SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 11

PROJECT 6

REVIEW OF THE LAW OF EVIDENCE

MARCH 1986

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman)
The Honourable Mr Justice H J O van Heerden (Vice-Chairman)
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PREFACE

This working paper has been prepared by the project committee for the law of evidence to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to furnish persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any person or body wishing to make oral representations to the Commission should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests could reach the Commission not later than 31 May 1986. Please refer to the previous page for the address to which correspondence should be directed.

The researcher responsible for the project who may be contacted for further information is Mr G J van Zyl.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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1. INTRODUCTION

1.1 The review of the law of evidence was included for research in the Commission's programme soon after its establishment in 1973. The investigation was not commenced immediately because the Criminal Procedure Bill,[1] which contained a number of provisions relating to the law of evidence, was then under consideration.

1.2 The Commission's original intention was to codify the South African law of evidence in its entirety and to consolidate it in one Act. The reasons for this were, mainly, that the rules of evidence are contained in various Acts and that a large part of the law evidence is not codified,[2] but is contained in case law which was built up over a long period. An important consideration which gave rise to the idea of codification was the fact that the English law is still referred to in some cases as a source of the law of evidence.[3] There were also certain aspects of the law of evidence which were considered to be in need of reform.

1.3 Professor C W H Schmidt of the University of South Africa was appointed an additional member of the Commission for purposes of the investigation. Research with a view to the eventual codification of the law of evidence was embarked on. During 1979 the stage was reached where the fundamental principles on which the contemplated Code would have to be based were formulated. The Commission gradually came to realise that the codification of the law of evidence as a whole was an enormous task which would take years to complete. The Commission noted that attempts elsewhere (for instance Canada) to codify the law of evidence, had entailed much more manpower and money than was available to the Commission. It was therefore necessary to plan the investigation anew.

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1 Now the Criminal Procedure Act 51 of 1977.

2 As is evident from inter alia the Civil Proceedings Evidence Act 25 of 1965 and Act 51 of 1977.

3 See for example s 42 of Act 25 of 1965 and s 206 of Act 51 of 1977. See also Hoffmann & Zeffertt 12; Schmidt 16.

1.4 The Commission considered the question whether there was really an urgent need for codification. The law of evidence is reasonably accessible. There are standard textbooks and specialised works from which the practitioner and the judiciary can readily ascertain the current rules of evidence. The most important rules which are contained in different Acts might, if need be, be consolidated in one Act. The law of evidence is a branch of the law with which legal practitioners and the judiciary are mainly concerned. It is the instrument with which the law is applied. However, the law of evidence affects the general public to a lesser degree in that knowledge of the rules of evidence is of no great importance to the public. The fact that English law is still a source of the South African law of evidence should be seen in its historical perspective. Even if codified, the rules incorporated in a Code could not be wrenched from their historical origin. An important consideration is that codification might present fresh problems of interpretation resulting in legal uncertainty.

1.5 In the light of all the considerations mentioned above, the Commission has decided to abandon the codification of the law of evidence. It has been decided to ascertain through research which aspects of the law of evidence are unsatisfactory or do not meet current needs and to formulate suggestions for their reform. For this purpose the Commission has appointed a committee consisting of Prof C W H Schmidt (additional member), Mr G G Smit (full-time member) and Mr G J van Zyl, a researcher on the secretariat of the Commission. This committee has examined the whole area of the law of evidence and also consulted various experts. The committee's report to the Commission forms the basis of this Working Paper.

2. CONCEPTS

2.1 Although it is true that expressions such as "bewysleer", as employed in section 42 of Act 25 of 1965; "proof"; "sufficient proof"; "conclusive proof"; "evidence"; "prima facie evidence"; "conclusive evidence"; "competent" and "competence" (as synonyms for "admissible" and "admissibility"); and others are frequently used in a sense which does not convey the precise meaning of these expressions, the Commission feels that the definition of such expressions would really only have any point in

a codification of the law of evidence and is not appropriate in its limited investigation into lacunae in the law of evidence.

3. SOURCES

3.1 This aspect of the law of evidence deals with the various statutory provisions in terms of which the law of evidence as at 30 May 1961 in the Republic remains in force in respect of the law of evidence not specifically regulated by law.[4] According to Hoffmann & Zeffertt[5] the effect of the 30 May 1961 formula is as follows:

(a) A pre 1952 decision of the Privy Council is to be regarded as if it were a decision of the Appellate Division itself: the Appellate Division may depart from it if it is clearly wrong;

(b) A pre "30th May 1961" decision of the Supreme Court of Judicature (or the House of Lords which, although not part of the Supreme Court of Judicature, binds it) is binding on the Appellate Divison to the extent that it is considered to be a correct reflection of the English law and to the extent to which it is not inconsistent with an established rule of South African practice that has achieved the quality of a binding rule. The law that applies, in other words, is the English law as it was applied in England *hat time* and as it is understood here. Statements, like that of Marais J in *Papenfus v Transvaal Board, Peri-Urban Areas*, that "South African courts may henceforth, if so persuaded, follow a line independent of the English precept" are too widely stated: *Van der Linde v Calitz* is not authority for that proposition. Indeed Steyn C J expressly stated in that case that the law that "until (the 30th May 1961) was applied in the Supreme Court of Judicature remains applicable".

(c) Post '30th May 1961' decisions of the English court have no binding force in our courts: they may, however, have persuasive value as has a post 1952 decision of the Privy Council.

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4 See Hoffmann & Zeffertt 5 et seq; Schmidt 13 et seq; Van der Merwe 19 et seq.

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3.2 These authors[6] state that the South African law of evidence remains to a certain extent frozen at the 30 May 1961, but then show that developments are still possible in certain cases. Although there are ways available to the courts of freeing themselves of these shackles, it is true that certain parts of the law of evidence (for instance hearsay evidence) will not easily develop further without the intervention of the legislature. The Commission is, however, of the opinion that the present position should be maintained in most cases. The reasons for this are the following:

- The relevant provisions are an embodiment of the historical development of our law of evidence which cannot be dismissed.

- The provisions do not in themselves preclude further development by the legislature. If there is good reason for reform, such reform can be accomplished by legislation.

- The provisions as such do not give rise to any insurmountable problems of interpretation or problems of enforcement.

- In so far as the rules of evidence have not been enacted by statute, rules of this nature are necessary, unless the remaining rules of evidence are codified, a step which is not contemplated at this stage.

4. THE BURDEN OF PROOF

* Nature and operation

4.1 In Tregea v Godart[7] the view was held that the burden of proof forms part of the substantive law and not of the law of evidence. This

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7 1939 AD 16.

view is not subscribed to by all the experts on the law of evidence.[8] The matter is, however, dealt with in virtually all the textbooks on the law of evidence.

4.2 According to Schmidt[9] the burden of proof determines which party will come off second best if insufficient evidence is presented to the court for a specific ruling on an issue of fact. In the past the burden of proof was quite often confused with the evidentiary burden. The evidentiary burden is the "...duty to adduce evidence to combat a prima facie case made by his opponent".[10] In the course of the trial this duty may shift from one party to the other whereas the burden of proof does not shift from the party upon whom it originally rested. The Commission does not consider legislation on these matters necessary or desirable.

* Incidence

4.3 Although it may sometimes be difficult to ascertain upon whom the burden of proof in respect of a particular issue of fact rests, the Commission is of the opinion that no general rules need be enacted in this regard. The Commission has, nevertheless, considered whether there is justification for the alteration of the current law relating to the incidence of the burden of proof in the following situations:

. The incidence of the burden of proof in respect of exception clauses or indemnity clauses which often appear in standard contracts.[11] Since clauses of this nature will in any case be examined as part of the Commission's investigation entitled Unreasonable stipulations in contracts and the rectification of contracts (Project 47) the Commission does not consider it necessary to give attention to this matter at this stage.

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8 See Schmidt 11. Hoffmann & Zeffertt 385 apparently accept this view.

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10 According to Hoffmann & Zeffertt 387.

11 See Van Dorsten 36.

- The incidence of the burden of proof where the defendant raises justification as a defence. Various writers have pointed out that in the case of libel the defendant only has an onus to rebut[12] whereas in other cases of delict he bears the full burden of proof.[13] In Joubert v Venter[14] the Appellate Division noted this anomaly and expressed the view that the position in libel cases should be re-examined. The Commission feels that further development should preferably be left to the courts and does not recommend any legislative amendment.

- The incidence of the burden of proof in the case of insanity, with specific reference to the approach of our courts following the Woolmington v DPP case[15] (duty of the State to prove all the elements of the offence); the departure from this in R v Kaukakani;[16] and the burden of proof where Chapter 13 of Act 51 of 1979 applies. The Commission is aware of the criticism.[17] Snyman, however, reasons as follows:[18]

> It has been alleged that the placing of the onus on a mentally ill person is injustified, since he, being mentally ill, is the least capable of all people of discharging the onus. Theoretically this argument may be valid, but in practice the defence is chiefly raised in charges of crimes for which the death penalty may be imposed: in these cases the accused is invariably represented by counsel, who then investigates

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12 According to e g Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977 3 SA 394 (A) and Borgin v De Villiers 1980 3 SA 556 (A).

13 Mabaso v Feliz 1981 3 SA 865 (A).

14 1984 2 SA 654 (A).

15 1935 AC 462, 1935 ALL ER 1. See R v Ndhlovu 1945 AD 369.

16 1947 SA 807 (A) - burden of proof rests on the accused who raises the defence of insanity.

17 See inter alia De Wet & Swanepoel at 112 who say that it is impossible to see why the burden of proof should rest on the accused in the case of the defence of insanity. De Wet 130 has, however, abandoned this view.

18 137 n 62.

> and argues the case on behalf of the accused. Furthermore, the accused's mental condition may be raised as an issue by both the prosecution and the court itself, and if the accused has been committed to a mental hospital for observation, the court will always have the report of the psychiatrists. If the burden of proof were on the prosecution, it would result in the untenable situation that the state would in each and every prosecution, however trival the crime may be, have to prove beyond reasonable doubt that the accused was mentally normal. This would involve the prosecution in a great deal of trouble and be a waste of time and money.

The Commission considers that there is not sufficient justification for altering the present position by way of legislation.

. In R v Lembete[19] it was held that the onus was on the accused to prove the existence of extenuating circumstances (see section 277(2) of Act 51 of 1977) on a balance of probabilities. This matter is discussed by Du Toit[20] who, for the following reasons, is in favour of this decision:[21]

> Owing to the special nature of extenuating circumstances, as well as the fact that the accused bears an onus to persuade the court on a balance of probabilities that extenuating circumstances do exist, the State would very rarely in practice adduce evidence relating to extenuating circumstances. Extenuating circumstances are after all circumstances that subjectively so affected the accused's state of mind at the time of the commission of the crime that his act may be regarded as less reprehensible. The State will very seldom have evidence at its disposal showing in a direct sense the subjective influencing (or its absence). In most cases the State would already have submitted the evidence at its disposal on the merits of the case to the trial court, so that it would be unnecessary to repeat it. In most cases the State would address the court on the absence of extenuating circumstances.

The Commission is of the opinion that it is not necessary to change the present legal position by legislation.

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19 1947 2 SA 603 (A). This decision has just been confirmed in S v Theron 1984 2 SA 868 (A).

20 Du Toit 216 et seq.

21 Du Toit 216. (Our translation.)

- In S v Swanepoel[22] the court examined the question of the onus if the accused invoked section 49(2) of Act 51 of 1977. The court took note of the criticism against R v Britz[23] (the onus resting on accused to prove that this section applies to him) but nevertheless thought that this case had been correctly decided. The court again held that the onus of proof rested on the accused. In view of the clarity established by the Swanepoel decision the Commission considers that there is no need for legislative intervention.

4.4 There are numerous examples of the legislature's placing the burden of proof pertaining to particular facts on the accused. Unfortunately this has often not been done in very clear language with the result that it is at times uncertain whether the legislature really intended to shift the onus. This is, however, a problem that must be resolved by interpretation of the relevant provision and on which no recommendations can be made by the Commission.

5. STANDARDS OF PROOF AND COGENCY

* Standards of proof

5.1 Although interpretation problems regarding certain statutory provisions sometimes arise because the legislature does not always, where it intends to regulate the evidential value of certain classes of evidence, clearly indicate whether it has prima facie evidence, conclusive proof, or be what it may, in mind, this is not a matter that is susceptible of general legislation.

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22 1985 1 SA 576 (A).

23 1949 3 SA 293 (A). See Hoffmann & Zeffertt 401.

* Cogency

5.2 The factors which play a part in the assessment and the cogency of evidential material do not, as far as can be ascertained, give rise to any problems which necessitate statutory rectification.

6. CORROBORATION AND THE CAUTIONARY RULES

* Corroboration

6.1 Corroboration is concisely defined by Hoffmann & Zeffertt[24] as "... independent evidence which confirms the testimony of a witness". As far as can be ascertained there is only one statutory provision relating to corroboration, which relates to confessions.[25] Section 209 of Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed. The Commission considers this to be a necessary provision.[26]

6.2 The cautionary rules

The cautionary rules laid down over the years by the courts for the assessment of the evidence of, for instance, accomplices, traps, children, prostitutes, complainants in sexual cases, etc, are all rules of practice which draw attention to the dangers of passing judgment on the evidence of such persons. The Commission sees no reason to expand or to restrict these rules by legislation.

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24 459.

25 S 209 of Act 51 of 1977.

26 See par 19.2 infra.

7. THE PRESUMPTION

7.1 Presumptions are traditionally classified as being threefold, namely the irrebuttable presumption of law, the rebuttable presumption of law, and the presumption of fact. Of the first-mentioned presumption Hoffmann & Zeffertt[27] rightly say that this presumption "... is simply an ordinary rule of substantive law formulated to look like a rule of evidence". Where such "presumptions", require law reform they fall outside the ambit of this investigation.[28] The second class of presumption, namely the rebuttable presumption of law, is certainly the most well known in our law. That is why both common law and statute law abound with presumptions of this kind. The Commission is not, however, aware of any problems worth mentioning which present themselves for law reform in this connection. The presumption (rebuttable) of fact is not a rule of law. The courts are constantly drawing certain inferences which in time become presumptions of fact. However, in practice these presumptions do not present problems necessitating law reform.

8. JUDICIAL NOTICE

8.1 Judicial notice forms part of the evidential material which makes it unnecessary to adduce evidence of the fact of which judicial notice is taken. There are numerous facts or matters of which a court may take notice[29] or of which it shall take notice.[30] This area of the law of evidence does not give rise to any problems worth mentioning. A matter which has

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27 414.

28 As in the case of the irrebuttable presumption of law that a boy under the age of 14 years is incapable of having sexual intercourse which was dealt with as part of Women and sexual offences (Project 45) - see Commission Report (Sexual Offences) par 2.52.

29 E g generally known facts.

30 E g an Act - see s 224 of Act 51 of 1977.

been broached before[31] is that of judicial notice of the indigenous law and custom of Blacks - hereinafter referred to as "customary law". The law as it now stands is fully discussed in various textbooks and need not be repeated here.[32] The position is, briefly, that only the Commissioner's Courts may in the adjudication of civil actions between Blacks in which customary law is applicable take notice of such law.

8.2 The main arguments put forward in favour of taking judicial notice of customary law are the following:

- The Supreme Court is not disposed to take judicial notice of customary law because it is supposed to be "foreign law". However, customary law is not foreign law in the same sense as, for example, French law is foreign law vis-à-vis South African law. To the Blacks it is incomprehensible and even humiliating that their law is regarded as foreign law in the Republic.

- Customary law is in fact part of our law and it is to some extent recognised by statute.[33]

- The Provincial and Local Divisions of the Supreme Court have concurrent jurisdiction with the Commissioner's Courts, and actions in which customary law is involved may in theory be instituted in these divisions. Moreover, the Appellate Division of the Supreme Court is in some instances the final court of appeal in respect of decisions of courts applying customary law.

- Customary law is offered as a course in most of the curricula of legal qualifications for the judiciary. There are few members of the judiciary, therefore, who do not have at least a basic

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31 See inter alia Kerr 359; VerLoren van Themaat 112; Visser 15; Olivier 313, 323.

32 See Hoffmann & Zeffertt 328; Schmidt 206; Cf Geldenhuys 137.

33 See for instance s 5 of Act 25 of 1965 and s 224 of Act 51 of 1977 respectively.

knowledge of customary law. Customary law is furthermore readily ascertainable from available textbooks.

8.3 As regards foreign law, such law must be proved by an expert witness if it is a real point in issue.[34] The Commission feels that this rigid rule ought really to be relaxed by allowing the courts to take notice of foreign law in so far as it can be readily ascertained with certainty, provided that the parties are not prohibited from adducing evidence on such law. Provision is made in the Bill for these matters.

9. THE FORMAL ADMISSION

9.1 Formal or judicial admissions are regulated by section 15 of Act 25 of 1965 in civil proceedings and by section 220 of Act 51 of 1977 in criminal proceedings. These provisions are not identical, as one would have wished, and they are, moreover, to a greater or lesser extent, not a complete recording of the common law relating to the matter under discussion. So far as criminal cases are concerned, there is also an intricate interaction between formal admissions in terms of section 220 of Act 51 of 1977 and the new plea procedures - sections 112 to 115 of Act 51 of 1977. In these cases the law of criminal procedure and the law of evidence are so intertwined that the reformer of the law of evidence would soon find himself within the domain of the law of procedure. So far as the law of evidence is concerned, the Commission is not aware of any adjustments which are necessary regarding formal admissions.

10. COMPETENCY AND COMPELLABILITY TO GIVE EVIDENCE

* Compellability

10.1 Attention has been given to the compellability of spouses only. There is nothing in civil proceedings which precludes a husband from

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34 See Hoffmann & Zeffertt 328; Schmidt 203 et seq.

testifying against his wife or a wife from testifying against her husband: spouses may be called and compelled by any party to give evidence. This does not, however, imply that the marital privilege in terms of section 10 of Act 25 of 1965 no longer applies.[35] A similar privilege applies in criminal proceedings.[36] This privilege will receive attention below.[37]

10.2 The position as regards the compellability of spouses in criminal proceedings differs substantially from that in civil proceedings. The provisions applicable to criminal proceedings are sections 195 and 196 of Act 51 of 1977. These provisions read as follows:[38]

> 195 (1) The wife or husband of an accused shall not be competent to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with -
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> (a) any offence committed against the person of either of them or of a child of either of them;
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> (b) any offence under Chapter III of the Children's Act, 1960 (Act 33 of 1960), committed in respect of any child of either of them;
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> (c) any contravention of any provision of section 11(1) of the Maintenance Act, 1963 (Act 23 of 1963), or of such provision as applied by any other law;
>
> (d) bigamy;
>
> (e) incest;
>
> (f) abduction;
>
> (g) any contravention of any provision of section 2, 8, 9, 10, 11, 12, 12A, 13, 17 or 20 of the Immorality Act, 1957 (Act 23 of 1957), or, in the case of the territory, of any provision of section 3 or 4 of the Girls' and Mentally Defective Women's Protection Proclamation, 1921 (Proclamation

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35 See in general Schmidt 225; Van der Merwe par 21.1; Van Niekerk 180.

36 S 198 of Act 51 of 1977.

37 See par 20.7 infra.

38 For a concise history of these provisions see Van Niekerk 181 et seq.

28 of 1921), or of section 3 of the Immorality Proclamation, 1934 (Proclamation 19 of 1934);

(h) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;

(i) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h),

and shall be competent but not compellable to give evidence for the prosecution in criminal proceedings where the accused is charged with any offence against the separate property of the wife or of the husband of the accused or with any offence under section 16 of the said Immorality Act, 1957,[39] or, in the case of the territory, section 1 or 2 of the said Immorality Proclamation, 1934.

(2) Anything to the contrary in this Act or any other law notwithstanding, any person married in accordance with Black law or custom shall, notwithstanding the registration or other recognition under any law of such a union as a valid and binding marriage for the purposes of the law of evidence in criminal proceedings, be deemed to be an unmarried person.

196. (1) An accused and the wife or husband of an accused shall be a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that -

(a) an accused shall not be called as a witness except upon his own application;

(b) the wife or husband of an accused shall not be called as a witness for the defence except upon the application of the accused.

(2) The evidence which an accused may, upon his own application, give in his own defence at joint criminal proceedings, shall not be inadmissible against a co-accused at such proceedings by reason only that such accused is for any reason not a competent witness for the prosecution against such co-accused.

(3) An accused may not make an unsworn statement at his trial in lieu of evidence but shall, if he wishes to give evidence, do so on oath or, as the case may be, by affirmation.

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39 Now repealed by s 5 of the Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985.

10.3 For a starting-point for a discussion of this topic there is no need to look any further than the well-known case of S v Khanyapa in which the following observation was made by the court:[40]

> The problem which has arisen in this case is that there cannot be, to my mind, as the law now stands, any reason for regarding a spouse in a criminal case as incompetent to testify against an accused.

10.4 This view coincides with criticism previously levelled at the present provisions.[41] The Commission wishes to refer only briefly to some of the most important points of criticism against the provisions concerned:

- When considering the provisions of section 195 the provisions of section 192 (every witness competent and compellable unless expressly excluded) must always be kept in mind. Barton[42] holds that section 192 is based "... on the principle that our courts have unfettered access to all evidence which might assist them in ascertaining the truth. Only a principle greater than this could justify either the disqualification of a witness or a right to refuse to testify".

- In seeking justification for a provision such as section 195, it might perhaps be said that this provision is aimed at the protection of the inviolability of the marital relationship. Barton gives short thrift to this argument by saying that:[43]

> Whatever the policy considerations behind the rule, they are invariably based on the sanctity of the ideal marriage, a concept conjured up in the minds of men's notions of spiritual unity and marital harmony which should, in the interests of society, remain inviolate. The marriage ideal, detached from reality, is placed on a pedestal to the

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40 1979 1 SA 824 (A), 835E. (Our translation.)

41 See inter alia Barton 1976 THRHR 228; Du Toit 1978 THRHR 431.

42 1976 THRHR 229.

43 1976 THRHR 238-9.

exclusion of the spouse's evidence, irrespective of the present state of the marital relationship in question, the gravity of the charge against the accused, the availability of other evidence and the willingness of the witness to testify.

- Other members of the family (brothers, sisters, children, etc) and persons "married" in accordance with Black law or custom (see section 195(2)), have for years, been compelled to testify under section 192. What about the violation of, and strain on family relationships, in these cases? Why are these persons not protected as well?

Du Toit sums up his views in this regard as follows:[44]

> The rule that the spouse of an accused is normally not competent nor compellable to testify for the State against her husband, especially where she has the only or the most important evidence against the accused, is indefensible. The modern system of criminal law should not put a higher premium on the bond of loyalty between spouses than on the administration of law and justice. If the accused endangers this bond and the sanctity of his marriage by unlawful conduct in the presence of his spouse, the ensuing violation of that bond and of the sanctity of his marriage, forms part of the punishment for his conduct. If the spouse is also ready and willing to testify for the State against the accused, the accused should not be allowed to hide behind the artificial statutory shield of section 195(1) and thus escape his lawful punishment.

- The decisions in R v Jamba[45] and S v Khanyapa are proof of the untenability of the law as it now stands. The overruling by the Appellate Division in Attorney-General, Northern Cape v Brühns[46] of certain dicta in Khanyapa strengthens the objections to section 195.

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44 1978 THRHR 439. (Our translation.)

45 1947 4 SA 228(C).

46 1985 3 SA 677(A).

- To continue to adjust section 195 by creating further exceptions on an ad hoc basis would not be proper reform, as is evidenced by the unsuccessful attempts of the legislature to adapt this provision from time to time by ad hoc remedial measures.

10.5 Both Barton and Du Toit[47] propose that section 195 be amended so as to make the spouse of the accused in all criminal proceedings a competent (but not a compellable) witness for the State against the accused. The Commission feels that these proposals cannot be supported. There is no denying that there are cases where the spouse should, for various reasons, be compelled to testify for the State against the other spouse. If not, the State will in many cases not be in a position to adduce evidence against the accused. If the spouse were given the option of deciding whether or not to testify, such spouse would in many cases be faced with an impossible choice. The spouse would then not only be exposed to the pressure of the other spouse not to testify, but would also be torn between the desire to testify and the possibility of distasteful recriminations for doing so.

A possible alternative would be to allow a spouse to testify in all cases, but then to give the court the discretion to absolve him or her from testifying. The snag is that it might sometimes be difficult for the parties to find out in advance what the court's decision will be - in other words the preparation and presentation of the case would be unnecessarily speculative and complicated. The court would also become unnecessarily involved in the process of presenting evidence. The court would naturally have to be fairly well informed of the broad background of the case and the evidence to be presented (availability, nature and scope, etc.) before being able to exercise its discretion. The court would inevitably have to give a decision one way or the other. Thus yet another possible ground of appeal would be created.

10.6 The Commission considers it desirable to make the spouse competent and compellable to testify for the State against the other spouse

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47 1976 THRHR 241 and 1978 THRHR 439 respectively.

(the accused) in all cases. This suggestion also affects the provisions of section 196(1)(b) of Act 51 of 1977. An accused in a joint trial cannot call the spouse of his co-accused - no matter how important and essential the evidence of such spouse may be to him. Such an accused would therefore be in the same dilemma as the State. The criticism against section 195 of Act 51 of 1977 mentioned above, applies equally to the spouse of an accused as a witness for the co-accused. The Commission consequently recommends that the spouse may also be called by a co-accused to testify.

10.7 It will be noticed that section 195(2) of Act 51 of 1977 is not incorporated in the Bill. This provision will of course not be necessary if all persons are compellable witnesses. Furthermore, the possibility of recognising customary unions as marriages is being investigated in a different context.[48] It is further suggested that section 196 (2) of Act 51 of 1977 be re-enacted in a slightly amended form. This provision relates to another aspect of the law of evidence dealt with below.

11. THE PRESENTATION OF EVIDENCE BY WITNISSES

* The presentation of evidence

11.1 There are several exceptions to the rule that evidence be given viva voce, such as, for example, evidence on commission and interrogatories. The following statutory provisions are relevant in this regard:

- sections 52 and 53 of the Magistrates' Courts Act 32 of 1944;
- sections 32 and 33 of the Supreme Court Act 59 of 1959;
- section 24 of Act 25 of 1965;
- sections 171 to 173 of Act 51 of 1977;

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48 See Working Paper 10 par 11.2.1.

- rule 26(1) of the Magistrates' Court Rules;

- rule 38(1) and (3) to (8) of the Uniform Supreme Court Rules.

11.2 Although one would like to see all the various provisions dealing with the same subject consolidated in one statutory enactment, this matter does not form part of this investigation. So far as the Commission knows, the provisions concerned do not give rise to any practical problems that should be rectified by legislation.

* The oath

11.3 Here, too, there is no uniformity whatsoever in civil and criminal proceedings. The relevant provisions are the following:

- section 112 of the Magistrates' Court Act 32 of 1944;

- sections 39 to 41 of Act 25 of 1965;

- sections 162 to 165 of Act 51 of 1977;

- section 28 of the Small Claims Courts Act 61 of 1984.

11.4 The Commission's standpoint in this regard is the same as in paragraph 11.2 above.

12. REAL EVIDENCE

12.1 The Commission has no proposals.

13. DOCUMENTARY EVIDENCE

* Secondary evidence of documents.

13.1 Representations have been made to the Commission to make provision for the admissibility of copies of documents. On closer examination it appeared that the real problem lies in the fact that there are various statutory provisions under which certain categories of documents have to be preserved for specified periods.[49] Documents produced in bulk require substantial shelving space and this makes their preservation for long periods fairly expensive. The modern technique of microfilming documents can lead to a considerable saving. However, the relevant provisions require the preservation of the original documents. This problem does not relate to the law of evidence. The solution lies in the amendment of the relevant provisions so as to authorise the preservation of filmed documents.[50]

13.2 As regards the law of evidence, the common law makes clear and elastic provision for the admissibility of copies. As appears from the decision in Barclays Western Bank Ltd v Creser[51] our courts are not reluctant to admit filmed documents. The admissibility of copies of lost documents might however be a problem.[52] In order to put the matter beyond all doubt and to make specific provision for the admissibility of copies, the Commission has included a provision in the Bill regarding the admissibility of documents.

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49 See inter alia s 36 of the Banks Act 23 of 1965 and s 23(6) of the Stamp Duties Act 77 of 1968.

50 See for instance s 101(1A) and (2A) of the Customs and Excise Act 91 of 1964.

51 1982 2 SA 104 (T).

52 See s 34(2)(b) of Act 25 of 1965; Bowskill v Dawson 1954 1 QB 288, 1953 2 All ER 1393; Hoffmann & Zeffertt 139; Schmidt 334.

* Computer print-outs

13.3 The Computer Evidence Act 57 of 1983, which came into operation on 1 October 1983, applies to civil proceedings only. One of the reasons put forward by the Commission at the time for making the proposed provision applicable to civil proceedings only was that "... it would be advisable to defer the extension of the proposed provisions to criminal proceedings until they have been properly evaluated and thrashed out in civil proceedings".[53] Evidence of the daily application and administration of Act 57 of 1983 is not available to the Commission. Furthermore, the courts have not, as far as can be ascertained, expressed any views on the Act. The Commission is consequently not in a position to express an opinion on the efficacy of the Act. Comment on the possible extension of the Act to criminal proceedings would therefore be welcomed by the Commission.

14. ADMISSIBILITY AND RELEVANCE

14.1 The Commission has given attention only to evidence obtained illegally or improperly. Such evidence is at present admissible in criminal proceedings because the courts take the view that unlawfulness or impropriety does not affect the admissibility of evidence.[54] The question whether the court nevertheless has a discretion to disallow such evidence was also investigated. In England the courts used to have a discretion to disallow evidence if the admissibility thereof would operate unfairly against the accused.[55]

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53 Commission Report (Computers) par 4.4.

54 See Hoffmann & Zeffertt 223 et seq; Schmidt 346 et seq.

55 See Kuruma v R 1955 AC 197, 1955 1 All ER 236 has put paid to this viewpoint. R v Sang 1979 2 SA 2 All ER 1222 (HL).

Possibly our courts could follow this course.[56] Hoffmann & Zeffertt[57] criticise fairness as a criterion saying that "(F)airness is a slippery, imprecise and vague concept". They go on to argue that the public interest would be a far better criterion because "(i)t appears to strike a satisfactory balance between the policy that all relevant evidence should be ventilated unless it be hit by an exclusionary rule and the policy that evidence should not be admitted if it is illegally obtained because the police should be deterred from illegal conduct and the liberties of the citizen should be zealously fostered".[58]

14.2 After a discussion of this matter (whether to admit inadmissible evidence on account of special circumstances) Schmidt[59] reaches the conclusion that there is no justification for such a discretion. His line of reasoning is briefly as follows:

- Except in extremely exceptional circumstances the court has no discretion to admit inadmissible evidence;

- evidence of little probative value is irrelevant and can be disallowed;

- the inadmissibility of evidence improperly or unfairly obtained from the accused himself is based upon the maxim nemo debet prodere se ipsum (i e self-incrimination) which forms the basis of the accused's right to remain silent;

- public interest as a criterion for a discretion does not mean much: all grounds of inadmissibility are after all aimed at the public interest.

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56 See S v Mushimba 1977 2 SA 829(A), 840E.

57 225.

58 Ibid.

59 347 et seq.

14.3 Since the matter under discussion has not as yet received the attention of the Appellate Division, the Commission considers that the time is not ripe to attempt to regulate the matter by legislation. In cases like these the courts are in a much better position than the legislature to bring development about.

15. PREVIOUS CONSISTENT STATEMENTS

15.1 No suggestions for reform.

16. SIMILAR FACTS

16.1 No suggestions for reform.

17. CHARACTER

17.1 There is a strong connection between character evidence, the relevance of evidence, evidence of similar facts, the credibility of witnesses, previous convictions, the examination of witnesses, and so forth. This area (character evidence) of the law of evidence is a thorny one and it would be most difficult to make modifications here and there (for instance, by laying down what exactly is meant by character: does it refer to reputation or disposition?). The Commission is aware of the fact that the cross-examination of the complainant in sexual cases is often sharply criticised (perhaps from ignorance). This matter was, however, investigated in the course of Project 45 - Women and sexual offences in South Africa - and certain recommendations were put forward by the Commission.[60] For the rest the Commission does not see any need for statutory adjustments to this aspect of the law of evidence.

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60 See Commission Report (Sexual Offences) par 3.24 to 3.50.

18. OPINION

* General

18.1 The Commission is aware of the problems and debate regarding the ultimate issue doctrine and the rule that opinion evidence is inadmissible if it relates to the applicability of a rule of law on the facts.[61] The Commission, however, feels that reform can be left to the courts: they deal with opinion evidence daily and they do not appear to encounter any insurmountable problems in laying down fair and equitable rules for the application of the rules.

* The rule in Hollington v Hewthorn[62]

18.2 This decision is surely the most discussed and criticised judgment in the sphere of the law of evidence.[63] As recently as in the case of S v Khanyapa[64] Rumpff CJ said (obiter) that the temptation was great to find the decision unacceptable. The decision means, briefly, that a conviction of negligent driving in a criminal case is not admissible evidence in a subsequent civil action for damages. Some of the reasons advanced by the court in the Hollington case to justify its decision are the following:

. The previous conviction is merely an opinion of the previous court and therefore irrelevant.

. The proceedings of the criminal court are for purposes of the civil case res inter alios acta.

. The previous conviction is based on hearsay evidence.

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61 See Schmidt 427 et seq; Hoffmann & Zeffertt 77 et seq.

62 1943 KB 587 (CA), 1943 2 All ER 35.

63 See Hoffmann & Zeffertt 80 et seq; Schmidt 436 et seq.

64 1979 1 SA 824(A), 840C.

. Convictions are traditionally not (the court went back to 1776) admissible in civil cases.

18.3 The criticisms against the decision are mainly the following:

. Evidence of a previous conviction is indeed relevant in subsequent civil proceedings.

. Although the finding of the criminal court is in fact an expression of opinion, it is an opinion of a particular nature which has authority and consequences.

. In a criminal court the guilt of the accused person must be proved beyond (any) reasonable doubt. Such proof has to be stronger than in civil proceedings where proof on a balance of probabilities is sufficient. The finding of a criminal court should therefore be admitted in civil proceedings.

. The inadmissibility of such evidence diminishes the respect of the man in the street for the administration of justice: it is contrary to common sense, especially if the finding of the civil court should differ from that of the criminal court.

. The court erred in its view that the authorities are against admissibility.

. On account of the inherent reliability of this kind of evidence some critics even argue that it is hearsay of a special nature and it ought therefore to be admissible.

18.4 As mentioned above, this rule elicited wide reaction and it is not surprising that the rule has received the attention of law reform bodies in various countries. Suffice it to mention the following:

. The United Kingdom: The investigation of the Law Reform Committee resulted in the provisions of sections 11 and 13 of the Civil Evidence Act 1968. What the provisions amount to, briefly,

is that evidence of a previous conviction is admissible in civil proceedings (with the exception of actions for defamation) if relevant. A presumption is created: the convicted person is taken to have committed an offence unless the contrary is proved. It is provided further (section 13) that if a person "stands convicted of an offence" such finding is conclusive proof of his guilt for the purposes of "an action for libel and slander".

- South Australia: The Evidence Amendment Act 1945 provides for the admissibility of the evidence in question.

- Fiji: The Evidence (Amendment) Act 1975 is very similar to that of the United Kingdom.

- New South Wales: Section 74 of the Defamation Act 1974 corresponds with section 13 of the legislation of the United Kingdom.

- Western Australia: After investigation it was recommended that the rule be upheld.

- Alberta & British Columbia: It was recommended that the rule be abolished.

- Ontario: The Ontario Law Reform Commission was not prepared to recommend the unconditional admissibility of such evidence. In its report this Commission argues its view as follows:[65]

> However, it would not be wise ... to amend the law to permit a court to receive in evidence, in civil proceedings, proof of a prior conviction for an offence arising out of the same facts. This issue is particularly significant in negligent actions. The result of a conviction for a breach of a provincial statute or a municipal by-law may be very minor, while the consequences for a judgement in a civil action may be great. In our view the results of the proceedings in the criminal court are quite irrelevant to the

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65 Ontario Report 97.

issues between the parties in the civil suit. In most negligent cases the real defendant in the civil suit is the insurer. Since the insurer is not before the courts in the criminal proceedings, it would be unjust if it were to be prejudiced by the result of those proceedings. If such an amendment were made, it would tend to encourage the use of the criminal courts to promote civil interests.

18.5 The Commission's views may be summarised as follows:

- The acute predicament of the plaintiff in the case concerned regarding the adducing of evidence may largely be ascribed to the rigidity of the hearsay rule. If the hearsay rule could be modified to make provision for matters such as these and others, a case such as the one under discussion would not arise again. The hearsay rule will be dealt with below.[66]

- The particular problem in the Kanyapa case which gave rise to the criticism against the rule would likewise not present itself again if the Commission's proposals for reform in respect of the compellability of spouses are accepted.

- As regards the remaining consequences or effects of the rule complained of, the Commission is not in favour of eliminating them. The reasons are, briefly, that a conviction is essentially hearsay opinion; the issues and parties in the criminal proceedings and subsequent civil proceedings are not necessarily identical; in criminal proceedings there are a number of statutory provisions relating to presumptions and the burden of proof which do not apply to civil proceedings and which might make it unreasonable to admit evidence of convictions without exception in civil proceedings; a civil court might attach too much weight to a conviction; the decision of the criminal court as such has no evidential value in the next court; to attach evidential value to the decision of the first court would in effect mean declaring something that is irrelevant to be relevant.

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66 See paragraph 22 infra.

19. THE INFORMAL ADMISSION AND THE CONFESSION

* The informal admission.

19.1 No proposals for reform.

* The confession

19.2 A confession is a particular kind of admission because the declarant acknowledges full criminal responsibility. All the admissibility requirements relating to an admission also apply to a confession. The additional requirements laid down by section 217(1)(a) of Act 51 of 1977 also apply. These additional requirements, which are a departure from our common law, were introduced in 1917 and have since been extended. It is these additional requirements that are the main target of criticism and their application has (sometimes) caused the court problems.[67] Although some of the criticism against the above-mentioned section is not without substance, for instance that the proviso is foreign to our law; that the proviso regrets in relevant and reliable evidence being regarded as inadmissible: that various devices are employed to characterise a statement as an admission; that a confession made to a respected and trustworthy policeman (not a peace officer) is virtually excluded without exception; that an apparently voluntary confession confirmed in the presence of a magistrate or a peace officer might be misleading if it could have been preceded by improper conduct on the part of the police; that the presumption that the primary requirements for admissibility have been met places a real onus of proof on the accused, the Commission is nevertheless of the opinion that the existing law relating to confessions should be retained. The Commission is also of the opinion that there should not be a return to the common law, as is advocated. The main reason for this is that the provisions concerned have been part and parcel of our law of criminal procedure and evidence for over 75 years. Furthermore, the legal rules relating to confessions

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67 See the comprehensive article by Labuschagne 58, 170, 262. Cf Hoffmann Zeffertt 178 et seq; Schmidt 519 et seq.

were thoroughly reviewed as recently as 1977. Although certain amendments were made, the principle was retained.

20. PRIVILEGE

* Legal professional privilege

20.1 Only legal professional privilege is at present recognised in our law.[68] In view of this it is only to be expected that members of other professions such as medical practitioners, journalists, clergymen, bankers, accountants, ect., who are also daily involved in confidential relationships with the man on the street, will claim a similar privilege.

20.2 In the first place the Commission wishes to point out that the privilege of the legal profession is based on grounds to which other professions can lay little or no claim. Van Niekerk[69] has made a thorough study of the history of and grounds for this privilege. The Commission is in full agreement with his views. The following view put forward by Schmidt[70] concerning the grounds on which the privilege is based puts the whole question in a nutshell:

> The underlying reason for the privilege is the protection or stabilisation of the practitioner's role in the accusatorial system. The practitioner cannot perform his duty as an adviser and spokesman properly if communication with his client is not frank and confidential. The object is therefore to promote the administration of justice and not to preserve the secrecy of confidential communications in general.

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68 See s 201 of Act 51 of 1977. In civil cases the common law applies without qualification.

69 28 et seq and his LLM thesis.

70 542. (Our translation.)

20.3 It must also be borne in mind that the legal professional privilege applies only if certain strict requirements are met, one of these being that there must have been a confidential communication. Confidentiality as such is not the only criterion. Furthermore the privilege belongs to the client and not to the legal practitioner.

20.4 Other professions cannot therefore, claim the same privilege on the strength of the precedent of this privilege. They would have to justify their claims on other grounds. It is necessary to examine the basic principles or the rules of the law of evidence to be able to judge whether new privileges should be created. It will consequently be necessary to establish whether there are such principles to apply. Wigmore,[71] supplies the answer. According to him, the following four requirements must be satisfied before the law will recognise a communication as being a privileged one:

(1) The communications must originate in a confidence that they will not be disclosed;

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered;

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

In conjuction with this it must borne in mind that the court must, as far as possible, be unfettered in its search for the truth and that it is entitled to all evidence which will assist it to discover the truth and also that every person who is in possession of evidence has a duty to assist the court. Wigmore warns that:[72]

> If follows, on the one hand, that all privileges of exemption from this duty (ie duty to give evidence) are exceptional, and are therefore to

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71 Wigmore Vol 8 par 2285. However, cf Van Niekerk 46 n 2.

72 Par 2192(3).

be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognised privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of the truth and the enforcement of testimonial duty demand the restriction, and not the expansion, of these privileges. They should be recognised only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without real necessity, an obstacle to the administration of justice.

20.6 The Commission endorses the above views and believes that new privileges should be created with great circumspection. The question poses itself whether only a few specific churches should be excluded and not other splinter groups or sects? Which medical practitioners must be included and which not? In the case of journalists, communications are often anything but confidential: the journalist is extremely keen to publish his scoop! His only concern is to protect his sources. To some extent medical practitioners,[73] insurers[74] and bankers[75] do enjoy some protection in certain circumstances.

20.7 It is recommended that the existing position be retained.

* Marital privilege

20.8 This privilege, which is governed by section 10 of Act 25 of 1965 and section 198(1) of Act 51 of 1977, respectively, deserves to be retained in every respect. Only two matters received the attention of the Commission here, namely the character of the marriage concerned and the termination of the privilege.

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73 See Schmidt 348 & 513 n 17; S v Forbes 1970 2 SA 594(C).

74 See Schmidt 547.

75 See Hoffmann & Zeffertt 212; S 236(4) of Act 51 of 1977; S 31 of Act 25 of 1965.

20.9 This privilege is available only to persons who have entered into a valid monogamous marriage (a civil marriage), marriages according to legal systems which countenance polygamy beeing excluded.[76] "Marriages" of persons in accordance with the indigenous law and custom of Black persons and of Muslims therefore fall outside the privilege concerned. As regards Hindus, it was held in S v Vengatsamy[77] that such unions do in fact gualify as a marriage for purposes of the provision concerned. This is a controversial decision and it is criticised.[78] The Commission is in agreement with the criticism and does not think that the decision will be followed readily.

20.10 There is, of course, nothing to prevent a Black person, Muslim or Hindu from entering into a marriage in accordance with the provisions of the Marriage Act 25 of 1961. Furthermore, any minister of religion of, or any person holding a responsible position in, any religious denomination or organisation may be designated a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.[79] Although this possibility might on the face of it seem to be a solution, it must be borne in mind that the marriages solemnized by such a minister or other person in accordance with Act 25 of 1961 must naturally be monogamous. The Black person, Muslim or Hindu whose marriage is solemnized by such a person, can, therefore, only enter into a monogamous marriage even though his religion may permit polygamous unions.

20.11 What is to be done about polygamous unions? The Commission is of the opinion that section 198(1) of Act 51 of 1977 and section 10 of Act 25 of 1965 should be amended to extend the privilege concerned to such

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76 See Schmidt 550; Van Niekerk 189; Labuschagne 71.

77 1977 4 SA 351(D), 353A-354A. See also Ismail v Ismail 1983 1 SA 1006(A).

78 See inter alia Hiemstra 399; Van Nerkerk 190; Hoffmann & Zeffertt 289; Kotzé 157, 164 n 56.

79 S 3(1) of the Marriage Act 25 of 1961.

unions. The Commission agrees with the following unequivocal remark by Barton:[80]

> It seems incongruous that in a plural society, such as exists in South Africa, the law should be sensitive to the preservation of one kind of marriage and indifferent to another. The family unit is an indispensable part of communal life, whatever the community.

20.12 Labuschagne also criticises the present legal position. He puts it as follows:[81]

> Serious objections may be levelled at this juridically rigid approach. Marriage is not in the first instance a juridical institution, but a socio-ethical sex-based relationship of trust between a man and a woman. To my mind the question for the present purpose should be whether such a relationship of trust in fact exists and not whether such a relationship should be sanctioned by some legal rule or other. If such a marital relationship does exist, communication between the parties to it should be privileged.

20.13 The following was said by Kotzé:[82]

> This amounts to unfounded discrimination because every person has the right to cherish and honour the harmony and sanctity of the marriage which he has entered into in terms of his recognised system of law, without it being treated as inferior or even invalid.

20.14 Unions other than civil marriages are already coming to be recognised for purposes of the law of evidence in Southern Africa. Section 1 of the KwaZulu Criminal Procedure Amendment Act 11 of 1982, an amendment to section 195(2), provides that any person married in accordance with the Zulu law and custom shall, for the purposes of the law of evidence, be deemed to be a married person. No registration of the

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80 Barton LLM 119.

81 72. (Our translation.)

82 162.

marriage is required. Van Niekerk[83] rightly regards this as a deficiency which may give rise to unnecessary evidential problems. Kotzé[84] associates himself with this, saying the the privilege concerned should be extended, provided that "... all statutory provisions regarding solemnization and registration be complied with". The Commission agrees with him. The registration of a marriage is, for various reasons, of importance. In general it may be said that the law must strive to create order in society. Applied to the matter under consideration this means, inter alia, that the law relating to to the solemnization, registration and termination of marriage is aimed at creating order and certainty. As regards the law of evidence it is of cardinal importance that it should be possible to prove the existence and termination of unions of the kind under consideration as easily and conclusively as in the case of a civil marriage. Otherwise, the decisive distinction between the civil marriage as we know it and the marriage of convenience and extra-marital cohabitation virtually disappears.

20.15 The law relating to the solemnization, registration and termination of a marriage is outside the scope of this investigation. Even if the Commission could formulate suggestions, these are matters that could certainly not be incorporated in any of the Acts concerned in this investigation. The Commission's view is, therefore, that the unions in question should, for the purposes of the marital privilege, be deemed to be legal, provided that statutory provision be made elsewhere (for instance in the Marriage Act 25 of 1965) for the solemnization, registration and termination of unions of this kind. Until such time, the amendments to section 198(1) of Act 51 of 1977 and section 10 of Act 25 of 1965 which the Commission advocates cannot be taken any further. It can, however, be mentioned that attention is being given to these matters in another investigation (Marriages and customary unions of Black persons - Project 51) in which the Commission is engaged.

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83 191.

84 164.

20.16 Provision is make for the termination of a marriage (and therefore by implication the marital privilege) in section 11 of Act 25 of 1965 and section 198(2) of Act 51 of 1977. Section 11 refers to a marriage which has been dissolved or annulled whereas section 198(2) refers to a marriage which has been dissolved or annulled by a competent court. Since a marriage may be dissolved by death as well as by divorce, the question arises whether section 11 applies to widows and widowers as well while section 198(2) does not, especially since the word dissolved in the last-mentioned section is qualified by the expression a competent court. The Commission feels that the matter ought to be cleared up - it only leads to confusion and unnecessary problems of interpretation.

20.17 If the history of these provisions is traced, section 3 of the English Evidence Amendment Act 1853 is found to be their source. This section reads as follows:

> No Husband shall be compellable to disclose any Communication made to him by his Wife during the Marriage, and no Wife shall be compellable to disclose any Communication made by her Husband during the Marriage.

20.18 In Shenton v Tyler[85] the court decided that this section "...relates only to husbands and wives, and no principle of construction known to me entitles me to read into the section a reference to widowers or widows..." The Commission endorses this interpretation and further holds the view that there is no need to extend this privilege to a widower or widow. The Commission's proposals regarding the matter under discussion are embodied in the Bill.

20.19 It will be noticed that the privilege may be claimed only by the witness (the one who has made the statement or the one who has heard it)

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85 1939 (Ch) 620, 1939 3 A11 ER 827. Cf Hoffmann & Zeffertt 200-1.

and not the spouse of the witness.[86] The Commission's view at present is that the existing position should not be changed.

21. SUBSTANTIVE LAW IN THE GUISE OF THE LAW OF EVIDENCE

* Estoppel

21.1 The Commission has noted Zeffertt's[87] warning that the introduction of issue estoppel into criminal cases could be dangerous, but believes that our courts will guard against this. Since issue estoppel strictly speaking does not form part of the law of evidence it in any case falls outside the scope of this investigation.

* Parol evidence

21.2 Parol evidence does not form part of the law of evidence and it was therefore not investigated.[88]

22. HEARSAY EVIDENCE

22.1 The Commission is of the opinion that the hearsay rule, in its current form, inhibits rather than promotes the administration of justice. The attention which this rule has received and, is still receiving in related legal systems also strengthens the impression that there is an urgent need of reform in this sphere.

22.2 The Commission was fortunate in that the essential research on this rule was done by Dr Paizes who made the results of his research

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86 S 12 of Act 25 of 1965 and s 199 of Act 51 of 1977 read with the provisions under discussion. See in general Hoffmann & Zeffertt 199 et seq; Barton 1979 CILSA 39 et seq.

87 Zeffertt 312. Cf Hoffmann & Zeffertt 268-9; Schmidt 582.

88 See Hoffmann & Zeffertt 228; Schmidt 592.

available to the Commission.[89] Dr Paizes also consented to the Commission's using any part of his thesis at its discretion.

22.3 The Commission itself has on previous occasions given attention to the rule. The following provision was formulated by the Commission:

> 1. Hearsay evidence shall be evidence of any oral, written or other statement made by any person other than a witness or a party (hereinafter referred to as the declarant), which is tendered for the purpose of proving the truth of what is contained in such statement.
>
> 2. Hearsay evidence shall not be admissible unless -
>
> (a) the declarant is not available to testify: Provided that, subject to the provisions of paragraph (b), evidence of the statement shall not be admissible if the party who intends to tender such evidence caused the non-availability to testify of the declarant with the intention of preventing the declarant from attending the proceedings or to testifying at such proceedings; or
>
> (b) the party against whom evidence of the statement is to be given agrees to the declarant not being called as a witness.
>
> 3. For the purposes of section 2(a) the declarant shall be deemed not to be available to testify if he is deceased or unfit or incompetent to testify, or if every reasonable attempt to trace him has been fruitless, or his appearance or obtaining of his evidence is not reasonably feasible.

22.4 The definition of hearsay evidence in section 1 is the cardinal point on which this provision turns. This definition is based on the well-known definition of hearsay evidence laid down in Estate De Wet v De Wet.[90] In this case hearsay evidence was defined as "... evidence of statements made by persons not called as witnesses which are tendered for the purpose of proving the truth of what is contained in the statement".

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89 See Annexure B. Dr Paizes took the extra trouble of adding to his doctoral thesis, *The concept of hearsay with particular emphasis on implied assertions* (Ph D Wits 1983), a chapter for the Commission under the title *Conclusion*: Suggestions for law reform in South Africa. The Commission would like to express its thanks to him.

90 1924 CPD 341. This definition was recently confirmed in Gonsalves v Gonsalves 1985 3 SA 507 (T) where the court said that (512 G) "... if

(Footnote continued)

22.5 Paizes's thesis is undoubtedly the most thorough research which has been done up to now on this difficult aspect of our law of evidence. He adopts, so far as South African Law is concerned, a fresh and novel approach.[91] His research shows that all definitions of hearsay evidence can be either "declarant-orientated" or "assertion- orientated". The latter definitions "... focus on whether an out-of-court assertion will be used to prove the truth of what it asserts", whereas the former definitions "... focus on whether the use of the utterance will require reliance on the credibility of the out-of-court declarant".[92] Depending upon the "model" employed, different consequences may result.[93] On the strength of his research Paizes came to the definite conclusion that the "declarant-orientated" type of definition was the correct approach. The definition quoted above, which the Commission had in mind initially, is based on an "assertion-orientated" approach. After further consideration the Commission is of the opinion that the "declarant-orientated" approach is the sounder one.

22.6 The Commission realises that Paizes's suggestions for reform represent a marked departure from the approach which the Commission has up to now had in mind, and also that these suggestions are at present somewhat novel to the South African law. Since it would appear to the Commission that Paizes's suggestions are completely consistent with the *ratio* for the exclusion of hearsay evidence (namely the inherent unreliability of hearsay evidence) and hearsay by implication,[94] they were used as the basis for the definition of hearsay evidence and the requirements for the admissibility thereof - see the draft Bill.

(Footnote continued)
it (i e hearsay evidence) is tendered to prove the truth of what was said, it is not admissible".

91 See Annexure B and in particular Chapter IV of his thesis.

92 Paizes 1983 SALJ 77.

93 For concise notes in this connection see Paizes 1983 SALJ 71 and Paizes 1985 SALJ 258, respectively.

94 See in this connection Hoffmann & Zeffertt 100, 111, 115; Schmidt 442, 453; Kroon v J L Clark Cotton 1983 2 SA 197 (ECD), 206.

22.7 Since the Commission has not yet had the benefit of comments on any of the reform models, it is not at present in a position to formulate proposals for the intricate dovetailing of the suggested hearsay models with the other existing legislation[95] relating to this type of hearsay evidence. As regards the provisions of section 216 (hearsay evidence) and 223 (dying declarations) of Act 51 of 1977 it is now already clear that these provisions may be repealed. Provision has been made for this in the draft Bill. The Commission feels that the proposals must first go through the process of inviting comments before attention can be given to such matters as incorporation, possible repeal and amendment of the present statutory provisions.

22.8 Specific comments in this regard will be of great value to the Commission.

23. CONCLUDING OBSERVATIONS

23.1 With due regard to the Commission's decision not to codify the law, but only to rectify identified problems as well as to the question whether the law of evidence should be adopted by case law or by legislation, the whole area of the law of evidence has been surveyed, and the Commission has come to the conclusion that at this stage reform is desirable in respect of the following matters only:

- Judicial notice of customary law and of foreign law.
- The compellability of spouses to give evidence.
- Copies of documents.
- The marital privilege.

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95 See inter alia Part IV of Act 25 of 1965; s 221 and s 222 of Act 51 of 1977.

. Hearsay evidence.

23.2 The reforms suggested, are embodied in the accompanying draft Bill. The Commission would welcome reasoned comments on the draft Bill, and also on any other matter that should be included in the Bill.

ANNEXURE A

GENERAL EXPLANATORY NOTE:

Words in bold type in square brackets indicate deletions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the law of evidence so as to provide for the taking of judicial notice of foreign law and of the law of indigenous nations and tribes in certain circumstances; to regulate further the proof of copies of documents; to lay down general requirements for the admissibility of hearsay evidence; to regulate at civil proceedings communications between spouses during the subsistence of the marriage; to make the husband or the wife of an accused a compellable witness at criminal proceedings; to regulate further at criminal proceedings communications made during the marriage; and to provide for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Judicial notice of foreign law and of the customs and habits of the indigenous or tribes.

1. (1) Any court may take notice of foreign law or of the unwritten customs and habits of the indigenous nations or tribes of the Republic or of territories which formerly formed part of the Republic which are binding rules of law in so far as such law can be ascertained readily and with sufficient certainty.

(2) The provisions of subsection (1) shall not preclude any party from adducing evidence of any fact, including the substance of a rule of law, which is a point in issue at the proceeding concerned.

Proof of copies of documents.

2. When a document is admissible as evidence, a copy of such document may be admitted as evidence notwithstanding the availability of the original document unless the court rules otherwise.

Hearsay evidence.

3 (1) Subject to the provisions of any other

Act, hearsay evidence shall not be admitted at criminal or civil proceedings, unless -

(a) the accused or any party against whom such evidence is to be adduced agrees to the admission of such evidence at such proceedings; or

(b) the person upon whose credibility the probative value of such evidence depends himself testifies at such proceedings; or

(c) the court, having regard to -

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice which the admission of such evidence might entail for an accused or a party against whom the evidence is to be adduced; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of paragraph (b) of subsection (1) if the court is informed that the person upon whose credibility the probative value of such evidence depends is to testify himself in such proceedings: Provided that the hearsay evidence shall be left out of account if such person does not testify later in such proceedings, unless the court admits the hearsay evidence in terms of paragraph (c) of subsection (1).

(4) For the purposes of this section hearsay evidence shall mean evidence, whether oral or in

writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

Amendment of section 10 of Act 25 of 1965.

4. Section 10 of the Civil Proceedings Evidence Act, 1965, is hereby amended by the insertion of the following subsection, the existing section becoming subsection (1)

"(2) Subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court.".

Repeal of section 11 of Act 25 of 1968.

5. Section 11 of the Civil Proceedings Evidence Act, 1965, is hereby repealed.

Substitution of section 195 of Act 51 of 1977.

6. The following section is hereby substituted for section 195 of the Criminal Procedure Act, 1977:

"Evidence by wife or husband of an accused.

195. The wife or the husband of an accused may be compelled to give evidence at any stage of criminal proceedings.".

Amendment of section 196 of Act 51 of 1977.

6 Section 196 of the Criminal Procedure Act, 1977, is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) An accused in criminal proceedings shall not give evidence at such proceedings except upon his own application."; and

(b) by the substitution for subsection (2) of the following subsection:

"(2) The evidence which an accused may [upon his own application,] give [in his own defence] at joint criminal proceedings, shall not be inadmissible against a co-accused at such proceedings by reason only that such accused [is for any reason not a competent witness] may not be compelled to give evidence for the prosecution [against such co-accused."].

Substitution of section 198 of Act 51 of 1977.

8. Section 198 of the Criminal Procedure Act, 1977, is hereby amended by the substitution of the following subsection (2):

"(2) The provisions of subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court.".

Repeals.

9 Section 216 and section 223 of the Criminal Procedure Act, 1977, are hereby repealed.

Short title and commencement.

10. This Act shall be called the Law of Evidence Amendment Act, ..., and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

ANNEXURE B

CHAPTER X

CONCLUSION : SUGGESTIONS FOR LAW REFORM IN SOUTH AFRICA

What, then, are the choices facing the South African Legislature?

(A) To retain the status quo: This, I have argued, is untenable. The flaws in the common-law hearsay-structure make reform imperative, and the argument that the rule "works in practice" rests upon a curious blend of legal fiction and judicial licence.

(B) To abolish the rule and to allow all relevant evidence to be received subject to an assessment of its weight: The simplicity of this approach gives it much appeal, but, while it is certainly preferable to the present system, its innocuous facade belies certain serious drawbacks:

(i) It is too radical a departure from traditional hearsay theory - even more drastic in its consequences than the bitterly opposed Model Code and Uniform Rules - and is likely to elicit vociferous resistance from the legal profession.

(ii) Exclusion is a more effective mechanism than the uation of weight for dealing with hearsay of minimal robative value.

(iii) An exclusionary rule, by compelling the court to label evidence as either hearsay or non-hearsay, is more conducive to a proper recognition and assessment of the dangers and safeguards contained in such evidence.

(iv) In the absence of legislative guidance, it is possible that the courts would allow the traditional hearsay objections to colour their determination of relevance, thus leading to a resuscitation and re-statement of the same problems that currently bedevil the topic.

(v) A scientifically formulated standard for separating admissible and inadmissible hearsay would be more satisfactory than a vague, broad mandate to receive all relevant evidence subject to an evaluation of its weight.

(C) To devise scientific criteria for determining when hearsay should be received or excluded: This, it has been submitted, represents undoubtedly the most satisfactory solution to the problem. It raises, however, the problem of choice, as here the Legislature is faced with a variety of possible formulations:

(a) A general exclusionary rule qualified by defined exceptions: This is the approach of the common law, and it has been shown that a concept as slippery as hearsay s not comfortably accommodated within the rigid confines of precise categories. It lends itself, rather, to the

more flexible qualities of a judicial discretion sometimes to receive hearsay, a fact recognized by the drafters of the United States Federal Rules when the thirty specified exceptions of the Rules were supplemented by the two residual discretionary exceptions. It is impossible to compile a comprehensive list of acceptable hearsay categories, just as it is impossible to identify all relevant evidence, and, even if our recognized hearsay exceptions were rationalized, revised and expanded, such an approach, by its very nature, is doomed to failure. It could be argued that in South Africa the specific exception approach was dealt a mortal blow by the decision in Vulcan Rubber Works (Pty) Ltd v SAR & H,[1] which, in effect, terminated the expansion of the common law exceptions, and that the status quo may be salvaged by a statutory circumvention of this decision. That this would be a panacea is doubtful. In Canada, for instance, where the courts have rejected the restrictive view of the majority in Myers v DPP,[2] legislative reform has still been considered necessary.[3] The stark reality, it would seem, is that the category and label approach is conceptually defective in that it fails to come to grips with the variable character of hearsay. The border between acceptable and unacceptable hearsay is often very thin, and depends on several inter-dependent factors which defy precise ennumeration and which may only be garnered from the totality of the circumstances of each individual case.

(b) Defined exceptions qualified by a residual discretion to admit in certain prescribed cases: This approach, which was adopted in the Federal Rules, also gives rise to certain difficulties. If the residual exception is restrictively framed so as to apply only in particular, circumscribed areas, then one has not really remedied the problems encountered in (a) above, and the discretion is rendered impotent. If the provision is given a wide ambit, one runs the risk that the ensuing tension between the specific exceptions and the flexible residual provision may create uncertainty and induce the courts to seek asylum in the relative safety of the common law. It is clear that such a solution is an anomaly, as it creates a paradoxical hybrid between rigid rules and a wide discretion, and makes it difficult for a court to resolve difficult issues by resorting to original legislative intent.

The approach of the Federal Rules raises, furthermore, difficult problems of interpretation, as the courts are compelled to resolve questions of admissibility by referring to the language of the residual provisions rather than by adhering to the general spirit and policy underlying them. The ensuing plethora of interpretations has, apart from jeopardizing uniformity, given rise to constructions and decisions which are incorrect and undesirable. One particular problem that has plagued the courts concerns assertions which narrowly miss admissibility via one of the recognized categories but which

comply substantially with the requirements of the residual exceptions.[4] Problems such as these, it is submitted, may be avoided by jettisoning, once and for all, the category approach and by making discretion the central mechanism for controlling admissibility instead of a safety net for regulating the imperfections of a flawed system.

(c) A broad, unqualified discretion to admit hearsay in appropriate cases: As with the abolitionist view, this proposal is unlikely to find an enthusiastic audience among legal practitioners. However, unlike that solution, this approach may be counterproductive and lead, paradoxically, to retrograde results. For judges, subjected to the considerable demands and pressures of litigation, and cast into the very midst of the hearsay thicket, could hardly be blamed for evading its unyielding briers and resorting to the well-worn paths of the common-law exceptions. Few would be so bold as to blaze trails through the heart of this thicket - a task more appropriately assumed by the Legislature. Certainly legislative direction is necessary, but it should be a direction that would provide guidance instead of shackles; that would fortify and foster the judicial discretion rather than stifle it.

(d) The identification of various categories of hearsay, followed by general principles of admissibility rather than specific exceptions: This approach, endorsed by the

Australian Law Reform Commission,[5] runs into conceptual difficulties at both ends of the admissibility spectrum. At one end, it would not adequately cover all classes of reliable hearsay, no matter how carefully such classes are compiled; at the other end, the ennumerated categories would necessarily be widely defined, allowing hearsay of minimal probative value to be received. It was submitted above[6] that these defects could be cured by introducing both inclusionary and exclusionary discretions, but this would result in a system that was cumbersome and unnecessarily complex. It would, furthermore, create uncertainty as to the status of the specific principles, as the dual discretionary provisions would render them, in large measure, redundant or tautologous. Because the provisions of such a system would often encompass general situations rather than specific instances, the distinction between them and the residual discretions would tend to become blurred, and one would be left with a bifurcated system for determining admissibility. Each particular question would then have to be resolved by having recourse to both standards, thus giving rise to confusion and unnecessary problems of construction.

(e) A judicial discretion qualified by a set of non-comprehensive guidelines: Here, it is submitted, lies the solution to the hearsay dilemma. By liberating hearsay from its traditional maze of exceptions, it would be possible to come to grips with the true concep-

tual objections to its reception, and to make these objections central rather than incidental to the overall enquiry, viz the admissibility of reliable evidence. Such an approach, moreover, allows one to transcend the present debate concerning implied assertions, and to perceive hearsay as evidence raising particular objections or dangers. This obviates the need to investigate the somewhat abstruse distinction between evidence that gives rise to certain permissible inferences and implied hearsay assertions, and penetrates the very core of the problem by identifying hearsay-like dangers and reciprocal safeguards.

The challenge that faces the Legislature in this regard is four-fold:

(i) to formulate a satisfactory definition of hearsay that will identify any evidence raising these dangers;

(ii) to decide whether to adopt a general principle of exclusion or inclusion in respect of such evidence;

(iii) to lay down a set of guidelines that will shepherd a judge through the hearsay thicket without having his discretion unduly tempered; and

(iv) to create procedural safeguards to prevent undue prejudice to the adversary.

The drafting of such an enactment should, furthermore,

take into account the following factors:

(1) The origin of the hearsay rule, and, in particular, its emergence as both the 'child of the jury' and the 'product of the adversary system'.[7] Account must therefore be taken of, respectively, the prestige of the fact-finding process and the protection of the adversary. In the light, however, of the modern swing towards the latter conception of hearsay, together with the abolition of the jury in South Africa, it is submitted that greater emphasis should be placed on the second of these principles, although the first should not be entirely overlooked.

(2) The traditional rationale underlying the hearsay rule. Hearsay has traditionally been excluded because: (i) it contains certain intrinsic dangers; (ii) it brings into question other dangers, which are not peculiar to hearsay, but which are exacerbated by the absence of the standard curial procedural devices to which witnesses are normally subjected; (iii) the absence of these procedural devices may therefore cause prejudice to the adversary in the presentation of his case; and (iv) the admission of hearsay causes procedural inconvenience and difficulties.[8] The proposed judicial discretion should, therefore, be structured in such a way as to take account of these objections, focussing particularly on the traditional 'hearsay dangers' of insincerity, defective memory, faulty perception and accidental miscommunication, and the pre-

judice caused to the adversary through being deprived of the effective employment of the recognized procedural aids. Such an approach would be in accord with the views of Professor Schiff, who submitted that "judges should admit any item of hearsay evidence at a trial when the purposes of the hearsay rule within our litigation system would be served no more than barely under the particular circumstances".[9]

(3) Considerations of legal policy. The hearsay rule spans the straits between two conflicting evidentiary principles. On the one hand, it is desirable that all relevant evidence be received and evaluated by the trier of fact, and on the other, it is equally desirable that all witnesses testify subject to the 'ideal conditions' of the courtroom, where such evaluation may be properly conducted. The proposed discretion must therefore, of necessity, take account of the tension between these two poles and provide some yardsticks as to how these competing priorities may be resolved. In this regard, two factors warrant specific attention:

(i.) Necessity: Necessity and trustworthiness were the two elements identified by Wigmore[10] in his attempt to rationalize the common law exceptions to the hearsay rule. They were adopted by the United States federal courts as being the dual criteria for determining the

admissibility of hearsay,[11] and were subsequently modified for incorporation into the residual exceptions of the Federal Rules. As regards necessity, these provisions require that the proferred statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts".[12] The Australian proposal, on the other hand, comes to grips with the problem by setting out different conditions for the admission of hearsay, depending on whether the original declarant is available or unavailable to testify personally.[13]

(ii.) The interests of justice: The residual exceptions require that "the interests of justice [must] best be served by admission of the statement into evidence",[14] a requirement which the United States courts seem to have conflated with the constitutional confrontation rule of the Sixth Amendment.[15] This concept of protecting the interests of the accused also finds an echo in the Australian proposal, which distinguishes between the reception of hearsay in civil and criminal trials on the ground that "the criminal trial is premised on the view that we should minimize the risk of convicting the innocent even though this may result in the acquittal from time to time of the guilty".[16] It is submitted that this principle may beneficially be utilized in the formulation of the proposed discretion, thereby making allowance for the right of confrontation which has become inextricably fused with the

hearsay rule in the United States.[17]

(4) The meaning of 'hearsay'. In Chapter IV, it was shown that hearsay may generally be viewed in one of two ways. It may be seen as an extra-curial assertion offered to prove the truth of its contents, or, alternatively, as any evidence which rests for its probative value on the untested testimonial factors of an actor or declarant other than the testifying witness. The theoretical advantages of the latter view have been illustrated; it remains to determine whether this declarant-oriented approach is practicable in the light of the solution which I have submitted should be adopted.

Throughout this dissertation, one leitmotiv has run like a thread through the discussion: the conceptual superiority of the declarant-oriented perspective of hearsay over its assertion-oriented counterpart. Yet in most instances, the full acceptance of this line of thought has been thwarted by a major obstacle - its incompatibility with the common-law exclusionary rule. The proposed judicial discretion, on the other hand, complements perfectly the broad perspective afforded by such a definition. The union of these two concepts would allow the court to identify hearsay-like evidence and then to examine whether, on balance, the exclusion of such evidence is desirable. In short, the labelling of

an item of evidence as hearsay would merely state the question of admissibility, not solve it.

(5) The rôle of hearsay as a "marginal cost factor". It was submitted in Chapter III that the exclusion of an item of evidence is only justifiable if the total cost of receiving it exceeds the total benefit derived thereby.[18] It was further shown that it is fallacious, when applying this principle to hearsay evidence, to resolve the question of admissibility by comparing the probative value of such evidence (which represents total benefit) with only its hearsay cost (being that part of the cost caused by the hearsay quality of the evidence). This would be to mis-state the problem, and to ignore the other components of total cost. What, for instance, of the tendency of the evidence to cause confusion, waste of time, lengthy collateral issues etc? What, moreover, if such evidence possesses minimal probative value? Should it be received merely because all the customary hearsay dangers are substantially accounted for? It was demonstrated above that the rules governing hearsay and relevance represented two facets of the same problem, viz. admissibility. It would therefore be erroneous in the extreme to overlook this fact in formulating the overall enquiry at which the proposed judicial discretion is to be directed.

At first glance, it may appear that these two enquiries are capable of separate resolution, but, on closer examination,

attached to the witness himself, but rests in part or in whole on the veracity and competence of some other person, hereinafter referred to as the "maker".

(ii) For the purposes of this Act, the "probative value" of an item of evidence means its logical tendency to show or indicate the material fact for which the evidence is offered.

Section 2 - Admissibility

(a) Subject to the provisions contained in [this or] any other law, hearsay evidence is inadmissible unless:

(i) its probative value exceeds the disadvantages caused by its reception;

(ii) its reception is in the interests of justice; and

(iii) the maker is unavailable to be called as a witness.

(b) In determining whether the probative value of any item of hearsay evidence exceeds the disadvantages caused by its reception in terms of s 2(a)(i), the court shall take into account all relevant factors including, but without necessarily allowing any of these or any other factors to be solely determina-

tive of the issue, the following:

(i) the trustworthiness of the evidence, and, in particular, the extent of any dangers that may arise as a result of relying on the sincerity, narrative competence and powers of memory, perception and evaluation of the maker; and

(ii) the extent to which the reception of the evidence raises procedural difficulties such as undue delay, waste of time, lengthy collateral issues, confusion or the misleading of the trier of fact.

(c) In determining whether the reception of an item of hearsay evidence is in the interests of justice in terms of s 2 (a)(ii), the court shall take into account all relevant factors including, but without necessarily allowing any one of these or any other factors to be solely determinative of the issue, the following:

(i) the extent of any prejudice that may be caused to the other party or parties by virtue of the fact that the maker is not subjected to cross-examination or any of the other standard devices to which a witness is ordinarily subjected; and

(ii) the nature of the proceedings - whether civil or criminal - and, in the latter instance, whether the evidence is tendered by or against the accused.

(d) For the purposes of s 2(a)(iii), the maker will be unavailable if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or is outside the Republic and it is not reasonably practicable to secure his attendance, or all reasonable efforts to find him have been made without success.

Section 3 - Notice

A party must, in any civil proceedings, give his opponent notice of his intention to adduce any item of hearsay evidence at least four days before the commencement of the proceedings. Provided that if such notice is not given, the evidence may, subject to the provisions of this Act, be admitted subject to such order as to postponement or costs, or both, as the court may consider fit.

COMMENTS ON THIS DRAFT PROPOSAL

Section 1 - Definitions

(i) The definition of "hearsay" is based on the formulation adopted in Jones on Evidence.[21] It is a classic declarant-oriented definition, akin to those endorsed by writers such as Tribe[22] and Lempert and Saltzburg.[23] The scope of this definition is extremely wide, bringing under the hearsay banner all evidence that raises particular dangers and objections, and avoiding the semantic and esoteric difficulties which invariably flow from defining hearsay as a particular kind of assertion. It is therefore irrelevant, for the purposes of this definition, whether a statement or act is intended as an assertion or not, or whether an assertion is express or implied. The enquiry, instead, revolves around the purpose for which an extra-curial act or statement is to be employed, i e whether or not it requires the court to treat the absent actor or declarant as a witness. This perspective of hearsay is in perfect harmony with the basic rationale underlying the common law rule and is vastly superior to the traditional assertion-oriented statements in coming to grips with implied assertions and other evidence lying on the borders of hearsay. Its functional simplicity serves also to alert the court to the fundamental dangers inherent in hearsay evidence, and dovetails with the flexible, discretionary approach to admissibility set out in s 2.

(ii) The definition of "probative value" is derived from a statement of Wigmore,[24] and finds favour with writers such as Mc Cormick[25] and Lilly.[26] It is also in line with how that concept is understood in South Africa.[27]

Section 2 - Admissibility

Section 2 (a):

The rule contained in this section is expressly made to operate "[s]ubject to the provisions contained in [this] or any other law" so as to take account of other statutory inroads into the law. The adoption of this draft proposal would, however, necessitate a re-examination and revision of some enactments, particularly Part VI of the Civil Proceedings Evidence Act[28] and the Computer Evidence Act.[29] These provide, respectively, for the admissibility of certain documents and computer prints-out, and it would be anomalous to subject such evidence to the technical requirements contained in those enactments while allowing other, less trustworthy hearsay to be admitted by way of the less restrictive measures set out in the above proposal. It would therefore be necessary either to amend these statutes by inserting residual discretionary provisions, or to repeal them and allow documentary and computer evidence to be governed by the same measures as other hearsay. The latter alternative, it is submitted, may be preferable in that it is simpler and engenders greater uniformity.

The rule in s 2(a) is stated in the negative, i e hearsay is inadmissible unless the three stipulated conditions are satisfied. The reason for this approach is that it is more in line with the common law than a positive formulation, and is therefore less likely to encounter resistance at the hands of legal practitioners. Lawyers are familiar with the traditional rôle of hearsay as an exclusionary rule, and the American experience demonstrates clearly the hazards of disturbing firmly-entrenched notions and principles.

The three conditions for admissibility, as qualified and explained in section 2(b), (c) and (d), create a delicate balance between, on the one hand, flexibility and judicial creativity, and, on the other hand, legislative guidance and direction. The wide wording used in the formulation of these conditions in s 2(a) is indicative of the extent to which admissibility is left to the discretion of the court, a notion which is further strengthened by the following factors:

(i) the court is empowered and, in fact, obliged to take account of "all relevant factors" in resolving the enquiries stipulated in subsections (b) and (c);

(ii) no attempt is made to list comprehensively these factors, and the matter is left to the discretion of the court; and

(iii) it is expressly provided that those factors that are listed are not to be considered as being either exhaustive or decisive of the issue.

There are, however, areas where the judicial discretion is curtailed, and where the courts are compelled to follow the Legislature's lead:

(i.) the court is obliged to exclude an item of hearsay evidence unless all three conditions are shown to be satisfied;

(ii.) one of these conditions (s 2(a)(iii)) is capable of simple factual determination, thus removing it entirely from the province of the judicial discretion;

(iii.) in the determination of the other two conditions (s 2(a)(i) and (ii)), the court is compelled to consider all relevant factors; if one or more such factors are not considered, the discretionary power of the court will not have been properly exercised, leaving the way open for a party to appeal against the court's finding; and

(iv.) in conducting the enquiries set out in s 2(b) and (c), the court is obliged to include in its investigation an examination of certain specific factors. Although these factors are not necessarily solely determinative of the issue, a failure to consider them will constitute an irregularity.

The result, therefore, is a qualified discretion, which must be judicially exercised and which provides guidance without unnecessary shackles. It ensures, in effect, that the courts follow a particular line of reasoning without limiting the factors that may be employed during the course of such reasoning. The proposal, in short, sets the lower limits of admissibility, and allows the court to resolve the remaining questions subject to a minimum of legislative interference. It is instructive in this regard to consider each of these three conditions in turn, in order to examine the rationale underlying their incorporation and the chain of reasoning the court is required to employ.

Condition (i):

This condition is central to the entire question of admissibility, and rests on the fundamental premiss that evidence is only beneficially received if the total benefit exceeds the total cost caused by its admission. It also embraces the rôle of hearsay as a marginal cost factor, as it measures the probative value of an item of hearsay evidence against all the disadvantages flowing from its reception. In s 2(b), the court is instructed to take account of all relevant factors in conducting this enquiry, but two sets of disadvantages are singled out as warranting particular attention:

Section 2(b)(i):

This provision compels the court to conduct a hearsay-danger analysis along the lines advocated by Professor Edmund Morgan in his well-known article, "Hearsay Dangers and the Application of the Hearsay Concept".[30] Implicit in this analysis is an assessment of the risks that may arise through relying on the testimonial factors of an actor or declarant who is not before the court, and an evaluation of the degree to which these risks may be reduced or eliminated by recourse to the circumstantial indicia of trustworthiness surrounding the making of the act or statement. By way of example, the court could consider the following factors:

(A) Factors relating to the danger of insincerity:

Whether the evidence was assertive or nonassertive; whether it was against the interests of the maker; whether there was any motive to falsify or misrepresent; the relationship between the maker and the parties to the case; whether or not the making of the act or statement preceded the controversy; whether it was subjected to cross-examination, the oath or any equivalent device designed for procuring the truth; whether it was voluntarily or spontaneously made; the status of the person by whom and to whom it was made; and the reputation of the actor/declarant for honesty.

(B) Factors relating to the danger of defective memory:

Whether any or substantial reliance was placed on the actor's/declarant's memory; the importance of the act or statement to the maker; whether the act or statement concerned the maker's own affairs or the affairs of another; the length of time that had elapsed between the act or statement of the maker and the event or condition it purported to describe; whether the evidence is first- or second-hand hearsay; and the amount of detail which the evidence contained.

(C) Factors relating to the danger of faulty perception:

Whether the maker had a proper opportunity to perceive the facts which his act or statement is offered to show; whether the facts were within his personal knowledge; whether the evidence is first- or second-hand hearsay; and whether there is any reason to doubt the maker's ability to perceive properly the facts in issue.

(D) Factors relating to the danger of accidental miscommunication: The manner in which the material facts were conveyed by the maker to the witness (i e whether oral or in writing); whether the maker's act or statement could have been motivated by a belief other than the one which it is tendered to establish; the simplicity or complexity of the act or statement; whether the evidence is first- or second-hand hearsay; and the

court's impressions of the ability of the witness to convey accurately the act or statement of the maker in the light of the peculiar susceptibilities of hearsay to erroneous transmission.

(E) Factors relating to the danger of erroneous evaluation: Where the evidence relies for its value on an inference or opinion drawn by the maker, the court should consider whether the maker was in a proper position to draw that inference; his qualifications; how much is known of the facts on which the inference is based; and whether there is any reason to question the maker's judgment.

Section 2(b)(ii):

This provision takes into account the other disadvantages of receiving an item of hearsay evidence and is based largely on Rule 403 of the Federal Rules of Evidence.[31] It incorporates those disadvantages which have traditionally been considered by our courts in the enquiry relating to "legal relevance".[32] The co-dependence of these two provisions, viz. ss 2(b)(i) and (ii), is a manifestation of the principle, expressed above,[33] that only when the two rules relating to hearsay and relevance are working in harness may a proper answer be found to the question of admissibility.

Condition (ii):

This condition is designed to give expression to the modern notion of the hearsay rule as the product of the adversary system of trial procedure. The primary consideration, therefore, is whether it is in the interests of justice that an item of hearsay evidence be admitted, and in this regard, two factors (inter alia) must be considered:

Section 2(c)(i):

Cognizance is taken here of the chief objection to hearsay evidence - the fact that it rests for its evidential value on the veracity and competence of a person who is not subjected to the standard "ideal conditions" [34] of the courtroom. According to Professor Schiff, the function of the hearsay rule is "to protect the opposing party against evidence of relevant matters presented in a fashion not satisfying the well-settled demands of witness examination in our trial system". [35] The learned writer then goes on to list eight such demands which characterize the in-court testimony of a witness but which are of no avail to the adversary in respect of hearsay evidence. [36] The extent of the ensuing prejudice may, it is submitted, be assessed by looking at the following dual enquiry:

(a) What utility would these procedural devices have

enjoyed? Each of these aids should be considered, but it is cross-examination that usually has the greatest potential for uncovering errors in perception, memory, narration and evaluation. Its value in exposing insincerity is somewhat less celebrated, although still by no means negligible.[37] It should be remembered, moreover, that because the adversary has been deprived of these devices, the focus falls upon the potential results of their skilful application.[38]

(b) What substitutes are there, if any, for the inapplicable procedural devices? Here regard may be had to the conditions under which the act or statement was made - was the maker under oath; did the adversary have the opportunity to question him?

Section 2(c)(ii):

One of the requirements for admissibility via the residual exceptions contained in the Federal Rules is that the reception of the proffered evidence be in the interests of justice.[39] As was pointed out above,[40] this requirement has been linked to the investigation regarding confrontation under the Sixth Amendment. This constitutional provision, it has been shown,[41] owes its origin to the premiss that it is desirable that the accused in criminal proceedings be given the opportunity to confront his accusers. However, as the United States Supreme Court

has found, this principle must occasionally yield to the dictates of public policy, and confrontation may be dispensed with where its utility is low or where the dual test of necessity and trustworthiness is satisfied.[42] Section 2(c)(ii) is designed to accommodate this experience; it alerts the court to the different priorities that apply in criminal proceedings - where the risk of convicting an innocent man necessarily carries more weight than the general need to receive all relevant evidence - without fettering the judicial discretion. The court would therefore be free to conclude that, on the facts of a particular case, the reception of an item of hearsay evidence would serve the interests of justice despite the deprivation of the accused's right to confrontation.

Condition (iii):

Trustworthiness and necessity were identified by Wigmore[43] as the essential criteria on which to predicate the admissibility of hearsay. The former element has been incorporated into this proposal in s 2(b)(i), where the court is obliged to assess trustworthiness by conducting the requisite hearsay-danger analysis; the third condition to s 2(a) (as qualified by s 2(d)) takes cognizance of the latter. The treatment accorded these two concepts is, however, strikingly different. Whereas the enquiry as to trustworthiness is left largely to the discretion of the court, subject only to the mandatory

hearsay-danger computation, necessity is removed entirely from the nebulous realm of discretion and given the hard substance of legislative control. It is tersely stated that hearsay evidence is inadmissible unless ... "the maker is unavailable to be called as a witness". This is followed in s 2(d) by a definition of unavailability, which is derived from Part V1 of the Civil Proceedings Evidence Act.[44]

The restrictive effort of this condition is justified, it is submitted, on grounds of legal policy. It was stated above[45] that the hearsay rule straddles two conflicting principles, viz. the need to subject witnesses to the ideal conditions of courtroom testimony and the need to receive all relevant evidence. This conflict, it is submitted, should only be resolved in favour of the latter where the maker is shown to be unavailable.[46] In the residual exceptions to the Federal Rules, a different approach is taken, and the proffered hearsay evidence is required to be more probative "than any other evidence which the proponent can procure through reasonable efforts".[47] Because of the potential uncertainty and problems of proof, it is submitted that this approach is not altogether satisfactory. It tends, furthermore, to conflate the hearsay rule with the best evidence rule, a union which is neither necessary nor desirable.[48]

Section 3 - Notice:

Because of the wide admissibility base created for hearsay evidence by sections 1 and 2, it is necessary to ensure that the adversary is not taken by surprise by its presentation at trial. To remedy this problem, the residual exceptions to the Federal Rules require the proponent to provide his opponent with notice of his intention to offer it "sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it".[49] This provision, moreover, is made a prerequisite to admissibility, thus giving the courts, on the face of it, no latitude or scope for discretionary manoeuvre. Despite this apparent inflexibility, the United States courts have split on the issue of whether notice may, in appropriate cases, be dispensed with.[50] The majority view is in favour of admissibility where the proponent only becomes aware of the need to adduce such evidence after the trial has commenced,[51] whereas the Second Circuit has adopted a stricter approach,[52] maintaining that there is "no doubt that Congress intended that the requirement of advance notice be rigidly enforced".[53]

Academic opinion seems to be in favour of the more flexible approach,[54] and Sonenshein has suggested that the residual exceptions should be amended to conform to this view and to "rescue the courts that have adopted it from decisions

which are unquestionably correct as a matter of policy, but erroneous as a matter of law".[55]

In the light of these difficulties, it was decided to divorce the notice requirement from the conditions for admissibility, and to allow the court a wide discretion in dealing with a defaulting party. The court may, in such cases, refuse to receive the evidence, or, in its discretion, receive the evidence subject to any order as to postponement or cost which it deems fit.

Conclusion:

Over three decades ago, Professor Morgan once expressed the following sentiment:

> "If we were privileged to start anew and were unwilling to treat the hearsay objection as affecting weight rather than admissibility, we should do well to put in the category of hearsay all evidence which requires the trier to rely upon the use of language or the sincerity or the memory or the observation of a person not present and not subject to all the conditions imposed upon a witness. But we should have as the basis of the system the principle that all relevant evidence is admissible ... "[56]

Today, in South Africa, we have this privilege, as the hearsay rule is currently awaiting the attention of the Law Commission. An opportunity such as this is too valuable to waste by resorting to the spurious and illusory safety of traditionalism and orthodoxy - such retrogressive timidity has for too long hampered the reform of the hearsay rule in foreign countries. It is time for a

revaluation of out-moded notions and a bold change of perspective. Such a change, it is submitted, has been attempted in the draft proposal set out above. Although this proposal is my own, it is consistent with what may be garnered from the accumulated wisdom of many perceptive minds that have graced the law of evidence, and its claim to validity rests on the basic values underlying not only the hearsay rule, but also the adversary system that created it. I have attempted to expose the hearsay rule as merely being a functional instrument of the adversary trial, and, thereby, to create a holistic substitute for it, in which ostensibly disparate concepts fit harmoniously together. I have endeavoured to achieve this result (a) by effecting a linguistic purge, in which terms such as res gestae (in so far as it impinges on hearsay), implied assertions, nonassertive conduct, verbal acts, verbal parts of acts, double hearsay and many others are rendered redundant; (b) by conflating the exclusionary rules relating to irrelevance and hearsay, so as to yield a composite solution to the problem of admissibility; and (c) by reducing the hearsay concept to four elements - trustworthiness, probativeness, justice and necessity.

NOTES TO CHAPTER X

1 1958 (3) SA 285 (A).

2 [1965] AC 1001, [1964] 2 All ER 881. In Ares v Venner [1970] S.C.R. 608, the Supreme Court of Canada unanimously disapproved the view of the majority of the House of Lords that the courts may no longer create new common law exceptions to the hearsay rule. This approach was further adopted in Canadian Pacific Railway v City of Calgary [1971] 4 W.W.R. 241. For a discussion of both cases, see Stanley Schiff, "Hearsay and the Hearsay Rule: A Functional View" (1978) 56 Canadian Bar Review 674 at 685-7.

3 For a brief aceount of this reform, see note 88 to Chapter V111. For a more detailed account see ALRC RP 3 Hearsay Evidence Proposal (1981) at 89-93, and also Rupert Cross "The Proposed Canadian Evidence Code and the Civil Evidence Act 1968" (1978) 56 Canadian Bar Review 306.

4 See p 399 ante.

5 See ALRC RP 3 Hearsay Evidence Proposal (1981). See, further, p 429 et seq.

6 At p 439 ante.

7 See Chapter II ante.

8 See, generally, Chapter III ante, where the rationale of the hearsay rule was discussed.

9 See Schiff, op cit note 2, at 674.

10 Wigmore Evidence V 3ed (1940) para 1420.

11 See 386 ante.

12 Clause (B) of Rules 803 (24) and 804(b)(5).

13 ALRC RP 3, op cit note 5, at 124.

14 Clause (C) of Rules 803 (24) and 804(b)(5).

15 See David A Sonenshein "The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule" (1982) 57 New York University LR 867 at 895. See, further, the cases that Sonenshein cited in notes 154.

16 ALRC RP 3, op cit note 5, at 121.

17 See Chapter III, pp 44 to 58 ante.

16 See p 70 ante.

19 See R v Vilbro 1957 (3) SA 223 (A). See, also, Wigmore Evidence V11 3 ed (1940) para 1918 and L H Hoffmann and D T Zeffertt South African Law of Evidence 3 ed (1981) 76-7.

20 See Hoffmann and Zeffertt, op cit note 19, at 17-19.

21 Jones on Evidence Civil and Criminal II 6 ed (1972) by Spencer A Gard 159.

22 Laurence H Tribe "Triangulating Hearsay" (1974) 87 Harvard LR 957 at 959.

23 R O Lempert and S A Saltzburg A Modern Approach to Evidence (1977) at 340-1.

24 J Wigmore A Student's Textbook of the Law of Evidence (1935) para 22 at 53.

25 C T Mc Cormick Handbook of the Law of Evidence 2 ed (1972) 436.

26 G Lilly An Introduction to the Law of Evidence (1978) para 10 at 22. See, also, Jack B Weinstein "Probative Force of Hearsay" (1961) 46 Iowa LR 331 at 331-2, where a similar formulation of "probative force" is adopted.

27 See R v Trupedo 1920 AD 58 at 62-3. See, also, Hoffmann and Zeffertt, op cit note 19, at 17 and C W H Schmidt Bewysreg 2 ed (1982) 352.

28 Act 25 of 1965. The provisions of ss 33 to 38 inclusive of this Act apply mutatis mutandis to criminal proceedings by virtue of s 222 of the Criminal Procedure Act 51 of 1977.

29 Act 57 of 1983.

30 (1948) 62 Harvard LR 177. See p 29 ante.

31 Fed. R. Evid. 403 provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

32 See Hoffmann and Zeffertt, op cit note 19, at 17-19.

33 See p 469-70 ante.

34 See Fed. R. Evid. 801 Advisory Committee Note, where the following statement appears: "[T]he Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination."

35 Schiff, op cit note 2, at 681.

36 Id at 680-1. See, also, pp 346 to 351 ante for a full discussion.

37 See Morgan, op cit note 30, at 186.

38 See Schiff, op cit note 2, at 679.

39 Clause (C) of Rules 803 (24) and 804(b)(5).

40 At p 467 ante.

41 At p 45 ante.

42 See p 46 ante.

43 Wigmore, op cit note 10.

44 Section 34(1)(b) of Act 25 of 1965.

45 At p 466 ante.

46 See, also, Morgan, op cit note 30, at 218, where the learned writer submits that we "should treat the hearsay rule as an exception generally applicable only when the declarant is available but not present for cross-examination".

47 Clause (B) of Rules 803(24) and 804(b)(5).

48 See Vulcan Rubber Works (Pty) Ltd v SAR & H 1958 (3) SA 285 (A) at 296, where Schreiner JA stated: "Weaker evidence is not excluded by the availability of uncalled stronger evidence except in the case of documents ..." See, further, Hoffmann and Zeffertt, op cit note 19, at 29-31.

49 Rules 803(24) and 804(b)(5).

50 See Sonenshein, op cit note 15, at 901-5.

51 See, for example, United States v Carlson 547 F. 2d 1346 (8th Cir. 1976), United States v Leslie 542 F. 2d 285 (5th Cir. 1976), United States v Bailey 581 F. 2d 341 (3d Cir. 1978) and Furtado v Bishop 604 F. 2d 80 (1st Cir. 1979).

52 See, for example, United States v Oates 560 F. 2d 45 (2d Cir. 1977) and United States v Ruffin 575 F. 2d 346 (2d Cir. 1978).

53 United States v Ruffin, supra note 52, at 358.

54 J Weinstein and M Berger Weinstein's Evidence (1975), 803 (24) [01], and Sonenshein, op cit note 15, at 904-5.

55 Sonenshein, op cit note 15, at 905.

56 Morgan, op cit note 30, at 218.

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