A STATUTORY EXCEPTION TO THE HEARSAY RULE

A. *GENERAL*

The exclusion of hearsay evidence may justly be described as one of the characteristic features of the Anglo-American legal system. The general exclusionary rule seems to have attained its present form only during the nineteenth century,[1] at a time when it was common to justify its existence on the ground that the reception of such notoriously unreliable evidence was likely to mislead a jury of laymen.[2] However, the modern tendency toward the substitution of judges in place of juries as the tribunal of fact in civil trials has not led to any corresponding relaxation in the rigidity of the rule, and this lends force to Professor Morgan's assertion that the exclusion of hearsay is essentially a product of the Anglo-American adversary form of trial procedure as a whole, rather than of the jury system in particular.[3] It certainly seems true to say that most practising members of the legal profession would oppose a general reception of hearsay on the ground that this would deprive a party of his opportunity to cross-examine the original maker of the statement, and the process of cross-examination by parties is, of course, one of the principal features of the adversary procedure as we know it.

Nevertheless, it must be admitted that the practical effect of the rule against hearsay is the inexorable exclusion of evidence which in many cases might be of material assistance to the court in arriving at the truth of the matter in dispute. It is undoubtedly this consideration which has been responsible for the admission of so many exceptions to the rule,[4] the bulk of which are concerned with statements made by persons who are not available to give evidence—generally for the compelling reason that they have died since their statements were made. From time to time judicial attempts have been made to generalise these exceptions so as to create some broad principle of admissibility when certain conditions are satisfied. Of these the most notable undoubtedly is that of Sir George Jessel M.R. who, in *Sugden v. St. Leonards*,[5] was prepared to assume that—

> "the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult

1. Baker *The Hearsay Rule*, p. 10, states that it was not until the end of the eighteenth century that the rule became part of the settled law of evidence.
2. See e.g. *Wright v. Doe d. Tatham* (1834) 1 Ad. & E. 313, per Parke, B., at p. 389; *R. v. Bedfordshire* (*Inhabitants*) (1855) 4 E. & B. 535, per Lord Campbell C. J., at p. 541.
3. For Professor Morgan's views, see American Law Institute's *Model Code of Evidence*, pp. 36 et. seq.; 62 *Harvard Law Review* 177, discussed in Baker *op. cit.* at pp. 11-12.
4. See Cross *Evidence* (1st edn.) chapter 16.
5. (1876) 1 P.D. 154.

to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases."[6]

However, any hopes of the courts' accepting some such formulation of a broad exception to the hearsay rule must now be regarded as irrevocably banished by the recent decision of the House of Lords in *Myers v. Director of Public Prosecutions*.[7] Although the question of admissibility arose there in the course of criminal, not civil, proceedings, the common law rule of exclusion applies alike to both, and the majority of their Lordships were firmly opposed to the idea of accomplishing the extension or generalisation of existing exceptions by means of judicial decision. Even Lord Reid who, to quote his own words, has "never taken a narrow view of the functions of this House as an appellate tribunal," felt constrained to admit that there were limits to what could be done by judges in developing the common law and considered that changes in this field should be left to legislation.[8] It follows therefore that those who favour modification or improvement in the law relating to hearsay must in future look to the legislature to do its work, though this is not to say that judicial attempts at reform, like that of Sir George Jessel, will necessarily go unnoticed when the time comes to determine the form of any statutory exceptions to the hearsay rule.[9]

In England the two principal statutory exceptions to the hearsay rule are embodied in the *Bankers Books Evidence Act* of 1879, and the *Evidence Act* of 1938, both of which have been adopted in most British Commonwealth countries where the common law of evidence prevails.[10] The former is of limited

6. *Ibid.*, at p. 214.
7. [1964] 3 W.L.R. 145, Lord Pearce and Lord Donovan dissenting.
8. *Ibid.*, at p. 156.
9. It is obvious from an examination of the English Evidence Act, 1938, that Sir George Jessel's formulation in *Sugden v. St. Leonards* had a considerable influence upon the framers of that Act.
10. For jurisdictions in which the Act of 1938 has been adopted, see Victoria: *Evidence Act*, 1958, ss. 54-58; N.S.W.: *Evidence Act*, 1898-1954, ss. 14A-14C; S. Australia: *Evidence Act*, 1929-1957, s. 34C; Tasmania: *Evidence Act*, 1910, ss. 78-79 (as amended); New Zealand: *Evidence Amendment Act*, 1945. The Act has also been adopted in at least one Province in Canada (see Cowen & Carter: *Essays on the Law of Evidence*, p. 6, n. 4) and, more recently, in South Africa.

application, and only the latter statute will be considered here.[11] In Queensland it is represented by s. 6 of the *Evidence Acts Amendment Act* of 1962 which adopts the English Act of 1938 subject, however, to some important modifications[12] which were recommended by the Evershed Committee on Supreme Court Practice and Procedure. The provisions of s. 6 of the local statute take effect as sections 42 A, 42 B, and 42 C, of the Queensland *Evidence and Discovery Acts*, 1867-1962,[13] and may, if the court thinks fit, be applied to any proceedings commenced before and in progress at the commencement of the Act of 1962.[14]

B. *SCOPE, PURPOSE, AND EFFECT OF THE ACT*

1. *Scope*

The Act has been described as a remedial statute[15] which is therefore to be given a liberal and not a narrow construction.[16] In scope, however, it is limited to civil proceedings; it renders admissible only statements of fact contained in documents, and then only if certain prescribed condtions are fulfilled.

(a) *Civil proceedings.* The Act is confined to civil proceedings,[17] but proceedings are defined in s. 42 A(1)(c) to include arbitrations and references, and the word "court", where it appears in the Act, is to be construed accordingly. The exclusion of criminal proceedings from the ambit of the reform is no doubt justified by considerations of the liberty of the subject, as well as by the fact that serious criminal charges are tried before juries, but the distinction can sometimes lead to anomalous results. In *Lilly v. Pettit*[18] a woman was charged under the Perjury Act with having made a false statement in registering the birth of her child by naming her husband as the father. In fact, her husband was at all material times a prisoner of war in Singapore and regimental records were tendered in proof of this fact as evidence of non-access. These records were held to be inadmissible both under the

11. For literature on the topic of the English Act, which may prove useful in Queensland, see Cowen & Carter, *op. cit.*, chap. 1; (1952) 68 L.Q.R. 106 (P. B. Carter); (1957) 31 A.L.J. 109 (R. B. Davidson).
12. Notably the omission of s. 1(3) of the English Act, which excludes the admission of a statement made by an "interested" person; and the modification of s. 1(1)(i)(b) so as to dispense with the requirement that the person supplying information to the maker should have personal knowledge of the information supplied.
13. Hereafter referred to as "the Act."
14. See s. 1(2). The Act was so applied in *Re Hennessy's Self-Service Stores* (unreported—18/4/63: Gibbs J.).
15. *In the Will of Thorne* [1947] V.L.R. 415, per Martin J., at p. 420.
16. *Ibid;* see also *Jarman v. Lambert & Cooke Ltd.* [1951] 2 K.B. 937, 940; *Shepherd v. Shepherd* [1954] V.L.R. 514, 519; *Saunders v. Saunders* [1965] 2 W.L.R. 32, 40.
17. Section 42 B(1).
18. [1946] K.B. 401.

Evidence Act and at common law, but in *Andrews v. Cordiner,*[19] in similar circumstances, such records were received as evidence of non-access in bastardy proceedings by a wife, such proceedings being civil.

There is much force in the argument that the accused in criminal cases should also be entitled to the benefit of the Act, but there are obvious dangers in extending its advantages to the prosecution without some safeguard, such as the conferring of a discretion to exclude such evidence where its prejudicial effect is likely to outweigh its probative value. However, this step has not so far been taken in any of the legislation modelled on the English pattern, and in Queensland, as elsewhere, the Act is restricted to civil proceedings.

(b) *Statements.* The term "statement" is defined[20] to include any representation of fact, whether made in words or otherwise. It is doubtful if this intended to be exhaustive, and in *Warner v. Women's Hospital*[21] Sholl J. inclined to the view that statements of opinions formed by the medical staff of a hospital in the course of treating a patient were admissible under the Act. However, it is unlikely that his Honour would have admitted anything less than expert opinion under this head, since, in the later case of *Tobias v. Allen (No. 2),*[22] he held that the statement tendered must itself be in admissible form, i.e., in a form in which the maker of the statement would be permitted to give oral evidence if he were called as a witness, and this was held to exclude a statement which amounted to a conclusion of law.

(c) *Document.* Two questions arise at this point: (1) what is a document?; and (2) must the document in question be the original? As to the first, s. 42 A(1)(a) specifically designates books, maps, plans, drawings, and photographs, as documents, but this is clearly not exhaustive and documents received under the Act generally take the more mundane form of statements (which may be written or typed), printed forms with details filled in, extracts from records, and private letters.

The second question has given rise to greater difficulty. Prima facie the original document must be produced,[23] but s. 42 B(2)(c) gives the court a discretion, if the original is not produced, to admit a certified copy of the original, or of the material part thereof, in lieu of the original. In *Bowskill v. Dawson*[24] it was held that the corresponding section of the English Act assumed

19. [1947] K.B. 655.
20. Section 42 A(1)(b).
21. [1954] V.L.R. 410, 416.
22. [1957]V.R. 221.
23. See s. 42 B(1).
24. [1954] 1 Q.B. 288; see also *Saunders v. Saunders* [1965] 2 W.L.R. 32

the existence of the original and was designed simply to avoid the inconvenience of bringing certain types of books and records into court, with the consequence that there was no discretion to admit a copy of a document where the original had been destroyed. In Queensland this difficulty has been overcome in s. 42 B(2)(c), which expressly authorises the court to receive a copy, notwithstanding that the original has been lost or mislaid or destroyed.

(2) *Purpose of the Act*

The Act is not intended to prejudice the admissibility of any evidence which, apart from its provisions, would be admissible.[25] Its evident purpose is to render admissible statements made in documents of the foregoing description and, subject to fulfilment of the necessary conditions, to make them evidence of the facts stated[26] although at common law they would be inadmissible. The extent to which the existing law of evidence has thus been altered by the Act may be considered from the point of view of its effect on (a) hearsay; (b) self-serving statements; and (c) contradictory statements.

(a) *Hearsay*. The principal effect of the Act is to modify the hearsay rule by rendering admissible, and attaching probative value to, certain statements which, because they consist of assertions of persons other than witnesses testifying, would formerly have been inadmissible as evidence of the truth of that which was asserted.[27] Viscount Maugham, who introduced the English Act into the House of Lords as a private member's bill during his term of office as Lord Chancellor, was apparently moved to do so because—

> "during my long time at the Bar I came across a number of cases in which the Evidence Act of 1938, had it been in force, would have been of extraordinary value. I have had cases in which it was necessary to prove reports by engineers as to the value of ore deposits of various kinds in distant lands, or to prove circumstances connected with landing facilities on a distant island, or the value of plantations in various places, cases where the reports would have been of extreme value, if they could have been put in evidence. It will be remembered that before the recent Act, such a report by an engineer to his own employer could never be put in evidence. The engineer in many cases could be called, but even then he could use his report only to refresh his memory, but not for any other purpose . . . ."[28]

25. Section 42 A(2).
26. See s. 42 B(1).
27. This definition of hearsay is adopted from Cross, *op. cit.*, p. 348.
28. (1939) 17 *Canadian Bar Review* 481.

These are the words of a practitioner on the Chancery side, but the Act has, if anything, proved more valuable to those concerned with common law, probate, and divorce. Lord Denning has stressed its value in accident cases where signed statements, taken shortly after the accident, "form a contemporary record made while the facts were still in the mind of the witness, and enable the court to check his subsequent recollection."[29] Under the Act, a variety of types of documentary statements have been admitted, such as a baptismal certificate as evidence of legitimacy in proceedings for letters of administration;[30] a letter by a testator stating that he had not made his will,[31] and another in which a testator expressed his dislike for a particular relative;[32] notes made by a solicitor with respect to the preparation of a will[33] or by a clerk in relation to a pending probate action;[34] factual accounts of road or industrial accidents made in statements to a policeman,[35] an insurance assessor,[36] a proof taken by a solicitor,[37] or in a form completed by a person claiming workers' compensation;[38] also hospital records tracing the history of a patient's treatment and conversations between him and his doctors;[39] evidence taken on commission[40] and statements obtained from witnesses abroad in order to prove marriage[41] or adultery[42] or to disprove adultery,[43] as well as evidence of non-access in the form of entries in regimental records.[44] In addition, affidavits of experts on foreign law are admissible under the Act since, unlike local law, foreign law is question of fact.[45]

It is obvious from these examples that the Act has made considerable inroads into that area of the law of evidence which has hitherto been the preserve of the common law rule against hearsay. The admission of evidence in this manner and form can,

29. *Jarman v. Lambert & Cooke Ltd.* [1951] 2 K.B. 937, 947.
30. *Re H, decd.* [1949] V.L.R. 197.
31. *In the Will of Thorne* [1947] V.L.R. 415. See also *Re Bridgewater* [1965] 1 W.L.R. 416.
32. *Re Thompson* [1939] 1 All E.R. 681, 682 (this may prove useful in proceedings under the *Testator's Family Maintenance Acts*, since, to the extent that the statement satisfies the statutory requirements, the decision in *Re Raybould* [1963] Qd.R. 188 is no longer good law).
33. *Re Poxe* [1956] P. 110.
34. *Re Hill* [1948] P. 341.
35. *Simpson v. Lever* [1963] 1 Q.B. 517.
36. *Murphy v. Haskell* [1961] S.A.S.R. 1.
37. Cf. *Harvey v. Smith-Wood* [1964] 2 Q.B. 161, but see *Phipson on Evidence* (10th edn.) para. 850.
38. *Baggs v. London Graving Dock Co.* [1943] K.B. 291.
39. *Reed v. Columbia Fur Dressers Ltd.* [1965] 1 W.L.R. 13.
40. *Edmonds v. Edmonds* [1947] P. 67
41. *Menicka v. Menicka* [1954] S.A.S.R. 74.
42. *Edmonds v. Edmonds*, supra; *Ossard-Lake v. Ossard-Lake* [1953] P. 272, see also *Widgus v. Widgus* [1959] V.R. 193.
43. *Galler v. Galler* [1955] 1 W.L.R. 400.
44. *Andrews v. Godmer* [1947] K.B. 655.
45. *Re Constantine, decd.* [1960] S.A.S.R. 19.

however, give rise to some peculiar problems. In *Patmoy v. Paltie*[46] a written statement made by a person since deceased was admitted in evidence pusuant to the Act and the opposing party then sought to contradict it by giving evidence of a subsequent oral statement by the deceased which was inconsistent with the earlier written statement. Jacobs J. held that the written statement must be taken to have been made at the time when it was tendered in evidence before the court; that the general rule as to inconsistent statements applied; and that any statement made by the deceased before or after the written statement was admissible to contradict the latter—

> "the fact that, by a modern amendment to the law of evidence, the evidence of the witness as to the facts may be given other than in the witness box, cannot, in my opinion, prevent the application of the common law principle which gives the right to contradict."[47]

(b) *Self-serving statements.*[48] Although modification of the hearsay rule may well have been the principal object of the Act, the admissibility of evidence under the Act is not defined by reference to the hearsay rule. It would, indeed, have been difficult to have approached the problem in this manner since there is little agreement as to how hearsay is to be defined. In particular, there is a marked difference of opinion among textwriters[49] as to whether the rule precluding a witness from giving evidence of previous statements consistent with his present testimony is an aspect of the rule against hearsay. Whether it is or is not is, however, of no consequence in determining whether a statement is admissible pursuant to the Act. It is true that in *Cartwright v. Richardson & Co.*,[50] Barry J. considered that the Act was "not intended to overrule the ordinary rules of procedure applicable in the trial of civil actions", but there the statement in question contradicted the present testimony of the witness and was tendered by the party who called him. The decision has not been followed in later cases, and in *Hilton v. Lancashire Dynamo Nevelin Ltd.*,[51] Megaw J. considered himself bound to admit a written statement which satisfied the statutory requirements even though it was put at the commencement of examination-in-chief to a witness who was presumably about to give evidence to the same effect as that contained in the statement tendered. Further-

46. (1960) 78 W.N. (N.S.W.) 3.
47. *Ibid.*, at p. 6.
48. This description was applied to evidence of this type by Dixon C.J. in *Nominal Defendant v. Clements* (1960) 104 C.L.R. 476, 479.
49. See Cross, *op. cit.*, p. 360.
50. [1955] 1 W.L.R. 340.
51. [1964] 1 W.L.R. 952.

more, it had already been decided by Sholl J. in *Shepherd v. Shepherd*[52] that a witness's previous written statement, tendered in support of his present testimony, was admissible, not merely as confirming his credit, but as evidence of the facts therein stated. His Honour was led to this conclusion by what, it is submitted, is the compelling consideration that since prima facie the Act requires the maker of the statement to be called as a witness,[53] it plainly contemplates that a statement made by a living person may be put in and may amount to evidence of the facts stated in it notwithstanding that the maker of the statement is himself called as a witness.

There may, however, be some slight difficulty in applying these decisions in Queensland. This is because the discretion to admit statements which is conferred by s. 42 B(2) of the local Act is, unlike its counterparts elsewhere, expressed as extending to statements "tendered by the party calling the maker of the statement."[54] A discretion to admit might be said to carry with it the implication that the statement is otherwise inadmissible; but since the whole purpose of requiring the maker of the statement to be called as a witness is to afford an opportunity of cross-examining him, it may equally be said that the rights of the opposing party are fully protected in such a case.[54A] Moreover, as we have seen, one of the principal objects sought to be achieved by the author of the Act was to enable information contained in reports to be tendered in evidence by the party calling the maker of the report,[55] and it is noteworthy that in the (as yet unreported) Queensland case of *Re Hennessy's Self-Service Stores*[56] Gibbs J. had no hesitation in admitting entries in books and stock sheets by persons who were in fact called as witnesses.

(c) *Contradictory statements.* Statements which contradict the present testimony of a witness are also admissible under the Act. It has, of course, always been the rule that the credit of an opposing witness can be impeached by evidence of previous inconsistent statements, but what is novel is that such statements, if they satisfy the statutory requirements, now become evidence, and also that they may be put to an unfavourable witness—one who has not been declared hostile—even by the party who calls him.

52. [1954] V.L.R. 514.
53. See s. 42 B(1)(b).
54. See s. 42 B(2)(a).
54.A It is submitted that the reason for the inclusion of s. 42 B(1)(a) is that at the time the Queensland Act was passed in 1962 *Cartwright v. Richardson & Co., supra*, still appeared to be good law; i.e., s. 42 B(1)(a) was intended to be inclusionary and not exclusionary in its effect.
55. See the statement by Viscount Maugham, quoted above in the text to n. 28.
56. Unreported judgment on 18/4/1963.

A decision which illustrates the first of these points in rather striking fashion is *Murphy v. Haskell*.[57] Here the facts were that M and H were involved in a motor car collision as a result of which proceedings were brought by the former against the latter. At the trial, one Turner, a passenger with M, gave evidence on behalf of M. In the course of cross-examination, counsel for H put to Turner a previous inconsistent statement alleged to have been made by him to Mrs H (since deceased) who had recorded it in a statement made by her to an insurance assessor before her death. Turner denied having made the statement to Mrs H, but since her own statement was admissible under the Act it became evidence of the facts stated, which evidence the judge preferred to that of Turner.

When it is considered that, had Mrs H been alive, she would certainly herself have given evidence of Turner's statement at the trial, the result in *Murphy v. Haskell* is not perhaps so very remarkable; but the same cannot be said of the decision in *Harvey v. Smith-Wood*.[58] In this case the plaintiff called as witness one Drummond, who unexpectedly gave evidence unfavourable to the plaintiff's case and inconsistent with a written statement made by the witness some time previously. Lawton J. held that the latter was admissible under the Act, but came to this conclusion "with some regret" because, as his Lordship said—

> "it seems to me that it is an unfortunate situation if counsel can call a witness and, when that witness does not come up to proof, counsel should be allowed to produce some earlier document which shows that on some other occasion the witness made a different statement."[59]

However, if (to revert to the question previously discussed) the admissibility of a statement made by one's own witness is, in Queensland, a matter for discretion under s. 42 B(2)(a) and not of right, the decision in *Harvey v. Smith-Wood* affords a useful indication of the sort of situation in which that discretion might well be exercised in favour of admitting the statement, since the facts were somewhat special: the witness, as Lawton J. observed, was an elderly man who might not have been as fit at the time of the trial as he was when he made the statement which it was sought to have admitted.[60]

C. *CONDITIONS OF ADMISSIBILITY*

In order to qualify for admission under the Act, a statement must satisfy the requirements of s. 42 B. Once it is shown that

57. [1961] S.A.S.R. 1.
58. [1964] 2 Q.B. 161.
59. *Ibid.*, at p. 175.
60. *Ibid.*

these conditions are fulfilled the statement becomes admissible and the court has no discretion to reject it,[61] unless the proceedings are with a jury and it appears for any reason to be inexpedient in the interests of justice that the statement should be admitted.[62] The statute lays down four prerequisites to admissibility which, briefly, are as follows: (1) the statement must tend to establish a fact of which direct oral evidence would be admissible at common law; (2) the person who made the statement must either (a) have had personal knowledge of the matters dealt with by the statement, or (b) where the document is or forms part of a continuous record, have made the statement in the performance of a duty to record information; (3) the document in which the statement appears must have been produced by, or signed or initialled, or otherwise authenticated, by the person making the statement; and (4) subject to some important exceptions, the maker of the statement must be called as a witness in the proceedings.

1. *Tendency to establish a fact*

The requirement that the statement should tend to establish a fact of which direct oral evidence would be admissible[63] has so far received little attention in the decided cases. No doubt it is intended to preserve the ordinary common law requirement of relevance as a prerequisite to admissibility and it may also have influenced Sholl J.'s decision in *Tobias v. Allen (No. 2)*[64] to reject a statement which embodied a conclusion of law, since direct oral evidence on a matter of law would not be admissible at common law.

2. *Personal knowledge . . . . continuous record*

As noticed above, the statement must satisfy either of two alternative requirements in relation to the state of knowledge or duty of the maker.

(a) *Personal knowledge.* Under s. 42 B(1)(a)(i) the maker of the statement must have had personal knowledge of the matters dealt with by the statement. *Carlton & United Breweries v. Cassin*[65] demonstrates that the hearsay rule may still be effective to exclude evidence which, to the mind untrained in legal niceties, may seem reliable enough. The issue in this case was the age of the deceased and it was sought to establish this by tendering a marriage certificate, signed by the deceased, in which his age was recorded. The certificate was rejected on the ground that the

61. *Ozzard-Low v. Ozzard Low* [1953] P. 272, not following *Infields Ltd. v. Rosen*, [1939] 1 All E.R. 121.
62. Section 42 B(4); see *infra*.
63. See s. 42 B(1).
64. [1957] V.R. 221.
65. [1959] V.R. 186.

deceased could not have had personal knowledge of his date of birth, and must have been acting upon hearsay when he gave his age as it appeared in the marriage certificate.

In some cases the degree of accuracy of the maker's personal knowledge may be doubtful, but, for the purpose of deciding whether or not a statement satisfies the requirements of the Act, the court is by s. 42 B(4) entitled to draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances. This is likely to be particularly helpful where the document in question consists of a book, map, plan, drawing, etc., and the provision was recently utilised in *Re Hennessy's Self-Service Stores*,[66] where the question was the admissibility of certain stock sheets which had been compiled by employees in the course of a stock-taking. The procedure adopted had been for one employee to call out the quantity of stock in a particular place and for another employee (the "maker" of the statement) to write down these quantities on the stock sheets. There was no opportunity for the maker to check the precise accuracy of the quantities called out, but Gibbs J. considered it a reasonable inference that the person who was doing the writing had some personal knowledge of the quantities of stock which were being written down since, in view of his necessary proximity to the caller, it would have been impossible for him to have failed to observe that there was some stock. Accordingly, the stock sheets were admitted, the accuracy of the maker's knowledge of the actual quantities of stock being a matter which affected the weight of the evidence rather than its admissibility.

(b) *Continuous record.* Section 42 B(1)(a)(ii), deals with statements recording matters of which the maker may not have personal knowledge. In order to be admissible under this head the statement must be, or form part of, a record purporting to be a continuous record made in the performance of a duty to record information. Unlike the corresponding provision[67] in the English Act, there is no requirement in the Queensland Act that the information should have been supplied to the maker by a person who had personal knowledge of the matters recorded, with the result that in Queensland, as Gibbs J. recognized in *Re Hennessy's Self-Service Stores*,[68] a record based on secondhand information, that is, a hearsay statement based on hearsay, will be admissible if the other requirements of s. 42 B(1)(a)(ii) are satisfied. On the strength of this, the evidence of age, which was rejected in *Carlton*

66. Unreported: judgment on 18/4/1963.
67. Section 1 (1)(i)(b).
68. *Supra.*

Breweries v. Cassin,[69] would be admissible in Queensland if contained in an extract from a marriage register made by a person whose duty it was to record such information.

The duty to record need not be statutory: for this reason a statement in a baptismal certificate was received in *Re H., decd.*,[70] and in *Re Hennessy's Self-Service Stores*[71] Gibbs J. admitted statements consisting of information recorded by employees in the performance of their duties to their employer. The requirement that the record should be "continuous" was said in *Thrasyvoulos Ionnou v. Papa Christoforos Demetriou*[72] to be "not necessarily" satisfied by—

> "the mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred subject-matter."[73]

But in other cases this requirement has been liberally construed and the following documents have been held to be within its terms, viz., a note of evidence forming part of a court record of proceedings;[74] an extract from regimental records;[75] an extract from a parish register of baptisms;[76] a copy of evidence taken on commission;[77] a "pay-out" book kept by an employee of a large company;[78] and a note in a policeman's official note book.[79] The circumstances in which the latter point arose afford a good illustration of the practical utility of the changes brought about by the Act. In *Simpson v. Lever*[80] a collision between two vehicles had been witnessed by a Frenchman holidaying in England who made an unsworn oral statement to a police constable at the scene of the accident which the latter recorded in his note book. It subsequently proved impossible to trace the identity of the Frenchman and at the trial it was sought to put in the statement given to the constable. This was not admissible as the statement of the Frenchman because it had not been signed by him in conformity with s. 42 B(3); but it was admitted pursuant to s. 42 B(1)(a)(ii) as a statement made by the constable in the course of a duty to record information and forming part of a continuous record, namely, one of his official police note books containing a series of notes which came into existence in the course of his work as a police officer.

69. *Supra.*
70. [1949] V.L.R. 197.
71. *Supra.*
72. [1952] A.C. 84.
73. *Ibid.*, at p. 92, per Lord Tucker.
74. *Brinkley v. Brinkley* [1963] 2 W.L.R. 822.
75. *Andrews v. Cordiner* [1947] K.B. 655.
76. *Re H., decd.* [1949] V.L.R. 197.
77. *Edmonds v. Edmonds* [1947] P. 67.
78. *Re Hennessy's Self Service Stores*, supra.
79. *Simpson v. Lever* [1963] 1 Q.B. 517.
80. *Ibid.*

3. *Signature*

Sub-section (3) of s. 42 B provides that, for the purposes of the section—

> "a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible."

This requirement appears to be peremptory and was treated as such in *Barkway v. South Wales Transport Co.*,[81] where the Court of Appeal refused to admit a statement which had not been signed. However, a similar objection to the reception of certain regimental records was rejected by a Divisional Court in *Andrews v. Cordiner*[82] on the ground that, under s. 42 B(4), the court was entitled to draw reasonable inferences from the form or contents of the document, and that the only reasonable inference on the facts of the case was that document was accurate; but Professor Cross would appear to be right in saying that the provisions of s. 42 B(4) do not aid in the interpretation of s. 42 B(3) and, if the conditions of the latter have not been fulfilled, the mere fact that the document appears on examination to be entirely reliable does not render it admissible.[83]

Where a signature or initial or handwriting is relied upon as satisfying the requirements of s. 42 B(3) it will, of course, be necessary to prove that it is the signature or initial or handwriting of the maker of the statement. Where the maker of the statement is called as a witness, this may be accomplished by the simple procedure of asking him in the witness box if the signature is his; but where the maker is dead, or for some other reason is not called as a witness, it will be necessary to prove his signature in some other way, e.g., by calling someone who saw him sign the document, or someone who is acquainted with the maker's writing, or by some other means.

Whether the statement has been signed by the maker also raises the question of who is the maker of the statement for the purposes of the Act. Usually the answer to this will be clear, but in *Re Powe*[84] the facts were that a solicitor dictated to his typist a note of the circumstances surrounding the preparation of a will.

81. [1949] 1 K.B. 54. See also *Bullock v. Borrett* [1939] 1 All E.R. 505.
82. [1947] K.B. 655.
83. Cross, *op. cit.*, p. 458. *Semble* the document must be signed, etc. at the time when, or soon after, the statement is made: cf *Phipson on Evidence* (10th edn.) para 857.
84. [1956] P. 110.

This note was typed, and then checked and amended but not initialled by the solicitor. Sachs J. held that the note was admissible, stating that—

> "My own view is that a document which is dictated, checked, and then amended in writing by a witness, certainly comes within the ambit of [s. 42 B(3)] of the Act, as being a document that was made or produced by that witness with his own hand. It does not matter if in fact he secured the intervention of someone else to do the actual typewriting provided that he himself sees it, checks it, and writes on it."[85]

4. *Calling the maker as witness*

The final prerequisite to the admissibility of a statement under the Act is that the maker of the statement should be called as a witness in the proceedings. This requirement is not absolute, however, and if it were, the statute would lose much if not all of its practical utility. The object of requiring the maker to be called evidently is to provide the other party with an opportunity for cross-examining him, but there are several statutory exceptions to this requirement which are designed to cover cases where it is impossible, difficult, expensive, or unnecessary, to call the maker as a witness; in addition, the court has a discretion to admit a statement even though the maker is available but is not called as a witness.

(a) *Statutory exceptions.* The condition that the maker of the statement shall be called as a witness need not be satisfied if any of the circumstances mentioned in the proviso to s. 42 B(1) exist. As indicated above, these are concerned with cases where it is impossible or unreasonable to call the maker as witness, such as where he is (i) dead, or (ii) unfit by reason of his bodily or mental condition to attend as a witness; (iii) if he is out of the State and it is not reasonably practicable to secure his attendance; or (iv) if all reasonable efforts to find him have been made without success; or (v) where no party to the proceedings, who would have the right to cross-examine him, requires him to be called as witness.

These exceptions speak for themselves and very little commentary is called for here. Evidence that the requisite circumstances exist is doubtless necessary, and, in relation to exception (ii), it may be noted that, in deciding whether or not a person is fit to attend as a witness, the court may act on a certificate purporting to be the certificate of a registered medical practitioner.[86] The first exception is the one most commonly invoked and presumably in such cases some evidence of death must be

85. *Ibid.*, at p. 113.
86. Section 46 B(4).

furnished; if this is not obtainable, it may be possible to rely on exception (iv).[87] Exception (iii) has been applied in cases where, for example, the maker of the statement lived abroad[88] and there were difficulties in procuring his attendance.[89]

(b) *Court's discretion.* Even where none of the prescribed exceptional circumstances exist, the court may at any stage of the proceedings admit in evidence a statement which in other respects fulfils the statutory requirements although the maker of the statement is available but is not called as a witness.[90] The corresponding provision[91] of the English Act refers explicitly to undue delay or expense as a reason for not requiring the attendance of the maker, and, although this has been omitted from the Queensland Act, it is undoubtedly a factor which may be considered by the court in determining whether its discretion should be exercised.[92] A recent English case in which this was done is *Reed v. Columbia Fur Dressers Ltd.*,[93] where the judge allowed certain hospital records to be put in without requiring the party tendering them to call the various doctors who were responsible for the statements embodied in the records. There is little doubt that much saving of time and expense can be effected if the courts or the parties[94] can be persuaded to utilise to the full the benefits which the Act confers.

D. *DISCRETION TO REJECT*

We have previously noticed that once a statement is shown to satisfy the requirements of the Act, the court is bound to admit it. The only exception is in the case of trials by jury, where s. 42 B(4) confers a discretion on the court to reject the statement, "if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted". A comparable provision in the Victorian Evidence Act was invoked in *Tobias v. Allen (No. 2)*,[95] where proceedings were brought by certain ratepayers to recover penalties from a local councillor who, it was alleged, had entered into an improper agreement. To prove this agreement, the plaintiffs tendered a written declaration by a

87. It is necessary, however, that adequate proof be given that reasonable efforts have been made to find the witness: *Union Steam Ship Co. v. Wenlock* [1959] N.Z.L.R. 173.
88. *Friend v. Wallman* [1946] K.B. 493; *Ozzard-Low v. Ozzard-Low* [1953] P. 272; *Galler v. Galler* [1955] 1 W.L.R. 400; *Wielgus v. Wielgus* [1959] V.R. 193.
89. *Cf. Union Steam Ship Co. v. Wenlock* [1959] N.Z.L.R. 173, 191.
90. Section 42 B(2)(b).
91. Section 1 (2).
92. See per Gibbs J. in *Re Hennessy's Self-Service Stores* (unreported).
93. [1965] 1 W.L.R. 13.
94. I.e., where, under the proviso to s. 42 B(1), the other party to proceedings does not require the maker to be called as a witness.
95. [1957] V.R. 221.

council engineer who was unable to attend as witness on account of his mental condition. Sholl J. decided that it was in the interests of justice that this statement should be rejected, since, having regard to the mental condition of the maker and to the fact that the proceedings were penal in nature, it would have been wrong to admit a statement where the maker was not available for cross-examination and not present to explain certain ambiguities in the statement.[96]

E. *WEIGHT OF THE EVIDENCE*

Although the admission of the statement is a matter of right once it is shown that the statutory conditions are satisfied, the Act draws a clear distinction between admissibility and weight.[97] Section 42 C(1) provides that in estimating the weight, if any, to be attached to a statement rendered admissible as evidence by the 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. The sub-section lays particular stress on matters such as whether or not the statement was made contemporaneously with the occurrence[98] or existence of the facts, and whether or not the maker of the statement had any incentive to conceal or misrepresent facts. This represents a notable advance over the English *Evidence Act* and other similar statutes, in which a statement is inadmissible if made by "a person interested" at a time when proceedings were pending or anticipated.[99] Because this makes the question one of admissibility and not merely of weight, the relevant provision has greatly restricted the circumstances in which advantage can be taken of this legislative reform,[100] and it is doubtful whether any of the cases dealing with the question of interest can afford much assistance in construing s. 42 C(1) of the Queensland Act.

F. *PROCEDURE*

A statement which satisfies the requirements of the Act may, by virtue of s. 42 B(2), be admitted in evidence in the course of the trial; but the sub-section also contemplates that the court may make an order that such a statement shall be admissible in evidence "at any stage of the proceedings" and in *Friend v. Wallman*[101] this was held to justify the making of an order by a judge

96. *Ibid.*, at pp. 225-6.
97. See per Denning L.J. in *Jarman v. Lambert & Cooke Ltd.* [1951] 2 K.B. 537, 541.
98. As to this, see *Murphy v. Haskell* [1961] S.A.S.R. 1.
99. English *Evidence Act*, s. 1(3).
100. But see now *Bearmans Ltd. v. Metropolitan Police District Receiver* [1961] 1 W.L.R. 634, in which a more liberal attitude is manifest.
101. [1946] K.B. 493; cf. also *Edmonds v. Edmonds* [1947] P. 67.

in chambers or by the Master on the hearing of a summons for directions.[102] Although the terms of the corresponding Queensland rule of court[103] are not identical with those of the relevant English rule[104] on which this case was decided, there is, it is submitted, a sufficient degree of similarity to justify the view that in Queensland a judge in chambers or the Registrar[105] likewise has jurisdiction to order that a statement be admitted in evidence under s. 43 B(2).[106]

G. *CONCLUSIONS*

Although the English *Evidence Act* of 1938 has been criticised[107] as manifesting "a piece-meal, nibbling approach" to the subject of reform of the hearsay rule, there is no doubt that it has proved its worth in practice and that it can and does effect considerable savings in time and expense. *Phipson*[108] considers that its chief advantage lies in facilitating proof of matters of technical importance, and where a witness has almost or completely forgotten the events which he has recorded, since in such cases the document itself becomes evidence and so lightens the burden of proof even where the maker of the statement is called as a witness. And the fact that some of the more restrictive features of the English legislation have been omitted from the local version of the Act[109] means that in Queensland its beneficial effects will be even more clearly apparent in practice. It is at least a first step towards a complete reform of the law of evidence and, in essential matters of trial procedure, it is perhaps not unreasonable that the first step should be cautious as well as short.

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102. The term "court" in s. 42 B(3) was construed to mean "court or judge".
103. Queensland R.S.C. O.20. r. 2; see also 0.65, r. 1(1).
104. English R.S.C. 0.30. r. 2(d) in the form in which it appeared in 1946.
105. Queensland R.S.C. 0.20. r. 6.
106. As Somervell L.J. pointed out in *Friend v. Wallman*, supra, at p. 500, "it is obviously of great convenience that a party should be able to know whether or not documentary evidence is admissible before he prepares for trial. If an order is refused it may, in some cases, not be worth proceeding further".
107. By Professor C. A. Wright in (1942) 20 *Can. Bar Review* 714, 718.
108. *Op. cit.*, para 849.
109. See footnote 12, *ante*.

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