggestions made in this chapter on competence and compellability are adopted the admissibility of an out-of-court statement of a spouse of the accused tendered on his behalf will be governed by (3) while admissibility of such a statement on behalf of the prosecution or a co-accused will be governed by (4).

It may be instructive to compare the suggestions made in this Chapter on the out-of-court statements of the spouse of an accused with the fully-worked-out recommendations of the English Criminal Law Revision Committee. By a majority, that Committee recommended that the out-of-court statement of a wife should not generally be admissible except in trials for those crimes of violence where the spouse is or, if dead, would have been a compellable witness.¹⁶⁴ It is submitted that there is no objection to the prosecution giving in evidence a statement of the spouse as long as it is not extracted by questioning. Despite the fact that they did not think that the spouse of an accused should be compellable for a co-accused, the Criminal Law Revision Committee recommended that the co-accused should be entitled to give in evidence her out-of-court statement where she refuses to testify.¹⁶⁵ Because it was felt that it is objectionable to extract from a wife a statement implicating an accused husband, it has been argued in this Chapter that no statement so extracted should be admissible. The injustice of denying to a co-accused of the husband the right to rely on relevant evidence which tells in his favour should, it is submitted, be avoided by giving the right to a separate trial in such a case. The difference between the suggestions in this chapter and the recommendations of the English Criminal Law Revision Committee would, in practice, be even less than might appear at first sight, as that Committee's draft Bill excludes any out-of-court statement made after the accused is charged or told he will be charged, unless the maker of the statement testifies, is dead or unfit

¹⁶⁴ Ibid. para. 245.

¹⁶⁵ Ibid. para. 252.

to attend court.¹⁶⁶ This would exclude most statements made by a non-testifying spouse in response to questioning.

The suggestions made in this Chapter relating to the admissibility of the out-of-court statements of various categories of incompetent and non-compellable witnesses may be summarised as follows:

- (1) An out-of-court statement made by a person at a time when he would have been incompetent to testify for the party tendering the statement should not be admissible, provided always that:
 - (a) an out-of-court statement made by a child or a person of defective intellect or disturbed mind should be admissible on behalf of the accused in a criminal case;
 - (b) an out-of-court statement of an accused should be admissible for the prosecution against a co-accused on a charge of conspiracy in cases where there is other evidence that that co-accused was party to the conspiracy;
- (2) An out-of-court statement made by a spouse at a time when he or she would have been incompetent to testify for the party tendering the statement without the consent of the other spouse should be inadmissible unless that other spouse consents;

¹⁶⁶ Ibid. Draft Criminal Evidence Bill clause 32 (1).

- (3) An out-of-court statement made by a person at a time when he would have been compellable to testify at the instance of the party tendering the statement should be admissible.
- (4) An out-of-court statement made by a person at a time when he would have been competent but not compellable to testify at the instance of the party tendering the statement should be admissible although he refuses to testify save that (a) an out-of-court statement of a party to a proceedings should not be admissible unless he testifies and (b) an out-of-court statement of a spouse of the accused should not be admissible for the prosecution or for a co-accused of the other spouse where it implicates that other spouse and is made in response to questioning in contemplation of legal proceedings, unless the spouse who made the statement testifies. An accused person should be entitled to be tried separately where he is exculpated by an out-of-court statement thus rendered inadmissible.

CHAPTER 6 EVIDENCE ADMISSIBLE UNDER EXISTING EXCEPTIONS
TO THE RULE AGAINST HEARSAY

If a General Scheme of legislation is adopted making out-of-court statements admissible whenever the person who made the statement is not available or, being available, testifies, the question arises what provision should be made for out-of-court statements in those cases where the common law already allows the reception of hearsay evidence even where the person who made the statement is available to testify and does not do so. These cases fall into six classes: (1) admissions; (2) statements which are part of the res gestae; (3) cases where reputation may be tendered as evidence of the facts reputed; (4) public documents and published works; (5) pre-trial identification; (6) statements which are admissible by virtue of specific statutory provisions.

A. Admissions

At present one party to an action may give evidence of a statement made by or on behalf of the other party which is adverse to the latter's case.¹⁶⁷ Such statements, called admissions, may be proved both in civil and criminal cases. In the latter an admission may be sufficient to sustain a conviction.¹⁶⁸ When made to a person in authority by an

¹⁶⁷ An admission by an infant was held admissible in O'Neill v. Read (1845) 7 Ir. L.R. 434: See also Alderman v. Alderman and Dunn [1958] 1 All E.R. 391.

¹⁶⁸ R. v. Sullivan (1887) 16 Cox C.C. 347.

accused person, they are called confessions and special rules regulate their admissibility which are designed to ensure that they are voluntary. These rules were considered by the Committee to Recommend Certain Safeguards for Persons in Custody and for Members of the Garda Siochana under the chairmanship of Mr Justice Barra O'Briain which reported in April 1978 and it is not proposed to re-examine its conclusions here.¹⁶⁹

An admission may take the form of silence or some other reaction in face of the statement of another.¹⁷⁰

¹⁶⁹ Dealing with the rules governing the admissibility of confessions the New South Wales Law Reform Commission concluded: "Although we are far from satisfied that the present law does work satisfactorily in practice, the view to which we have come is that the present general reference on the law of evidence does not supply an appropriate context in which to review it. It is, of course, true that the law of confessions is part of the law of evidence and part of the law relating to the admissibility of out-of-court statements which we have sought to codify as far as possible. On the other hand, the law of confessions is not a mere consequence of, or development of, general principles of the law of evidence. It has a quite separate and different history and is closely bound up with the working of the whole criminal process. We have come to the conclusion that any review of the law of confessions should be made as part of a review of that whole process, so that there can be considered together with the investigation of crimes, interrogation, arrest and the rights of persons held in custody, as well as the methods of presenting evidence in court ..." (Report on the Rule against Hearsay (1978) p. 95)

¹⁷⁰ Cleland v. McCune (1908) 42 I.L.T.R. 201; Morrissey v. Boyle [1942] I.R. 514; O'Shea v. Roche [1952] Ir. Jur. Rep. 11; The People (Attorney General) v. Quinn [1955] I.R. 57

It is on this basis that any statement made in the presence of a party is allowed to be proved although it may then be ruled inadmissible if no admission can be inferred in the circumstances. There is authority that the correct practice in such cases is to give evidence of the fact, but not the contents, of the statement in the first instance together with the answer and, only if the judge thinks an admission may be inferred, should the contents be received,¹⁷¹ but this practice is not a rule of law and is apparently often disregarded. Conduct, such as fleeing from arrest or making an offer in a civil case, may constitute an admission.¹⁷² In Sullivan v. Robinson [1954] I.R. 161 submission to a test for drunkenness was treated as a species of admission. It is not certain whether a person making an admission must have personal knowledge of the facts stated or whether a statement of opinion may be received as an admission. There is no requirement that the statement should be against interest when made so long as it is adverse to the party's case in the litigation. Once part of a statement is given in evidence as an admission, the entire statement becomes evidence including those parts favourable to the party making the admission.

There are cases where a statement made by a third person may rank as an admission as against a party to litigation. In Power v. Dublin United Tramways Co. [1926] I.R. 302, a claim by dependants under the Fatal Accidents Act 1846, it was held, by the former Supreme Court, Kennedy C.J. dissenting, that a statement made by the deceased was admissible as an admission

¹⁷¹ R. v. Norton [1910] 2 K.B. 496.

¹⁷² The following Irish cases on this point should be noted:-
Powell v. McGlynn [1902] 2 I.R. 154; Vandeleur v. Glynn [1905] 1 I.R. 483 at 506-7; Tait v. Beggs [1905] 2 I.R. 525.

as against the dependants. An admission made by a servant or agent may bind his employer or principal when it is made either (1) as part of a conversation or other communication which he was authorised to have with a third person or (2) in the ordinary course of business by an agent or servant authorised to represent the principal in that business.¹⁷³ Thus, in England, it was held by the Court of Appeal in Burr v. Ware R.D.C. [1939] 2 All E.R. 688 that a driver's admission of negligence was not admissible against his employer as he was not authorised to make a statement relative to his driving. A statement made by a servant or agent to his principal can never be admitted as an admission against the latter. As was stated by O'Connor L.J. in Swan v. Miller, Son and Torrance Ltd. [1919] 1 I.R. 151 at 183: "the notion that a principal should be bound by what his agent says to him seems to me to have no warrant whatever, either in law or sense." In cases where a statement of an agent is admissible as an admission against his principal, the fact of agency must be proved by evidence in court and it is not enough that the alleged agent or servant purported to speak on behalf of a party. Thus in Bord na gCon v. Murphy [1970] I.R. 301 it was held by the Supreme Court on a case stated from the Circuit Court that evidence could not be given of a statement made by the defendant's solicitor in a letter purporting to be written on the defendant's instructions in reply to the complainants' initial letter,

¹⁷³ Phipson on Evidence, para. 728 (12th ed. 1976). See also the following Irish cases: Components Tube Co. v. Naylor [1900] 2 I.R. 1, 73; Dwyer v. Larkin (1905) 39 I.L.T.R. 40.

as the complainants did not offer sworn testimony to establish that the documents had been written with the defendant's authority.

Apart from agents and servants, the statements of others with whom a party is in a relationship of privity may constitute admissions as against that party. In Ireland maps made by a predecessor of a landlord have been held admissible against a person claiming under a lease subsequently executed by him.¹⁷⁴ An admission by a principal that he had received money has been held admissible against a surety who was made liable on this basis when the principal absconded.¹⁷⁵ A statement made by a partner concerning partnership business may be an admission against the partnership. Corporation books are evidence by way of admission between members of the corporation.¹⁷⁶ But in Turner v. Attorney General (1847) Ir. R. 10 Eq. 386, a statement by one joint tenant asserting the existence of a trust affecting trust property was not admitted as against other joint tenants. There is authority that the contents of an affidavit used by a party in previous legal proceedings may be proved against him.¹⁷⁷ But it seems that a party must cause the affidavit to be made or knowingly use it as true. In some circumstances, a party's possession

¹⁷⁴ MacKenna v. Earl of Howth (1893) 27 I.L.T.R. 48.

¹⁷⁵ Guardians of the Poor of the Abbeyleix Union v. Sutcliffe (1890) 26 L.R. Ir. 32.

¹⁷⁶ Corporation of Waterford v. Price (1846) 9 Ir. L.R. 310.

¹⁷⁷ White v. Dowling (1845) 8 Ir. L.R. 128

of documents may give rise to an inference that the contents have been adopted by him. However, in Duke of Devonshire v. Neill and Fenton (1876-77) 2 L.R. Ir. 132 at 158 the Court of Exchequer rejected as having no solid foundation the proposition "that a person is to be deemed bound, by way of recognition or adoption of their truth, by the statements of fact contained in every document made by any person whomsoever, of his own knowledge or upon hearsay, for any purpose, known or unknown, provided only that such document be after his death found among his muniments".

In England the Civil Evidence Act 1968, section 9, preserved, unaffected by its other provisions, the "rule of law whereby in any civil proceedings an admission adverse to a party to the proceedings whether made by that party or any other person may be given in evidence against that party for the purpose of proving any fact stated in the admission". Consequently, in contrast to the generality of out-of-court statements made admissible under the Act, no advance notice need be given to the other side of an admission proposed to be tendered nor is its admissibility conditional on the maker of the statement being unavailable or dependent on the leave of the court when he is called as a witness. Where an admission is made by a party himself, this approach is unexceptionable. As a party will generally recollect his own statement in such a case, advance notice is unnecessary and might merely give scope for false explanations of a genuine admission. A requirement of unavailability would generally have no application. As long as the present rules prohibiting any cross-examination of one's own witness are retained, it would put a party at an unfair disadvantage if he had to call the opposing party as a witness in order to make that party's admission admissible.

In criminal cases there would be the further difficulty that the accused is incompetent for the prosecution and the prosecution has no means of compelling him to testify on his own behalf. To make the reception of an admission conditional upon the accused choosing to testify in such cases would give him an unacceptable degree of control over the evidence tendered by the prosecution.

Where admissions are made by servants, agents or other persons in privity with a party the position is different. It cannot be assumed that the principal will be aware of the admission. It is desirable, therefore, that he should receive notice and that the maker of the statement should testify if he is available. If admissions by servants or agents are to be exempt from the requirements of admissibility applicable to other out-of-court statements, the uncertainty which afflicts the present law of deciding what statements of such persons are to be considered as admissions against their principal would persist. If, however, this exemption applies only to admissions made by a party himself the position is clear-cut. It is submitted that it is preferable to draw the distinction where it is easily understood, i.e. between the out-of-court statements of parties and those of all other persons.

The position as regards admissions of a co-plaintiff or a co-defendant merits special consideration. Apart from some cases where there is a relationship of agency or privity between the co-parties, the admission of one is not, under the present law, evidence against another. This can lead to anomalies. In divorce proceedings in England where a co-respondent had admitted committing adultery with the respondent, it was held that there was no evidence

that the wife had committed adultery with him, but that there was evidence that the co-respondent had committed adultery with her,¹⁷⁸ a conclusion stigmatised by Wigmore who said that "it is perfectly and absurdly artificial and negates the claim of Courts of Justice to be efficient fact-finders".¹⁷⁹ However, it would be objectionable that a party should be prejudiced by the out-of-court statement of a co-party who does not testify. As in criminal cases it is desirable to avoid artificial situations where evidence is taken into consideration against one party and not another. It is considered that an out-of-court statement of any party adverse to another's case should not be admissible at all unless the maker testifies. It is then open to the party who wishes to tender the statement to call the maker as a witness. A relaxation of the rules prohibiting cross-examination of one's own witness would meet the difficulties inherent in requiring a party to call an unfavourable witness. However, it is considered that the rule should be retained by which a statement made by a declarant in pursuance of a conspiracy to commit a civil wrong is admissible against other persons participating in the conspiracy at that time.

In any legislation which is enacted, it would be appropriate to resolve some uncertainties in the law. It is considered

¹⁷⁸ Morton v. Morton [1937] P. 151.

¹⁷⁹ Wigmore, A Treatise on the Anglo-American System of Evidence, vol. IV, para. 1073 fn 13 (3rd ed. 1940).

that a statement should be regarded as an admission notwithstanding the fact that the maker lacks personal knowledge thereof. As it was put by the New South Wales Law Reform Commission in their Report on the Rule against Hearsay (1978):-

"In our view such evidence should generally be admissible; and should only be excluded if in the circumstances it has no weight. An admission based only on belief may sometimes be very weighty if the sources of the declarant's belief are normally reliable, or if he is in such a position that he is likely to be well informed. Further, admissions which are relevant in litigation normally concern matters of importance to the declarant, so that his belief is almost as convincing evidence of their truth as his knowledge of them; it is safe to assume that if he had any doubt he would have taken steps to obtain personal knowledge of the truth. And one valuable feature of admissions as evidence lies in the element of contradiction between the out-of-court statement and what the maker now asserts." (P. 169).

It is also considered that the recommendations of that Commission should be followed making statements admissible as admissions even if they contain statements of opinion or notwithstanding the fact that they may indicate a party's assumption as to the law as when he states that he was negligent.

Accordingly, if the law relating to hearsay is amended so that out-of-court statements are admissible generally on condition that the maker testifies, if he is available and if notice is given, it is suggested that the following special provisions should be made in respect of admissions:

- (1) A party should be entitled to tender in evidence against another party an admission made by that other party without giving advance notice and notwithstanding the fact that that other party does not testify, provided such an admission is proved by the best available evidence.
- (2) An admission should be defined as any statement made by a party himself adverse to his interest in the proceedings and should include -
 - (a) a statement not based on personal knowledge,
 - (b) a statement of opinion,
 - (c) a statement notwithstanding the fact that it may indicate the party's assumptions as to the law.
- (3) Except in cases where a conspiracy is alleged and there is independent evidence thereof no statement made by a party adverse to the case of a co-party should be admissible as an admission against that co-party. However, where a party calls a witness who may be unfavourably disposed towards him for the purpose of enabling an out-of-court statement of the witness to be received in evidence, the rules restricting cross-examination of one's own witness should be waived by the court.

If, in respect of any category of proceedings, it is decided that out-of-court statements should not be generally admissible, it will then be desirable to consider the exact scope of the rule making admissions admissible. The rule that a statement made by a servant or agent is not admissible unless it is made in the course of an authorised conversation has been much criticised. Wigmore, having cited

an American case in which it was held that an admission made by a superintendent of a coal station did not bind his employer, comments:

"It is absurd to hold that the superintendent has power to make the employer heavily liable by mismanaging the whole factory, but not to make statements about his mismanagement which can be even listened to in court; the pedantic unpracticalness of this rule as now universally administered makes a laughing-stock of court methods."¹⁸⁰

The rule is overcome in practice by suing the servant or agent as well as his principal for the purpose of making the admission evidence. But even if this is done, the admission is not properly evidence against the principal. In the United States, rule 801 (d) (2) of the Federal Rules of Evidence makes admissible against a party "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship". A similar provision was recommended after very full examination by the Ontario Law Reform Commission in 1976.¹⁸¹ It may be objected that it is wrong to make an admission of an agent admissible on the basis of some implied contract with his principal, as the employer and employee would never have agreed to any such term if it had been mentioned.

¹⁸⁰ Wigmore, A Treatise on the Anglo-American System of Evidence, vol. IV, para. 1078, fn. 2 (3rd ed. 1940)

¹⁸¹ Report on the Law of Evidence pp. 216-8.

The reception of admissions would open the way to a principal being prejudiced in litigation by an incompetent employee who knows little of the business or a vindictive ex-employee who bears a grudge. The New South Wales Law Reform Commission in their Report on the Rule against Hearsay (1978) sifted these arguments:--

"The American Model Code (1942), r. 508(a), and the Uniform Rules (1953), r. 63(9)(a), are provisions which we have followed to some extent in permitting an agent's admission to be received if it relates to matters within the scope of the agency and was made before its termination and of which he had, or may reasonably be supposed to have had, personal knowledge: see s. 88(3)(b). We go further, and make admissible statements made with ostensible authority, statements made which relate to a matter of which the maker had superintendence, and statements relating to a matter which it was within the scope of his employment or agency to discuss with any person to whom he made the statement: s. 88(3)(c) and (d). The law of admissibility should not depend on authority, or contract, or the principal being bound, but on what promotes the search for truth. It is perverse to exclude such admissions while permitting the agent to testify, for the admissions are more likely to be reliable, being made when the facts are fresher and the likelihood of evidence tailored to suit the principal's case is less. The agent is likely to be well informed about matters within his agency. He is unlikely to make false statements about them while the relationship continues, because of such factors as loyalty to his principal's interests, and fear of dismissal if discovered in an untruth. The result is that the principal will lack opportunity to cross-examine the agent; but the principal in engaging the agent must run certain risks, and it may not be thought unjust that one of them should be the risk of having what the agent says tendered against him. The argument based on the employee with a grudge should go to weight, not admissibility. In many cases a party in dispute with a company or other employer will have no source of information about the employer's activities other than what he has been told by the employee who is acting on behalf of the employer. The employer has placed the employee in the position of handling those activities and it would be unfair if the other party could not use the statements of the employee. The employer, on the other hand, will

usually have some means of knowing whether the employee has told the truth and of contradicting him if he has not. One case in which the employer may have difficulty in checking his employee's statement is where it relates to the employee's own unsupervised conduct for which the employer is vicariously liable, for example, the driving of the employer's vehicle. But an employee will not normally concede that he has been at fault unless it is true. In any event much the same considerations as make it reasonable to hold the employer vicariously liable for the employee's unauthorized acts within the scope of his employment make it reasonable to admit the employee's statements against the employer. The arguments stated above concerning authority are strong if the law of vicarious admissions is based only on authority; our contention is that authority was always an unsatisfactory basis and a better basis is the justice of admitting in evidence the out-of-court explanations for actions of agents given by those agents. At common law, even where authority is discovered, it is largely the result of a fiction. The rules of evidence are for use not only in large commercial causes but also for small matters in inferior courts: persons suing companies in such courts should not be put to proof of authority. This is to give an unfair advantage to corporations." (Pp. 175-6)

Another solution would be to provide that an admission by a servant or agent should be admissible only in cases where he is personally liable on the basis of the admission. On facts such as those in Burr v. Ware R.D.C.^{181A} the admission of negligence by the driver would be admissible because he is being sued for that negligence and is liable equally with his master.

The rule that an admission of an agent or servant should be excluded because it was made to his principal and not to a third party has also been criticised. In Victoria it has been held not to apply in the case of records made by a

^{181A} [1939] 2 All E.R. 688 cited p. 132 supra.

hospital employee as these were the means by which the hospital made its own records.¹⁸² This exclusion is all the more anomalous if, as has been held in the United States, a statement contained in a document retained by the maker and not communicated to anyone else is admissible as an admission.¹⁸³ It is submitted that an authorised statement should be capable of being an admission irrespective of the person (if any) to whom it is communicated. To exclude admissions because they were made by an agent to his principal would be tantamount to creating a new category of privilege which could hardly be supported having regard to the fact that an admission made by a husband to a wife has been allowed to be proved by a person who overheard it.¹⁸⁴

The New South Wales Law Reform Commission in their Report on the Rule against Hearsay (1978) suggested a modification of the common law rule, approved by the Supreme Court in Bord na gCon v. Murphy [1970] I.R. 301, that the terms of the agent's admission itself could not be used to prove the fact of agency.¹⁸⁵ They recommended that the terms of the

¹⁸² Warner v. The Women's Hospital [1954] V.L.R. 410.

¹⁸³ Wigmore, A Treatise on the Anglo-American System of Evidence, vol. IV, para. 1057 (3rd ed. 1940).

¹⁸⁴ Rumping v. D.P.P. [1964] A.C. 814.

¹⁸⁵ Report on the Rule against Hearsay (1978) p. 178.

statement should be admissible evidence, although not conclusive evidence, of the fact of the agency. This was part of a more general proposal designed "to overcome the problem of statements the admissibility of which depends on proof of some antecedent fact, and which assert that fact". "On ground of necessity," concluded the Report, "it is desirable that to some extent such statements be allowed to hoist themselves up by their own bootstraps if in fact a bare assertion of the antecedent fact seems reliable."¹⁸⁶

Finally, it should be noted that the practice of admitting all statements made in the presence of a party is not warranted by the present law, where the statement is otherwise inadmissible and no admission can be inferred from the reaction of that party. If such statements are proved in the presence of the jury, even if they are told to disregard them where no admission can be inferred in the circumstances, there is a danger that they will act on evidence which is inadmissible. It is, therefore, suggested that a judge should, as a matter of law, be required to rule on whether an admission should be inferred before an otherwise inadmissible statement made in the presence of a party is put to the jury. Where a judge sits without a jury he should be required to rule explicitly on the admissibility of the statement.

¹⁸⁶ Ibid. p. 188.

B. Statements which are part of the res gestae

The doctrine of res gestae makes statements admissible which either constitute a fact in issue or a relevant fact or are closely associated in time and circumstance with a fact in issue. In Teper v. R. [1952] A.C. 480, a Privy Council case, which was cited with approval by the Court of Criminal Appeal in The People (Attorney General) v. Crosbie and Meehan [1966] I.R. 490 at 497 it was stated:

"The rule that words may be proved when they form part of the res gestae appears to rest ultimately on two propositions, that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words, and the dissociation of the words from the action would impede the discovery of truth. But the judicial application of these two propositions, which do not always combine harmoniously, has never been precisely formulated in a general principle." (P. 486)

No fully satisfactory formulation of the doctrine has ever been achieved. It is, in the words of Lord Tomlin in Homes v. Newman [1931] 2 Ch. 112 at 120, "adopted to provide a respectable legal cloak for a variety of cases of which no formula of precision can be applied". "If you wish to tender inadmissible evidence" advised Lord Blackburn, "say it is part of the res gestae."¹⁸⁷

¹⁸⁷ Cited in Cross on Evidence p. 37, fn. 2 (4th ed. 1974)

Essentially, statements admitted by virtue of the doctrine of res gestae belong to three categories. The first are statements which are relevant for reasons other than the truth of what they assert. Examples commonly given are words of offer and acceptance in an action on a contract; words of provocation where provocation is put forward as a defence to a criminal charge; a declaration accompanying a delivery of money to determine whether a loan or payment was made or whether it was a gift. In all of these cases what is relevant is that the statement was made, not whether its contents are true. For this reason they cannot properly be regarded as exceptions to the rule against hearsay.

The second category are statements made by a person as to his own state of mind or feelings when this is in issue or relevant. The necessity for admitting such evidence was explained by Mellish L.J. in the celebrated Victorian case Sugden v. Lord St. Leonards (1876) 1 P.D. 154 at 251:-

"Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, then you may prove what he said, because that is the only means by which you can find out what his intentions are."

Thus, a person's out-of-court declaration of his intention to stay in a country or his reasons for going there are regularly received on issues concerning his domicile.¹⁸⁸

¹⁸⁸ Davis v. Adair [1895] 1 I.R. 379 at 407; Moffet v. Moffet [1920] 1 I.R. 57

A statement of intention by a deceased to benefit others while depositing money in the joint names of those others and himself is admissible to rebut a presumption of a resulting trust.¹⁸⁹ Evidence may be given of the reasons given by prospective employers for not offering a job to a person the reasons for whose inability to obtain employment are in issue.¹⁹⁰ The belief of third parties that a libel referred to a particular person may be proved by giving evidence of their statements to that effect.¹⁹¹ In personal injury actions a statement by the injured person as to his contemporaneous physical sensation, e.g. "I have a pain in my head", may be proved although his statement as to the cause of the injury would not be admissible.¹⁹² As a general rule, such out-of-court statements must be contemporaneous with the state of mind or feeling which they narrate; but the matter is not clear, especially as the continuance of a state of mind or feeling may be inferred. In his judgment in Cullen v. Clarke, Kingsmill Moore J. stated, albeit without citing authority, that the modern tendency is to admit declarations as to states of mind even where they are made prior to or subsequent to an act and unconnected therewith.¹⁹³

¹⁸⁹ Murray v. Murray [1939] I.R. 317.

¹⁹⁰ Cullen v. Clarke [1963] I.R. 368.

¹⁹¹ Fullam v. Associated Newspapers [1953-4] Ir. Jur. Rep. 79.

¹⁹² Donaghy v. Ulster Spinning Co. Ltd. (1912) 46 I.L.T.R. 33.

¹⁹³ [1963] I.R. 368 at 379.

There is a difference among the authorities on whether statements as to one's own state of mind or feelings, admissible under the doctrine of res gestae, are properly classified as an exception to the hearsay rule or not.¹⁹⁴ On one view, such statements are original circumstantial evidence from which a state of mind or feeling may be inferred; on the other view, they are assertions about the facts of a person's state of mind or feelings, the truth of which is sought to be proved. (See Cross on Evidence pp. 474-5 (3rd ed. 1967))

The third category of statement admitted under the doctrine of res gestae are words which "if not absolutely contemporaneous with the action or event, [are] . . . so closely associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement". (Teper v. R. [1952] A.C. 480 at 486). This passage was cited with approval by the Court of Criminal Appeal in The People (Attorney General) v. Crosbie and Meehan [1966] I.R. 490 at 497, when holding admissible the words "He has a knife, he stabbed me", spoken of an accused by the deceased victim of an assault within a minute of receiving the fatal wound. The Court was of opinion that evidence of these words was admissible "although it was hearsay, because it formed part of the criminal act for which the accused were being tried, or for those who prefer to use Latin phrases,

¹⁹⁴ Cross on Evidence pp. 474-5 (3rd ed. 1967)

because it formed part of the res gestae".¹⁹⁵
 Subsequently in Ratten v. R. [1972] A.C. 378 at 389,
 Lord Wilberforce, delivering the opinion of the Judicial
 Committee of the Privy Council, having reviewed all the
 authorities, stated:

"[T]he test should not be the uncertain one whether the
 making of the statement was in some sense part of the
 event or transaction. This may often be difficult to
 establish: such external matters as the time which
 elapses between the events and the speaking of the words
 (or vice versa), and differences in location, while
 being relevant factors are not, taken by themselves,
 decisive criteria. As regards statements made after
 the event it must be for the judge, by preliminary
 ruling, to satisfy himself that the statement was so
 clearly made in circumstances of spontaneity or
 involvement in the event that the possibility of
 concoction can be disregarded. Conversely, if he
 considers that the statement was made by way of
 narrative of a detached prior event so that the
 speaker was so disengaged from it as to be able to
 construct or adapt his account, he should exclude it."

This judgment has thrown the law on the topic into a state of
 flux as it is uncertain whether the courts in Ireland will
 accept the test adumbrated by the Privy Council, and if so,
 whether it will be treated as superseding that applied in
 cases such as The People (Attorney General) v. Crosbie and
 Meehan, or merely as an additional ground upon which statements
 may be admitted as part of the res gestae.

¹⁹⁵ [1966] I.R. 490 at 496. Other Irish cases on this matter
 are:- R. v. Lunny (1854) 6 Cox C.C. 477; R. v. Herlihy
 (1897) 32 I.L.T.R. 38; Re Gilliland [1940] N.I. 125 at
 130; Brodie v. Dublin United Tramway Co. (1942)
 (unreported, case no. 141/1942).

It is also uncertain whether a statement which is concerned with a relevant fact rather than a fact in issue is admissible under the doctrine of res gestae. The Privy Council clearly thought not in Teper v. R. [1952] A.C. 480:

"For identification purposes in a criminal trial the event with which the words sought to be proved must be so connected as to form part of the res gestae, is the commission of the crime itself"

Consequently, on a charge of arson against an owner of his own premises, it was held that a police constable should not have been permitted to give evidence that he heard a woman in the crowd shouting a half-an-hour after the fire broke out, "Your place burning and you going away from the fire", as this only related to a relevant fact, viz., the whereabouts of the accused half an hour later. However, the reasoning in Ratten v. R., linking admissibility with the spontaneous reaction to an event observed, would appear to be just as applicable to a relevant event as to the actual event in issue.

In Canada the doctrine of res gestae has been utilised to admit statements made by an accused person relating to property in his possession at the moment it is discovered, on the basis that any explanation then offered constitutes part of the res gestae which is the possession of goods.¹⁹⁶

If out-of-court statements are made generally admissible as evidence of the facts asserted subject to the maker of the

¹⁹⁶ R. v. Graham [1974] S.C.R. 206; R. v. Risby [1978] 2 S.C.R. 139.

statement being called to testify, if available, and a requirement of notice, recourse to the doctrine of res gestae will be unnecessary to make out-of-court statements admissible. But it may be questioned whether statements presently within the doctrine should be subject to the maker of the statement being called, if available, and a requirement of notice. The circumstances in which such statements are made generally gives them a guarantee of trustworthiness not possessed by the general run of out-of-court statements. It may be considered retrograde to make the conditions for the reception of any class of hearsay more restrictive than they are at present. As against this, the assessment of the veracity of any out-of-court statement will be aided if the maker of the statement is subject to examination in court and the other side has an opportunity to investigate its reliability beforehand. As was argued by the New South Wales Law Reform Commission:

".... A res gestae statement, which is often vague and sometimes a response to an emergency or a sudden drama, is precisely the kind of statement the maker of which should, if available, be produced for cross-examination as to precisely what he meant and as to his means of observation. The exciting nature of the event which provokes some res gestae statements may induce unreliability through over-excitement"¹⁹⁷

Consequently it is considered that out-of-court statements, which would formerly have been admissible under the doctrine of res gestae, should not receive special treatment when they are tendered as evidence of the facts asserted, but should

¹⁹⁷ Report on the Rule against Hearsay (1978) p. 207.

be subject to the requirement of the maker being called, if available, and notice being given. But where it is the fact of the statement rather than its truth that is sought to be proved, these requirements should not apply any more than they do to proof of any other facts. It is, as has been noted, doubtful whether the second category of statements admissible under the doctrine of res gestae, viz. a person's statements about his own state of mind or feelings, are received as evidence of the facts asserted, or merely as circumstantial evidence. It is considered that they should be treated as evidence of the facts asserted and the definition of out-of-court statements whose admissibility is subject to the maker being called if available and to a requirement of notice, should be such so as to include such statements. Thus, in a case such as Cullen v. Clarke where the reasons why an injured person failed to obtain a job were in issue, the out-of-court statements of persons who refused him employment as to their reasons for so doing would be inadmissible unless these prospective employers are called, if available, and advance notice given to the other side of their evidence. It seems incontestable that this would be more satisfactory than placing exclusive reliance on reports of their statements relayed to the court by the injured man himself or some other person. Accordingly, it is suggested that, if the arguments put forward in this Paper in favour of the admissibility of out-of-court statements are accepted, no special provision be made for out-of-court statements now admissible as evidence of the facts asserted by virtue of the doctrine of res gestae; but, for the sake of clarification, a provision should be included to the effect that a statement of a person as to his state of mind or feelings is an assertion of the truth of the facts stated.

If it is decided that the existing rules excluding out-of-court statements should be retained either generally or for any class of case, it will be necessary to decide whether any amendment is required in respect of statements admitted under the doctrine of res gestae. It is suggested that statements as to the maker's own state of mind or feelings should remain admissible as they are valuable evidence of these matters and are sometimes the only or best evidence available. Statements made as an immediate reaction to events may have a built-in guarantee of trustworthiness arising out of their contemporaneity and spontaneity, which is justification for their reception. It would be beneficial to resolve the uncertainty of the law on this matter by a provision along the lines of that contained in rule 803 of the United States Federal Rules of Evidence (1978), which provides as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:-

- (1) Present Sense Impression. - A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.
- (2) Excited Utterance. - A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) Then Existing Mental, Emotional, or Physical Condition. - A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

Such a provision should cover statements as to relevant facts as well as facts in issue. It is not considered that statements made on arrest or on the recovery of goods should as a rule be admissible under this heading where the maker does not testify.

C. Reputation

The general rule is that the reputation prevailing in the community as a whole or among a particular group is not admissible as proof of any facts reputed. There are, however, certain exceptions. An oral or written declaration by a deceased person concerning the reputed existence of a public or general right is admissible as evidence of the existence of such a right, provided that the declaration was made before any dispute arose.¹⁹⁸ Where questions of pedigree arise, these may be proved by means of a statement as to family tradition or reputation by a dead member of the family provided this statement was made before any dispute arose.¹⁹⁹ Where a man and woman cohabit, the reputation among the community of being married gives rise to a presumption of marriage except in criminal cases and actions for criminal conversation.²⁰⁰ Whenever the character of a person is allowed to be proved in legal proceedings²⁰¹ it may be done by giving evidence

¹⁹⁸ For cases see pp. 180 sqq. infra.

¹⁹⁹ For cases see pp. 182 sqq. infra.

²⁰⁰ McCarthy v. Hastings [1933] N.I. 100.

²⁰¹ Evidence of the good character of an accused may be given and, if given, rebutted. Evidence of the character of the plaintiff may be given in actions for defamation, breach of promise, criminal conversation or wrongful dismissal. In trials for rape, evidence of the bad reputation of the prosecutrix may be given; in actions for criminal conversation and seduction, the bad character of the wife and daughter of the plaintiff respectively may be proved. In all cases it is permissible to call a witness to swear that the reputation of a witness is such that he would not believe him on oath, but this is rarely done.

as to his general reputation: at common law no other evidence is allowed, not the individual opinions of witnesses as to a person's character nor evidence of specific acts.²⁰²

There are cases where the actual existence of a reputation rather than the truth of the facts reputed is relevant or at issue. The stock example is a defamation action where damages depend on the plaintiff's reputation. Reputation as such might also be relevant in assessing the reasonableness of a person's behaviour in relation to another person or to a situation where that is in issue. In such cases, so long as the person testifying has personal knowledge of the reputation of which he testifies there is no question of hearsay. However, where a witness deposes to the existence of a reputation to prove the facts reputed, he is in effect recounting the express or implied assertions of a number of other people in order to establish the truth of that which he asserts. Where the reputation must be proved by the statement of a dead person, as is presently the case in respect of declarations as to pedigree and public rights, there is, in effect, a requirement of double hearsay as a person is testifying about the assertion of another as to matters of which that other has not personal knowledge.

The admissibility of evidence so far removed from personal knowledge is strange within the context of a general prohibition of hearsay. Its justification in cases where

²⁰² R. v. Rowton (1865) 169 E.R. 1497.

such ancient facts as public rights or pedigree are in issue is the difficulty of adducing any more convincing evidence. As regards proof of character by means of reputation, Cockburn C.J. in his judgment in R. v. Rowton (1865) 169 E.R. 1497, the case which established the rule, admitted that "this part of our law is an anomaly". Several years afterwards Fitzjames Stephen in his great treatise on the law of evidence, commented:

"A witness may with perfect truth swear that a man who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty if he has the good luck to conceal his crimes from his neighbours."²⁰³

However, in these and other cases where evidence of reputation is given, it can be tested in cross-examination and the basis of any such reputation explored. If the person whose reputation is the subject of evidence testifies, he may be asked questions about his previous conduct in the course of cross-examination. If a Scheme of legislation is adopted abolishing the rule against hearsay altogether whenever the maker of a statement is unidentifiable or unavailable, statements as to reputation would be generally admissible as evidence of the truth of any facts reputed. There would then be no need for any special provision relating to evidence of reputation. It might be feared that this would lead to a proliferation of evidence which is, of its nature, generally of slight probative value. But unsatisfactory as evidence of reputation is, it may be the best available in a particular case. The safeguard against its proliferation would be the

²⁰³ Digest of the Law of Evidence, p. 201 (12th ed. (1936)).

requirement that statements about reputation, like any other evidence of out-of-court statements, must be supplied in advance and the means of knowledge stated. These safeguards, buttressed by the residual judicial discretion to exclude out-of-court statements of negligible probative value should suffice to limit evidence of reputation to the rare cases where it has special value.

If, however, the existing law excluding hearsay statements is retained, either generally or for any class of proceedings, consideration must be given to those cases where evidence of reputation is now admissible to prove the facts reputed. In England the Law Reform Committee in their report on hearsay evidence in civil proceedings did not deal with evidence of reputation in great detail but they did express the view that the general prohibition of secondhand hearsay, which they recommended, should not have the effect of removing or restricting any of the existing common law exceptions to the hearsay rule and they instanced cases where evidence of character could be proved by means of reputation, where statements of family repute or tradition are admissible in pedigree cases and where statements of public repute are admissible on issues concerning public or general rights.²⁰⁴ Section 9 of the subsequent Civil Evidence Act 1968 preserves these exceptions. The relevant provisions are:

"(3) In any civil proceedings a statement which tends to establish reputation or family tradition with respect to any matter and which, if this Act had not been passed,

²⁰⁴ Thirteenth Report of the Law Reform Committee (1966) para. 42.

would have been admissible in evidence by virtue of any rule of law mentioned in subsection (4) below -

- (a) shall be admissible in evidence by virtue of this paragraph in so far as it is not capable of being rendered admissible under section 2 or 4 of this Act; and
- (b) if given in evidence under this Part of this Act (whether by virtue of paragraph (a) above or otherwise) shall by virtue of this paragraph be admissible as evidence of the matter reputed or handed down;

and, without prejudice to paragraph (b) above, reputation shall for the purposes of this Part of this Act be treated as a fact and not as a statement or multiplicity of statements dealing with the matter reputed.

(4) The rules of law referred to in subsection (3) above are the following, that is to say any rule of law -

- (a) whereby in any civil proceedings evidence of a person's reputation is admissible for the purpose of establishing his good or bad character;
- (b) whereby in any civil proceedings involving a question of pedigree or in which the existence of a marriage is in issue evidence of reputation or family tradition is admissible for the purpose of proving or disproving pedigree or the existence of the marriage, as the case may be; or
- (c) whereby in any civil proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving the existence of any public or general right or of identifying any person or thing.

(5) It is hereby declared that in so far as any statement is admissible in any civil proceedings by virtue of subsection (1) or (3)(a) above, it may be given in evidence in those proceedings notwithstanding anything in sections 2 to 7 of this Act or in any rules of court made in pursuance of section 8 of this Act.

(6) The Words in which any rule of law mentioned in subsection (2) or (4) above is there described are intended only to identify the rule in question and shall not be construed as altering that rule in any way."

This is a rather difficult provision the exact purpose and scope of which is not easy to discern.²⁰⁵ It appears in the context of a statute which made first-hand hearsay generally admissible and might not be appropriate if the prohibition against hearsay is retained as a general rule. There is justification for admitting evidence of reputation on matters of public concern in cases where the hearsay statements of individuals are excluded because matters which have achieved general repute are likely to have been checked and verified in the course of public discussion. However, the present rules under which evidence of reputation is admissible are based on ancient precedents and some re-statement may be desirable. The requirement that the declaration as to the reputed existence of a public or general right should have been made by a deceased person seems perverse as, ceteribus paribus it is more satisfactory that it should be proved by a living person who can be examined in court as to the basis of that reputation. In the United States the Federal Rules of Evidence (1978) provide at rule 803(20) for the admissibility of "reputation in a community, arising before the controversy, as to the boundaries of or customs affecting lands in the community". Whether it is necessary to provide for proof of private rights in this way in Ireland is questionable. The American rule was related to the early unsettled condition of their country. If it is followed, it might be argued that reputation should be admissible to prove all rights and not just private land rights.²⁰⁶ The fact

²⁰⁵ See Cross on Evidence pp. 439-41 (4th ed. 1975).

²⁰⁶ New South Wales Law Reform Commission, Report on the Rule against Hearsay (1978), p. 149.

of controversy having arisen should, it is suggested, go only to weight and not affect admissibility.²⁰⁷

The exception relating to proof of pedigree by reputation might also be broadened. The present requirement that the declaration as to reputation must be made by a deceased member of the family is too restrictive. A declaration by a living person who can be called to testify should also be admissible as should the statements of servants or close associates, who have competent knowledge. Consideration might be given to the adoption of a provision along the lines of rule 803(19) of the United States Federal Rules of Evidence (1978) which makes admissible:

"Reputation concerning Personal or Family History. —

Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage ancestry, or other similar fact of his personal or family history."

This is apt to cover the present rule as to proof of marriage from co-habitation and the reputation of being married. However, it should be noted that the New South Wales Law Reform Commission, while making provision to allow evidence of reputation on questions of pedigree and to prove marriage, recommended that it should not be admissible when tendered against the accused in criminal cases.²⁰⁸

²⁰⁷ The admissibility of the statements of deceased persons as to public or general rights is considered at pp. 180-2 *infra*.

²⁰⁸ New South Wales Law Reform Commission, Report on the Rule against Hearsay (1978), p. 146; Draft Bill, section 79. The admissibility of the statements of deceased persons as to questions of pedigree is considered at pp. 182-4 *infra*.

There are a number of other cases where provision might be made for the reception of evidence of reputation by way of exception to the rule against hearsay. At present a witness may assert the actual existence of a trade usage from personal knowledge without having to give evidence of particular instances of its exercise. In so far as his personal knowledge is derived from reputation or what others have told him, the evidence can only be admitted by way of exception to the hearsay rule. The New South Wales Law Reform Commission recommended that provision should be made for the reception of such evidence.²⁰⁹ Another case where provision might be made for evidence of reputation are events of general history important to the community where they occurred.²¹⁰

²⁰⁹ Report on the Rule against Hearsay (1978), p. 149; Draft Bill, section 79(5).

²¹⁰ See Federal Rules of Evidence (1978), rule 803(20); Law Reform Commission of Canada, Report on Evidence (1975) p. 76.

D. Public Documents and Published Works

A variety of documents classified as public documents are admissible as evidence of the facts stated in them. These include statutes, state papers, gazettes, registers relating to matters such as births, deaths, marriages, returns made under public authority on matters of public interest and entries in the public books of corporations and public companies.

In order to qualify for reception at common law under this heading it is necessary that there should be a strict duty on the part of an authorised agent of the public to inquire into and record the facts, but he need not have personal knowledge of them;²¹¹ the record must relate to a matter of public interest and concern; the documents constituting it must be intended to be retained and not made for some mere temporary purpose and they must be meant for public inspection.²¹² Under this principle, the Down Survey made by Sir William Petty in the seventeenth century and the Book of Distributions consisting of extracts from the Down Survey have been held admissible on issues of title to land as showing that parcels of land existed as separate

²¹¹ R. v. Halpin [1975] 2 All E.R. 1124.

²¹² Sturla v. Freccia (1880) 5 App. Cas. 623.

divisions at that time which assisted in the determination of the exact boundaries of the settlements of land made in the reign of Charles II.²¹³ Delivering his judgment in Poole v. Griffith (1849) 15 I.C.L.R. 239 holding the Book of Distributions admissible, Monahan C.J. said:

"... we are of opinion that it was in this case properly receivable in evidence, though we are unable to state with any certainty the precise provisions of any statute under which it was compiled; still, having been so compiled under public authority, preserved among the records of the office always used for public purposes, we are of opinion that it was properly received in evidence with the extract from the Down Survey, more fully to connect the survey with the patent of Charles the Second..." (P. 280)

In R. (Lanktree) v. McCarthy and Ors [1903] 2 I.R. 146 the Dublin Gazette was held to be evidence of Acts of State, such as the fact that a district had been proclaimed as one to which certain provisions in the Criminal Law and Procedure (Ireland) Act 1887 applied. The finding of lunacy by inquisition, being a return made under public authority on a matter of public interest, was recognised in Hassard v. Smith (1872) Ir. R. 6 Eq. 429 as evidence of insanity in an action to set aside a contract on grounds of incapacity. A census of population was held to be evidence of the population of a town in Dublin Corporation v. Bray Townships [1900] 2 I.R. 88. More recently in Minister for Defence v. Buckley and Ors (Case No. 112/1974, unreported) a

²¹³ Archbishop of Dublin v. Coote and Lord Trimleston (1849) 12 Ir. Eq. R. 251 at 266 (Down Survey); Poole v. Griffith (1864) 15 I.C.L.R. 239 (Book of Distributions).

map of the Curragh outlining its divisions for the purposes of the Curragh of Kildare Act 1969 was held by the Supreme Court to be a public document and so prima facie evidence of those divisions. However, in Ireland parish registers of births (or baptisms), deaths or marriages are probably not admissible under this heading as the existence of any common law duty to keep such a register, even in the former Established Church, was not accepted by FitzGibbon J. after an exhaustive survey of the history of the matter in Mulhern v. Clery [1930] I.R. 649 at 682 sqq. But such parish registers have, as noted, been admitted as declarations made in the course of duty. Of course, later registers kept pursuant to statute are admissible by virtue of those statutes.

In England the courts have resisted efforts to extend the common law rule making public documents admissible to cover certain modern public records which are not admissible by statute. In Heyne v. Fischel & Co. (1913) 30 T.L.R. 190, records compiled by the Post Office showing the times at which telegrams were received were ruled inadmissible because there was no intention that such records should be retained for public inspection. In Lilley v. Pettitt [1946] K.B. 401, a case where a mother was prosecuted for making a false statement as to the paternity of her child, regimental records of an army unit showing that the named father was abroad at the relevant time were held inadmissible to show his non-access, the reason being that the records were not kept for the use and information of the public. It is possible that the courts in Ireland would feel bound to adopt a similarly restrictive approach. Even so, this common law exception to the rule against hearsay is not bereft of all importance. Cases concerning ancient facts recorded prior to the coming into effect of

provisions making particular public records admissible, may occasionally arise. Where records are those of another State, reliance may have to be placed on the common law rule to make them admissible.

A related rule makes published works admissible to prove ancient facts of a public nature. Such published works may take the form of histories, dictionaries, scientific works or maps. In several English decisions early this century²¹⁴ a restrictive attitude was adopted towards this exception and stress was laid on the necessity for proof of public repute of the facts recorded in a book and the public duty to make a map. Referring to these cases Professor Sir Rupert Cross remarked that "it is regrettably true that a high degree of technicality has been allowed to creep into this branch of the law".²¹⁵

If out-of-court statements (including those made by unidentifiable persons) are made generally admissible as evidence of the facts asserted subject to the maker being called to testify, if he is available, and to a requirement of notice, it is unnecessary to have any special provision making statements in public documents or published works admissible. In the case of ancient public documents or published works, the maker of the statement will be dead so

²¹⁴ Mercer v. Denne [1905] 2 Ch. 538; A.G. v. Horner (No. 2) [1913] 2 Ch. 140; Fowke v. Berington [1914] 2 Ch. 308.

²¹⁵ Cross on Evidence p. 435 (4th ed. 1974)

the requirement that he must be called, if available, would have no application in practice. If a statement in a public document is made by a living person, there is no reason why, in general, he should not give evidence if he is available and has a recollection of the facts stated. The requirement of notice would have the effect of imposing an extra restriction not presently applicable. But where a party to a case is to be faced with evidence gleaned from ancient public documents or published works, it is not unreasonable that the other party should have adequate notice so as to be able to check the reliability of such evidence.

If, on the other hand, the rule against hearsay is retained generally or for any class of case it is necessary to consider whether these exceptions to that rule should be retained or amended. In England the Civil Evidence Act 1968, section 9, following the recommendations of the Thirteenth Report of the Law Reform Committee, simply carried over these common law exceptions to the hearsay rule unaffected by the provisions of the Act prohibiting second-hand hearsay, requiring notice of intention to adduce an out-of-court statement as evidence and making admissibility conditional on the presence or unavailability of the maker as a witness. This approach had the advantage of retaining exceptions to the rule against hearsay which might occasionally prove useful while avoiding the thorny problem of examining and re-defining them. The New South Wales Law Reform Commission in their Report on the Rule against Hearsay (1978) was, however, not satisfied to follow this device of "referential preservation" and advocated a bolder course to eliminate the perplexity, obscurity and anachronism of the common law.²¹⁶ Section 85

²¹⁶ Report on the Rule against Hearsay (1978) p. 159.

of their draft Bill which related to public documents did not contain any requirement of personal knowledge or public inspection and there were "no esoteric limitations on the meaning of public records". It provides as follows:

- "(1) Where a document is made or kept or published in the course of public administration, for use as a reliable source of information of any kind by a public officer or by the public or by any section of the public, a statement of information of that kind in the document is evidence of any matter asserted in the statement.
- (2) A statement published in the course of public administration in the Gazette or a like publication or in a newspaper or other periodical of an act done in the course of public administration is evidence of the doing of the act.
- (3) In a civil legal proceeding, a statement of a fact of any kind in a report of a Royal Commission or other body charged with a duty of ascertaining facts of that kind for the purpose of public administration is evidence of the fact stated."
- (4) In this section -
 "public officer" means a person employed or engaged in public administration.

The New South Wales Law Reform Commission also recommended that the rule making assertions in published works admissible should be expanded to cover all works of authority relating to matters of learning or special study. Accordingly, Section 78 of their draft Bill provides:

"Any book, monograph, article, map, table, chart or other work relating to historical, scientific, actuarial, lexicographical, topographical or other matters of learning or special study which the court considers to be of authority is admissible evidence of any fact relating to such matters which is asserted in the work."

This has the effect of eliminating the former requirements that there should be a duty to assert the facts and that they should be of a public nature.

E. Evidence of Pre-trial Identification

In The People (Attorney General) v. Dominic Casey (No. 1) [1961] I.R. 264 at 274-8 the Court of Criminal Appeal seemed to accept that evidence of pre-trial identification at a parade is admissible even when the person making the identification does not testify. However, it was held that in the circumstances of the case the evidence of the identification ought not to have been admitted as it might have prejudiced the accused unfairly. No reference was made in argument to a previous Irish case where evidence had been given of a pre-trial identification by a witness although the witness failed to make an identification in court. In R. v. Burke and Kelly (1847) 2 Cox C.C. 295, a charge of robbery, the victim identified Kelly as one of his assailants two days after the attack. At the trial he swore that his identification was correct but he could not say that the prisoner was the man he had identified. In a more recent English robbery case R. v. Osbourne and Virtue [1973] Q.B. 678 at 690 the Court of Appeal held that "evidence of identification other than identification in the witness box is admissible". In the actual case an eye witness identified Osbourne at an identification parade. At the actual trial the eye witness said "she did not remember that she had picked out anyone on the last parade". An Inspector of Police was called to prove the identification. It was held that the evidence was admissible.²¹⁷ This

²¹⁷ On this subject see also R. v. Christie [1914] A.C. 545 [House of Lords]; R. v. MacLean (1968) 52 Cr. App. Rep. 80; R. v. McGuire (1976) 23 C.C.C. (2d) 385 (British Columbia Court of Appeal); R. Gooderson, "Previous Consistent Statements" [1968] Cambridge L.J. 64.

decision has been criticised;²¹⁸ evidence of a pre-trial identification by a witness who does not testify to that identification is clearly evidence of the assertion of a person other than while testifying, tendered as evidence of its truth. If out-of-court statements are made generally admissible as evidence of the facts asserted subject to the maker of the statement being called to testify, if he is available, and a requirement of notice, there is no reason why an exception should be made excluding a pre-trial identification by an unavailable witness or admitting a pre-trial identification by an available witness who does not testify. If the existing law excluding hearsay is retained, it will be necessary to clarify any exception relating to evidence of pre-trial identification. It is considered that evidence of such identification should be admissible whenever the person making it testifies even if, as in R. v. Osbourne and Virtue, he does not recall making any identification. The jury having observed his demeanour in the witness box is in as good a position as anyone to decide what weight to give to his pre-trial identification. But if he does not testify, evidence of his pre-trial identification should not be admissible. This may result in the exclusion of logically probative evidence either for the prosecution or the defence but this is a consequence of the hearsay rule and there is no reason to make a special exception in this case.

Mistaken identification was described by the Criminal Law Revision Committee in England as "by far the greatest cause of actual or possible wrong convictions" and they recommended that in all cases of disputed identification the jury should be warned of the danger of convicting in the absence of corroboration. This recommendation had been anticipated by the

²¹⁸ Cross on Evidence, p. 469 (5th ed. 1979); D. F. Libling "Evidence of Past Identification" [1977] Crim. L.R. 268.

Supreme Court in The People (Attorney General) v. Dominic Casey (No. 2) [1963] I.R. 33 and The People (Attorney General) v. Bond [1966] I.R. 214. In England, in 1976, a committee under the chairmanship of Lord Devlin recommended a general rule, subject to clearly defined exceptions, prohibiting convictions in cases where the prosecution relied mainly on evidence of visual identification. Clearly no review of the law relating to the admissibility of evidence of pre-trial identification will be complete without consideration of the wider question of the weight to be attached to evidence of identification generally.^{218A}

F. Statements Admissible by virtue of Specific Statutory Provisions

There are a host of cases where out-of-court statements are admissible as evidence of the facts therein by virtue of specific statutory provisions. For example, a certified copy of an entry of a birth or death in the General Registrar Office is admissible as evidence of the birth or death to which it relates by virtue of section 5 of the Registration of Births and Deaths (Ireland) Act 1863. A certified copy of an entry in the register of marriages may be received as evidence of a marriage under section 71 of the Marriages (Ireland) Act 1844. Under the Bankers' Books Evidence Act 1879, section 3, (as amended by the Bankers' Books Evidence (Amendment) Act 1959) a copy of an entry made in any records used in the ordinary business of a bank, or used in the transfer department of a bank acting as registrar of securities is prima facie evidence of the matters, transactions and accounts therein recorded. Under section 2(2) of the Vendor and Purchaser Act, 1874, recitals, statements and descriptions of facts, matters and parties in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of a contract for the sale of land are to be taken as sufficient evidence of the truth of such facts, matters and descriptions, unless and except so

^{218A} See Law Reform Commission Working Paper No. 6, pp. 12-13.

far as they are proved to be inaccurate.

If out-of-court statements are made generally admissible, subject to the requirements that the maker testifies if he is available and that notice is given, the question arises whether out-of-court statements admissible by virtue of specific statutory provisions should be subject to the requirements laid down for the generality of out-of-court statements. It might be argued that there is no reason why these out-of-court statements should enjoy more favourable treatment by virtue of statutory provisions enacted before advance notice for admissible hearsay became the rule. On the other hand it may be presumed that the legislature directed its attention to the reliability of statements made admissible by virtue of specific statutory provisions and that this renders it unnecessary to superimpose extra guarantees of reliability. It is considered that a full examination of all cases where statements have been made admissible by virtue of specific statutory provisions should be undertaken before deciding to subject such statements to a requirement of notice or a requirement that the maker of the statement should testify, if he is available.

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If it is decided that the existing rules excluding out-of-court statements should be retained either generally or for any class of proceedings, it will be necessary to consider those existing exceptions to the rule against hearsay under which the statements of deceased persons are admissible as evidence of the facts therein. These fall into five classes: (1) Declarations against interest; (2) Dying declarations; (3) Post-testamentary declarations of testators; (4) Declarations as to Public or General Rights; (5) Pedigree declarations.

G. Declarations against Interest

A statement by a deceased person of a fact which he knew to be against his pecuniary and proprietary interest when the declaration was made is admissible as evidence of that fact and of collateral matters mentioned in the declaration.²²⁴ Thus, in Richards v. Gogarty (1870) 4 Ir. C.L.R. 300, entries in accounts made by a deceased person stating that he had received rent was accepted as evidence of its payment. In Conner v. Fitzgerald (1883) 4 L.R. Ir. 106, a note by a deceased landlord that he had agreed to let land for a certain term at a certain rent was held admissible. In his judgment in the Court of Appeal Chatterton V.C. stated:

"Mr Conner was at the time in possession of the estate and presumably seised in fee. Any statement by a person so situated tending to cut down his interest or to charge or fetter it, is a declaration against proprietary interest within this rule."²²⁵

²²⁴ Cross on Evidence, pp. 551-2 (5th ed. 1979). In addition to the authorities cited below the following Irish cases on this exception should be noted: Foster v. McMahon (1847) 11 Ir. Eq. R. 287, 299; Whaley v. Masserene (1863) Ir. Jur. (N.S.) 281; Whaley v. Carlisle (1866) 17 I.C.L.P. 792.

²²⁵ The principle had also been applied in two earlier Irish cases, Garland v. Cope (1848) 11 Ir. L.R. 514, La Touche v. Hutton (1875) L.R. 9 Eq. 166.

In Flood v. Russell (1891) 29 L.R. Ir. 91, a statement by a wife, since deceased, that her husband had made a will leaving her a life interest was admitted as a declaration against interest as she would have taken an absolute interest in much of his property had he died intestate. In Domvile and Ors. v. Calwell and Ors. [1907] 2 I.R. 617, a case involving the right to possession of a considerable portion of Ballybrack in Co. Dublin, a statement by the tenant for life of the freehold interest contained in a deed renewing a lease for lives to the effect that the lease had been renewed on two previous occasions was admitted as evidence of that fact because the tenant for life would have gained materially from the determination of the lease and she had special knowledge of the facts.

A statement exposing the maker to criminal liability is not within the exception. Thus in R. v. Gray (1841) Ir. Circ. Rep. 76 a death-bed confession by a third person that he, not the accused, had committed the murder charged was held inadmissible.²²⁶ Moreover, "the interest against which the statement appears to be made must, in order to supply that sanction which, after the death of the party, is accepted as a substitute for an oath, be an interest existing at the time of making the statement". These words are those of Fitzgibbon L.J. in his judgment in Lalor v. Lalor (1879) 4 L.R. Ir. 678, at 681, a case where a statement said to have

²²⁶ This principle has been accepted in other common law jurisdictions: see The Sussex Peerage Case (1844) 11 Cl. & Fin. 85; 8 E.R. 1034; Donnelly v. United States 288 U.S. 243; In re Van Beelan (1974) 9 South Australian State Reports, 163.

been made by a deceased person after he had parted with his interest in land admitting that he held the land in trust was excluded. In England it has been held that a statement affirming a contract where each side has still to perform its part is not a declaration against interest. (R. v. Inhabitants of Worth (1843) 4 Q.B. 132; Ward v. H.S. Pitt. & Co. [1913] 2 K.B. 130).

There is no conclusive authority in this country or in England on whether an acknowledgment of liability in tort constitutes a declaration against interest (Cross on Evidence, p. 556 (5th ed. 1979)). In Power v. Dublin United Tramways Company [1926] I.R. 302 at 315, Kennedy C.J. in his dissenting judgment, held that the statement of a deceased person that he had alighted from a moving tram was not admissible as a declaration against interest in an action by his dependants arising from his death. In the English cases there is conflicting authority on whether the declarant must have personal knowledge of the facts stated in order that his statement should be admissible as a declaration against interest. (Cross on Evidence p. 559 (5th ed. 1979)).

The scope of this exception to the hearsay rule has been much criticised.²²⁷ The exclusion of admissions of criminal guilt was described by Wigmore as a "barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows,

²²⁷ See Jefferson, "Declarations Against Interest: An exception to Hearsay Rule" (1944) 58 Harvard L.R. 1; New South Wales Law Reform Commission, Report on the Rule against Hearsay (1978) pp. 44-7.

by the true culprit now beyond the reach of justice".²²⁸
 The U.S. Federal Rules of Evidence have made statements against penal interest admissible where the maker is unavailable as a witness but it is specifically provided in rule 804(3) that "a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement".

The rigid classification as declarations against interest of all statements by a person in possession of land claiming less than an absolute title is highly artificial if only because the maker of the statement is unlikely to be aware that possession gives rise to a presumption of ownership and that the statement he has made is therefore against his interest. In fact other evidence displacing the presumption may make the statement obviously self-serving. Where, as in Conner v. Fitzgerald, the statement is one of a landlord recording a tenancy it is anomalous that this should be admissible when statements as to the terms of executory contracts are not. Similarly, the acceptance of all statements that money has been received as declarations against interest so as to make collateral facts stated admissible as evidence may result in the admission of statements which are self-serving. Thus in the English case of Taylor v. Witham^{228A} a receipt for payment of interest of £20 made by a deceased creditor was received as proof of the debt of £2,000, a result which Fitzgibbon L.J. said in Lalor v. Lalor "was perhaps a questionable extension of a dangerous principle".

²²⁸ A Treatise on the Anglo-American System of Evidence, para. 1477 (3rd ed.).

^{228A} (1876) 3 Ch. D. 605.

On the other hand there may be circumstances where a statement of a party to an executory contract as to its terms may be so much against interest as to be some confirmation of its truth.

This exception to the rule against hearsay is criticised because of its rather simplistic reasoning about when people lie or tell the truth whereas "men lie for so many reasons and some for no reason at all and some tell the truth without thinking or even in spite of thinking about their pockets".²²⁹ However, in general the interests of the maker of a statement may be some indication of its veracity. Accordingly, if the rule against hearsay is retained, it is considered that out-of-court statements of deceased persons should be admissible when they are against the interests of the declarant. But only the actual statement which is against interest and not collateral statements should be admissible. Moreover, the Court should be free to approach the issue untrammelled by any rigid rules such as exist in the present law. The evidence should indicate that the declarant knew that the statement was against his interest when made. But personal knowledge on the part of the maker should not be required as it is a fair presumption that a person will not make a statement against his interest without satisfying himself of its truth. A statement of a person who is unavailable to testify should be admissible under the exception in the same way as that of a deceased person.

²²⁹ Ward v. H.S. Pitt & Co. [1913] 2 K.B. 130 at 138.

H. Dying Declarations

A statement, whether oral or written, of a deceased person is admissible as evidence of the cause of his death at a trial for his homicide, provided that he was under a settled hopeless expectation of death when he made the statement.²³⁰ The justification for this exception is that the imminence of death removes every motive to falsehood and the solemnity of the occasion is regarded as imposing a sanction equivalent to that of an oath.²³¹

There are few cases where it is invoked, especially since legislative provision has been made for the taking of bedside depositions. A dying declaration is not rendered inadmissible because it is made in response to questions.²³² In R. v. Stephenson [1947] N.I. 110 at 116, the Court of Criminal Appeal in Northern Ireland, in holding admissible the statement of the deceased victim in an abortion - manslaughter case, said that "it is no objection to the admissibility of a dying declaration that it is made in answer to leading questions, though that fact may affect its weight in evidence".

²³⁰ In addition to the authorities cited below the following Irish cases on this exception should be noted: R. v. Gray (1841) Ir. Circ. Rep. 76; R. v. Mooney (1851) 5 Cox C.C. 318.

²³¹ R. v. Stephenson [1947] N.I. 110 at 121.

²³² R. v. Fitzpatrick (1910) 46 I.L.T.R. 173.

However, the Court felt that the jury should have been warned of the shortcomings of such evidence:

"It cannot be said, however, that the law regards such declarations as generally superior in credibility to sworn testimony. Like evidence given in the witness box, they may be lacking in veracity or they may be lacking in accuracy. Indeed in most cases they deserve even closer scrutiny, inasmuch as the jury have no opportunity of seeing and hearing the declarant and forming their own judgment as to the declarant's reliability, and moreover, as it can seldom happen, in the nature of things, that the accused will have been present or have had any opportunity for cross-examination. Again, speaking generally, it is this lack of opportunity to test and amplify the declaration which, more than anything else, makes it desirable to weigh and ponder the evidence contained in such a declaration, with special care and attention. For one of the dangers in admitting such declarations is the danger that omissions, failure to tell the whole story, or misrepresentations, even quite unintentional, or mere turns of phrase, may have the effect of giving a colour which could have been corrected by cross-examination."

The exception may be criticised for the simplistic psychology on which it is based. The dying may be influenced more by revenge than by fear of divine retribution. The very circumstances which cause the necessary expectation of death may also cause such weakened faculties as to make declarations unreliable.²³³ There is also little logic in limiting the exception to homicide cases and to the facts causing the death of the declarant as the knowledge of impending death is as likely to produce a true declaration relating to any other fact. In the United States

²³³ New South Wales Law Reform Commission, The Rule Against Hearsay (1978) p. 47.

rule 804(b)(2) of the Federal Rules of Evidence (1978) makes dying declarations as to the cause or circumstances of the declarant's death admissible in a civil action or proceeding as well as in a prosecution for homicide.

I. Testamentary Declarations

In Re Ball (1890) 25 L.R. Ir. 556, it was held that a copy of the first page of the will in the testator's handwriting bearing a statement by him that he had substituted the copy for the original, was admissible to prove the contents of the will. Warren, J. in delivering judgment professed to follow the principle laid down by the House of Lords in Sugden v. St. Leonards (1876) 1 P.D. 154 "that declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents". However, as was pointed out by Andrews L.C.J. in his judgment in the Court of Appeal in Northern Ireland in Re Gilliland [1940] N.I. 125 at 130, the judge in Re Ball "suffered from the disadvantage that the case was imperfectly argued and that his attention was never directed to the doubts [about Sugden v. Lord St. Leonards] expressed by the House of Lords in Woodward v. Goulstone 11 A.C. 469" and to the view expressed in Plipson on Evidence that the decision in Sugden v. Lord St. Leonards was "contrary to principle". In Re Gilliland the contents of a will were sought to be proved by means of a letter written by the Testatrix to the main beneficiary on the day of the will. The Court held that this letter was "entitled to be classified not as a post-testamentary statement but as one which was contemporaneous with the making of the will". "As such," concluded the Court, "it is admissible as part of the res gestae - part of the act itself, or so intimately connected therewith that it may

be considered as forming part of the act."²³⁴

The letter admitted in Re Gilliland would probably not have qualified as part of the res gestae under the test adumbrated by Lord Wilberforce in Ratten v. R. [1972] A.C. 378 at 389 as it was not "so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded". There is probably little case for drawing a distinction between testamentary declarations made immediately after the will is made and other post-testamentary declarations as a testator is unlikely to forget the main provisions of his will. Whether any post-testamentary declarations should be admissible is more problematical. Sugden v. Lord St. Leonards has been much criticised by legal writers. However, pre-testamentary declarations are admissible to prove the contents of the will on the basis that they are statements of intention. It would be illogical to treat post-testamentary declarations differently. It is also somewhat illogical that post-testamentary dispositions should be admissible to prove the contents of a will but not its execution, revocation or, according to older English authorities, the presence of fraud or undue influence.²³⁵ The California Evidence Code section 1260 provides that "evidence of a statement made by a declarant who is unavailable as a witness that he has

²³⁴ [1940] N.I. 125 at 131.

²³⁵ Cross on Evidence, p. 424 (3rd ed., 1965) Atkinson v. Morris, [1897] P. 40.

or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule". The Federal Rules of Evidence (1978) at rule 803(3) while providing that a statement of memory or belief is not generally admissible to prove the fact remembered or believed excepts from this rule a statement which "relates to the execution, revocation, identification, or terms of declarant's will".

J. Declarations as to Public Rights

Reference has been made to the rule that a statement by a deceased person concerning the reputed existence of a public or general right is evidence of the existence of such a right and it has been suggested that a statement of a living person who can testify as to the reputed existence of the right should be admissible.^{235A} This rule was invoked in Duke of Devonshire v. Neill and Fenton (1877) 2 L.R. Ir. 132 where it was sought to tender in evidence a document dated 7 July 1733 and found among the Duke's papers at Lismore Castle entitled "An account of weyers and nettes on the River Blackwater, and in whose possession". It was unsigned and there was nothing to show by whom, or for what purpose it was made. Holding that it was inadmissible Palles C.B. stated:

"Though it is now settled that upon a question of public interest, such as the existence of a fishery in tidal waters, a declaration of a person not shown to have personal knowledge on the subject may be admissible as evidence of reputation: Crease v. Barret 1 Cr. & M. & R. 919, every statement made by anyone is not so admissible. It is necessary to show the circumstances under which it is made, and if those circumstances show that the declaration is made otherwise than upon the knowledge of the declarant, it is inadmissible

^{235A} See pp. 153 sqq. supra.

It has never, that I am aware of, been decided that an unsigned and unrecognised document is evidence as reputation because it is kept amongst muniments." (Pp. 159-60)

In the same case a decree of the Court of Chancery in a seventeenth century case stating that the ancestor of the Duke was in possession of the fishery was admitted as evidence of reputation. The position by which statements as to facts from which the existence of a right may be inferred are excluded while those as to the reputed existence of those rights are admitted has been criticised by Professor Sir Rupert Cross who remarked that "this has produced decisions of breathtaking absurdity".²³⁶ In its Report on the Rule against Hearsay (1978) the New South Wales Law Reform Commission developed this argument at some length:

"This distinction produces results which must be astonishing to laymen and which are certainly difficult for lawyers to understand. A map showing land as unfenced, and hence suggesting it was part of an adjacent highway, was excluded because it was evidence of a fact, not reputation. (R. v. Berger /1894/ 1 Q.B. 823) Evidence that at intervals since 1189 the sea had covered a piece of foreshore, thus rendering it impossible that fishermen could have been drying nets there since that date was excluded. (Mercer v. Denne /1905/ 2 Ch. 538) This distinction, apart from its difficulty of application, is objectionable because sometimes it involves admitting untrustworthy and vague evidence of reputation while excluding clear statements of facts from which the existence of the right in question can be convincingly deduced or disproved." (P. 148)

²³⁶ Cross on Evidence, p. 507 (5th ed. 1979)

In England some of the resulting inconvenience has been obviated by a statutory provision that any map, plan or history of a locality is admissible to show whether a way has or has not been dedicated as a highway.²³⁷ In Ireland the courts may well adopt a less rigid approach by following Giant's Causeway Co. Ltd. v. Attorney-General and Ors. (1898) [1905] 5 New. Ir. Jur. Rep. 301, where the Irish Court of Appeal held that the original Ordnance Survey map was admissible as reputation to prove the existence of a public right of way:

"... the question we are dealing with is one of public, or at least of general, interest. On such questions evidence of reputation may consist of ancient documents which have been found in the custody of some person who is entitled to the property in question, and production of an old map from the title-deeds of Mr Lecky would be clearly evidence, and I apprehend that if a document is found in the custody of a person whose duty it was to have it and preserve it and to see that it was correct, it would stand upon the same principle, and would, therefore, come within these documents which are matters of reputation ...
[I]t is given as evidence of reputation, which, in my opinion, means that opinion of some person who has had an opportunity of acquiring knowledge on the spot, which on the cases may be acquired by hearsay from other people."

K. Pedigree Declarations

Reference has been made to the rule by which declarations to be inferred from family conduct, are admissible as evidence of pedigree.^{237A} A pedigree hung up in a family mansion is good evidence even if the person who made it

²³⁷ Highway Act 1959, section 35.

^{237A} See p. 153 supra.

is unknown because of the presumption that if the family did not more or less adopt it, it would not have been suffered to remain. (Duke of Devonshire v. Neill and Fenton (1877) 2 L.R. Ir. 132 at 160) For similar reasons entries in family bibles and on tombstones are admitted.

The scope of the questions of pedigree to which this rule applies is not fully settled. In Haines v. Guthrie (1884) 13 Q.B.D. 818, where infancy was pleaded as a defence, a statement on affidavit by the deceased father of the defendant as to the latter's age was rejected because no question of family was raised. Shortly afterwards the Court of Appeal in Ireland had to consider a similar question in Palmer v. Palmer (1885) 18 L.R. Ir. 192 where the devolution of property turned on whether a particular member of the family had died. Following the earlier Irish case, Smith v. Smith 1 L.R. Ir. 206, which had not been cited in Haines v. Guthrie, the Court held that evidence of family reputation was admissible to establish the death. Where questions of relationship are raised, evidence of statements by deceased members of the family are admissible to establish particular facts which are relevant to the inquiry (Cross on Evidence, p. 416 (3rd ed. 1967)) These fine distinctions do little credit to the law and it is suggested that evidence of any fact concerning a person's descent, birth, marriage and death should all be admissible on the same footing.

To come within this exception to the rule against hearsay, the declarant must be a blood relation or the spouse of a blood relation of the person whose pedigree is in issue, although the statement may be proved in court by a person who is not a member of the family. (Re Holmes; Beamish v. Smeltzer [1934] I.R. 693) These restrictions give rise to

difficulty in cases where there is illegitimacy as an illegitimate child is legally filius nullius and has no family except his descendants. The statements of persons, such as servants, professional advisers and close friends, should be received on the same footing as those of members of the family. The fact that the statement was made after the controversy arose should go to weight and should not, as at present, make it inadmissible.

The United States Federal Rules of Evidence (1978) have, as noted, made provision for the admissibility of evidence of reputation concerning a person's personal or family history. Further provision is made in rule 804(b)(4) for the admission of statements of personal or family history if the declarant is unavailable as a witness.

"The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

.....

(4) Statement of personal or family history

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared."

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In other common law jurisdictions where the rule against hearsay has been retained, provision has been made for exceptions which have no counterpart in our law. The United States Federal Rules of Evidence (1978) make provision at rule 803(4) for the admissibility of "statements made for the purposes of medical diagnosis or treatment and describing

medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment". Rule 803(11) makes admissible statements of births, marriages and such matters contained in a regularly kept record of a religious organization. Statements in a document in existence twenty years or more, the authenticity of which is established, are admissible as evidence of the facts therein under rule 803(16). Rule 803(17) makes admissible market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations. Learned treatises are generally admissible by virtue of rule 803(18) and judgments of previous convictions are evidence of any fact essential to sustain the judgment under rule 803(22).

The New South Wales Law Reform Commission in their Report on the Rule against Hearsay (1978) proposed several other exceptions to the rule against hearsay. Section 81 of their draft Bill provides that where in the course of manufacture, packaging or distribution of goods, a statement is made to appear on the goods, or any label, package or container associated with the goods, the statement is admissible as evidence of any fact asserted in it. The purpose of this provision is to reverse the decision in Patel v. Customs Comptroller [1966] A.C. 356 (see p. 11 supra).²³⁸

²³⁸ Report on the Rule against Hearsay (1978), p. 151.

Section 82 purports to clear up a doubt in the common law by making statements displayed on land in the course of business admissible against the person carrying on the business at the time of the display.²³⁹ Section 90 provides that where in the course of a business a person receives from a second person a message, package or parcel for delivery or transmission, any statement made on or in it by the first in the course of delivery or transmission is admissible as evidence of any fact asserted in it. The main purpose of this provision is to resolve doubts about the admissibility of postmarks in the wake of Myers v. Director of Public Prosecutions [1965] A.C. 1001. (See p. 11 supra.)

²³⁹ Ibid. p. 152.

CHAPTER 7 EXAMINATION OF WITNESSES

The treatment of out-of-court statements of a witness, when used during his cross-examination, has already been considered as has that of documents used to refresh memory which are so used.²⁴⁰ Where a witness is cross-examined on the basis of a statement made by another, it may not be read out unless that statement is admissible in evidence. In R. v. Gillespie and Simpson (1967) 51 Cr. App. Rep. 172 documents prepared by others which would have been inadmissible as hearsay were handed to the accused in cross-examination with a request, notwithstanding their dissent from what was said in the documents, to read them aloud. This procedure was held to be improper by the English Court of Appeal and the convictions in the case were quashed. The proper procedure in such a case is to put the document into the hands of a witness without describing it and simply ask whether he still adheres to his answer or alternatively whether he accepts the truth of what is in the document. If he does the latter it becomes evidence - not otherwise. If the statement is admissible, the cross-examiner may refer to its contents in cross-examination. But if he does, it seems that he must show any document containing the statement to the witness and tender it in evidence.²⁴¹

²⁴⁰ See supra. pp. 60-76.

²⁴¹ H.H. Class (ed.) Seminars on Evidence, p. 136.

It is submitted that the correct principle is that no out-of-court statement should become admissible by virtue of its use in cross-examination if it is not otherwise admissible. If such a statement is admissible as evidence of the facts stated therein there should be no restrictions on how a witness may be questioned about it. But if it is not so admissible, it should not be used in cross-examination even to the extent of putting it to a witness without comment to induce him to change his answer. It was argued in the Working Paper of the New South Wales Law Reform Commission on The Course of the Trial (1978) as follows:

"It seems undesirable to have a system where documents are handed around the courtroom without the jury hearing of their contents directly because of a rule of admissibility, but with the possibility open of their drawing inferences as to the contents, particularly where counsel has hinted at or summarized their contents." (P. 126)

There is an old obscure rule of evidence that if a party calls for and inspects a document held by an adversary, other than one being used to refresh memory, he is bound to put that document in evidence if required to do so.²⁴² This rule, which may apply in criminal as well as in civil cases, is effective to allow in statements which would otherwise be excluded by the rule against hearsay. This is best exemplified by an Australian case Walker v. Walker (1937) 57 C.L.R. 630 where a wife was suing her husband for maintenance. She made a statement about her husband's

²⁴² Senat v. Senat [1965] 172 at 177.

means in the course of her testimony. When cross-examined about her knowledge of this, she referred to a letter she had from an accountant who had been investigating the matter. Counsel for the husband called for the letter and it was held that he had been rightly obliged to put it in evidence at the request of the wife's counsel and that it could be regarded as evidence of the husband's means.

The New South Wales Law Reform Commission Working Paper on The Course of the Trial examined this rule, the basis of which they found to be obscure "for none of the cases applying it have explained what principle or policy underlies it":

".... It may depend on the view that evidence not objected to is admissible. The probable explanation, however, is an historical one. In the nineteenth century, when discovery of documents was ill-developed and the adversary system was in its hey day, it may have been thought that if counsel was prepared to risk gaining an advantage by inspecting his opponent's documents then he must accept whatever risks arise from his opponent's insistence on the documents going in. If this was the basis of the rule, it seems not to be a satisfactory justification of it today. Ambush is a less prized method of litigation. Discovery and interrogatories to some extent enable the parties to discover how each proposes to prove his case. It is difficult to see why a radical difference should exist between the consequences of inspection before the trial and inspection during it. It is difficult to see why otherwise inadmissible documents should become admissible. It is difficult to see that mere inspection during the trial confers such an advantage that the inspecting party should be forced to put the document in. It is difficult to see that the rule confers any benefit to the administration of justice." (P. 151)

Earlier the Commission had remarked that the rule sat strangely with the rule that counsel may inspect a document used to refresh a witness's memory without having to put it in evidence.²⁴³

In 1972 the English Criminal Law Revision Committee had recommended the abolition of the rule for criminal cases:-

"How the rule would be applied where the document is one of a number in a file and /the cross-examining/ party reads part of the file it is difficult to forecast. In any event it seems to us very doubtful whether it is right that a party should be able to get a document before the Court in this way when it may be impossible or difficult to find out who supplied the information contained in the document or what was his authority for doing so. The information might even have come from somebody incompetent to give evidence to the effect of the information. We considered whether to recommend preserving the rule, adjusting it to our proposals about hearsay evidence; but we came to the conclusion that if the rule applies to criminal proceedings, it should do so no longer, because the benefit which it might confer in these proceedings is minute and it might work injustice, especially in a case such as suggested where the reliability of information contained in the document cannot be checked."²⁴⁴

It is considered that the arguments put forward against this rule by both these bodies are persuasive both for

²⁴³ New South Wales Law Reform Commission Working Paper on The Course of the Trial (1978) p. 150-1.

²⁴⁴ Criminal Law Revision Committee, Eleventh Report: Evidence (General), p. 131; See draft Bill, clause 29.

civil and criminal cases and it is suggested that provision should be made that where in any proceedings a party calls for or inspects a document which is in the possession or power of another party or of a witness called by that party, his doing so should not entitle that party to make the document evidence in the proceedings.

CHAPTER 8 EVIDENCE OF THE CREDIBILITY OF THE MAKER OF AN
OUT-OF-COURT STATEMENT

In a trial the credibility of a witness may be challenged in the course of cross-examination by the other side and he may be asked any question concerning himself which, although irrelevant to the issue, would be likely to discredit him and, consequently, his testimony. While he cannot be compelled to answer such questions and while his answers are final in the sense that evidence may not be called to contradict them, such cross-examination under oath with the sanction of perjury is usually effective to undermine the credibility of a suspect witness. In addition, there are three recognised exceptions to the rule that a witness's answer to questions on credit may not be contradicted: viz. where he denies that (1) he has been convicted of a crime, (2) he is biased in favour of a party calling him, as would be the case with a witness who had been bribed or who was the mistress of one of the parties, or (3) he has made statements inconsistent with his present testimony. In certain circumstances it is permissible for the other side to lead evidence impugning the veracity of a witness. For this purpose somebody may be called to testify as to the reputation for veracity of the witness or as to his own opinion as to that veracity. But the person so called may not give reasons for his opinion unless asked about them in cross-examination by the side calling the witness whose credit he has impugned. In practice evidence of this latter kind is rarely given. In Toohey v. Commissioner of Metropolitan Police [1965] A.C. 595 the House of Lords has held that it is permissible to call

medical evidence to show that a witness suffers from some disease or abnormality that affects the reliability of his evidence. But it does not appear to be permissible to lead other evidence on the capacity or opportunity of a witness to observe the facts to which he has testified.²⁴⁵

If the maker of a statement does not give evidence there is no mechanism for subjecting his credibility to examination. This is one of the main objections to the reception of such out-of-court statements as evidence. There is no recent reported case under the existing exceptions to the rule against hearsay where evidence has been allowed adverse to the credibility of the maker of an admissible out-of-court statement.²⁴⁶ If such evidence is not allowed, the maker of the statement may be given a credibility he would not merit if he had appeared before the court. Accordingly, in England, section 7 of the Civil Evidence Act 1968 declares admissible any evidence which, if the maker of an out-of-court statement had testified, could have been given

²⁴⁵ Professor Sir Rupert Cross may be reading too much into the decision in Toohey v. Commissioner of Metropolitan Police when he states that "the decision . . . suggests that evidence may always be given of a witness's lack of opportunity or capacity to perceive the events about which he testifies". See Cross on Evidence p. 234 (4th ed. 1974).

²⁴⁶ But Stephen, A Digest of the Law of Evidence (11th ed. 1925) states at Article 135 that the credit of a deceased declarant may be impeached or confirmed in the same manner as a witness who had denied in cross-examination the truth of the matter suggested. On the other hand in the English case Stapylton v. Clough (1853) 2 E. & B. 933 an inconsistent statement was rejected to discredit a witness whose declaration in the course of duty was tendered in evidence, Lord Campbell remarking: "what he may babble during the rest of his life on the subject cannot be admitted in evidence, contradicting as it does here what he has written before".

for the purpose of destroying or supporting his credibility, including other statements inconsistent with the statement sought to be tendered. But evidence may not be given of any matter of which, if the maker of the statement had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party. A similar provision is contained in Rule 806 of the United States Federal Rules of Evidence (1978) and in the draft Act proposed by the Ontario Law Reform Commission in their Report on the Law of Evidence (1976).²⁴⁷

In its Report on Evidence in criminal proceedings in 1972 the English Criminal Law Revision Committee was not prepared to follow the solution adopted for civil cases by section 7 of the Civil Evidence Act 1968:

"In the case of a hearsay statement there is a dilemma. If the maker of the statement had been guilty of discreditable conduct not resulting in a conviction, the other party might wish to give evidence of this; and since, if the maker had given evidence, he would very likely have admitted the conduct or his denial would not have been believed, the party against whom the hearsay statement is given in evidence might complain that, as the maker cannot be cross-examined, that

²⁴⁷ Section 22(5) of the draft Act provides:

Where a statement is tendered in evidence under this section the circumstances under which it was made may be investigated by the court, and, where it is admitted, the credibility of the maker of the statement may be impeached to the same extent and in the same manner as if he had been a witness in the proceedings as to the right to cross-examine him.

party is at an unfair disadvantage. Against this, to allow unrestricted evidence of matter to the discredit of the absent maker of the statement might be very unfair to him and might lengthen the proceedings beyond what would be tolerable. S. 7 of the Civil Evidence Act resolves the dilemma in favour of excluding evidence of any matter as to which the maker's denial, had he been present and given evidence, would have been final. This is clearly defensible owing to the difficulties mentioned above and the fact that the lesser weight of hearsay statements would compensate for the lack of an opportunity to attack the maker's credit. However, we prefer the solution of allowing the evidence but subject to the leave of the court where the maker's denial would have been final. This should provide for the exceptional cases which might arise."²⁴⁸

The Committee might also have cited the situation where the maker of the statement had not the opportunity to observe the facts asserted. As the reply of a witness to questions on this are final and may not be contradicted,²⁴⁹ no evidence could be led under the Civil Evidence Act 1968 of such lack of opportunity.

²⁴⁸ Criminal Law Revision Committee, Eleventh Report: Evidence (General), para. 263; See draft Bill, clause 39.

²⁴⁹ As to this see the Australian case Piddington v. Bennett and Wood Property Ltd. (1940) 63 C.L.R. 583. A witness who claimed to have seen the accident said he was on his way to do business at a bank. The judge allowed another witness to prove that the first witness had no business at the bank. On appeal it was held by the High Court of Australia that he should not have done so.

It is considered that this problem cannot be satisfactorily tackled solely in terms of the evidence which is permissible to impugn the credibility of the maker of an out-of-court statement. What is required is a thorough-going reform of the law governing the cross-examination of witnesses as to credit, limiting the questions which it is permissible to put to a witness in cross-examination, at the same time providing that any answers may be contradicted. Where an out-of-court statement is received, evidence should be admissible of any matter which could have been put to the maker of an out-of-court statement, had he given evidence.

The New South Wales Law Reform Commission Working Paper on The Course of the Trial (1979) made proposals along these lines and suggested the following provision to govern cross-examination as to credit:

- "130. (1) Subject to section 111²⁵⁰ and subsection (8), any party who cross-examines a witness -
- (a) may ask leading or other questions concerning matters relevant to the issue; and
 - (b) may also, except where the witness has not given evidence against the party, ask leading or other questions concerning other matters, that is to say, he may -

²⁵⁰ Section 111 deals with the cross-examination of accused persons.

- (i) ask questions concerning a former statement made by the witness which is inconsistent with his testimony;
 - (ii) ask questions concerning a criminal conviction or incident of substantial relevance to the disposition of the witness not to tell the truth;
 - (iii) ask questions concerning a bias or other motive to lie of the witness;
 - (iv) ask questions concerning the physical or mental powers or capacity of the witness;
 - (v) ask questions concerning the opportunity or capacity of the witness to observe or report on an event or condition to which he testifies;
 - (vi) ask questions concerning the failure of the witness, if a person referred to in section 127(a), to make a complaint;²⁵¹
 - (vii) ask questions concerning matters (other than a disposition not to tell the truth as mentioned in subparagraph (ii)) which tend to prove the witness not to be giving truthful testimony or which tend to lessen the weight of his testimony; or
 - (viii) ask questions concerning a document or object used by the witness to refresh his memory, and may inspect a document or object to which subparagraph (viii) applies.
- (2) Any party who cross-examines a witness may tender evidence which contradicts that given by a witness in answer to questions within subsection (1)(b)

²⁵¹ Section 127 provides -

- Notwithstanding Section 75, a party calling a witness may -
- (a) prove a complaint of the witness that he was the victim of an act in issue in that proceeding involving an element of sex or violence made voluntarily at the first opportunity that reasonably presented itself.

- (4) Where a statement tendered under subsection (2) in consequence of cross-examination under subsection (1)(b)(i) is partly inconsistent and partly consistent with the witness's testimony, the statement shall be admitted so far as relevant to the matters in issue, to his credibility, or to the weight of his evidence.
- (5) Where a statement is tendered under subsection (2), and another statement is made by the same witness on the same occasion which supports, qualifies or explains his testimony, the first statement is not admissible unless the second statement is also tendered.
.....
- (8) A party shall not, in cross-examination, ask a leading question where in the opinion of the court -
- (a) the witness questioned is so favourable to the party cross-examining him that the question should not be asked; or
 - (b) for any other reason the asking of a leading question does not promote justice."

The thinking behind this proposal was "that collateral questions, e.g., relating to credibility, should not be asked at all unless substantially relevant to credibility, but once answered, the answer should be capable of disproof".²⁵² "If a question is sufficiently relevant to be asked", remarked the Commission "we think it should be proper to reveal the falsity of the answer."²⁵³ Accordingly they proposed that questions about previous convictions should not be permissible unless they had substantial relevance to the credibility of a witness. On the other hand questions should be allowed about other specific incidents relevant to credibility and evidence should be admissible in disproof of the answers given. The right of the cross-examining party to give evidence concerning the opportunity or capacity of the witness to observe or report on

²⁵² New South Wales Law Reform Commission, Working Paper on The Course of the Trial (1978) p. 79.

²⁵³ Ibid. p. 82.

an event or condition to which he testifies fills an important gap in the present law. But section 130(1)(b)(vii) allowing questions and evidence concerning matters which tend to prove the witness not to be giving truthful testimony or which tend to lessen the weight of his testimony appears open-ended and might allow in any kind of evidence relevant to the credibility of the witness. The New South Wales Law Reform Commission Working Paper on The Course of the Trial (1978) also recommended that evidence of the reputation of a witness as to veracity should not be allowed nor should a witness be allowed to state that he would not believe another on oath.²⁵⁴ In their view reputation was unreliable and opinion was only weighty if supported by specific instances on which the opinion is based. But, in fact, under the present law the impeaching witness may state the facts on which his opinion is based if it is challenged in cross-examination. So the situation is not materially different from what would obtain if the impeaching witness were entitled to give evidence on specific incidents relative to credibility in the first place.

The Law Reform Commission of Canada in their Report on Evidence (1975) expressed the view that no rigid classification of the cases where a witness's answers relating to his credibility are final was likely to be satisfactory.²⁵⁵ Section 62 of their draft Evidence Code provided that evidence for the purpose of attacking or supporting the credibility of a witness should be generally

254 Ibid. pp. 86, 93.

255 pp. 92-5.

admissible except as provided. The exceptions were contained in the following sections:

- "63. Evidence of a trait of a witness's character for truthfulness or untruthfulness is inadmissible to attack or support the credibility of the witness unless it is of substantial probative value.
- 64(1) Evidence of the conviction of a witness for a crime is inadmissible for the purpose of attacking his credibility if the witness has been pardoned for the crime or five years have elapsed from the day of his conviction or release from confinement for his most recent conviction of a crime, whichever is the later.
.....
- 66. The judge may exclude extrinsic evidence relevant to the credibility of a witness, such as matters indicating bias, interest, prejudice or character or that the witness has made a prior statement that is inconsistent with any part of his testimony, unless the witness has been given an opportunity to deny or explain such matters."

In addition section 5 of the draft Code vests in the Court a discretion to exclude evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues, misleading the jury, or undue consumption of time".

Pending reconsideration of the general question of the scope of cross-examination and evidence as to the credit of witnesses it is considered that the recommendation made by the English Criminal Law Revision Committee should be adopted so that, subject to the discretion of the court evidence may be given of any matter impugning the credibility of the maker of an out-of-court statement if it could have been proved or put to him in cross-examination for that purpose had he testified.

CHAPTER 9 RECOMMENDATIONS OF THE COMMISSION

The Law Reform Commission is of opinion that as a general rule facts in dispute are best ascertained by the viva voce examination of witnesses who have personal knowledge of that to which they testify. Consequently such evidence should be made available whenever possible. However, it must be recognised that there will be cases where the out-of-court statements of persons who are not available to testify have definite probative value and the out-of-court statement of a person who testifies and is subject to cross-examination may have a value additional to his testimony. In these circumstances the Commission considers that it is undesirable to retain the rule against hearsay and the rule against self-corroboration in their present form as rigid exclusionary rules of evidence. But in order to ensure that witnesses testify if they are available the out-of-court statement of an available witness who does not testify should remain inadmissible. There should be safeguards in the form of requirements of advance notice and proof by the best evidence to guard against the possible unreliability of out-of-court statements. However, while accepting that the arguments put forward in this Working Paper for these amendments in the law of evidence apply to criminal as well as civil cases, the Commission is of opinion that such changes might go beyond what is necessary as a matter of practice in criminal cases. It is also conscious of the difficulty of making the amendments suggested in criminal cases without at the same time amending other parts of the law of criminal evidence, notably that relating to the competence and compellability of witnesses. Accordingly the Commission has decided to present the arguments contained in this Working Paper without making firm recommendations as to the law to be applicable to the admissibility of out-of-court statements in criminal cases until such time as observations have been received from

interested persons. The Commission's recommendations are, therefore, confined to civil cases. They are as follows:-

1. (1) An out-of-court statement should be admissible as evidence of any fact therein of which direct oral evidence by the maker would be admissible if -
 - (a) the maker and, where the maker had not personal knowledge of the facts asserted, the person from whom the information derived,
 - (i) are dead;
 - (ii) are unable by reason of their health to testify;
 - (iii) cannot be identified or found; or
 - (iv) being competent or compellable witnesses, refuse to be sworn or to testify;

[pp. 26-38]
 - (b) advance notice is given to the other party, a requirement which may, however, be waived in the discretion of the court if the other party is not prejudiced by the failure to give him notice or if that failure has resulted from factors outside the control of the party tendering the out-of-court statement; [pp. 40-3, 92-3] and
 - (c) the statement is proved in court by the best evidence available. [pp. 38-40]

- (2) A statement should be defined to include conduct which is intended to be assertive and any verbal utterance or statement in a document, whether or not it is intended to be assertive. pp. 44-5
2. An out-of-court statement should be admissible as evidence of the facts therein when no objection is made to its admission. pp. 43-4
3. The judge should have discretion to exclude an out-of-court statement if it is of insufficient probative value or if its admission would operate unfairly against any party. p. 26
4. The judge should have discretion to admit depositions, evidence taken on commission and statements on affidavit where the importance of the evidence does not justify the expense of bringing a witness to court. pp. 37-8
5. An out-of-court statement of a person should not be taken as corroboration of his testimony or that of any witness called to prove the making of the statement. pp. 45-6
6. (1) An out-of-court statement of a witness should be admissible as evidence of any fact therein. However, unless the Court gives leave, no such statement should be given in evidence before the conclusion of the examination-in-chief of the witness who made it. pp. 53-8
- (2) Advance notice should be given of an out-of-court statement of a witness as for other out-of-court statements of persons who do not testify pp. 57-58

7. (1) A witness should be entitled to refresh his memory, either before or at the time he testifies, by referring to any previous statement made either by him or by another. Advance notice of such statement should be served on the other party, who should then be at liberty to tender the statement as evidence of the facts therein. But where a witness refreshes his memory by reference to a statement made by another, the party calling the witness should not be entitled to put that statement in evidence unless it is otherwise admissible or unless the statement is read out during cross-examination. [pp. 60-2]
- (2) Cross-examination should not be permitted from statements in parts of a document used to refresh memory other than those parts actually used for that purpose unless the statements referred to in cross-examination are admissible in evidence in their own right. [p. 62]
8. Prior inconsistent statements of a witness should be admissible as evidence of the facts asserted at the instance of any party without any requirement that advance notice should be given to the other party. [pp. 62-8]
9. (1) The restrictions on cross-examination contained in Sections 3, 4 and 5 of the Criminal Procedure Act 1865 should be repealed and the following provisions applied to the cross-examination of a witness on a previous statement made by him:-
- (a) Any previous statement of a witness used in cross-examination should be made available to the other party to the litigation.

(b) Notwithstanding (a), it should remain permissible to cross-examine a witness about a previous statement made by him before his attention is drawn to its exact contents or any document containing it.

(c) Where a previous statement of a witness is used in his cross-examination, he should be entitled to comment thereon and explain any discrepancy between it and his testimony in court; and evidence should then be admissible without notice of other previous statements explaining or qualifying an inconsistency.

[p. 68-74]

(2) A party producing a witness should not be permitted to give any evidence adverse to that witness's credibility except evidence of a previous inconsistent statement made by that witness. [p. 68]

10. The following special provisions should be made for business and administrative records:-

(1) An out-of-court statement contained in a business or administrative record should be admissible as evidence of any fact therein provided the court is satisfied that there is no person who was concerned in making the record who has any recollection of the facts stated therein. [pp. 91-2]

(2) Whenever a fact is sought to be proved by reference to a statement contained in a business or administrative record, or produced from such a record, whether or not the information was collected or processed by any mechanical device, evidence must be given by a responsible person as to the reliability of the

system of compiling those records and notice of such evidence given to the other party. pp. 82-3, 90-4

- (3) Where a statement in a business or administrative record, or produced from such a record, is not in a form comprehensible to a layman, an explanation by a qualified person should be admissible. pp. 94-5
 - (4) The absence of a record should be evidence that an event did not happen where in the course of business a system has been followed to make or keep a record of the happening of events of a given description. p. 95
- 11. (1) An out-of-court statement of a child who is not competent to give sworn or unsworn evidence should not be admissible. pp. 102-3
 - (2) An out-of-court statement of a person who is not competent to testify as being of defective intellect or disturbed mind should not be admissible unless it is established that the maker of the statement would have been competent to testify when he made the statement. pp. 104-5
- 12. The out-of-court statement of persons entitled to diplomatic immunity who, not being compellable, refuse to testify should be admissible in the same way as those of any other witness who refuses to testify. p. 106

13. (1) A party should be entitled to give in evidence against another party an admission made by that other party without giving advance notice and notwithstanding the fact that that other party does not testify provided such an admission is proved by the best available evidence. [pp. 134-57]
- (2) An admission should be defined as any statement made by a party himself adverse to his interest in the proceedings and should include -
- (a) a statement not based on personal knowledge,
- (b) a statement of opinion,
- (c) a statement notwithstanding the fact that it may indicate the party's assumptions as to the law [pp. 136-77]
- (3) Except in cases where conspiracy is alleged and there is independent evidence thereof, no statement made by a party adverse to the case of a co-party should be admissible as an admission against that co-party. However, where a party calls a witness who may be unfavourably disposed towards him for the purpose of enabling an out-of-court statement of that witness to be received in evidence, the rules restricting cross-examination of one's own witness should be waived by the court. [pp. 111, 135-67]
14. (1) Out-of-court statements admissible under existing law as part of the res gestae or as public documents or published works should be admissible on the same basis as the generality of out-of-court statements. [pp. 149-151, 163-47]

- (2) An out-of-court statement by a person as to his state of mind or feeling should be treated as an assertion of the facts stated therein and its admissibility subject to the same conditions as out-of-court statements generally. [p. 151]
15. Whenever an out-of-court statement as to reputation is to be given in evidence, particulars of the statement and the authority or grounds upon which it is based should be supplied to the other party in advance of the trial. [pp. 155-6]
16. Out-of-court statements admissible by virtue of specific statutory provisions such as the Bankers' Books Evidence Acts 1879 and 1959 should not be affected by the proposed legislation. [pp. 166-7]
17. No witness should be cross-examined about statements which are inadmissible in evidence, whether or not such statements are read to the court in the course of cross-examination. [pp. 168-9]
18. Where in any proceedings a party calls for or inspects a document which is in the possession or power of another party or of a witness called by that other party, his doing so should not entitle that other party to make the document evidence in the proceedings. [pp. 188-191]

19. It should be permissible to give evidence of any matter impugning the credibility of the maker of an out-of-court statement proved in any proceedings if that matter could have been put to him in cross-examination for the purpose of impugning his credibility had he testified. [pp. 192-200]
20. The admissibility of expert evidence should not be affected by the proposed legislation. [pp. 46-47]

CHAPTER 10 GENERAL SCHEME OF A BILL TO REFORM THE LAW
RELATING TO THE ADMISSIBILITY OF OUT-OF-COURT
STATEMENTS IN CIVIL CASES

1. (1) Provide that save as provided in this statute or any other statutory provision, no statement other than one made while testifying by a person with personal knowledge of the facts stated shall be admissible as evidence of the facts therein.

Note: *This section is a general statement of principle.*

- (2) Provide that "a statement" shall include any oral or written utterance whether or not it is intended to be assertive and any conduct which is intended to be assertive.

Note: *This sub-section implements Recommendation 1(2).*

- (3) Provide that for the purposes of this Act, "a statement" by a person as to his state of mind or feeling shall be deemed to be an assertion of the facts therein.

Note: *This sub-section implements Recommendation 14(2).*

2. Provide that an out-of-court statement shall be admissible as evidence of any fact therein, provided the other party, upon being served with notice, does not object to its admission.

Note: *This sub-section implements Recommendation 2.*

3. (1) Provide that an out-of-court statement shall be admissible as evidence of any fact therein provided:

- (a) the maker and, where the maker had not personal knowledge of the facts stated, the person or persons from whom the information in the statement was derived, testify in the proceedings or are dead or otherwise unavailable to testify;
- (b) notice of the contents of the statement and evidence of the death or unavailability of the maker is served on the other party;
- (c) the statement is proved by the best available evidence.

For the purpose of this sub-section a person shall be deemed to be unavailable to testify where he -

- (i) is unable to testify by reason of his health;
- (ii) cannot be identified or found; or
- (iii) being competent or compellable, refuses to be sworn or to testify.

Note: *This recommendation implements Recommendations 1 and 6.*

- (2) Provide that notwithstanding sub-section 1(b) no notice need be served of an out-of-court statement of a witness inconsistent with his testimony where that statement is tendered for the purpose of discrediting that testimony.

Note: *This sub-section implements Recommendation 9.*

- (3) Provide that the requirement of notice may be waived at the discretion of the judge if the other party is not prejudiced by the absence of notice or where the absence of notice is due to factors outside the control of the party tendering the out-of-court statement.

Note: *This sub-section implements Recommendation 1(i)(b).*

- (4) Provide that save with the leave of the court an out-of-court statement of a witness shall not be tendered in evidence before the witness has testified.

Note: *This sub-section implements Recommendation 6(1).*

- (5) Provide that where evidence of reputation is tendered by any party notice shall be given to the other party and shall include the grounds and authority upon which any statement as to reputation is based.

Note: *This sub-section implements Recommendation 15.*

4. (1) Provide that an out-of-court statement is not admissible where it was made by a person at a time when that person was incompetent to testify on behalf of the party tendering the statement.

Note: *This sub-section implements Recommendation 11.*

5. (1) Provide that an out-of-court admission made by a party shall be admissible in any proceedings as evidence of the facts admitted.

Note: *This sub-section implements Recommendation 13(1).*

- (2) Provide that where conspiracy to commit a civil wrong is alleged against several parties and there is independent evidence implicating them, a statement made by one conspirator in pursuance of the conspiracy is admissible as evidence of the facts therein against any other party in respect of whom conspiracy is alleged.

Note: *This sub-section implements Recommendation 13(3) in so far as it permits the admission of admissions against co-parties where conspiracy is alleged.*

- (3) An admission admissible under this section shall be proved by the best available evidence.

Note: *This sub-section implements Recommendation 13(1).*

- (4) For the purposes of this section, an admission is an out-of-court statement made by a party adverse to his interest in the proceedings and shall include -
- (a) a statement where the maker had not personal knowledge of the facts therein;
 - (b) a statement of opinion;
 - (c) a statement that contains assumptions as to the law.

Note: *This definition sub-section implements Recommendation 13(2).*

6. (1) Provide that an out-of-court statement contained in a business or administrative record shall be admissible as evidence of any facts therein, provided that evidence is given by a person occupying a responsible position in relation to such records showing -
- (a) that the records are reliable, and
 - (b) that there is no person who was concerned in the compilation of the records who has personal knowledge of the facts therein.

Note: *This sub-section implements Recommendation 10(2).*

- (2) Provide that where a fact is sought to be proved by reference to a statement contained in a business or administrative record notice must be given to the other party of the contents of the statement and of the evidence to be tendered in support of the reliability of the record.

Note: *This sub-section implements Recommendation 10(1).*

- (3) Provide that where production of a record described in sub-section (1) would not convey to the court the information contained in the record by reason of its being kept in a form that requires explanation, an explanation of the record by a person qualified to make such explanation is admissible in evidence under this section in the same manner as if it were the original record.

Note: *This sub-section implements Recommendation 10(3).*

- (4) Provide that where a business or administrative record does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record the judge may, upon production of the record, admit it in evidence for the purpose of establishing that such matter did not occur or exist.

Note: *This sub-section implements Recommendation 10(4).*

7. (1) Provide that a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath, before any person at any place, of a witness and may allow the deposition to be adduced in evidence without

requiring the witness to attend to give evidence at the trial of the cause or matter.

- (2) Provide that except where the judge so orders:
 - (a) the examination shall take place in the presence of the parties, their counsel, solicitors or agents;
 - (b) the witnesses shall be subject to cross-examination and re-examination; and
 - (c) the examination, cross-examination and re-examination of witnesses shall be subject to the same rules as at the trial of the cause or matter.

Note: *This section implements Recommendation 1(4).*

8. (1) Provide that a judge may at any time order that an affidavit may be received as evidence of the facts therein without requiring that the deponent be produced for cross-examination where the judge is satisfied that the deponent has personal knowledge of those facts and that undue expense or inconvenience would be caused by requiring the deponent to be called to give evidence.
- (2) Provide that the provisions of this section shall not prevent the reception of evidence on affidavit by virtue of any other statutory enactment or by virtue of rules of court.
- (3) Provide that an affidavit shall not be received in evidence by virtue of this section unless notice thereof is given to the other party, provided that

the court may waive the requirement of notice where the other party is not prejudiced by the absence of notice or where the absence of notice is due to factors outside the control of the party tendering the affidavit.

Note: *This section implements Recommendation 1(4).*

9. Provide that where an out-of-court statement of a person who is not called as a witness is given in evidence, there may be given in respect of that person, or of any person from whom he derived the information in the statement -
- (a) any evidence which, if any such person had testified, would be admissible for the purpose of impugning or supporting his credibility as a witness; and
 - (b) with the leave of the court, any evidence of any matter which, if any such person had testified, could have been put to him in cross-examination for the purpose of impugning his credibility as a witness.

Note: *This section implements Recommendation 19.*

10. (1) Provide that a witness may refresh his memory by reference to any writing or object, provided that notice is given to the other parties of the writing or object.
- (2) Provide that where a witness refreshes his memory by reference to a writing or object that writing or object may be tendered in evidence at the request of any other party to the proceedings.

- (3) Provide that statements used to refresh memory shall not, for that reason, be admissible as evidence of the facts therein at the instance of the party calling the witness whose memory has been refreshed.
- (4) Provide that where a witness refreshes his memory by reference to any document a party shall not cross-examine him about a part of that document other than that used to refresh memory unless -
 - (a) that part qualifies a statement which is used to refresh memory, or
 - (b) the statement in that part of the document is admissible in its own right as evidence of the facts therein.
- (5) References to refreshing memory shall include refreshing memory before testifying or while testifying.

Note: *This section implements Recommendation 7.*

- 11. (1) Provide that a party shall not examine a witness about a statement that is inadmissible in evidence.

Note: *This section implements Recommendation 17.*

- (2) Provide that where a party cross-examines a witness about a statement made or alleged to have been made by that witness -
 - (a) a copy of that statement or notice of its contents shall be furnished to on the other party;
 - (b) notwithstanding (a) a witness may be cross-examined about a previous statement made by him without the full contents of that statement

being shown to him at the time, provided that the circumstances and the contents of the statement are subsequently put to him so that he can make comment thereon.

- (3) Sections 3, 4 and 5 of the Criminal Procedure Act 1865 are hereby repealed in their application to civil proceedings.

Note: *Sub-sections (2) and (3) implement Recommendation 9.*

12. Provide that where in any proceedings a party calls for or inspects a document which is in the possession or power of the other party or of a witness called by that other party, his doing so shall not of itself entitle that other party to make the document evidence in the proceedings.

Note: *This section implements Recommendation 18.*

13. Provide that the judge may exclude an out-of-court statement tendered in evidence of the facts therein where it is of opinion that the probative value of the statement is too slight to justify its admission or where the admission of the statement would operate unfairly against any other party.

Note: *This section implements Recommendation 3.*

14. Provide that where corroboration is required by law, an out-of-court statement shall not be taken as corroboration of the testimony of the person who made it or of the testimony of the person who proves it in court.

Note: *This section implements Recommendation 1(5).*

15. Provide that nothing in this Act shall affect the admissibility of expert evidence.

Note: *This section implements Recommendation 20.*

APPENDIX 1

UNITED STATES FEDERAL RULES OF EVIDENCE (1978 VERSION)

Article VIII. Hearsay

Rule 801

DEFINITIONS

The following definitions apply under this article:

- (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
- (b) Declarant. A "declarant" is a person who makes a statement.
- (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
- (d) Statements which are not hearsay. A statement is not hearsay if -
 - (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

- (2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802

HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

- (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
- (4) Statement for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a

regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

- (7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

- (9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
- (10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.
- (11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- (12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
- (13) Family records. Statement of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

- (14) Records of documents affecting an interest in property.
The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.
- (15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
- (16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.
- (17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
- (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

- (19) Reputation concerning personal or family history.
Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage ancestry, or other similar fact of his personal or family history.
- (20) Reputation concerning boundaries or general history.
Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.
- (21) Reputation as to character. Reputation of a person's character among his associates or in the community.
- (22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.
- (23) Judgment as to personal, family or general history, boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

- (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804

HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

- (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant -
- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
 - (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
 - (3) testifies to a lack of memory of the subject matter of his statement; or

- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

- (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
- (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which

it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805

HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each party of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806

ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801 (d) (2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a

hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

APPENDIX 2

THE LAW IN NORTHERN IRELAND

The law on the admissibility of out-of-court statements is basically the same in Northern Ireland as in the State. But there have been a number of statutory innovations there which should be noted.

The Evidence Act (Northern Ireland) 1939 which followed a similar Act of the previous year in England was largely repealed by Section 15(2) of the Civil Evidence Act (Northern Ireland) 1971. Section 5 which has survived and which has no counterpart in the English Act made the following provision for evidence on affidavit:-

Rules of court may provide for orders being made at any stage of any civil proceedings directing that specific facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination notwithstanding that a party desires the attendance of the deponent for cross-examination and that he can be produced for that purpose.

Under the Magistrates' Courts Act (Northern Ireland) 1964 section 50, a deposition taken at a preliminary investigation of an indictable offence may be read to the court at the trial where it is proved that the witness is dead, insane, so ill as to be unable to travel or is being kept out of the way by the procurement of the accused or on his behalf. The Act also permits depositions to be read where the evidence is merely of a formal nature. Section 49 enables the taking of depositions from dying persons which may be read if the dying person has since died or is unable to travel to give evidence provided the reasonable notice is given to a person (whether prosecutor or accused) against whom it is proposed

to be given in evidence so as to afford an opportunity for cross-examination.

The Criminal Procedure (Committal for Trial) Act (Northern Ireland) 1968 provided for a preliminary inquiry before the magistrates' court into indictable offence on the basis of signed statements of witnesses. Any such witness may be required by the court, the prosecutor or the accused to give evidence on oath which is recorded as a written deposition in which case his signed statement is disregarded. Under section 7, a statement of a witness admitted in evidence at a preliminary enquiry may, with the leave of the court of trial, be read as evidence at the trial by agreement between the prosecution and the defence, or if the court is satisfied that the witness is dead or unfit to give evidence or to attend for that purpose, or that all reasonable efforts to find him or to secure his attendance have been without success.

The Criminal Evidence Act (Northern Ireland) 1965, which followed similar English legislation, subsequent upon Myers v. Director of Public Prosecutions* provided for the admissibility of trade or business records. Section 1(1) reads:-

1. (1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any recorded representation contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if -

* See p. 79 supra.

- (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 the 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 representation 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.

The Civil Evidence Act (Northern Ireland) 1971 largely follows the English Civil Evidence Act 1968. However, unlike the English Act, it makes no provision for the reception of the general run of hearsay statements but confines itself to records compiled in the course of any trade, business, profession or other occupation and statements produced by computers. Part I of the Act provides as follows:-

DOCUMENTARY EVIDENCE

1. (1) Without prejudice to section 2, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty.
- (2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person who originally supplied the information from which the record containing the statement was compiled, the statement -
 - (a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and

- (b) without prejudice to paragraph (a) above, shall not without the leave of the court be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person who originally supplied the said information.
 - (3) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.
2. (1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) are satisfied in relation to the statement and computer in question.
- (2) The said conditions are -
- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
 - (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
 - (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.
- (3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) was regularly performed by computers, whether -
- (a) by a combination of computers operating over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) by different combinations of computers operating in succession over that period; or

- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Part as constituting a single computer; and references in this Part to a computer shall be construed accordingly.

- (4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say -
 - (a) identifying the document containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
 - (c) dealing with any of the matters to which the conditions mentioned in subsection (2) relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

- (5) Notwithstanding subsection (4), in any civil proceedings the court may for special cause require oral evidence to be given of any matter of which evidence could ordinarily be given by means of a certificate under that subsection.
- (6) For the purposes of this Part -
- (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
 - (b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
 - (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.
- (7) Subject to subsection (3), in this Part "computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

3. (1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 1 or 2 it may, subject to any rules of court, be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.
- (2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 1 or 2, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including the form and contents of that document in which the statement is contained.
- (3) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 1 or 2 regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular -
 - (a) in the case of a statement falling within section 1(1), to the question whether or not the person who originally supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not that person, or any person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts; and

- (b) in the case of a statement falling within section 2(1), to the question whether or not the information which the information contained in the statement reproduces or is derived from was supplied to the relevant computer, or recorded for the purpose of being supplied thereto, contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not any person concerned with the supply of information to that computer, or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent the facts.
- (4) For the purpose of any transferred provision or rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement which is admissible in evidence by virtue of section 1 shall not be capable of corroborating evidence given by the person who originally supplied the information from which the record containing the statement was compiled.
- (5) If any person in a certificate tendered in evidence in civil proceedings by virtue of section 2(4) wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both.

4. (1) Subject to subsection (2) and to rules of court, where in any civil proceedings a statement contained in a document is given in evidence by virtue of section 1 -
- (a) any evidence which, if the person who originally supplied the information from which the record containing the statement was compiled had been called as a witness in those proceedings, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings; and
 - (b) evidence tending to prove that, whether before or after he supplied that information, that person made (whether orally or in a document or otherwise) a statement inconsistent with that information shall be admissible for the purpose of showing that that person has contradicted himself.
- (2) Nothing in subsection (1) shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.
5. (1) Provision shall be made by rules of court as to the procedure which, subject to any exceptions provided for in the rules, must be followed and the other conditions which, subject as aforesaid, must be fulfilled before a statement can be given in evidence in civil proceedings by virtue of section 1 or 2.

- (2) Rules of court made in pursuance of subsection (1) shall in particular, subject to such exceptions, if any, as may be provided for in the rules -
- (a) require a party to any civil proceedings who desires to give in evidence any such statement as is mentioned in that subsection to give to every other party to the proceedings such notice of his desire to do so and such particulars of or relating to the statement as may be specified in the rules, including particulars of such one or more of the persons connected with the making or recording of the statement or, in the case of a statement falling within section 2(1), such one or more of the persons concerned as mentioned in section 3(3)(b) as the rules may in any case require; and
 - (b) enable any party who receives such notice as aforesaid by counter-notice to require any person of whom particulars were given with the notice to be called as a witness in the proceedings unless that person is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he was connected or concerned as aforesaid and to all the circumstances) to have any recollection of matters relevant to the accuracy or otherwise of the statement.
- (3) Rules of court made in pursuance of subsection (1) -

- (a) may confer on the court in any civil proceedings a discretion to allow a statement falling within section 1(1) or 2(1) to be given in evidence notwithstanding that any requirement of the rules affecting the admissibility of that statement has not been complied with, but except in pursuance of paragraph (b) of this subsection shall not confer on the court a discretion to exclude such a statement where the requirements of the rules affecting its admissibility have been complied with;
- (b) may confer on the court power, where a party to any civil proceedings has given notice that he desires to give in evidence a statement falling within section 1(1) which is contained in a record of any direct oral evidence given in some other legal proceedings (whether civil or criminal), to give directions on the application of any party to the proceedings as to whether, and if so on what conditions, the party desiring to give the statement in evidence will be permitted to do so and (where applicable) as to the manner in which that statement and any other evidence given in those other proceedings is to be proved; and
- (c) may make different provision for different circumstances, and in particular may make different provision with respect to statements falling within sections 1(1) and 2(1) respectively;

and any discretion conferred on the court by rules of court made as aforesaid may be either a general discretion or a discretion exercisable only in such circumstances as may be specified in the rules.

- (4) Rules of court may make provision for preventing a party to any civil proceedings (subject to any exceptions provided for in the rules) from adducing in relation to a person who is not called as a witness in those proceedings any evidence which could otherwise be adduced by him by virtue of section 4 unless that party has in pursuance of the rules given in respect of that person such a counter-notice as is mentioned in subsection (2) (b).
- (5) In deciding for the purposes of any rules of court made in pursuance of this section whether or not a person is fit to attend as a witness, a court may act on a certificate purporting to be a certificate of a fully registered medical practitioner.
- (6) Nothing in subsections (1) to (5) shall prejudice the generality of section 7 of the Northern Ireland Act 1962, sections 146 and 147 of the County Courts Act (Northern Ireland) 1959, sections 23 and 24 of the Magistrates' Courts Act (Northern Ireland) 1964 or any other enactment conferring power to make rules of court; and nothing in section 66 of the Supreme Court of Judicature (Ireland) Act 1877, section 147 (a) of the County Courts Act (Northern Ireland) 1959 or any other statutory provision restricting the matters with respect to which rules of court may be made shall prejudice the making of rules of court with respect to any matter mentioned in those subsections or the operation of any rules of court made with respect to any such matter.
- (7) References in this section to rules of court include -

- (a) in relation to the county court, references to county court rules; and
- (b) in relation to magistrates' courts, references to magistrates' courts rules.

6. (1) In this Part -

"computer" has the meaning assigned by section 2;
"document" includes, in addition to a document in writing -

- (a) any map, plan, graph or drawing;
- (b) any photograph;
- (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

"film" includes a microfilm;

"statement" includes any representation of fact, whether made in words or otherwise.

(2) In this Part any reference to a copy of a document includes -

- (a) in the case of a document falling within paragraph (c) but not (d) of the definition of "document" in subsection (1), a transcript of the sounds or other data embodied therein;

- (b) in the case of a document falling within paragraph (d) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not;
- (c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and
- (d) in the case of a document not falling within the said paragraph (d) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged or not,

and any reference to a copy of the material part of a document shall be construed accordingly.

- (3) Subject to subsection (4), for the purposes of the application of this Part in relation to any such civil proceedings as are mentioned in section 14(1)(a) and (b), any rules of court made for the purposes of this Act under section 7 of the Northern Ireland Act 1962 shall (except in so far as their operation is excluded by agreement) apply, subject to such modifications as may be appropriate, in like manner as they apply in relation to civil proceedings in the High Court.
- (4) In the case of a reference under section 60 of the County Courts Act (Northern Ireland) 1959 subsection (3) shall have effect as if for the references to section 7 of the Northern Ireland Act 1962 and to civil proceedings in the High Court there were substituted respectively references to section 147

of the County Courts Act (Northern Ireland) 1959 and to civil proceedings in a county court.

- (5) If any question arises as to what are, for the purposes of any such civil proceedings as are mentioned in section 14(1) (a) or (b), the appropriate modifications of any such rule of court as is mentioned in subsection (3) or (4), that question shall, in default of agreement, be determined by the tribunal or the arbitrator or umpire, as the case may be.