*This study paper, prepared by the Evidence Project of the Law Reform Commission of Canada, is circulated for comment and criticism. The proposals do not represent the views of the Commission.*

# EVIDENCE

# 9. HEARSAY

*The Law Reform Commission of Canada will be grateful for comments before August 1, 1974. All Correspondence should be addressed to:*
*Mr. Jean Côté, Secretary*
*Law Reform Commission of Canada,*
*130 Albert Street,*
*Ottawa, Ontario.*
*K1A 0L6*

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LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

# EVIDENCE

# 9. HEARSAY

A study paper prepared by the
Law of Evidence Project

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## TABLE OF CONTENTS

# INTRODUCTION

The hearsay rule excludes evidence of out-of-court statements when tendered for the purpose of establishing the truth of the matter stated. The common law has traditionally insisted that the person who personally perceived the events in issue should testify to those events under oath in the presence of the trier of fact and opposing party and subject to cross-examination by the adversary litigant. Such evidence has greater probative force than if the events were described by means of evidence of an earlier out of-court report of the person with personal knowledge The threat of a perjury prosecution is bound to enhance the trustworthiness of the witness' testimony as will the solemnity of the courtroom surroundings and the presence of the party against whom the evidence is given; the demeanour of the witness while testifying should also aid the trier of fact in evaluating his evidence.

The origin of the hearsay rule resides in our adversary theory of litigation, which depends on the right of the adversary to cross-examine the witnesses produced by his opponent and thereby test their credibility. A person's description of a past event might be incorrect because of five possible dangers: the danger that the person did not have personal knowledge of the event; the danger that the person did not accurately perceive the event; the danger that the person when he describes the event does not recall an accurate impression of what he perceived; the danger that the language the person uses to convey his recalled impression of the event is ambiguous or misleading; and, the danger that the person describing the event might not be giving a sincere account of his knowledge. (Morgan, *Hearsay Danger and the Application of the Hearsay Concept* (1948), 62 Harv. L. Rev. 177). All of these dangers may be explored by effective cross-examination and the adversary is denied the opportunity of exposing imperfections of perception, memory, communication and sincerity and challenging the person's testimonial qualification of first-hand knowledge if the description is not given at trial by the person with alleged first-hand knowledge of the event but through the testimony of another reporting that person's description.

The foregoing analysis of the basis for the hearsay rule could lead logically to the conclusion that all statements made out-of-court ought to be excluded if tendered for the purpose of establishing the truth of the matter stated. This, however, has never been the law and as many as thirty-one exceptions are presently recognized. In none of these exceptions are there sufficient guarantees of reliability that one can say the adversary is fully protected. Beginning in the 19th century most of the existing exceptions were rationalized on the basis of circumstantial guarantees of trustworthiness attending the making of the statement and unavailability as a witness of the person who made the statement. These rationalizations were made

long after many of the exceptions had been established and were justified on the premise that the purpose of the hearsay rule was to exclude evidence the reliability of which the jury could not adequately evaluate. If the statement were made under conditions which promoted sincerity to a degree that it were felt that the trier of fact could give it appropriate probative value the statement might be received although the adversary was denied the ability to cross-examine and expose possible defects attributable to the other dangers of perception, memory and communication attendant on a description of a past event. The existing hearsay rule with its numerous exceptions is seen then as a product of conflicting theories: the adversary system of litigation and distrust of the ability of the trier of fact to properly evaluate the evidence. No single principle will explain all existing exceptions and judicial refinements of the exceptions over a long period of time have added little to the rule's consistency. Many of the exceptions may be viewed as solely the product of history and the tendency of the courts has been to limit them to the factual contexts out of which they first arose and to see the list of exceptions as fixed. (But see *Ares v. Venner* (1970), S.C.R. 608.) The judicial creation of exceptions indicates the courts belief that hearsay can have definite probative value and ought to be received despite the intrusion on the adversary system but the haphazard and stultified development of the exceptions has produced a highly technical and often mischievous rule badly in need of reform.

The disadvantages of the hearsay rule were well-stated by the English Law Reform Committee in their 13th report, *Hearsay Evidence in Civil Proceedings:* Cmnd. 2694 (1967), p. 18, and repeated by the English Criminal Law Revision Committee in their 11th report, *Evidence in Criminal Cases:* Cmnd. 4991 (1972):

> The rule against hearsay has five disadvantages. First, it results in injustice where a witness who could prove a fact in issue is dead or unavailable to be called; secondly, it adds to the cost of proving facts in issue which are not really in dispute; thirdly, it adds greatly to the technicality of the law of evidence because of its numerous exceptions in addition to those provided in the Evidence Act 1938; fourthly, it deprives the court of material which would be of value in ascertaining the truth; and, fifthly, it often confuses witnesses and prevents them from telling their story in the witness-box in the natural way. These disadvantages have long been recognized. It is high time that they were tackled boldly.

Of course there is a difference of opinion as to the direction reform of the hearsay rule should take. Since the multiple goals of the rules of evidence, such as truth determination, certainty of result, administrative trial efficiency, and fairness to the parties seem to clash most uncompromisingly at the hearsay rule, perhaps these differences of opinion will never be resolved. (See Murray, *The Hearsay Maze: A Glimpse at Some Possible Exits* (1972), 50 C.B. Rev. 1.)

**In our attempt to rationalize the rule and its exceptions we have been guided by the principle that first-hand testimony should always be preferred; but if it is the only evidence available or if it were given under circumstances that tend to ensure its reliability or if the declarant is present and subject to cross-examination then hearsay evidence should be admissible.**

One result of our attempt at rationalization would be, of course, that the amount of hearsay evidence receivable would be significantly expanded. Two arguments

are likely to be made opposing any expansion of the hearsay rule, even though such evidence may be the only evidence available and may be just as reliable as much of the evidence now received under the present exceptions to the hearsay rule.

First, it might be argued that the jury will be unable to evaluate the worth of this evidence, and might accordingly be misled by it and convict an accused person on the "slender reed" of hearsay evidence. While jurors at the time the hearsay rule emerged may have been illiterate and ignorant, and therefore were in need of mechanical rules to assist them in assessing evidence, jurors today are usually people of experience and education. Certainly they are more sophisticated in weighing evidence and reaching decisions than jurors of 150 years ago. Probably they rely on hearsay evidence in their everyday affairs and distinguish between it and statements that are made in their presence, the foundation about which they can ask questions. As well, of course, if hearsay evidence is particularly unreliable and likely to mislead the jury the trial judge can exclude it; as noted in earlier study papers the Project recognizes the present existence and suggests the codification of the trial judge's discretion to exclude evidence which has trifling probative value in comparison to other dangers attendant on its receipt. In a criminal case if the evidence against the accused consists in the main of a "slender reed" of hearsay the trial judge will grant a motion for directed verdict, or if a jury verdict is based on such evidence it will be reversed on appeal for lack of sufficiency.

We are fortified in our conclusion about the ability of the jury to assess the worth of hearsay evidence by the reasoning and conclusions of the English Criminal Law Revision Committee:

> We disagree strongly with the argument that juries and lay magistrates will be over-impressed by hearsay evidence and too ready to convict or acquit on the strength of it. Anybody with common sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can. In any event judges will be in a position to remind juries that the former is the case with hearsay evidence, and sometimes the judge may think it advisable to mention this to the jury at the time which the statement is admitted. On the other hand there is some hearsay evidence which would rightly convince anybody. Moreover, juries may have to consider evidence which is admissible under the present law, and there are other kinds of evidence which they may find it more difficult to evaluate than hearsay evidence — for example, evidence of other misconduct. (Eleventh Report, *Evidence (General):* Cmnd. 4991 (1972).)

Second, the relaxation of the conditions for the admissibility of hearsay might be opposed by the argument that such relaxation will greatly increase the danger of manufactured evidence. This danger is most often of concern in criminal cases where, it is alleged, if the hearsay rule is relaxed it will make it too easy for the accused to introduce false evidence. It is argued that because the accused has so much at stake in a criminal case, and because he only has to raise a reasonable doubt about his guilt, that he will be unscrupulous in the methods he uses to get an acquittal. A relaxation of the hearsay rule would permit him to introduce a false confession of the crime by a person unavailable to give evidence, or to raise an alibi defence by hearsay alone. The difficulty with this argument is that the rules of evidence are too blunt an instrument to protect the court from false evidence. The recent history of the rules of evidence has been largely a movement away from the position that perjury can be prevented by exclusionary rules. Indeed because of

the great need to protect the innocent in criminal cases a strong case can be made for never applying the hearsay rule against the accused. In reaching this conclusion we tend to agree with Professor Morgan:

> If there was ever a time when exclusionary rules prevented perjury, that time has long since passed . . . Given a litigant willing to commit or suborn perjury and counsel ready to encourage or wink at it, no exclusionary rule will deter them . . . By such exclusionary provisions only the honest litigants will be hurt; he alone will be deprived of the benefit of persuasive evidence. No rational procedure will sanction an exclusionary rule supported only by its supposed efficacy to hinder or prevent false testimony. (A.L.I. Model Code of Evidence (1942), p. 4).

## POSSIBLE FORMULATION OF PROPOSED LEGISLATION

### Section 1. Definitions

**(1) Statement**

A statement is verbal or non-verbal conduct intended by the declarant to communicate his belief in the existence of a fact.

**(2) Hearsay**

Hearsay is a statement, other than one made by the declarant while testifying at his trial or hearing, offered in evidence to prove the truth of the statement.

### Section 2. Hearsay Rule

Hearsay evidence is not admissible except as provided by section 3 or by any other Act of the Parliament of Canada.

### Section 3. Hearsay Exceptions

Evidence of the following is not excluded by the hearsay rule:

**(1) Author of Statement Unavailable**

Statements made by a person (1) who is dead or is unfit by reason of his bodily or mental condition to attend as a witness or, (2) who is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means or, (3) who, being present at the hearing and being compellable to give evidence on behalf of the party desiring to give the statement in evidence, refuses to be sworn, provided that the person's inability or refusal to testify is not due to any wrongdoing of the proponent of his statement committed for the purpose of preventing the person from attending or testifying.

**(2) Author of Statement Available**

Statements made by a person who has been or is to be called as a witness at the trial or hearing unless the statement was made for the purpose of setting out the evidence which that person could be expected to give as a witness in pending or contemplated legal proceedings.

**(3) Admissions**

A statement offered against a party and which is

(a) the party's own statement,

(b) a statement which the party by his words or other conduct has adopted as his statement or with which, by his words or other conduct, he has agreed,

(c) a statement by a person authorized by the party to make a statement concerning the subject,
(d) a statement by the party's agent or servant concerning a matter within the scope of his agency or employment, made during the continuance of the relationship, or
(e) a statement by a person engaged with the party in common enterprise, if made in pursuance of their common purpose.

**(4) Records**

(a) A memorandum, report, record, or data compilation, in any form of acts, events, conditions, opinions or diagnoses, made pursuant to a duty at or near the time in the course of a regularly conducted activity.
(b) Where information in respect of a matter is not included in memoranda, reports, records, or data compilations of a regularly conducted activity and the concurrence or existence of such information might reasonably be expected to be there found, the court may upon production of such memoranda, reports, records or data compilations admit the same for the purpose of establishing that fact and may draw the inference that such matter did not occur or exist.
(c) The circumstances of the making of such a memoranda, reports, records, or data compilations, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

**(5) Learned Treatises**

Statements in learned treatises, periodicals, or pamphlets if identified as authoritative by a witness who is expert in the field with which the material is concerned, and any expert in the same field may be asked to explain statements contained therein. If admitted, the statements may be read into evidence but may not be received as exhibits.

**(6) Reputation**

(a) A person's reputation arising before the controversy among those who know him or would know about him and
(b) Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history and
(c) Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

## COMMENT

### Section 1. Definitions

#### Subsection 1 (1) Statement

The present hearsay rule excludes not only certain oral and written statements but also might exclude from a trial evidence of a person's conduct if that conduct were intended by the person to be assertive. For example, evidence that a person shook his head in response to a question suffers from the same testimonial dangers discussed above as would a negative oral statement by him in response to the question. Therefore in that situation evidence of his conduct which was intended as a substitute for words should obviously be treated in the same way as evidence of a verbal statement by him.

However a person's conduct may also tend to prove a fact even though it was not intended by the person to be assertive of that fact. For example, a witness may testify, as tending to prove that it was raining at a particular time, that he saw X put up his umbrella. X in most instances would not have intended his conduct to be an assertion that it was raining, but rather he would simply be responding to his perception of his environment.

Whether evidence of non assertive conduct should be classified as hearsay when it is offered to prove the actor's belief in a particular fact as a basis for an inference that the fact believed is true is a difficult question on which the Evidence Project earnestly solicits advice. The classic analysis of the problem appears in *Wright v. Doe d. Tatham* (1837), 112 E. R. 488, where such evidence was classified as hearsay but its identification as hearsay is often difficult and seldom discerned by counsel or judge (compare *Lloyd v. Powell Duffryn,* [1914] A. C. 733).

We concluded that for the purposes of this study paper conduct, whether verbal or non-verbal, which was not intended as a communication should not be classified as hearsay, even though the actor's sincerity, perception and memory cannot be tested by cross-examination. Since there is an absence of intent on the part of the actor to communicate, the dangers arising from insincerity are slight although we recognize that the threshold question of lack of intent may be difficult in some cases (see Finman, *Implied Assertions as Hearsay: Some Criticism of the Uniform Rules of Evidence* (1962), 14 Stan. L. Rev. 682). The proposed legislation is worded in such a way that conduct will be receivable unless the opponent demonstrates that the actor-declarant intended his conduct to be a communication. The dangers of errors in perception and memory will be minimized in the case of non-verbal conduct since the actor will have based his actions, and not simply his words, on the correctness of his belief. While it is clear by our definition that verbal conduct

which was not intended to be communicative, e.g. a man's scream in pain, is excluded from the operation of the proposed hearsay rule, it should also be noted that verbal conduct intended to be communicative is not within the definition if it were not intended to be assertive of the fact sought thereby to be proved (see *Ratten v. R.*, [1972] Cr. App. Rep. 18 (P. C.) and *Lloyd v. Powell Duffryn, supra*). By our proposal conduct not intended to be assertive will be considered as circumstantial evidence of the actor's belief in the existence of the fact sought to be proved with the strength of the inference to be drawn influenced by the probative value of the conduct (see McCormick, *Evidence* (1954), p. 479). The trial judge would be able to exclude evidence of such conduct if he believes that its probative value is outweighed by the danger of undue prejudice.

**Subsection 1 (2) Hearsay**

Under the definition, as under existing case law, only statements that are offered in evidence to prove the existence of the fact about which the statement was made are classified as hearsay. Only when the statement is offered for such a purpose is the declarant's sincerity, perception, memory, and behaviour of sufficient importance to render misleading a statement made when these elements cannot be tested by cross-examination. Thus evidence of an extra-judicial statement offered for any purpose other than to prove the truth of the matter asserted is not hearsay. Under the recommended legislative definition, as under the present law, the following kinds of statements would not be hearsay statements since they are being offered only to prove the fact that the statement was made: statements that affect the legal rights of the parties; statements that accompany and explain a transaction; statements that are offered to show the knowledge of the hearer; and, statements offered as circumstantial evidence tending to prove the feelings or state of mind of the declarant.

Also our proposed definition of hearsay and the following exceptions make no distinction among first, second or third-hand hearsay. The well-known dangers in transmitting an oral statement, that the statement will not be accurately remembered and reported, may of course, affect the weight to be given to a second-hand hearsay statement. However, as is evident from our over-all approach to the hearsay problem we do not believe the law of evidence should generally concern itself with weight unless the worth of the evidence in question is totally undeterminable. (See Glanville Williams, *The New Proposals in Relation to Double Hearsay and Records*, [1973] Crim. L. Rev. 139.)

## Section 3. Hearsay Exceptions

**Subsection 3 (1) Declarant Unavailable**

Subsection 3 (1) makes a fundamental change in the common law. At common law a statement made by a person who is unavailable to testify at trial is admissible only if it comes within one of the recognized common law exceptions to the hearsay rule. Under this subsection if the declarant is unavailable all relevant statements made by him are admissible.

If the declarant is unavailable, then his hearsay statement is often the best evidence, indeed often the only evidence. None of the reasons traditionally given for

the exclusion of hearsay evidence appear to us to be compelling enough to warrant the absolute exclusion of such evidence. Also we think that it would be impossible to enumerate the circumstances in which the necessity of admitting a statement made by an unavailable witness would outweigh the possible unreliability of the statement. Therefore we concluded that it would be preferable to provide for the reception of all such statements. The testimonial and other dangers discussed above will of course affect the weight to be given to the statement; the effect of these factors in each particular case can be measured with greater accuracy at the time of the reception of the evidence rather than at the time when we would be in effect attempting to diagnose future events.

In England, where in civil cases statements made by an unavailable declarant are admissible under the present law, a similar recommendation has been made the liberalization of the hearsay rule in criminal cases. However it was recommended that the admissibility of such statements should be subject to two restrictions:

> 1. At a trial on indictment a statement will not be admissible by reason of the impossibility of calling the maker unless the party seeking to give it in evidence has given notice of his intention to do so with particulars of the statement and of the reason why he cannot call the maker. English Criminal Law Revision Committee 11th Report, *Evidence (General):* Cmnd. 4991 (1972), para. 237, 240-242.
>
> 2. A statement said to have been made after the accused has been charged, (by a person who is unavailable at trial), will not be admissible at all. English Criminal Law Revision Committee 11th Report, *Evidence (General):* Cmnd. 4991 (1972), paras. 237, 240-242.

Both of these restrictions were recommended by the English Criminal Law Revision committee because of a perceived need to provide for safeguards against the use of manufactured evidence. We decided against providing for such restrictions.

The English Committee recommended the requirement to give notice because they felt that such notice would "enable the other parties to make inquiries as to the identity (and credibility) of the person supposed to have made the statement, as to whether it is really impossible to call him, and as to the contents of the statement". para. 241. We have not here provided for an advance notice requirement since we think it wise to wait for the report of the Criminal Procedure Project on Discovery; we do however welcome suggestions respecting its desirability and practicality in the criminal process.

Also we do not think that the restriction that hearsay statements are inadmissible if made by a person who is unavailable if it were made after the accused has been charged, should be adopted. Throughout our recommendations we have attempted to avoid making evidence inadmissible merely because it might be false. The English Criminal Law Revision Committee was concerned that after he was charged a professional criminal might manufacture exculpatory evidence by having a "witness" make a statement, for instance that he saw someone other than the accused commit the crime, and then conveniently become unavailable to testify at trial. The danger with such a restrictive proposal is of course that it might cause grave injustices. Such a statement might in some cases be a necessary part of the

accused's defence. It seems much more sensible to admit such statements and permit the time they were made and the circumstances under which they were made to go to weight, rather than decide *a priori* that they will all be fabricated.

If this exception is accepted it will be unnecessary to separately codify those common law exceptions that now depend for their admissibility upon the unavailability of the declarant: dying declarations, declarations against interest, declarations in the course of duty, declarations as to public or general rights, declarations as to pedigree, post-testamentary declarations of testators concerning the contents of their wills and testimony given on former occasions.

If this proposal is unacceptable we would appreciate views on an alternative proposal which was also considered. The existing common law exceptions noted, which depend for their receipt on the unavailability of the declarant, would be codified. In addition the trial judge would be empowered to assess, from the opponent's viewpoint, the hearsay dangers of the particular evidence offered and to weigh it against the necessity, from the proponent's viewpoint, in the particular trial; the trial judge would have a discretion to admit hearsay when the dangers are minimized by the conditions surrounding the making of the statement relative to the necessity.

**Subsection 3 (2) Author of Statement Available**

By the present law previous out-of-court statements of a witness may be received for the purposes of supporting or attacking his credibility but when so received they may not be used as evidence of the truth of the matter stated. We believe this application of the hearsay rule to be an overly stringent one which pays little regard to the reasons underlying the rule and which produces a limiting instruction to the trier of fact on the utility of the statement which instruction is mere verbal ritual, (See Study Paper 3, *Credibility*). The maker of the statement is present as a witness and subject to cross-examination. If he acknowledges that he remembers the matter to which the statement is relevant, cross-examination on the earlier statement and his present testimony is available to expose the dangers which normally reside in hearsay and as noted by Learned Hand, J.:

> If, from all the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are nonetheless deciding upon what they see and hear of that person and in court. (*DiCarlo v. U.S.* (1925), 6 F. 2d 364, 368.)

If the witness denies any knowledge of the matter to which the statement speaks then the necessity for the evidence is just as great as if he were unavailable and yet the trier of fact will be in an improved position to evaluate the statement since it will have present before it not only the witness who reports the statement was made but also the person who is reported to have made it; the trier of fact can decide whom to believe.

Under the exception to the hearsay rule proposed in subsection 3 (2) all prior statements made by a person who has been called or is to be called as a witness at the trial will be admissible as substantive evidence, and not only for the limited purpose of attacking or supporting the witness' credibility. The trial judge of course has a discretion to exclude such statements when he determines the probative value to be outweighed by other considerations such as time, prejudice and super-

fluity (See Study Paper No. 3, *Credibility*). Additional reasons for our proposed change are: that the present rule often results in the exclusion of relevant evidence; the proposed rule will protect a party against a turncoat witness; an out-of-court statement made by a witness is often more likely to be reliable than a statement he makes on the witness stand since the out-of-court statement was made when the event was fresher in the mind of the witness, and perhaps made before he has been influenced by the parties or subsequent events; the declarant is present in court and his credibility and the worth of his previous statement can be evaluated by the trier of fact; it is unrealistic to think that the trier of fact can follow an instruction that the statement can only be used to impeach the credibility of the witness and not as substantive evidence; the present rule works against only that party having the burden of proof; the trial judge will always be able to weigh the sufficiency of the evidence and thus will be able to exercise some control over the danger that the jury will give too much weight to a prior inconsistent statement; many of the present exceptions to the hearsay rule might lead the trier of fact to find the existence of a fact on much less reliable out-of-court statements than those admitted under the proposed rule.

In Study Paper No. 2, *Manner of Questioning Witnesses*, we noted the distinction between writing used to refresh the memory and writing used as past recollection recorded. Under proposed subsection 3 (2), when a witness identifies a writing as one made by him on an earlier occasion but confesses that his memory is not refreshed by it, the earlier statement will nevertheless be receivable as evidence of the truth of the matter stated without indulging in the present fiction of refreshing memory. For example, the witness may be able to testify that on an earlier occasion, while the facts were fresh in his mind, he recorded the licence number of the vehicle allegedly involved in the disputed event; even though unable at trial to recall that number, evidence of it will be admissible under the proposed section. The witness may be cross-examined respecting the accuracy with which he made the notation. Circumstances surrounding the making of the earlier statement will affect the weight of the evidence, but not its receivability.

The proposed section will also permit evidence of an out-of-court conversation between the witness and another witness to be given in a more natural and meaningful manner than at present. By the present law the witness is generally permitted to testify to what he himself said to X, and what he did as a result of what X said, but is not permitted to relate what X said to him; what X said will be later testified to by X. The witness is often confused by the objections and the trier of fact receives the evidence in an unnecessarily interrupted way.

One of the dangers of admitting a witness' prior consistent statements at trial is that the witness will prepare before trial a careful written statement of his evidence and then simply put his case in by use of these documents. This would destroy the principle of orality in legal proceedings, avoid the prohibition against leading questions on direct examination, and enable an insincere witness to present a smoothly coherent story which could often not be duplicated on direct examination. To avoid such, the subsection provides that it is not applicable to a statement which was made for the purpose of setting out the evidence which a person could be expected to give as a witness in pending or contemplated legal proceedings.

**Subsection 3 (3) Admissions**

The present law permits the reception into evidence of extra-judicial statements made by a party to an action when tendered by a party opponent as adverse to the maker's case. Under the present law these statements are referred to as admissions and are considered as a hearsay exception.

In the proposed draft we have retained this characterization of admissions. However, unlike other exceptions to the hearsay rule the admissibility of admissions has never been justified soley on the basis that the admissibility of such statements is necessary, or on the basis that such statements are made under circumstances that assure the trier of fact of its reliability. Indeed, under the present law admissions are admissible even though when made they were not against the party's interest, (4 Wigmore, *Evidence,* sec. 1048; *Falcon v. Famous Players Film Co.,* [1926] 2 K.B. 474, 489) and even though the party did not have personal knowledge of the fact which he admits, (*Stowe v. Grand Trunk Ry.* (1918), 39 D.L.R. 127 (Alta. C.A.)). Thus admissions are received not because they assure the trier of fact of reliability in satisfactory substitution for the absence of the oath and cross-examination, but rather because of the nature of the adversary system. Under the adversary system a party can hardly object that he had no opportunity to cross-examine himself on a statement that he has made, nor should he be heard to require that his own statements be under oath or not worthy of belief.

Paragraph (a) states the basic rule. Confessions are but one kind of admission and additional requirements with respect to them will be treated in another section of the Code. The remaining four paragraphs specify four categories of statements that at common law a party was deemed to be sufficiently responsible for to justify their reception as admissions.

Paragraph (b) states the law existing at present. (*R. v. Christie,* [1914] A.C. 545; *Chapdelaine v. The King,* [1935] S.C.R. 53.) A statement may be treated as an admission by a party if he adopts it. The adoption may be expressed or implied. Silence in the face of an accusation may be considered an acquiescence to its truth and permit the reception of the statement made to him; silence however may be explained away and an accused exercising his right to remain silent in the face of accusations made in the presence of the police should not be prejudiced thereby, (see *R. v. Eden,* [1970] 2 O.R. 161 (C.A.); *Miranda v. Arizona* (1966), 384 U.S. 436, 468 and Cross, *Evidence,* 3d ed., 40; but see *R. v. Fargnoli,* [1957] O.R. 140 (C.A.) and *R. v. Cripps* (1968), 3 C.R.N.S. 367 (B.C.C.A.)). It is a condition of admissibility that there be evidence capable of supporting an inference that the statement was accepted by the party although since the Christie case (supra) the requirement that this evidence be led prior to receiving the statement has not been insisted on in all cases. The better view (see *Chapdelaine v. The King, supra,* and *R. v. Harrison,* [1946] 3 D.L.R. 690 (B.C.C.A.)) is to require the foundation evidence prior to receiving the statement to avoid unfair prejudice to the accused and the proposed paragraph is worded to accomplish that result.

If a party expressly authorizes another to make an admission on his behalf, it is logical that such an admission be treated as an admission of the party and paragraph (c) so provides. Implied authorization to make an admission is sometimes

found to exist by the present law in agency or employment relationships but only subject to rigid conditions, which usually result in the exclusion of the statement. To be receivable against his principal the statement must have been made by the agent acting within the scope of his employment and during the continuance of his employment. The courts have also imposed at times the requirement that the statement of the agent must have been part of the *res gestae*, part of the act done (*Confed. Life v. O'Donnell* (1886), 13 S.C.R. 218; *Bourgoin v. Sullivan,* [1942] Que. K.B. 593 (C.A.)) although this has been regarded as a confusion of two separate principles. (4 Wigmore, *Evidence,* sec. 1078). The development of the law in this area by analogizing to the substantive law of agency doctrine of a master's responsibility for his agent's acts has forbidden the reception of agents' descriptions of past acts done as "mere narrative" (*Confed. Life v. O'Donnell, supra*) and also statements of an agent to his principal as distinct from statements for him (Cross, *Evidence,* 3d ed., 442). The trend in the United States has been away from these various restrictions (McCormick, *Evidence,* 2d ed., 639, *Proposed Federal Rules of Evidence,* R. 801 (d) (2) (iv); and see Laskin J., dissenting, in *R. v. Shand Electric Ltd.,* [1969] 1 O.R. 190 (C.A.)) and the Evidence Project agrees that a liberalization is desirable along the lines of proposed paragraphs (c) and (d). In criticizing an older decision holding the exception to apply only to an agent's statements that were "within the scope of the agent's authority to speak for his principal" Wigmore noted:

> ". . . it is absurd to hold that the superintendent has power to make the employer heavily liable by mismanaging the whole factory, but not to make statements about his mismanagement which can be even listened to in court; the pedantic unpracticalness of this rule as now universally administered makes a laughing stock of court methods." (4 Wigmore, *Evidence,* sec. 1078, p. 166 n. 2.)

The assurance of reliability for statements about past events may be found in the agent's familiarity with the acts done in the course of business; the fact that the statements are normally against interest; and the fact that, at least while he is employed, an employee's statements are likely to be sincere. The reliability of statements to a principal as opposed to those made to an outsider is based upon by the fact that such statements are made for the purposes of some action being performed. Therefore they would appear to be at least as reliable as the evidence admitted under the existing exception for business records.

Paragraph (e) is simply a restatement of the existing law. (*Koufis v. R.,* [1941] S.C.R. 481; *R. v. Northern Electric,* [1955] 3 D.L.R. 449 (Ont. H.C.).) Statements by a person engaged in a common enterprise with a party are receivable as admissions against the party if the statements were made in furtherance of the common design. The justification underlying the reception of these statements is that there is an implied agency relationship between the individuals. Therefore statements made in furtherance of the common object are deemed to be authorized by all parties to it. The rule will operate most frequently in conspiracy trials but it is not limited to a particular cause of action.

**Subsection 3 (4) Records**

Under the common law statements made in the course of a duty are recognized as an exception to the hearsay rule. However, numerous restrictive conditions limit

the admissibility of these kinds of statements: the statement must have been made by a person who had a duty to record acts done by him personally; the statement must have been made contemporaneously with the acts described; the declarant when he made the statement must have had no motive to misrepresent the facts; and, finally, the declarant must be deceased at the time of trial. (See *O'Connor v. Dunn,* [1877] 2 O.A.R. 247; *Conley v. Conley,* [1968] 2 O.R. 677 (C.A.)). This exception to the hearsay rule is justified on two grounds: first, since the declarant must be dead at the time of the trial the exception is the only way of gaining his evidence; second, guarantees that the statement is trustworthy reside in the habits of precision generated from regularly recording business transactions and the likelihood that any errors will have been detected in records which form the basis for important decisions. (Cross, *Evidence,* 3d ed. 406, McCormick, *Evidence,* 2d ed., 720.)

The strict conditions of admissibility for this common law exception and the great inconvenience that they produced in the banking world was recognized and obviated in England in 1876 by the passage of the Banker's Books Evidence Act, 42 Vict., c.11 (U.K.). Prior to this passage entries in a banks' records could only be proved by producing the original records and by calling the clerks who had made the entries; by the new legislation copies of bank records could be received and relatively simple requirements for establishing their authenticity were provided. Comparable legislation copied from this English Act has long existed in Canada (see e.g. Canada Evidence Act R.S.C. 1970, c.E-10, s.29; Ontario Evidence Act R.S.O. 1970, c.151, s.34). The inherent reliability of records regularly made and relied on and the convenience of the procedures devised for their proof led to further legislation easing the proof of records kept by government departments and officials, (see e.g. Canada Evidence Act R.S.C. 1970, c.E-10, ss. 19, 20, 21, 22, 23, 26, 27; Ontario Evidence Act R.S.O. 1970, c. 151, ss. 25, 26, 27, 28, 29, 30, 32, 39, 40, 41).

Recently various provincial legislatures and the Parliament of Canada have eased proof requirements for business records generally (Canada Evidence Act R.S.C. 1970, c.E-10, s.30; British Columbia Evidence Act R.S.B.C. 1960, c.134, as am. S.B.C. 1968, c.16, s. 43a; New Brunswick Evidence Act R.S.N.B. 1952, c.74, as am. S.N.B. 1960, c.29, s.42a; Nova Scotia Evidence Act R.S.N.S. 1967, c.94, s.22; Ontario Evidence Act R.S.O. 1970, c.151, s.36; Saskatchewan Evidence Act R.S.S. 1965, c.80, as am. S.S. 1969, c.151, s.30a. The Ontario and Canada Evidence Act provisions require advance notice of the litigant's intention to use this technique of proof while the other four statutes do not. Some of these statutes are modelled after the Federal Business Records Act, 23 U.S.C.A. s. 1732 in the United States.) By statute then, with respect to various records regularly kept the old restrictions of the common law have been removed. For example, the business records section in the Canada Evidence Act, subject to certain restrictions, provides:

> **30(1)** Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding upon production of the record.

The death of the declarant is no longer required and other conditions of admissibility, (personal knowledge, duty to act, duty to record, contemporaneity with acts

done, motive for falsification) have been converted into factors affecting the weight to be given to the evidence. The word business has been broadly defined:

> **30(12)** "business" means any business, profession trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government.

Indeed the definition includes so many activities that it is interesting to compare the latest draft of a comparable section in the United States (Proposed Federal Rules of Evidence, 1973, R. 803(6)) in which "business records" is supplanted by the phrase "records made in the course of a regularly conducted activity," in recognition of the fact that it is the routine and repetitive nature of the records that guarantees reliability rather than the mere use of the adjective "business".

The need for change in this area to meet modern conditions was recently recognized in our courts (*Ares v. Venner*, [1970] S.C.R. 608; *C.P.R. v. City of Calgary*, [1971] 4 W.W.R. 241 (Alta. C.A.)) as well as in the legislatures above-noted and the Evidence Project agrees completely with this trend toward liberalization. We suggest by the proposed subsection a form of omnibus provision to cover all records made in the course of a regularly conducted activity. It is anticipated that should this proposed section be enacted, all of the above-noted sections of the Canada Evidence Act would be repealed. It should be noted that the breadth of this proposed exception would also sanction the receipt in evidence of material now receivable under the common law exception known as "public documents" or "public records" and thereby removes many of the stringent conditions of admissibility presently demanded by that exception. For example, we agree with Professor Baker that:

> Accessibility of the public to documents should never have been raised from the status of an additional reason for admitting official records to that of a condition of admissibility. (Baker, *The Hearsay Rule*, 137 (1950).)

and we believe that the "duty to record in a regularly conducted activity" is sufficient guarantee of reliability to justify their reception.

The proposed section begins by describing the admissible evidence as "a memorandum, report, record, or data compilation, in any form" rather than simply as "a record". This was done to prevent any restrictive interpretation of "record" to matters contained in books of account or logs (as in *Watkins Products Inc. v. Thomas*, [1965] 54 D.L.R. (2d) 252; but see, *contra*, *Re Martin and The Queen* (1973), 11 C.C.C. (2d) 224 (O.H.C.)). "Data compilation" is intended to include, but of course is not restricted to, electronic computer print-outs. The section then provides that the things described may be "acts, events, conditions, opinions or diagnoses" to prevent restrictive interpretations rejecting diagnostic entries (as in *Adderly v. Brenner*, [1968] 1 O.R. 621 (H.C.); but see *Farris v. M.N.R.*, [1970] C.T.C. 224). The advance notice requirement mentioned in sec. 30(7) of the Canada Evidence Act has been deleted following the pattern of the other provincial enactments which make no such condition necessary. We agree with the Eleventh Report of the Clinical Law Revision Committee, in England, 1972, that the fact

> ". . . that the record should have been compiled by a person acting under a duty or otherwise in a responsible position . . . seems to us to make the likelihood that the statement is reliable great enough to justify dispensing with the requirement to give notice of intention to give the statement in evidence." (p. 150)

Unlike the existing sections in the Canada Evidence Act the proposed section has no provision for the receipt of copies of the admissible records nor for the manner of satisfying the trial judge as to their authenticity as a record of a regularly conducted activity; questions of authenticity and identification of evidence generally and the manner of determining whether conditions of admissibility are satisfied will be dealt with in other sections of the proposed code.

**Subsection 3(5) Learned Treatises**

An expert's opinion if frequently founded on information gained from the writings and instruction of others and, despite an initial reluctance to receive into evidence the actual books regarded by the expert as authoritative (see *Collier v. Simpson,* [1831] 172 E.R. 883), the common law now provides, as summarized by the Alberta Court of Appeal:

> An expert medical witness may, therefore, upon giving his opinion, state in direct examination that he bases his opinion partly upon his own experience and partly upon the opinions of text writers who are recognized by the medical profession at large as top authorities. I think he may name the text writers. I think that he may add that his opinion and that of the text writers named accords. Further I see no good reason why such an expert witness should not be permitted, while in the box, to refer to such text books as he chooses, in order, by the aid which they will give him, in addition to his other means of forming an opinion, to enable him to express an opinion; and again that the witness having expressly adopted as his own the opinion of the text writer, may himself read the text as expressing his own opinion. In cross-examination an expert medical witness having first been asked whether a certain text book is recognized by the medical profession as a standard author and having said that it is, there may be read to him a passage from the book expressing an opinion, for the purpose of testing the value of the witness's opinion, *(R. v. Anderson* (1914), 16 D.L.R. 203, 219.)

The recommended provision is taken mainly from the Military Rules of Evidence, Queen's Regulations and Orders, 1971, Rule 57 but the Evidence Project has added the proviso restricting the physical introduction of the material to avoid the danger that the trier of fact might misunderstand the contents of the material if unaided by the expert witness. (See Proposed Federal Rules of Evidence, 1973, R. 803(18).)

A witness who testifies to reputation is in effect testifying to what a number of people have said and his evidence is therefore hearsay. The common law however has long received reputation evidence as an exception to the hearsay rule (Cross, *Evidence,* 3d ed. 457) for the purpose of establishing matters of public or general interest (*O'Connor v. Dunn,* [1876] 39 U.C.Q.B. 597), family relationships (*R. v. Lindsay* (1916), 36 O.L.R. 171) and traits of character (*R. v. Tilley,* [1953] O.R. 609 (C.A.); *R. v. Rowton,* [1865] Le. & Ca. 520); and see the Evidence Project's previous Study Papers on Credibility and Character). The proposed section is an attempt to codify this broad common law exception since we agree with Professor Wigmore that:

> The circumstances creating a fair *trustworthiness* are found when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one. (5 Wigmore, *Evidence,* see. 1580, p. 444.)

The proposed section is drawn mainly from Proposed Federal Rules of Evidence, 1973, R. 803 (19), (20), (21).