HEARSAY EVIDENCE

REPORT OF THE TORTS AND GENERAL LAW REFORM COMMITTEE OF NEW ZEALAND

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1. Introduction -

Prior to the formation of the present Law Revision Commission the Law Revision Committee appointed a sub-committee under the chairmanship of Professor F.W. Guest to "re-examine the whole implications of the hearsay rule in criminal and civil proceedings." That subcommittee duly reported to the Minister of Justice in June 1966. It recommended the adoption of the provisions of the Criminal Evidence Act 1965 (U.K.) which was passed in consequence of the decision of the House of Lords in Myers v. Director of Public Prosecutions [1965] A.C. 1009. That recommendation was acted on with the passage of the Evidence Amendment Act 1966 (N.Z.) which follows, with some minor modifications, the provisions of the 1965 United Kingdom statute. The subcommittee went on to make more far-reaching recommendations relating to the admissibility of oral and written hearsay evidence in civil and criminal cases. This second part of its report was referred by the Minister of Justice on 8 July 1966 to the Torts and General Law Reform Committee for further consideration and report.

2. In considering this difficult and complex topic the Committee had the advantage at an early stage of a meeting with members of Professor Guest's subcommittee. Later in its deliberations it invited Professor Guest to attend and comment on its tentative proposals to reform the law and has profited from consultation with him by correspondence. We wish to record our thanks to him though it will be seen that our recommendations differ materially from those of his subcommittee. The Honourable Mr Justice Turner kindly consented to attend two of the meetings of the Committee and we also record our thanks to him for his assistance.

The Committee has considered the hearsay rule at length. The greater part of nine meetings has been devoted to the discussion of the principles which should govern the reception of hearsay evidence and of consequential matters and details of drafting. We have had the advantage of studying the thirteenth report of the English Law Reform Committee published in 1966 (Cmd 2964). During our discussions we corresponded with Professor Rupert Cross who

kindly offered his comments on our proposals and we have acted on some of his suggestions. We have of course, consulted a number of sources, and we should specially mention our indebtedness to the symposium by Cross, Nokes and Griew in [1965] Crim. Law Review 65-128 and to the Californian Law Revision Commission's study of the hearsay rule in 1962.

3. We think that the main concern of those considering this report will be to examine the principles which we recommend should govern new legislation in this area and the reasons for our recommendations. But detail is very important. Recognising this, we decided to follow the somewhat unusual course of preparing a draft bill containing our detailed recommendations. Explanation of these is contained in notes to the various clauses of the draft Bill. The draft Bill served the purpose of clarifying our own minds on the implications of our proposals; it will also, of course, avoid the difficulties of translation of our recommendations into statutory form and may speed the enactment of our proposals if they are agreed to.

4. We considered whether it was desirable to insert the word "hearsay" in the Short Title to the Bill to indicate its limited scope but decided not to do so, mainly because it is established practice in New Zealand to amend the rules of evidence by legislation simply entitled the Evidence Amendment Act (year).

We have deliberately avoided the expressions "hearsay" or "hearsay evidence" in the wording of the various clauses of the Bill, though "hearsay" appears in the headings to the various clauses.

The rule against hearsay has been stated as follows: "Express or implied assertions of persons other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted." (Cross on Evidence, 3rd ed. 1967, at p.387).

As Professor Cross says, however, (ibid., at 380) the rule has never been fully formulated judicially - though statements by the Privy Council in Subramaniam v. Public Prosecutor [1956] 1 W.L.R. 965, at 969 and in Mawaz Khan v.

The Queen [1967] 1 All E.R. 80, go some distance in this direction. The writers offer divergent definitions. The main substantive controversy has revolved around the question whether conduct not primarily intended to be assertive infringes the hearsay rule if related by someone who witnessed that conduct, e.g. evidence that the accused fled from the scene of the crime. There is force in the view of the Californian Law Revision Commission that this is not hearsay evidence at all. The other view is taken by Professor Cross, citing Wright v. Doe dem. Tatham (1838) 4 Bing. (N.C.) 489. Cf also Teper v. R. [1952] A.C. 480. We prefer to avoid making a recommendation to resolve this dispute, which is of little practical importance, and to avoid defining what constitutes hearsay evidence. This is often a matter of some difficulty - for example it is not certain whether the evidence admitted by the Court of Criminal Appeal in R. v. Rice [1963] 1 Q.B. 857 should have been rejected as hearsay evidence. (The decision in Rice is hard to reconcile with the subsequent decision in Myers case, infra.)

5. We think it is better to list categories of evidence which are affirmatively admissible than to start with a statement that hearsay evidence is inadmissible and then list numerous exceptions, though this was the procedure adopted by the compilers of the Uniform Rules of Evidence in the U.S.A. Under our method, which was used in enactments relaxing the hearsay rule in limited areas, namely the Evidence Act 1938 (U.K.) and our Evidence Amendment Act 1945, the Criminal Evidence Act 1965 (U.K.) and our Evidence Amendment Act 1966, it will be unnecessary first to inquire whether an item of evidence constitutes hearsay and then whether it is saved from inadmissibility by virtue of any one of a list of numerous exceptions. It will be sufficient to consult clauses 3 - 7 of the draft Bill to ascertain whether the item qualifies for admission under any one of those clauses. Our proposal also avoids the question whether evidence admissible under the umbrella of the res gestae principle is admissible as original evidence or by virtue of an exception to the hearsay rule, or sometimes the one and sometimes the other.

6. The draft Bill accompanying the report is not intended to be a codification of the law relating to the admissibility and inadmissibility of hearsay evidence, though it covers the major part of the ground. Hearsay evidence at present admissible under a particular statute or, for example, by virtue of Rule 185 of the Code of Civil Procedure (Judicature Act 1908, Second Schedule), will continue to be admissible under its relevant authority rather than by virtue of the Bill, if adopted. If any evidence is specifically declared to be inadmissible by statute it will continue to be inadmissible. After the hearsay rule had emerged as a firm rule of adjectival law a number of exceptions to the rule were evolved by judicial decision, especially in the nineteenth century. In Myers v. Director of Public Prosecutions [1965] A.C. 1009, however, a majority of the House of Lords held that it was no longer competent for the courts to create new exceptions to suit particular cases where it was considered desirable to admit evidence caught by the prohibition. We propose that those common law exceptions which are of high practical importance and which have attracted a substantial body of law of their own should continue to exist alongside the new Act. Accordingly we do not recommend any alteration for the time being of the present rules regarding the admissibility of evidence of confessions in criminal cases, or of admissions by the parties or their agents in civil cases. In this respect we refer to the savings provision contained in clause 17 (3) of the Bill. But a number of comparatively little-used exceptions, sometimes referred to as the "principal common law exceptions" to the hearsay rule, should in our view be brought up to date and codified immediately. The reasons for so doing are explained in the notes to clause 6 of the Bill.

We are not satisfied that the rules of evidence about either confessions or admissions are entirely satisfactory but we have judged it best not to concern ourselves with their reform at this juncture. They might usefully be made the subject of a separate report. The same comment applies to certain features of the present law of evidence which our present terms of reference do not cover, notably the confusing rules governing similar fact evidence and "the rule in Hollington v. Hewthorn & Co. Ltd [1943] K.B. 587" which has been judicially declared to be "ripe for re-examination" (per Lord Denning M.R. and Diplock L.J. in Barclays

Bank Ltd v. Cole [1967] 2 W.L.R. 166, 169, 171).

We accept the desirability of an enactment exhaustively codifying the law of hearsay evidence. That enactment would clarify, and where necessary modify, those exceptions to the hearsay rule which are unaffected by our present proposals. We also think that at the same time or, perhaps more realistically, subsequently, the entire law of evidence should be subjected to codification. We agree in this respect with the comments of the English Committee in paragraph 3 of its Report, already cited:

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

We expect that such a comprehensive code would deal with the res gestae principle and with the rules as to conduct which is not primarily intended to be assertive of a fact.

7. In considering our recommendations we have endeavoured to adhere to certain principles which it may be useful to make explicit:

(i) So far as possible, we think the rules in civil and in criminal cases should be the same.

(ii) In general it is undesirable in criminal cases to have one evidentiary rule for the prosecution and a different rule for the defence. The only differentiation which we think justified is that already accepted by the cases, viz. that the trial Judge has a discretion to reject evidence which, though technically admissible, is likely to have a prejudicial effect on the jury out of all proportion to its probative value. This obviously operates in favour of the accused in criminal proceedings. (Here see clause 11 and the notes thereto.)

(iii) The admissibility of an item of evidence should be highly predictable by counsel preparing for trial, or at least as predictable as we can reasonably make it. The English Committee stressed the same point in paragraph 23 of its Report. This consideration at once rules out a legal reform which would permit a Judge or Magistrate to admit hearsay evidence in his discretion if he considered it sufficiently reliable in the particular circumstances to make this course expedient. Under such a system, if the discretion were exercised against admissibility a party might well be faced with a crucial gap in the evidence necessary to support his claim or his defence. On the other hand, circumstances are so infinitely variable that the Court must be vested with some discretionary powers. Some of the more important discretions will, under our proposals, be exercised before trial. In this way a party will know where he stands at the trial. If a plaintiff elects to discontinue, having regard to an adverse ruling on his interlocutory application, this will at least save him costs.

We also recognize that a decision to exercise a discretion in a particular way may often have a decisive bearing on the outcome of litigation. We therefore propose an unqualified review of the exercise of the discretion on appeal. (Refer to clause 16 and note thereto.)

(iv) The English Committee, to whose report we have already referred, was much influenced by the near extinction of jury trial in civil cases in the English courts; see paragraph 7 of its report. Moreover, its terms of reference required it to confine its attention to civil cases. The Criminal Law Revision Committee is currently and separately reviewing the rules of evidence in criminal cases, but its report on the hearsay problem has not yet been issued. (Its Ninth Report (November 1966) is confined to recommendations about the admissibility of written evidence by the consent of all parties; formal admissions; and notices of alibi.) Our position has been different in both respects. Most personal injuries litigation

is heard by a Judge and a jury in New Zealand and such litigation constitutes a considerable proportion of the total volume of civil litigation. Moreover, we have been concerned to propose rules for application in both civil and criminal cases, so that the desirability of admitting certain kinds of evidence before both civil and criminal juries has occupied a prominent place in our thinking. But we would emphasize that it has not been within our province to evaluate the wisdom of retaining jury trial in civil cases, let alone to speculate on the wisdom of retaining common law claims for the compensation of industrial accidents or highway accidents. We accordingly make the assumption, throughout our report, that trial by jury will be retained in those cases where it is now available.

(v) The same rules should govern proceedings in both the Supreme Court and the Magistrate's Court. It may, perhaps, be argued that the procedure we suggest is unnecessarily complex. But our reply would be, first, that claims which may be for as much as $2000 should not be determined on hearsay evidence without adequate procedural safeguards; secondly, that it might be confusing to have different sets of rules in the two Courts; and, thirdly, the Magistrate, in his "equity and good conscience jurisdiction" may admit reliable hearsay evidence, without any special procedure being followed, in claims under $100 (Magistrates' Courts Act 1947, s.59).

As to arbitrations we refer to the definition of "proceedings" in clause 2 of the draft Bill, and to note (3) to that clause.

(vi) We have, in drafting, elected to follow the wording of earlier enactments, notably the Evidence Amendment Acts 1945 and 1966, as far as we could. The 1945 Act deals with documentary evidence in civil cases only, and the 1966 Act to "business records" in criminal cases only. The draft Bill at once incorporates and supersedes the 1945 Act, the provisions of which we have extended in various respects, as explained in the notes. It is also designed to incorporate and preserve the beneficial

provisions of the 1966 Act as well as extending the law to cover all documentary evidence in criminal proceedings. Where a choice of language was possible there seemed to be some advantage in adhering to the wording already used in one or other of these Acts. Some re-wording was necessitated by the very fact that we have as far as possible welded the rules for civil cases and those for criminal cases into one piece of legislation.

(vii) We have kept in view the need to simplify the law of hearsay evidence as well as the need to improve it. But the need to simplify the law, should, in our view, take second place to affording a proper answer to the substantive question, which is: what kinds of evidence may be usefully and safely admitted, and before what tribunals? We have endeavoured so to arrange the sequence of clauses in the Bill that the relevant rule can be found reasonably quickly.

Effect of the Draft Bill

9. We must now explain what the draft Bill does. The Evidence Amendment Act 1945 constituted a cautious first step towards the more liberal admissibility of documentary hearsay evidence. It has been in force for 22 years and has provided useful experience of the effect of admitting particular kinds of hearsay evidence. Yet, as the English committee noted in paragraph 11 of its report, it has "hardly worked a revolution in the attitude of the legal profession to the hearsay rule". And as that committee went on to state, the reason "lies partly in the limiting and excluding provisions of the Act". Our impression is that the relevant provisions of the Evidence Amendment Act 1945 (ss. 2-4) have not been used frequently in this country; indeed there is only one reported decision on the interpretation of the Act, Union S.S. Co. of N.Z. Ltd v. Wenlock [1959] N.Z.L.R. 173 (C.A.) - compared with many in the United Kingdom in recent years.

The Bill would enable much more documentary hearsay to be admitted in civil proceedings. The main extensions we propose here are:

(i) The category of persons unavailable to give evidence has been extended to include those who are unfit by

reason of old age (not youth) or bodily or mental condition to appear as witnesses and those who cannot with reasonable diligence be found. In each case the unavailable person must have had personal knowledge of the facts contained in the statement that he made. This will exclude second-hand hearsay evidence.

(ii) The category of statements recorded by a person from information supplied by someone else, and admissible at present under section 3 (1) (a) (ii) of the 1945 Act, is broadened so as to include statements made in the course of any business, as well as statements recorded in the performance of a duty, and to include statements recorded by A from information obtained by B from C who had personal knowledge of the facts but is unavailable. To this extent only are we prepared to recommend the admission of second-hand hearsay evidence. (Refer clause 3 (b) of the Bill.)

(iii) The limitation imposed by s.3 (3) of the 1945 Act, which disqualifies statements by interested persons, is removed.

(iv) Statements made by witnesses who are in New Zealand may be admitted when, although it would be possible to arrange their attendance at the trial, this would cause delay or expense disproportionate to the importance of the evidence they can give the court. This will avoid calling a witness from a distance to speak to a fact about which there is, or can be, little or no dispute. (Refer to clause 4 of the Bill.)

(v) The range of documents which may be admitted is considerably extended. (Refer to the very wide definition of "document" in clause 2 of the Bill and to what is said in paragraph (7) (vi) above.)

(vi) All hearsay evidence which the parties agree should be admitted will be admissible (Refer clause 7). This merely formalises the current practice.

(vii) Copies of documents will be freely admissible: (refer to clause 8 and notes thereto).

10. As to documentary hearsay in criminal proceedings, the Evidence Amendment Act 1966 marks the first step towards

greater admissibility. The provisions of this Act are in some respects wider, and in at least one respect narrower, than those of the 1945 Act. (For a useful commentary on its model, the Criminal Evidence Act 1965 (U.K.), see Cross, note in (1965) 28 Mod. L.R. 571.) The main limitation of the Act is that it applies only to business records, (but note that the definition of "business" in s.24A (5) of the New Zealand Act is materially wider than that contained in s.1 (4) of the U.K. Act), thus excluding, for example, a soldier's regimental records as evidence that he was abroad at the time his wife conceived a child (Lilley v. Pettit [1946] K.B. 401) or a letter written to the police or to an insurance company by a person now dead or insane or in Switzerland and containing matter relevant and helpful to the prosecution or the defence case on a charge of dangerous driving causing death. The Bill applies to documentary evidence generally: thus clause 3 relates to any proceedings, whether civil or criminal. The soldier's regimental records will be admissible; as will letters, diaries and memoranda of all kinds. The line is again drawn short of second-hand hearsay evidence by the requirement of personal knowledge, as in the case of documentary hearsay evidence in civil proceedings. Reference to the exclusion of second-hand hearsay was made in the previous paragraph. Again, copies of documents will be freely admissible and a witness will not be disqualified on account of his interest in the outcome of the criminal proceedings.

11. For reasons summarized in paragraph 15 below, a distinction must be drawn between oral and documentary hearsay. As to oral hearsay evidence in civil proceedings, the Bill proposes that it be admitted before a Magistrate or, in the Supreme Court, before a Judge alone, if conditions similar to those in clause 3 (which applies to documentary evidence alone) are met (refer to clause 5 of the Bill). But note that no second-hand hearsay evidence is to be admitted in this instance, and that oral evidence of opinion will be excluded. Limited provision is made for a party to apply to the court for a trial by Judge alone in order to obtain the benefit of clause 5 (refer to clause 18).

Further, oral evidence will be admissible in civil proceedings, and in this instance whether with or without

a jury, under clause 6 which amends and codifies the "principal common law exceptions". We do not propose to discuss the details here for they are of limited practical significance, and a full discussion may be found in the notes to clause 6.

13. The reasons for our recommendations -

The rationale of the hearsay rule was explained by Judges after the rule had gained acceptance as a rule of inadmissibility. Various reasons for the existence and necessity of the rule have been given by courts and writers over the years. Of these, the following are perhaps most commonly advanced:

(a) The unreliability of statements, whether written or oral made by persons not under oath or subject to cross-examination.

(b) The desirability of the "best evidence" being produced of any fact sought to be proved.

(c) The undesirability, where the trial takes place before a jury, of admitting evidence which the jury will not be able to evaluate properly and which may accordingly mislead them.

(d) The danger which exists, in the case of oral hearsay evidence, that the statement of a person other than the witness testifying may not have been accurately reported.

We agree with the assertion made by the English Committee, in paragraph 6 of its report:

> "Prima facie any material which is logically probative of a fact in issue, i.e. which tends to show that a particular thing relevant to the cause of action or to the defence happened or did not happen or is likely or unlikely to happen, is capable of assisting the Court in its task and should be capable of being tendered in evidence, unless there are other reasons for refusing to admit it ... [Rules which exclude the use of a particular kind of material to prove a fact] should have a rational basis. It should be possible to point to some disadvantage flowing from the admission of the particular kind of material as evidence of a fact which would outweigh the value of

"any assistance which the court would derive from the material in ascertaining what in fact happened."

Several comments may be made about the reasons which have been advanced to justify the exclusion of hearsay evidence. As to (a), its unreliability, it is, as the English committee commented in paragraph 8 of its report, "quite impossible to generalise". Not all hearsay evidence is unworthy of reliance. Much is already admitted in practice, as, for instance, when counsel raises no objection, and the court then weighs it and may act upon it. The Evidence Amendment Act 1945 illustrates the point that hearsay evidence is not necessarily objectionable. So do the numerous statutory exceptions. The question really is: which kinds of hearsay evidence are in general so unreliable that they should not be admitted? - or, putting it another way, in what circumstances do the disadvantages of admitting a statement not on oath by a person not present in court to be cross-examined outweigh the assistance which the court might get from it in endeavouring to arrive at the truth? In our opinion cross-examination of those who assert facts or opinions, while probably deserving Wigmore's description as "the greatest legal engine ever invented for the discovery of truth", is not essential to every item of proferred evidence. Cross-examination is a leading feature of our system of trial procedure, but it cannot be said that the structure of our trial procedure will collapse if the opportunity to cross-examine every first-hand observer of an event is denied. There are situations where injustice will be caused if hearsay evidence is refused admission. This, we think, was the mainspring of the ad hoc creation of the numerous common law exceptions to the rule and the reason underlying the enactment of the Evidence Act 1938 (U.K.), the Evidence Amendment Act 1945 (N.Z.) and the legislation of 1965 and 1966. Where the advantages of admitting hearsay evidence outweigh the disadvantages the preferable course is to admit it, and weigh it. We believe that, generally speaking, Judges and Magistrates are well able, by their training and experience, to assess the reliability of hearsay evidence. They can easily differentiate between hearsay evidence which is inherently likely to be true and hearsay evidence to which it would be dangerous to attach any weight. We refer, in this

connection, to the "weight" clause which appears as clause 10 of the Bill. The position is different where there is a jury. The problem here is one of drawing a sensible line between hearsay evidence which will probably mislead a jury and hearsay evidence which probably will not.

14. As to (b), that hearsay evidence is not the "best evidence" of a fact, this may be merely another way of stating objection (a) to the reception of hearsay evidence. If it is a separate objection, it must be remembered that the "best evidence" rule survives at the present day as a counsel of prudence rather than a rigid rule of inadmissibility. Moreover, the hearsay rule applies notwithstanding that, in the circumstances of a particular case, hearsay evidence actually is the "best" evidence probative of a particular fact because no other evidence is available, as happens whenever the only eye-witness of an event has died or become insane. Moreover, as the English committee noted, the hearsay rule applies to all facts which a plaintiff must prove to establish his claim, whether or not when it comes to the trial any particular fact will be disputed. The result is that preparation for trial is made more complicated and unnecessary costs are incurred.

15. We have already touched on reason (c). We think that this reason for excluding hearsay evidence can be exaggerated. But we fully recognise its validity in those cases where it would be very likely to sway the jury to reach a particular verdict on emotional grounds and in disregard of the other evidence given in the action. Non-hearsay evidence is frequently excluded for exactly the same reason, e.g. photographs of battered corpses, and, in civil cases, the fact that the defendant is insured. Where hearsay evidence is not generally likely to lead the jury astray it should be admitted, under stringent conditions and subject to procedural safeguards. Even then cases may easily arise in which hearsay evidence falling within a category which should ordinarily be admissible should not be admitted in the special circumstances of a particular case. Provision is made for the judge to reject such a statement "if the prejudicial effect of the admission of the statement would outweigh its probative value or if for any other reason whatsoever the Court is satisfied that it would be inexpedient in the interests of justice that the statement

should be admitted". We stress this provision, which appears in clause 11 and applies to both civil and criminal proceedings: it is an important and indispensable feature of our proposals, though by no means new, having appeared in s.3 (5) of the 1945 Act for civil cases and having been developed by leading decisions in criminal cases.

16. As to the final reason, namely that there is a special danger in the admission of oral hearsay evidence, this is clearly valid, though it does not necessarily lead to the conclusion that all oral hearsay evidence should be excluded. Some oral hearsay is already admissible at present, e.g. statements by deceased persons under any of the principal common law exceptions to the hearsay rule (as to which reference should be made to clause 6 of the draft Bill); and oral confessions and admissions. But clearly there is a double source of error when oral hearsay is admitted. Not only may the veracity of the maker of the statement be in doubt or his powers of observation, memory or narration defective, but there may also be doubt as to whether the statement is accurately remembered and reported to the court.

17. We turn now to the reasons justifying our recommendations in respect of the various categories of hearsay evidence which the Bill proposes to make admissible.

The least controversial category is that of documentary evidence in civil proceedings before a Judge alone. The Committee is unanimously agreed that such evidence should be admissible, provided that the person who might have given first-hand oral evidence is genuinely unavailable. The procedural provisions of the Bill will enable the opponent of the party who wishes to adduce such evidence to check on the genuineness of the cause of unavailability stated in the interlocutory application to the court, and, where he thinks fit, to oppose the making of an order in the applicant's favour. Groundless opposition, or opposition merely to delay the trial of proceedings, will no doubt be penalised by the court in costs. The Committee is agreed that some limiting requirements to the 1945 Act should now be removed on the ground that they go to weight, but should not determine admissibility. In this we have the support of the English committee. The detailed extensions of the 1945 Act are referred to in the notes to the clauses of the Bill.

The next category is documentary evidence in civil proceedings with a jury. The Committee is unanimously agreed that such evidence should be admitted. The procedural sections will apply and there will be the additional safeguard of clause 11, already explained. We are aware that in some civil actions the evidence may be unreliable because of the possibility of fabrication. But it is harder to fabricate a document successfully than it is to suborn a witness to give false oral evidence, and it must be remembered that the danger of fabricated evidence is not a problem unique to hearsay evidence, but may equally arise in the case of original evidence. On balance we consider that the dangers of admitting this class of evidence under the safeguards we propose fail to outweigh the advantage which courts may obtain from such evidence in arriving at the truth.

18. As to minor criminal proceedings heard before a Magistrate there can be no doubt that documentary hearsay evidence will often be of assistance in arriving at the truth and producing a just result. We discussed whether in summary proceedings before Justices it would be safe to admit documentary hearsay evidence and were hesitant about the wisdom of this course but eventually decided that we should so recommend since the more important summary proceedings are nowadays usually heard by Magistrates rather than Justices of the Peace in most districts and since it would be inconvenient to have one rule for proceedings before a professional bench and another rule before a lay bench.

19. As to documentary hearsay evidence in trials on indictment before a Judge and jury we first repeat the obvious point that the Criminal Evidence Act 1965 (U.K.) and the Evidence Amendment Act 1966 (N.Z.) which followed it already make provisions for a limited class of documentary hearsay. This legislation was passed to remedy the unfortunate consequence of the hearsay rule disclosed by Myers case (supra.). So far as we can judge, this legislation has been well received by the Profession, and it was advocated and welcomed by some of the Judges on our Supreme Court bench. We think the time has come to admit documentary evidence generally in criminal proceedings. The document speaks for itself. There can be no dispute, other than as a matter of semantics, as to what it says.

It is generally more reliable than oral hearsay evidence. It may often be necessary to admit the statement in order that a well-founded criminal charge should not fail simply for evidentiary reasons; conversely, it may be essential to the defence case. Consider, for example, a doctor's clear written statement of his opinion that the accused was insane at the time of his actions. This should not be withheld from the Court merely because the doctor died the day before trial. It will be necessary to establish who the maker of the statement was before the court can be satisfied that he had personal knowledge of the matters contained in his statement, or that he cannot be found. Note the contrast between the wording of clause 3(a) and the wording of clause 3(b). In clause 3(a) it is: "cannot with reasonable diligence be found". In clause 3(b) (ii) it is: "cannot with reasonable diligence be identified or found". This, together with other indications, clearly implies that an accused person will not be entitled to adduce in evidence an unsigned letter, the maker of which is unknown, but which "I found lying around in the yard". Our recommendation does not go beyond admitting a statement proved to have been written or typed by a named person, known to exist, whose whereabouts are unknown. Further, the Judge must be satisfied that a reasonable search has been made for the maker of the statement. We concede that, even with these safeguards, there is a possibility of abuse and some room for fabrication, e.g. a prisoner awaiting trial might procure a fellow-prisoner to write a letter exculpatory of him immediately before the fellow-prisoner's release and on release he could conveniently "disappear" and so be unavailable to appear as a witness at the trial. But this evidence would surely be received with the suspicion that it deserved. In a similar situation, however, the evidence just might be true. More important, for every occasion of abuse there are likely to be many examples of logically probative evidence which would fall under a general ban if a general ban were continued in order to meet the cases of abuse. Furthermore, the draft Bill, by requiring an interlocutory application to the court, will help to eliminate fabrication, as the prosecutor will be able to investigate the alleged unavailability of the witness and to undertake inquiries to check the truth of

the hearsay statement of which he will have a copy.

20. We are unanimously agreed that oral hearsay evidence should not be admitted in criminal proceedings. We have been advised that some members of the Criminal Law Revision Committee in the United Kingdom are "very worried" about the effect that the admission of such evidence might have on a criminal jury. We think that the dangers of fabricated evidence are much more real in criminal than in civil proceedings. From the accused's point of view his liberty is at stake and accused persons tend to be unscrupulous in the methods they are prepared to use to secure an acquittal, often to the extent of deception of their legal advisers. Another factor which has influenced the Committee is that the standard of proof in criminal proceedings provides an incentive to fabricate, say, a false confession of crime from a person unavailable to give evidence in order to raise a reasonable doubt in an otherwise hopeless case. We think that a number of those now convicted would be unjustly acquitted if oral hearsay evidence were admitted. Although less likely, there is also the possibility of a prosecution witness having an incentive to fabricate evidence.

We gave consideration to imposing the requirement that the maker of the statement should have had no interest in the outcome of the criminal trial and to limiting the ground of unavailability to cases where the maker of the statement was dead, but our ultimate decision was that, even with these requirements, which would, in any event, serve further to complicate the provisions of the draft Bill, it was unsafe to admit the evidence. A Magistrate would not be influenced by unreliable hearsay evidence, but in the Magistrate's Court also the standard of proof required is frequently decisive in producing an acquittal; moreover we are reluctant to recommend one rule for the Magistrate's Court and a more restrictive rule for the Supreme Court.

21. The Committee was, however, divided in its opinion about the merits of admitting oral hearsay before a civil jury. A majority of the Committee was against its admission. A minority would prefer to see it admitted. The draft Bill embodies the majority recommendation. (Refer to clause 5.) The majority considers that the dangers of fabrication, coupled with the generally inferior quality of oral hearsay

as compared with documentary hearsay, militate against permitting its admission before a jury which, however well-educated, lacks experience in weighing evidence. Juries would need guidance on the question of weight. But if they were to be given it, and even assuming that it had the necessary effect, they would still need to be told, in terms comprehensible to them, what pieces of evidence adduced before them were hearsay and for what purposes. This would add to the difficulties of the jury, to the complexity of trials and potentially to the number of appeals. The jury system is indeed a parent of much of the law of evidence: assuming as we do that juries will be retained in civil cases, it follows that oral hearsay should be rejected.

The minority, on the other hand, holds the opinion that the double source of error of oral hearsay evidence should affect weight but not determine admissibility. Members of the Committee taking this view argue that the disadvantages of admitting oral hearsay before civil juries do not outweigh the assistance likely to be obtained by the court from the evidence in many cases. They would agree in this respect with the view taken by Professor Guest's subcommittee. They are unimpressed by the alleged danger of fabrication and think that that would occur in only a small minority of cases. Oral statements by persons other than the witness testifying are already admissible at common law, under one of the common law exceptions or by virtue of the res gestae rule, i.e. that the statement was a contemporaneous indication of the person's state of mind, or otherwise part of the thing done. If oral hearsay were admitted, by amendment of clause 3, it would be admitted only where the person who made the statement was genuinely unavailable, so that it would be likely to constitute the best evidence available. A court would rarely be asked to listen to oral hearsay when better evidence was available: prudent counsel will not risk adverse comment and inferences drawn by his opponent or the bench. The interlocutory provisions mean that a party would have to "disclose his hand" prior to trial, and this is a heavy price to pay in order to have the evidence admitted. They also mean that the opponent in litigation would have an opportunity to make his own inquiries about the unavailability of the maker

of the statement. The operation of the hearsay rule means that costs are unnecessarily aggregated as regards the proof of facts not really in dispute, though not formally admitted on the pleadings. Finally, the safeguard provided by clause 11, to reject evidence prima facie admissible under the Bill where this is expedient in the interests of justice, would operate. The minority concedes that trials in which oral hearsay evidence is admitted would be slightly more complex, but this would be a criticism of the admission of any hearsay evidence and slightly increased complexity (with the possibility of appeals) should be accepted having regard to the desirability of admitting evidence which, though often unreliable, is perhaps equally often of considerable probative value.

(J.C. White)
Chairman
(For the Committee)

Members of the Committee

J.C. White, Esq., Solicitor-General and one of Her Majesty's Counsel (Chairman)

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SUMMARY OF PROPOSED DRAFT BILL

In essence the draft Bill which follows embodies and combines the aims of the Evidence Amendment Acts of 1945 and 1966, extends their operation in a limited way, and bringsup to date the principal common law exceptions.

In broad outline the extensions to the existing legislation are as follows -

(i) the category of persons unavailable to give evidence has been extended to include those who by reason of old age or bodily or mental condition are unfit to appear as witnesses and those who cannot with reasonable diligence be found;

(ii) the absolute limitation imposed by s.3 (3) of the 1945 Act which disqualifies statements by interested persons is removed;

(iii) in civil proceedings only, statements made by witnesses who are in New Zealand may be admitted when, although it would be possible to arrange their attendance at the trial, this would cause delay or expense disproportionate to the importance of the evidence they can give the Court; and

(iv) the range of documents which may be admitted is extended.

Despite the fact that the extensions that the Bill proposes are cautious the Committee has thought it wise to add safeguards to those already in the 1945 and 1966 Acts. First among these is the primary prerequisite of admitting hearsay that the maker of the statement or the person who supplied him with the information must have personal knowledge of the matters dealt with by the statement. This will automatically rule out the possibility of the admission of documents whose maker is not known. Secondly, the procedural clauses will enable the opponent of the party who wishes to adduce hearsay evidence to check the genuineness of the cause of unavailability stated in the interlocutory application to the Court, and, where he thinks fit, to oppose the making of an order in the applicant's favour.

In conclusion it is worth noting that the Committee has been more conservative than its counterpart in England in that it does not recommend the admission of oral hearsay in any proceedings unless the hearsay comes within the principal common law exceptions.

DRAFT EVIDENCE AMENDMENT BILL (ANNOTATED)

1. Short Title - This Act may be cited as the Evidence Amendment Act 19 , and shall be read together with and deemed part of the Evidence Act 1908 (hereinafter referred to as the principal Act).

2. Interpretation - In this Act, unless the context otherwise requires, -

"Business" means any business, profession, trade, manufacture, occupation, or calling of any kind; and includes the activities of any Department of State, local authority, public body, body corporate, corporation sole, organisation or society:

"Document" means a document in any form whatsoever, whether signed or initialled or otherwise authenticated by its maker or not; and includes -

(a) Any writing on any material whatsoever:

(b) Any information recorded or stored by means of any computer or other device whatsoever; and any material subsequently derived from information so recorded or stored:

(c) Any label, or marking, or other writing which identifies or describes any thing of which it forms part, or to which it is attached by any means whatsoever:

(d) Books, maps, plans, drawings and photographs:

"Party" includes the prosecutor or the informant in any criminal proceedings:

"Proceedings" includes arbitrations and references: and "Court" shall be construed accordingly:

"Statement" means any representation of fact or opinion whether made in words or otherwise; and includes a statement made by a witness in any proceedings.

NOTES:

(1) The word "business" appears in clause 3 (b) and clause 4 and is defined very widely in this interpretation clause. A "record relating to any business" will thus include regimental records, church archives and a solicitor's deeds register. The definition follows that in the new Evidence Amendment Act 1966, with the addition of 'corporation sole'.

(2) "Document" is also widely defined. It will include printed, typewritten or handwritten documents. The requirement of formal authentication contained in s.3 (4) of the Evidence Amendment Act 1945 has been dispensed with (cf. the English Committee's report, para. 17).

"Any writing on any material whatsoever". This is inserted to avoid a possible narrow judicial construction of the word 'document'. Thus writing on (say) a mattress in a prison cell will constitute a "document".

"Any information ..." etc. This will include information recorded or stored by all kinds of electronic devices, tape-recorders etc. and the product of computerised information.

"Books, maps ... etc." This follows s.25A (5) of the 1908 Act, inserted by the 1966 Act. It is convenient to remove any possibility of argument about the admissibility of items such as photographs which are regularly produced.

"Any label or making ..." etc. Cf. Patel v. Comptroller of Customs [1966] A.C. 356,365. The decision, so far as it turned on the admissibility of a legend written on bags, would probably be different under the present Bill. The ordinary meaning of 'document' may perhaps extend no further than paper, vellum, parchment, etc. The present extensive definition is intended to bring in metal discs screwed on to radiograms, engine numbers stamped on to engines of motor cars etc., as well as labels tied on with string to bags of produce, etc.

(3) "Proceedings". This definition is copied from the 1945 Act, s.2 (1). This Bill applies to arbitrations equally as to proceedings in the Magistrate's Court or the Supreme Court. Departing from the English Committee's report, para. 47, we apply the procedural

safeguards to arbitrations as well. If one party to an arbitration insists on a strict compliance with the law of evidence he should be entitled to do so. We would expect that in practice, however, much hearsay evidence will be readily admitted by consent and that there will often be a waiver of the strict rules in the submission to arbitration itself.

(4) "Statement". Cf the 1945 Act, s.2 (1).

"Or opinion". This phrase removes the doubt whether an "opinion" is a "fact". Sholl J. in Warner v. Women's Hospital [1945] V.L.R. 410, suggested that it is, sed quaere. In the Committee's view, a deceased doctor's written opinion about (say) the accused's sanity or insanity should be admissible. But evidence by a doctor's nurse of the doctor's diagnosis of X's condition, unless recorded by her in the course of her duty, is too dangerous to admit, and will accordingly be inadmissible. Opinion evidence will be admissible under clauses 3, 4 and 7, but not under either clause 5 or clause 6.

3. Admissibility of documentary hearsay evidence - In any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement made by a person in a document and tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion, [notwithstanding any rule of the common law to the contrary,] if either -

(a) (i) The maker of the statement had personal knowledge of the matters dealt with by the statement; and

(ii) The maker of the statement is dead, or is outside New Zealand and it is not reasonably practicable to secure his attendance, or is unfit by reason of old age or his bodily or mental condition to appear as a witness, or cannot with reasonable diligence be found; or

(b) (i) The document was made pursuant to a duty or in the course of, and as a record or part of a record relating to, any business, from information supplied (whether directly or indirectly) by a person who had, or may reasonably be supposed by the Court to have had, personal knowledge of the matters dealt with in the information he supplied; and

(ii) The person who supplied the information is dead, or is outside New Zealand and it is not reasonably practicable to secure his attendance, or is unfit by reason of old age or his bodily or mental condition to appear 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 recollect the matters dealt with in the information he supplied.

NOTES:

(1) This is the most important clause in the Bill.

(2) The words in square brackets may be unnecessary or confusing. This is an unresolved drafting point.

(3) A previous draft read "by reason of his age or bodily or mental condition". The present wording is designed to prevent a practice of mothers being called to give evidence of what their very young children, not themselves called on (say) a sexual assault charge, told them. Cf Sparks [1964] A.C. 964. The Committee has decided, after anxious deliberation, not to recommend any change in the law as stated in that case. There may be cases which are covered aptly by "old age" but not so aptly by "bodily or mental condition", e.g. while it might be possible for an infirm person of 90 to travel to another centre it might be unreasonable in the circumstances to ask him to do so. "Mental condition" is not intended to cover extreme mental immaturity due to tenderness of years.

(4) The phraseology of (b) (i) brings together the "duty" concept of s.3 (1) (a) (ii) of the 1945 Act, and the "course of business" formula which appears in s.25A of the principal Act, inserted by the 1966 Act. There will, of course, be considerable overlap in this regard, but the Committee was concerned not to lose anything presently admissible under the 1945 Act or under s.25A. E.g. "course of business" might well be construed as limited to frequently recurring actions, whereas a duty to compile a document might arise on a single occasion which will not recur.

(5) An earlier draft of this Bill contained a wide definition of "duty" in the following terms: "'Duty' includes any duty imposed by law or arising under any contract and any duty recognised by business practice (of which the Court may take judicial notice." Cf. the end of para. 16 (b) of the English report. This has tentatively been dropped.

(6) The 1945 Act has a requirement that a record should be a "continuous record". But this is merely one aspect of probative value, and has been omitted here. Cf. para. 16 (a) of the English Committee's report, here followed.

(7) 'Directly or indirectly': we here adopt the reasoning in para. 16 (c) of the English Committee's report. This formulation already appears in s.25A for criminal cases (1966 Act, following the Criminal Evidence Act 1965 (U.K.).)

(8) "Cannot ... be identified': thus in an industrial accident case workers on a machine might have complained about its dangerous condition to a foreman who recorded their complaints as part of his duty, but it may be impossible to identify the workers who complained. The foreman's record will be admissible evidence of the condition of the machine though the weight to be accorded to it may be great or nil.

(9) 'Cannot ... recollect': this is identical with the formulation in s.25A (1966 Act) and should apply to civil cases also where there is considerable lapse of time between the event and the trial of the facts. This phraseology is deliberately omitted from para. (a). No provision is thus made for the case of a witness suffering from amnesia, but such cases must be rare.

(10) In (b) (i) the alteration of the tenses from 'have' to 'have had' is a minor drafting improvement on the wording of s.25A (1966 Act).

(11) Note that where clause (3) (b) applies, we do not require the person who recorded the information received from someone else to be called, though we considered adding such a provision. In theory someone other than the recorder might prove the statement. In practice he will be the normal person to call; and counsel would risk adverse comment from opposing counsel and the Judge if he did not do so. The case for adding this requirement would be that counsel should be entitled to cross-examine the recorder of information to show that he was (say) drunk at the time.

4. Admissibility of documentary hearsay evidence in civil proceedings - In any civil proceedings where direct oral evidence of a fact or opinion would be admissible, any statement made by a person in a document and tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion [notwithstanding any rule of the common law to the contrary] if undue delay or expense would be caused by requiring that person's attendance as a witness and either -

(a) The maker of the statement had personal knowledge of the matters dealt with by the statement; or

(b) (i) The document was made pursuant to a duty or in the course of, and as a record or part of a record relating to, any business, from information supplied (whether directly or indirectly) by a person who had, or may reasonably be supposed by the Court to have had, personal knowledge of the matters dealt with in the information he supplied; and

(ii) The person who supplied the information is dead, or is outside New Zealand and it is not reasonably practicable to secure his attendance, or is unfit by reason of old age or his bodily or mental condition to appear 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 recollect the matters dealt with in the information he supplied.

NOTES:

(1) This clause is independent of clause 3 and creates a further head of admissibility of hearsay evidence. Since counsel will usually find it prudent to call a witness who qualifies only under this clause it is not envisaged that it will be of frequent application. Criminal cases are excluded because it is felt that undue delay or expense is never a sufficient reason for dispensing with the personal attendance of a witness where the accused's liberty is at stake.

(2) Clause 4 will cover a case where the witness is in New Zealand, and therefore theoretically 'available', but remote from the place of trial and, in the case of Magistrate's Court proceedings, remote even from the nearest Magistrate's Court where his evidence could be taken in advance of trial, and his evidence is of a formal nature or otherwise such that counsel would risk the possible adverse comment of his opponent or the Court. For example, a witness at Manapouri whose evidence is required for a minor civil action in Whangarei.

(3) If the witness is outside New Zealand and it is not reasonably practicable to secure his attendance the position has already been covered in clause 3. The meaning of 'reasonable practicability' was authoritatively canvassed in Union S.S. Co. of N.Z. Ltd v. Wenlock [1959] N.Z.L.R. 173. Financial considerations are relevant: c.f. North J., ibid., 196.

(4) The phrase 'undue delay or expense' is taken from s.3 (2) of the 1945 Act, but placed in a different context.

(5) It would be satisfactory if clauses 3 and 4 could be amalgamated. This, however, presents grave drafting difficulties.

5. Admissibility of oral hearsay evidence in civil proceedings without a jury - In any civil proceedings without a jury where direct oral evidence of a fact would be admissible, any oral statement made by a person and tending to establish that fact shall be admissible as evidence of that fact, [notwithstanding any rule of the common law to the contrary,] if -

(a) The maker of the statement had personal knowledge of the matters dealt with by the statement; and

(b) The maker of the statement is dead, or is outside New Zealand and it is not reasonably practicable to secure his attendance, or is unfit by reason of old age or his bodily or mental condition to appear as a witness, or cannot with reasonable diligence be found.

NOTES:

(1) As we explain in our report the majority of the Committee recommends against the admission of oral hearsay evidence in proceedings with a jury. The repetitious character of this clause would be better avoided, but the present drafting scheme will enable a practitioner quickly to locate the relevant head of admissibility and the conditions of admissibility of evidence under that head.

(2) A party may wish to obtain trial by Judge alone in order that he may obtain the benefit of this clause. Limited provision for that eventuality is made by clause 18 hereof.

(3) In contrast to clauses 3 and 4 the formula here used is "evidence of a fact". Both the earlier clauses have "fact or opinion". This gives effect to the recommendation in our report that oral hearsay opinion evidence should be inadmissible except by consent.

6. Admissibility of oral hearsay evidence in special cases - (1) The rules enacted by this section shall have effect, in place of the rules of the common law, to regulate certain further circumstances in which oral evidence may be admitted in any proceedings.

(2) In any proceedings where direct oral evidence of a fact would be admissible, any oral statement made by a person and tending to establish that fact shall be admissible as evidence of that fact, if -

(a) The maker of the statement had personal knowledge of the matters dealt with by the statement; and

(b) The maker of the statement is dead, or is outside New Zealand and it is not reasonably practicable to secure his attendance, or is unfit by reason of old age or his bodily or mental condition to appear as a witness, or cannot with reasonable diligence be found; and

(c) The statement qualifies for admission under any of subsections (3) to (7) of this section.

(3) (a) A statement shall be admissible under this section if the maker of the statement knew, or believed, or may reasonably be supposed by the Court to have known or believed, that the statement was, in whole or in part, against his interest at the time he made it.

(b) For the purpose of paragraph (a) of this subsection "interest" means any pecuniary or proprietary interest and any interest in any proceedings pending or anticipated by the maker of the statement.

(4) (a) A statement shall be admissible under this section if the maker of the statement made it in performance of any duty and had no motive to conceal or misrepresent the facts.

(b) For the purpose of paragraph (a) of this subsection:

(i) "Duty" includes any duty imposed by law or arising under any contract and any duty recognised in carrying on any business practice (of which the Court may take judicial notice).

(ii) It shall be immaterial whether the matters dealt with by the statement relate to acts of the maker of the statement or not or whether the statement was made contemporaneously with the matters contained in it or not.

(5) A statement shall be admissible under this section if -

(a) The statement relates to the existence or nature of family relationship or descent; and

(b) The maker of the statement was directly or indirectly related by birth (legitimate or illegitimate) or adoption or marriage to the person whose family relationship to or descent from any other person is in issue in any proceedings; and

(c) The maker of the statement made it before any dispute about the matters dealt with by the statement arose.

(6) A statement shall be admissible under this section if the maker of the statement had previously made a will or other testamentary writing and the statement relates to the contents of that will or testamentary writing as the case may be.

Provided that the statement shall not be admissible to prove that the requirements of the Wills Act 1837 or its amendments have been satisfied.

(7) A statement shall be admissible under this section if the statement relates to the existence of a public or general right or of Maori custom.

(8) (a) A statement shall be admissible under this section if

(i) The maker of the statement had personal knowledge

of the matters dealt with by the statement; and

(ii) The maker of the statement is dead; and

(iii) The maker of the statement knew or believed, or may reasonably be supposed by the Court to have known or believed that his death was imminent; and

(iv) The maker of the statement would, if he were not dead, be a competent witness for the party who claims to adduce the statement as evidence under this subsection.

(b) For the purpose of paragraph (a) of this subsection it shall be immaterial whether the maker of the statement entertained any hope of recovery or not, whether the statement related to the cause of its maker's injury or illness or not, and whether the statement was complete or not.

NOTES:

(1) Since the Bill substantially liberalises the hearsay rule as regards documentary statements in both civil and criminal proceedings but not as regards oral statements in criminal proceedings or civil proceedings without a jury, it is desirable to make provision regarding the admission of oral hearsay evidence already admissible at common law. The Committee shares the view that what are usually termed the "principal common law exceptions to the hearsay rule" should be both brought up to date and expressed as simple statutory provisions. The present clause is aimed at achieving both objectives, and at eliminating the quite undesirable situation that presently obtains, viz. that some evidence may have to be tested for admissibility first at common law and then under the terms of the Evidence Amendment Act 1945. This kind of complexity is indefensible.

(2) The principal common law exceptions to the hearsay rule are six in number: (a) declarations against interest [subclause (3)]; (b) declarations in the course of duty [subclause (4)]; (c) pedigree declarations [specially excepted from the provisions of the Evidence Amendment Act 1945, for reasons which are obscure, but now codified in subclause (5)]; (d) post-testamentary declarations [subclause (6)]; (e) declarations as to public or general rights [subclause (7)]; (f) dying declarations [subclause (8)].

(3) Often included in this list in addition are (g) statements in public documents, but, unlike exceptions (a) - (f), these are, of course, always documentary statements, and are covered by clauses 3, 4 and 5 of the Bill. Those clauses make it clear that, to be admissible, the maker of the statement must either have had personal knowledge or recorded the statement in performance of a duty: this was not clear at common law. Further, the limiting requirement that the document be intended for public inspection has been eliminated (Thrasyvoulous Ioannou v. Papa Christoforos Demetriou [1952] A.C. 84; though the strictness of the common law was modified for civil cases by the 1945 Act: see Andrews v. Cordiner [1947] K.B. 655).

(4) The rationale of the principal common law exceptions varies but common to all of them are the considerations (a) that necessity and expedience compel the reception of the items of evidence to which they relate; and (b) that there is some special circumstance which is thought to give credibility to the statement in question (traditionally termed a "declaration", though no formality is required). We propose admitting oral hearsay evidence in conformity with the spirit of this rationale, but eliminating all restrictive requirements which have developed through decisions of the courts but which are irrelevant to the appropriate guarantee of trustworthiness. Each of the exceptions depends on proof of the death of the declarant. But we see no reason why admissibility should not be extended to cases of unavailability of the declarant for other reasons such as insanity and old age. It will be seen, in fact, that the same conditions apply as in the case of documentary evidence admissible under clause 3 (a) of the Bill. In this respect dying declarations alone receive different treatment. Because of the extension beyond dead declarants, it is reasonable to make the procedural clauses of the Bill apply - not only to obviate the confusion that might result from having the procedure apply to all except one of the sections of the Act, but also because it is proper to make it mandatory to give advance notice, to enable an opponent to check up on the facts.

(5) Two of the exceptions, pedigree declarations and declarations as to public or general rights, are of minimal importance in New Zealand but they are included here for the sake of simplicity. Note the suggested extension of the ~~former~~ latter of these exceptions to matters of Maori custom in subclause (7); this may be beneficial in rare cases.

(6) <u>Declarations against interest [subclause (3)]</u>.

(i) The limitation to statements against pecuniary or proprietary interest is abolished. Statements against criminal or tortious interest are brought within the ambit of the exception.

(ii) It will not matter if the statement was not in fact against the maker's interest, if he believed it was, or such belief is a reasonable inference

from all the facts. Nor will it matter if the statement subsequently turns out not to be against the maker's interest.

(iii) It is made clear that the maker must have personal knowledge of the facts in his statement. This is not quite clear at common law.

(iv) "Collateral facts" may be proved, i.e.facts which, in themselves, were not against the maker's interest.

(7) Declarations in the course of duty [subclause (4)].

(i) The distinction between specific and merely general duties (e.g. that of a branch manager to manage his branch) is abolished.

(ii) Similarly, the two limiting requirements of the common law are expressly made immaterial by the wording of clause 4 (b) (ii). Lack of contemporaneity should affect weight, not admissibility. The distinction between acts of the declarant himself and of other people is another distinction drawn by the common law which lacks any merit and is here accordingly abolished.

(iii) The prohibition against using the statement to prove collateral facts [Chambers v. Bernasconi (1834) 1 Cr. M. and R. 347] is abolished.

(iv) The draft preserves, however, the requirement that the maker of the statement should have had no motive to conceal or misrepresent the facts. The majority of the Committee thinks this is a necessary limitation in the case of oral statements in criminal proceedings. Contrast our elimination of the rule that statements are inadmissible if made by a person interested in the case of statements in documents. Refer clause 10 and notes.

(8) Pedigree declarations [subclause (5)].

Our wording re-states the common law, except that doubts about declarations as to parentage by illegitimate children (see Re Davy [1935] P.1) are removed. Any discussion would be pointless as a pedigree issue can rarely arise under modern conditions; further, adequate evidence of marriages and births is usually obtainable from the appropriate register.

(9) Post-Testamentary declarations [subclause (7)].

Our wording simply codifies the law stated, possibly obiter, in Sugden v. Lord St Leonards (1876) 1 P.D. 154, and confirmed by In the Estate of Macgillivray [1946] 2 All E.R. 301 (C.A.) and Acosta v. Longsworth [1965] 1 W.L.R. 107 (P.C.).

(10) The common law is uncertain but we again think it right to exclude oral hearsay opinion evidence in all these cases.

(11) Dying declarations [subclause (6)].

(i) This exception developed in the exercise of courts' criminal jurisdiction but we see no reason why it should not now be extended to civil cases. Otherwise the Bill would create a new anomaly, viz. that a statement admissible on a charge of dangerous driving causing death, where the accused's liberty was at stake, would be inadmissible in a damages claim before another jury arising out of the same events. Dying declarations were admitted in civil and criminal cases without distinction in the earliest period of the history of this exception; see McCormick, Evidence, Ch. 29, para. 260 where the limitation to criminal cases is regarded as arbitrary.

(ii) Knowledge or belief that death is "imminent" replaces the unduly restrictive condition of the common law, viz., that the declarant had a "settled, hopeless expectation" of death. "Imminent" is vague but it is hard to think of a more suitable word. Note that it will be unimportant whether death immediately followed the statement. Our formula would probably qualify the victim's statement in the much criticized case, Townsend [1965] Crim. L.R. 367 as an admissible dying declaration.

(iii) It is further immaterial under our draft whether there was a faint hope of recovery at the time the statement was made, so overcoming the decision in Jenkins (1869) L.R. 1 C.C.R. 187, while not interfering with the rule for the situation illustrated by Kahu [1946] N.Z.L.R. 221.

(iv) There is good sense in the competence requirement, which we accordingly retain.

(v) Our wording further abolishes the limitation of the exception to murder and manslaughter cases, and its limitation to statements about the cause of death.

(vi) Finally, our wording abolishes the limitation that the statement should contain everything that the deceased might have wished to say (Waugh [1950] A.C. 203). If the statement was obviously incomplete this will gravely affect its weight, but should not go to inadmissibility. If the statement was obtained by putting leading questions this also goes to weight.

7. Admissiblity of oral and documentary hearsay evidence by consent - In any proceedings, where direct oral evidence of a fact or opinion would be admissible, any statement, whether oral or in a document, made by a person and tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion, [notwithstanding any rule of the common law to the contrary,] if both parties to the proceedings consent to the statement being admitted in evidence, or, where there are more than two parties to the proceedings, all those parties so consent.

NOTES:

(1) This clause gives effect to a recommendation of Professor Guest's Committee. The majority view of the Torts and General Law Reform Committee was that it should apply to both civil and criminal proceedings. A minority believed that it should be limited to civil proceedings, on the ground that when an accused is unrepresented he cannot give a free and informed consent. The majority, on the other hand, considered that the trial Judge could protect an unrepresented accused in this respect, equally as in the case of other evidentiary questions arising in the course of a criminal trial.

(2) The clause makes it clear that the Judge has no discretion to reject evidence which the parties consent to admit. The procedural clauses, clauses 13 and 14, to not of course apply.

(3) For the words in square brackets, cf note (2) to clause 3.

(4) In an earlier draft it was provided that, in cases with several parties, it would be sufficient if every party "against whose interest the statement was made" consented to the admission of the statement. This has now been omitted in the interests of simplicity.

8. Proof of documents - A statement in a document which is admissible as evidence by virtue of this Act may be proved either by the production of the original document or of the material part thereof in which the statement is contained, or by the production of a copy of the original document or of the material part thereof certified to be a true copy of such manner as the Court may approve.

NOTES:

(1) This clause follows, with minor drafting alterations, the wording found in s.3 (2) (b) of the 1945 Act and s.25A(2) of the 1966 Act. A Court would not be likely to accept copies of company records certified by the office boy.

The alternative to the proposed wording would appear to be a long list of different documents, each with its certification procedure.

(2) Under s.3 (2) of the 1945 Act it is necessary to produce the original document and the only exception is where the Court is satisfied that to do that would cause "undue delay or expense". This limiting restriction is removed. If anything turns on the precise form of the original, e.g. the style of handwriting, counsel will risk adverse comment if he fails to produce the original when that is reasonably accessible and may lose if his own case depends on the precise form of the original

9. Power to draw inferences - For the purpose of deciding whether or not any statement is admissible as evidence by virtue of this Act, the Court may draw any reasonable inference from the circumstances in which the statement was made and, in the case of a statement in a document, from the form or contents of the document in which it is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner.

NOTE:

This clause follows, with minor necessary modifications, the wording found in the first part of s.3 (5) of the 1945 Act, and in s.25A (3) of the 1966 Act. It allows hearsay evidence to qualify other hearsay evidence for admission, but this is not objectionable.

10. Weight to be attached to hearsay evidence - In estimating the weight, if any, to be attached to a statement admissible as evidence by virtue of section 3, section 4, section 5, section 6 or section 7 of this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the time when the statement was made in relation to the occurrence or existence of the facts or opinions stated which the statement is tendered to prove, and to the question whether or not the maker of the statement, or any person by or through whom information was supplied to the maker of the statement, had any incentive to conceal or misrepresent those facts or opinions.

NOTES:

(1) This clause closely follows s.4 of the 1945 Act and s.25A (4) of the 1966 Act. The only substantive change is that 'contemporaneously' has been dropped and replaced with a more flexible formula. Contemporaneity is not always a virtue; thus an injured motorist's account of an accident while still half-shocked may be less reliable than his account two days later.

(2) It is important to note that inadmissibility due to the maker's interest in pending or anticipated proceedings contained in s.3 (3) of the 1945 Act has been dropped. In practice that subsection was found difficult to interpret; it has been roundly condemned by textbook writers; and its abolition was recommended by the Evershed Committee in 1953 (see Final Report of the Committee on Supreme Court Practice and Procedure Cmd. 8878, para. 276) and by the more recent English Committee: cf. para. 18 of its Report. To quote from that paragraph: "A court is, we think, quite capable of assessing the weight to be attached to statements by whomsoever they are made".

11. Court may reject unduly prejudicial evidence - Notwithstanding anything in section 3, section 4 or section 6 of this Act, where the proceedings are with a jury, the Court may, in its discretion reject any statement which would be admissible in any proceedings by virtue of those sections, if the prejudicial effect of the admission of the statement would outweigh its probative value, or if for any other reason whatsoever the Court is satisfied that it would be inexpedient in the interests of justice that the statement should be admitted.

NOTES:

(1) This clause is vital to the reform which the Bill proposes. It follows the wording of the second part of s.3 (5) of the 1945 Act. A similar section should, in our view, have been included in the 1966 Act and it will do no harm to make it clear that the overriding discretion in (all?) criminal cases, established at common law, continues to apply (cf. Noor Mohamed v. R. [1949] A.C. 182).

(2) The main reason for rejecting evidence admissible under the Act is expressly stated, in this respect elaborating on s.3 (5) of the 1945 Act. There are likely to be many other cases for which no guideline can be offered in advance. There is no record of the general formula "inexpedient in the interests of justice" having occasioned any difficulty in the past.

12. Admissibility of previous statements by witness - (1) Nothing in paragraph (b) of section 3 of this Act shall render admissible a statement previously made by a person who is called as a witness in any proceedings and gives evidence relating to the matters contained in that statement, unless the Court is of the opinion that its probative value outweighs or may outweigh the probative value of the evidence given by the witness in relation to those matters (whether the statement is consistent or inconsistent with that evidence).

(2) If the Court is of that opinion, the statement previously made by the witness shall be admitted at the conclusion of the evidence-in-chief of that witness or during his cross-examination but not otherwise.

NOTES:

(1) The purpose of clause 12 is to provide for the possible, but unusual, case where the recorder of a statement admissible under clause 3 (b) is called, not only to prove the statement and the circumstances of its recording, but also to give independent first-hand evidence of the matters contained in the statement he made in the course of duty, etc.

(2) The Evidence Amendment Act 1945 is silent as regards a testifying witness's previous statements and leaves it theoretically open to swear a witness and then put in through him a brief of his evidence prepared by his solicitor in response to what may have been leading questions, leaving him to be cross-examined on his brief. In practice this has not happened, so far as we are aware, but such a course is so obviously undesirable that in our view it should be expressly prohibited. Cf. para. 35 of the English Committee's report. Our draft obviates this possibility in the case of statements admissible as evidence by virtue of clause 3 (a) of this Bill. The maker of a statement admitted under clause 3 (a) will never be a witness at the trial.

(3) Clause 12 does not alter the existing rules whereby a previous statement may be used by an opponent to attack the credibility of the witness and by the party calling him either (i) to rebut, in re-examination, or (ii) to cross-examine him if the Judge permits the witness to be treated as "hostile". Clause 12 relates solely to the admissibility of the previous statement as evidence of the facts stated in it.

(4) As regards the final words of the clause, "unless the Court is of opinion ... etc.", refer to paras 35 - 38 of the English Committee's report, where the problem of admitting previous statements of witnesses testifying at the trial is considered in detail. The Torts and General Law Reform Committee believes that in some circumstances a previous statement may have such high probative value that the Judge should have a discretion to admit it. This will mean that a witness will be allowed both to prove the statement that he recorded from someone else now unavailable and give his own independent eyewitness account of the same events, even though both accounts are likely to be consistent and therefore reciprocally corroborating. If they are inconsistent the opponent will be entitled, on compliance with the procedural provisions, to put in the inconsistent statement of the person who supplied the information to the maker of the statement.

(5) The English Committee unanimously recommended, in para. 38 of its report, that a previous statement should be admitted, at the instance of its proponent, only at the conclusion of the witness's examination-in-chief and before his cross-examination. We agree and subclause (2) gives effect to this requirement.

(6) Use of Prior Testimony

It is convenient here to note the use which may be made of testimony in earlier proceedings. Such evidence will be admissible as documentary hearsay evidence under clause 3 hereof. Two of the standard objections to the reception of hearsay evidence are that the person who made the statement reported by the witness was not on oath, and was not subject to cross-examination. Where, exceptionally, neither of these objections applies, as in the case with statements made on oath

(or affirmation) in previous civil or criminal proceedings, the statement should be admitted. This conforms with the recommendation contained in para. 28 of the English Committee's report. Clause 3 will govern the admission of recorded testimony because of the last words in the definition of 'statement' in clause 2. This will not involve such change of the existing common law position, which it will largely codify. At common law "it is necessary to prove that the witness is dead, or insane, or too ill to attend the trial, or kept away by the other side. Alternatively, in civil proceedings it may be sufficient to show that he is out of the jurisdiction of the Court or otherwise unable to be found". Nokes, An Introduction to Evidence (3rd ed., 1962), 359. But those propositions depend on old case law. No problem arises regarding prior consistent statements. Whether the testimony in the earlier proceedings is admitted under clause 3 (a) or clause 3 (b) the witness will necessarily not be a witness to the same facts in the later proceedings.

The Torts and General Law Reform Committee has considered limiting the use of previous testimony in earlier proceedings to earlier proceedings where there was an identity of parties and the witness had an interest and motive similar to that which he has in the later proceedings: the Californian Law Revision Commission insisted on these limitations in 1962. But we decided to avoid such complicating restrictions: they are factors going to weight but should not determine admissibility. In this we have the support of the American Law Institute in its Model Code, rule 511, and of McCormick, Evidence, para. 238.

13. Procedure in civil proceedings - (1) Subject to the provisions of subsection (3) of this section, where in any civil proceedings any party intends to adduce as evidence any statement that is admissible as evidence by virtue of section 3, section 4, section 5 or section 6 of this Act, he shall, before trial, apply to the Court or a Judge in chambers for an order that the statement be admitted at the trial.

(2) If the Court or Judge considers it expedient and proper to do so, having regard to the facts proved in support of or in opposition to the application and to all the circumstances, the Court or Judge shall make an order, with or without conditions, that the statement may be admitted as evidence at the trial, and thereupon, subject to the provisions of section 11 of this Act, the party on whose application the order was made shall be entitled to have the statement admitted as evidence at the trial. If the Court or a Judge refuses to make such an order, then, notwithstanding anything in section 3, section 4, section 5 or section 6 of this Act, the statement shall not be admitted as evidence at the trial.

(3) In any civil proceedings, a statement which is admissible as evidence by virtue of section 3, section 4, section 5 or section 6 of this Act shall, subject to section 11 of this Act, be admitted, notwithstanding that an order for its admission has not been made under this section, if the Court is satisfied that it was not reasonably practicable to apply for such an order before trial [or that the party seeking to adduce the statement was justified, having regard to the nature of the statement and all the circumstances of the case, in not applying for such an order before trial].

NOTES:

(1) Because of essential dissimilarities between civil and criminal proceedings it is unfortunately necessary to prescribe different procedures for each.

(2) The procedure here prescribed for civil cases differs somewhat from the procedure recommended by the English Committee - see para. 24 of its report. Practitioners should find it easier to apply this procedure than that recommended by the English Committee - which involves notices and counter-notices. In our view the onus of applying to the Court and making out a case for the admission of a statement under the Act should rest squarely on the proponent of the proposed evidence. In this respect it is a more onerous procedure than that recommended by the English Committee. Under the English procedure it would also be more likely that arguments about whether the requisite conditions were satisfied would arise at the trial whereas in our view they should be cleared out of the way, as far as practicable, before trial.

(3) It is envisaged that the application to the Court will take the form of a motion supported by accompanying affidavit(s). If further details are required these can best be left to the rules of procedure which are made on the recommendation of the Rules Committee, e.g. length of time of notice, whether application to the Court must follow discovery of documents (cf. the English Committee's suggestion in that regard: para. 24 of its report). The essential thing is that the applicant should annex a copy of the statement if written, or detailed particulars of the words used and the name of any person to whom the statement was made, if oral.

(4) Clause 13 (3) confers a residual discretion on the Court to admit statements which were not the subject of an application to the Court. It covers evidence admissible under the Act which became available to the party seeking to adduce it only at the eleventh hour. In para. 25 of its report the English Committee supports such a residual discretion.

(5) The Torts and General Law Reform Committee is divided about the retention of the words in square brackets. The majority supports their retention on the ground that existing procedures enable one party to surprise his opponent with unexpected evidence, subject to the possibility of an adjournment if he is unfairly surprised in the opinion of the Court; that hearsay evidence should not be treated differently from other evidence in this respect; and that the safeguard against abuse of clause 13 (3) is that a litigant relying on it will not be certain in advance that the Court will hold, the extra 'hoop' satisfied, viz. that he was justified in not disclosing his evidence. He will still have the onus of calling satisfactory evidence to qualify the statement under clause 3, 4, 5 or 6. A minority of the Committee hold the opinion that it is likely to prejudice the opponent's case unduly if a statement admissible under the Act is admitted at the trial, without advance warning, since he will have no opportunity of checking that the maker of the statement is dead or outside New Zealand etc. Whichever view is accepted, the Committee unanimously supports a residuary provision where it "was not reasonably practicable to apply for such an order before trial".

14. Procedure in criminal proceedings - (1) In any criminal proceedings dealt with summarily under the Summary Proceedings Act 1957, a party shall be entitled to have any statement that is admissible as evidence in criminal proceedings by virtue of section 3 or section 6 of this Act admitted as evidence at the hearing, if he proves that the statement is admissible as evidence by virtue of either of those sections.

(2) In any criminal proceedings for an offence to be tried on indictment, the following procedure shall apply, namely:

(a) At the preliminary hearing of the information, the prosecutor shall, and the defendant may, adduce in evidence any statement which he claims is admissible as evidence by virtue of section 3 or section 6 of this Act, and the party adducing the statement shall also adduce evidence which he claims is sufficient to show that the statement is admissible as evidence by virtue of either of those sections:

(b) All evidence adduced at the preliminary hearing pursuant to paragraph (a) of this subsection shall form part of the depositions:

(c) Where any statement is adduced in evidence at the preliminary hearing pursuant to paragraph (a) of this subsection, the Court before which the preliminary hearing is conducted shall, if requested by either party or if the defendant is not represented, and may of its own motion if it is of opinion that the interests of justice so require, make an order forbidding the publication of the statement or any part thereof before the evidence is adduced at the trial.

(d) If any party has adduced any statement in evidence at the preliminary hearing pursuant to paragraph (a) of this subsection, -

(i) He shall, before trial, apply to the Supreme Court or a Judge in chambers for an order that the statement be admitted at the trial; and

(ii) If the Court or Judge considers it expedient and proper to do so, having regard to the evidence adduced at the preliminary hearing and to any facts proved in opposition to the application and to all the circumstances, the Court or Judge shall make an order, with or without conditions, that the statement may be admitted as evidence at the trial, or an order that the statement be refused admission as evidence at the trial; and thereupon, the statement shall be admitted, subject to the provisions of section 11 of this Act, or, as the case may be, refused admission accordingly:

(e) If any party intends to adduce as evidence any statement that is admissible as evidence by virtue of section 3 or section 6 of this Act but which he did not adduce at the preliminary hearing, -

(i) He shall, a reasonable time before trial, apply to the Court or a Judge in chambers for an order that the statement be admitted at the trial; and

(ii) If the Court or a Judge considers it expedient and proper to do so, having regard to the facts proved in support of or in opposition to the application and to all the circumstances, the Court or Judge shall make an order, with or without conditions, that the statement may be admitted as evidence at the trial, and thereupon, subject to the provisions of section 11 of this Act, the applicant shall be entitled to have the statement admitted as evidence at the trial. If the Court or Judge refuses to

make such an order, then, notwithstanding anything in section 3 or section 6 of this Act, the statement shall not be admitted as evidence at the trial:

(f) A statement which is admissible as evidence by virtue of section 3 or section 6 of this Act shall, subject to the provisions of section 11 of this Act, be admitted as evidence at the trial, notwithstanding that an order for its admission has not been made under paragraph (d) or paragraph (e) of this subsection, if the Court is satisfied that it was not reasonably practicable to apply for such an order before trial [or that the party seeking to adduce the statement was justified, having regard to the nature of the statement and all the circumstances of the case, in not applying for such an order before trial].

(3) Every person commits an offence, and is liable on summary conviction to a fine not exceeding one hundred dollars, who commits a breach of any order made under paragraph (c) of subsection (2) of this section or evades or attempts to evade any such order.

NOTES:

(1) Under clause 14 (2) (d) and (e) the onus of applying to a Supreme Court Judge is again placedon the party seeking an order that the statement be admitted. He need not apply any specified number of days before trial. It is considered that the exigencies of the criminal calendar would make this impracticable.

(2) For the question whether the words in square brackets in (f) should be retained see note (5) to clause 13.

15. Hearsay evidence not corroboration in certain cases - For the purpose of any rule of the common law or of practice or the provisions of any Act requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by virtue of paragraph (b) of section (3) of this Act shall not be treated as corroboration of evidence given at the trial of the proceedings by the maker of the statement other than direct evidence in relation to any matter contained in the statement of which the maker of the statement had personal knowledge.

NOTES:

(1) This follows, with minor drafting alteration, s.4 (2) of the Evidence Amendment Act 1945 and there is no harm in applying it to criminal cases, although it was omitted from s.25A (the 1966 Act). It is, in any event, ex abundante cautela as there is an absolute prohibition on self-corroboration at common law.

(2) The "maker of the statement" for the purposes of this clause can only be the recorder of the information under clause 3 (b). His documentary record of the information supplied to him will not corroborate that information. If, however, the maker of the statement should also happen to be an independent eye witness of an event narrated in the statement the recorded statement may corroborate the recorder's own independent evidence.

16. Power of Court hearing appeal - In an appeal from any order made by a Court or by a Judge under this Act or from any determination of a Court to admit or reject evidence under section 11 of this Act, the Court hearing the appeal shall have the same power to draw inferences as the Court or Judge whose decision is appealed from, and may substitute its own discretion for any discretion exercised by that Court or Judge.

NOTE:

This is an important additional safeguard. In some cases the outcome of a trial may depend on the manner of the exercise of a Judge's discretion under clause 11 hereof: perhaps less frequently on the manner of exercise of a discretion built into one of the other clauses. It is considered that an appellate Court should be unfettered by the fact that the trial Judge or the Magistrate has exercised a discretion, and that seldom will the lower Court have a substantial advantage over the appellate Court in that it was able to see and hear the witnesses. Even when it does this is outweighed by the paramount importance of appellate review. It is recognised that clause 16 is out of line with the practice obtaining under (say) section 20 of the Evidence Act 1908 (relating to confessions) but that section needs careful reconsideration.

17. Savings - (1) Subject to the provisions of subsection (1) or section 6 of this Act, nothing in this Act shall prejudice the admissibility of any evidence that would be admissible apart from the provisions of this Act.

(2) Nothing in this Act shall render admissible any evidence which is inadmissible under the provisions of any other Act.

(3) Nothing in this Act shall derogate from -

(a) Section 10 of the principal Act (relating to proof of inconsistent statements of witnesses) or section 11 of the principal Act (relating to cross-examination as to previous statements in writing):

(b) The rules of the common law relating to the admissibility of evidence as to complaints:

(c) The rules of the common law or the provisions of any Act relating to the admissibility of confessions and admissions of the parties:

(d) The rules of the common law relating to evidence of character:

(e) The rules of the common law or the provisions of any Act relating to the reading in evidence of depositions taken in a preliminary hearing in a trial on indictment.

NOTES:

(1) Clause 17 (2) is possibly superfluous because generalia specialibus non derogantur. But it expresses the intention of the Committee which has not considered it its duty to make a thorough survey of the New Zealand statutes for evidentiary provisions creating heads of inadmissibility. Generally, statutory provisions create special categories of admissible evidence and that evidence will continue to be

admissible under its relevant authority notwithstanding its non-compliance with the provisions of this Bill or notwithstanding the non-observance of the procedural clauses of this Bill.

(2) The provisions of clause 17 (3) are inserted in order to preserve the status quo of the particular rules of evidence mentioned, which might otherwise be thought to be affected by a side wind. For example, the terms of a complaint are inadmissible at common law unless the victim of the sexual assault gives evidence: hence the veto on previous statements contained in clause 12 might apply were it not for clause 17 (3) hereof.

18. Discretion to allow action to be tried by Judge alone - Section 2 of the Judicature Amendment Act (No. 2) 1955 is hereby amended by adding to subsection 5: the following paragraph:

"(c) That evidence would be admissible under the Evidence Amendment Act 19 which would be inadmissible if the action were tried before a jury and that it is necessary or expedient in the interests of justice to admit such evidence at the trial of the action."

NOTE:

This clause enables a party wishing to adduce oral hearsay evidence in a civil case under clause 6 hereof to apply for an order that the action be tried before a Judge alone although a jury notice has been given. Such an order will not be obtainable as of right. We envisage that a Judge would make the order only if the evidence is of such importance in arriving at the truth that it is fair to deprive the adducing party's opponent of his right to jury trial.

19. Repeals - (1) The following enactments are hereby repealed:

(a) Section 25A of the principal Act (as inserted by section 2 of the Evidence Amendment Act 1966):

(b) Subsection (2) of section 2 and sections 3 and 4 of the Evidence Amendment Act 1945:

(c) Section 2 of the Evidence Amendment Act 1966.

(2) Section 2 of the Evidence Amendment Act 1945 is hereby amended by repealing the definition of the term "statement" in subsection (1).

A. R. Shearer, Government Printer
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