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MAKING SENSE OF DOCUMENTARY EVIDENCE
(Part I)

In Part I of this two-part article the scope of the best evidence rule, both as it is understood at common law and as it is embodied in the Evidence Act, is clarified. Detailed consideration is particularly given to one of the expressions of the best evidence rule, namely, section 93. Part II will continue with a discussion of the inherent limitations in section 93 as opposed to its exceptions which are set out in section 94. The contention and demonstration that the Evidence Act is deficient in the treatment of mechanical, electrical and electronic recordings of relevant facts completes Part II.

I. INTRODUCTION

NO discussion of documentary evidence can begin without some appreciation of the principle of free proof, namely, the principle that generally neither party to a litigation is constrained to prove the existence of facts he alleges by a particular type or category of evidence. There are three means of proof: oral, documentary and real; and so the principle is to allow the proof of relevant facts by any one of these three. The principle of free proof has its principal qualification in relation to documentary evidence. The best evidence rule clearly affects and qualifies free proof. But exactly how it qualifies free proof is still a matter of guess-work. This may seem a little incredible since the best evidence rule is as ancient as any rule of law can be. But the leading English texts still do not clearly tell us when and whether the contents of a document may be proved by oral evidence[1] while Stone is adamant that whenever the contents of a document are in issue the document itself must be produced.[2]

The Singapore Evidence Act[3] as a code of course deals comprehensively with the reception of documentary evidence; but, as will become apparent, the relevant provisions in the Act, namely, sections 61, 66 and 93 are accepted as embodying the best evidence rule. The same uncertainty as to the scope of the best evidence rule therefore afflicts these provisions. If anything, there is some danger of exacerbation since the enactment in statutory form

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1 See, *eg, Phipson on Evidence* (14th ed, 1990), at 1011-1019.

2 *Evidence – Its History and Policies* (1991), at 462.

3 Cap 97, 1990 Ed.

of the best evidence rule will be without the malleability of the common law. The statutory enactment of definitions of a document and documentary evidence introduce a further constraint. So as to make sense of documentary evidence, there must be some attempt to argue the scope of the best evidence rule and further there must be detailed consideration of the provisions in the Evidence Act, beginning with the definitions in section 3 of "document" and "documentary evidence".

The inter-relations of documentary evidence and real evidence will also be important in understanding documentary evidence. Stephen thought slightly of real evidence and this shows in the Singapore Evidence Act. It would add needless intricacy, he argued, to provide for real evidence;[4] and so section 62(3) is all there is by way of explicit reference to real evidence. "If oral evidence refers to the existence or condition of any material thing other than a document, the court may, require if it thinks fit, the production of such material thing for its inspection."[5] Section 3 further defines the contents of a document offered for inspection as being documentary evidence; a definition which precludes regarding them also as real evidence. These transpire to be severe limitations the elimination of which will clarify considerably the function and role of documentary evidence in Singapore.

II. Nature of Documentary Evidence

The Evidence Act defines documentary evidence as evidence of inspection afforded by a document. Two things are predicated: first, a document; second, inspection of it; both therefore premissing capacity for inspection.

A. *Meaning of "Document"*

Section 3 defines a document as any matter expressed or described upon any substance by means of letters, figures or marks or by more than one

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4 He argued that in all cases, real evidence in the Benthamite sense would be proved by either oral or documentary evidence. This overlooks somewhat the effect of real evidence which was evident even then in such cases as *Line* v *Taylor* (1862) 3 F & F 731; see also the ancient insanity cases in which judges maintained that they were the best judges of insanity: *R* v *Steel* (1787) 1 Lea 451; *R* v *Goode* (1837) 7 A & E 535,536,538. Incidentally, Tiberius when attempting to disprove a false claim to the throne could not get the claimant to trip up until he showed that the claimant did not possess that delicacy of constitution which a prince might well have.

5 The provision is an enabling provision. Therefore if the trial judge thinks fit to order a view of the *locus in quo* when that is unnecessary or prejudicial to the accused, an appeal may be well grounded: *Loo Lau Chai* v *PP* [1963] MLJ 401. See also *Manager, Tuborg (Malaysia) Sdn Bhd* v *PP* [1990] 2 MLJ 173. *Cf* RSC Ord 35, r 5 and the Schedule to Act No 16 of 1993. The provisions touching real evidence in the Criminal Procedure Code (Cap 68, 1985 Rev Ed) are inconsequential. S 210 accepts that demeanour of the witness is real evidence.

of those means intended to be used or which may be used for the purpose of recording that matter.

The presence or existence of marks, letters, or figures is one indicium of a document. A piece of blank paper, not bearing marks, figures or letters is not a document. But what if marks have been made on it with invisible ink? Perceptibility of impression, namely, the marks, letters or figures seems to be implied or assumed; but as this is not expressly captured, it should be resisted, as the common law has resisted it. Perceptibility and reproducibility are bosom companions. Although the letters, marks and figures may not be perceptible, it should be sufficient that they can be rendered perceptible, that they are "capable of being read". In an old English case, the court had no difficulty in regarding a sealed envelope as a document even though the writing contained inside was not, without more, perceptible to the eye.[6] The same principle ensures that paper on which marks occur which are invisible but which can be made perceptible is a document.

This need not be carried to the length of including the equipment for reproduction within the definition of the document. In *Grant* v *Southwestern & County Properties Ltd*[7] it was argued that the need to interpose an instrument for reproduction precluded a matter expressed upon a substance being a document for the purposes of discovery. But Walton J thought it quite clear that "the mere interposition of necessity of an instrument for deciphering the information cannot make any difference in principle. A litigant who keeps all his documents in microdot form could not avoid discovery because in order to read the information extremely powerful microscopes or other sophisticated instruments would be required. Nor again, if he kept them by means of microfilm which could not be read without the aid of a projector."[8] In *Senior* v *Holdsworth, ex p Independent Television News Ltd,*[9] a film was held by the Court of Appeal to be a document for the purposes of a subpoena in the County Court. Discovery of such a film could therefore be ordered and although under the discovery rules, the equipment for reproduction could not, the court boldly claimed an inherent jurisdiction to order the holder of the film to provide such equipment with costs being paid by the applicants for discovery. In *Derby* v *Weldon (No 9)*[10] a computer database was held to be a document. To resolve the technical problem that such a document might have to be fetched from several places, it was held that the court would have regard to the possibilities of corruption.

If the meaning of section 3 is that there is a document so long as it can be rendered perceptible, there will be no practical difference between

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6 *R* v *Daye* [1908] 2 KB 333.

7 [1975] Ch 185.

8 At 197. *Glyn* v *Weston Feature Film Co [*1916] 1 Ch 36is probably now of doubtful authority.

9 [1975] 2 All ER 1009.

10 [1991] 2 All ER 901.

section 3 of the Evidence Act and section 378(3) of the Criminal Procedure Code. That latter provision, occurring in specific legislation, alone will suffice in criminal trials according to its terms. It says that for the purposes of the hearsay exceptions in that Code, a document includes any map, plan, graph or drawing; any photograph; any disc, tape, sound-track, or other device in which invisible images are embodied, any film, negative, tape or other device which is capable of being reproduced. Any disc, tape, sound-track or other device containing invisible images which are capable of being reproduced will also be documents within the meaning of section 3, provided we do not insist on explicitness of perception. That a document should be similarly defined whether for purposes of civil or criminal proceedings, and whether in the same criminal proceedings the use is as admissible hearsay or some other use, is a considerable advantage.

The existence of a substratum, namely a substance, on which the marks, letters, figures are recorded is another indicium of a document. Any substance will do; as Darling J once said, "it is a document no matter upon what material it be."[11] But substance, although it can be anything, must mean something capable of bearing marks, figures and letters, whether or not designed to do so.[12] Brown argues that "An oral conversation is not a document, for although data are transferred from speaker to listener, the transferring medium (the air) does not record the data; the speech is merely a transient disturbance of the air molecules."[13] Similarly, "a television broadcast is not a document, as the medium through which it is transmitted cannot record the electromagnetic radiation passing through it."[14] But suppose I project by laser light some defamatory material across the sky. Surely, that constitutes a libel. Surely, there is little difficulty in seeing that the writing in the sky is a document, though it persists but a while. That must imply that the sky is capable of recording the marks which I have made. The reason that the examples given in Brown's argument are not documents is really that speech is speech and that the making of marks by way of speech alone is not the making of a document.

Brown's argument essentially is that there can be no recording unless the substance on which the recording is made is fairly permanent or of fairly enduring quality. The argument thus interpreted, an oral conversation which is a transmission of data across space does not qualify as a document not because the air is incapable of recording the transmission but because it is incapable of recording it in a fairly permanent state, at least potentially.

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[11] *R* v *Daye* [1908] 2 KB 333.

[12] A cow is not designed to be substratum for the writing of a cheque but if it happens, no one will dispute that the cow with the writing is a document.

[13] *Documentary Evidence in Australia* (1988), at 9.

[14] *Ibid,* at 9.

Brown also supposes an electronic funds transfer between bank A and bank B.[15] A transmits electronic impulses by telephone line to *B.* Corresponding accounts are created in the respective computers of A and *B.* The actual transmission, the argument goes, cannot be a document, although the resulting accounts are. The actual transmission fails as a recording, being evanescent and lacking the attribute of relative permanence. If the recording must be potentially enduring, it follows that the substance must also be fairly enduring. This argument may be tested by asking whether the requirement of relative permanence serves any substantive law purposes. It implies that where a laser beam is used to write in the sky, the writing in the sky will fail to be a document with the consequence that the writer has not committed libel but then neither has he committed slander, since he plainly expressed his defamatory remarks in writing. This surely is an awkward stymie. For the purposes of the law of evidence, there is also no reason to impose this requirement. It simply means that upon destruction of the primary document, we will have to be content with secondary oral evidence. This will not open a door of liberality as cases involving transient documents are more often imagined than real. Where an electronic funds transfer is effected, a better explanation is available; the actual transmission is not a document, not for the reason suggested, but by virtue of the intention. The intention was not to create a document of transmission but to effect a funds transfer, by the creation of corresponding credit and debit accounts. In any case, the document of transmission would not be reproducible and not being capable of inspection, must fail to be a document.

A third indicium of a document is that it is a recording of expression or description. The marks and so on are used to express or describe. This is probably the most controversial part of section 3. It is capable of bearing several meanings. On one view, expressing or describing is different from identifying or inscribing. If a stone contains a mark or engraving, whether left by nature or inscribed by man, that would not, on this view, be a document. The mark or engraving or inscription identifying that stone would not have been made to express or describe a matter which matter is now before the court.[16]

The term "inscribed chattel" was coined by the great Wigmore as a fitting expression of this difference.[17] But Wigmore himself was unhappy with the distinction, accepting it only as a counsel of despair. A clear instance of its application is the Australian case of *Commissioner of Railways (NSW)* v *Young*;[18] but there was neither cause nor reason to apply the thesis in

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[15] *Ibid,* at 13.

[16] In fact, *Burrell* v *North* (1847) 2 Car & K 680 refutes it.

[17] *Wigmore on Evidence* (3rd ed, 1940) vol IV, 1182, at 321-323.

[18] (1962) 106 CLR 535. *Cf Orell* [1972] Crim LR 313; *Tremlett* v *Fawcett* (1984) TLR 551.

that case and the case may be better explained as a warning against using hearsay to lay a foundation for the introduction of real evidence. In a trial for negligence, the defence was that the deceased, being drunk, had caused his own death. A doctor testified that he took a sample of the deceased's blood and placed it in a jar on which he affixed a label containing the name of the deceased. A senior government health analyst testified that he performed an analysis of the blood contained in that jar. The jar itself, in particular the label which identified its contents was not produced and the trial judge ruled that oral secondary evidence could not be received as to the contents of the label with the result that the link between the sample and the analysis could not be made. The High Court held that the jar need not be produced since the contents of the label were identificatory or inscriptory. The jar was an inscribed chattel, not a document, and therefore oral evidence could be given in order to describe its condition and particularly to identify it, in the same manner that oral evidence may be given to describe the condition of an article when there is a question as to its manufactured condition. The result that there was a proper chain of identification was no doubt correct. But there was in fact no need to invoke the "inscribed chattels" thesis. The question was whether oral evidence could be given to show that the same jar which the doctor sent off was the jar which the analyst received. As will be shown, unless the substantive law requires this to be in writing, any original evidence, and not solely documentary evidence, may be adduced to show that the same jar was transmitted. There was no question of invoking the best evidence rule and there was therefore no need to use the "inscribed chattels" thesis to escape the best evidence rule. The whole contention that secondary evidence could not be given of the contents of the label was misconceived.

On another view, the terms "express" and "describe" might be read as implying communication of thought; so that a marking which does not communicate thought is no document.[19] This touchstone is traceable to Best, who, in formulating it, was concerned to answer a particular inquiry of Bentham. When Bentham first proposed to distinguish real evidence from personal evidence, he preveniently created the problem of distinguishing real evidence from documentary evidence, which he cursorily dismissed in these sanguine terms:

> Imprinted upon any subject-matter of property, the proprietor's name at length would be unquestionably an article of written evidence: no less so the initials, as in the case of G.R. for George Rex. But when instead of the G.R. comes the *broad arrow* on timber, or the *strand*

[19] See Windeyer J in *Commissioner of Railways (NSW)* v *Young* (1962) 106 CLR 535 at 557.

> in sail-cloth, then comes the doubt (happily altogether an immaterial one) as between written and real evidence.[20]

Bentham's successor, Best, suggested this solution.[21] It all depends, Best said, on whether you are communicating or not. Are you conveying thought? If so, that which you have created is a document. Documents are:

> material substances, on which thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, milkmen, *etc,* indicate by notches the number of loaves of bread or quarts of milk supplied to their customers; the old exchequer tallies, and such like, are documents as much as the most elaborate deeds.[22]

Thus models and drawings are not documents since they are actual and not symbolical representations.

But case law is not as narrow as Best's suggestion. A photograph has been held to be a document.[23] There may not be letters and writing may be absent but there will be figures and marks; and though not communicating any thought but capturing personal features, a photograph seems rightly denominated a document.[24] As Gulson points out, the only difference in Best's distinction is a difference of degree, not of kind; a matter of direct or indirect communication.[25] A document which conveys thought does so directly. A document which bears actual representations still conveys thought, only indirectly.

Neither the "inscribed chattels" thesis nor the distinction between communication and representation seems persuasive. The terms "express" and "describe" in section 3 should be given their widest meaning, even as the illustrations accompanying the provision appear to intend.[26] "An inscription on a metal plate or stone is a document". This manifestly denies the "inscribed chattels" thesis.

Another indicium of a document is that the marks, letters or figures found in it must be intended to be used or are such as may be used for the purpose

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20 *Ibid,* at 691.

21 *Prin Law Ev,* § 215, as cited in Chamberlayne, *A Treatise on the Modem Law of Evidence* (1912), at 30. *Cf* Darling J's judgment in *R* v *Daye* [1908] 2 KB 333; *Sturge* v *Buchanan* (1839) 10 A & E 598 at 604-605.

22 *Ibid.*

23 *Lyell* v *Kennedy (No 3)* (1884) 50 LT 730.

24 In *Harjit Singh* v *R* [1963] MLJ 287, the court treated an X-Ray photograph of a fractured skull as a document.

25 *Philosophy of Proof* (1905).

26 See *Mohamed Syedol Ariffin* v *Yeo Ooi Gark* [1916] 2 AC 575 on the significance of an illustration.

of recording conveyances of thought. If intended to be used, it will not matter that conventionally the marks employed would not be so used to record a matter. Conventionally, stones will not be used to express a fact or matter. But if intended so to be used, the matter as described will be a document.[27] Marks which are conventionally used to express a matter will constitute a document; they certainly may be used for such purposes.

The intention is vital not only to make out a document but also to ascertain its nature. If two contracting parties intend to make a contract by tape, it may be argued to be a contract reduced to "writing". But if they intend merely to record their oral agreement, the document is merely documentary evidence of the oral contract. Without ascertaining the intention, it will be impossible to make out which is the case. An alternative view maintains inviolate the distinction between speech and writing.[28] A recording of a statement on tape continues to be speech, and not writing. It follows that the making of a contract by tape recording will be and can be no more than the recording of an oral contract; the intention is irrelevant. But the alternative view misses the point. Writing is no more than expressing a fact by certain conventional symbols, whether that fact is also articulated or not. When a party records his oral statements intending that recording to be his writing, he is simply employing another set of conventional symbols to write his statement. In *R* v *Mills*[29] this analysis is adopted. As Winn J said: "In this case, the police constable set a machine to perform a function which otherwise would have been performed by a pen or pencil in his own hand."[30] Therefore, he might use the "written" record produced by that piece of mechanism in order to refresh his memory.

The disjunctive "or" has perhaps another significance. It also suggests that the test of whether a thing is a document is objective and not subjective. A document created by accident is still a document. Significant also is the absence of reference to human agency. A document created without direct human agency is not less a document. Suppose a radar which is monitoring the approach of various ships to the harbour. The bleeps which represent them and which are made on the screen are created without direct human agency. But the composite of screen and bleeps will be a document.

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27 Arguably, Joshua's twelve stones which were to serve as a memorial to the Israelites of God's deliverance of them from Egyptian bondage would not be a document since they would not be expressing or describing a matter, although they would be intended to inspire recollection of the matter.

28 In Punjab, the term "writing" is defined and the definition excludes a recording of speech: *Rup Chand* v *Mahabir Prasad* AIR 1956 Punjab 173.

29 [1962] 3 All ER 298.

30 *Ibid,* at 301.

B. *Meaning of "Documentary Evidence"*

The existence of a document makes possible an issue of documentary evidence. To constitute documentary evidence, the document, whose definition has been elaborated, must be inspected by the trier of fact. Para (b) of section 3 explains that evidence includes all documents produced for the inspection of the court: such documents are called documentary evidence. If there is a document and it is produced for the court to see, the evidence presented is documentary evidence. A document which is not produced cannot raise an issue of documentary evidence. In those circumstances where the document need not be produced, and oral and original evidence of its contents is permissible, there is merely oral evidence, not documentary evidence.

The purposes for which the document is needed are clearly important. To show that the document existed, or that there was such and such a document, would not require court inspection. No issue of documentary evidence would be engaged. If it is alleged that someone stole my bill of exchange, what is at stake is the existence and condition of it. There should be no need to require its production in court. Without producing it I should be able to testify that I had it in my possession and that the accused stole it from me.[31] Again, where an action is brought for conversion of a cheque, oral evidence may be given of the existence of the cheque.[32]

But section 62(3) distinguishes the existence or condition of a material thing other than a document. So, can it be said by implication that the existence and condition of a document is also a matter of documentary evidence? The principle of statutory interpretation that a definition section is not to be given substantive effect is helpful. Conversely, a substantive section ought not to be read as having a definitional effect, unless clearly intended to be so. If section 3 is paramount, the contrary implication in section 62(3) may be suppressed.[33] Whereas therefore the contents of a document represent documentary evidence, the existence and condition of a document should not raise an issue of documentary evidence.

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[31] See *R* v *Aickles* (1784) 1 Lea 294, 297, 300.

[32] See also Taylor, *A Treatise on the Law of Evidence* (10th ed, 1906), ed Hulme-Williams, at 316. In *Jolley* v *Taylor* (1807) 1 Camp 143, when dismissing an objection in a trover action to evidence of certain promissory notes being given orally, Sir James Mansfield CJ says at 144: "A notice here appears to me to be unnecessary. I can make no distinction as to this purpose between written instruments and other articles – between trover for a promissory note, and trover for a waggon and horses." See also *Bucher* v *Jarratt* (1802) 3 B & P 143; *Davis* v *Reynolds* (1815) 1 Stark 115; *cf Cowan* v *Abrahams* (1793) 1 Esp 50.

[33] The same argument applies to s 67 which refers to the existence or condition of a document and envisages that secondary evidence may be given of these matters.

One consequence of section 3 read with section 62(3) is that documentary evidence and real evidence are antipodean concepts. They are contraries and one contrary must expel the other. If a thing is a document and its contents are in issue, the document when inspected is documentary evidence and can never be real evidence. This affects the way we look at recordings. The contents of a tape recording will necessarily be regarded as documentary evidence immediately it is a document produced for inspection. In those cases in which the existence of the recording purely as a material object is of interest, the recording when produced for inspection will be real evidence. But where, as is more often the case, its contents are in issue, they will be documentary evidence. This result seems inescapable. As has been shown, Best's distinction between communication and representation and therefore between a recording of speech and a recording of personal conduct as an actual representation, rather like a drawing, is not viable. It is impossible to argue that a recording of acts is akin to a pictorial representation and therefore not a document. This result is sadly indiscriminate. In many cases, the existence of a medical condition, of the amount of alcohol in the blood, of the chemical composition of a thing, is determined, measured, and assessed by a machine which computes and yields a print-out. Section 3 constrains us to denominate that print-out a document and its contents documentary evidence. Likewise, a bleep on a radar screen which shows the position of an object which is being monitored will be documentary evidence. In *PP* v *Ang Soon Huat,*[34] the court admitted certain computer print-outs which were chromatograms and spectograms as real evidence. With respect, these were documentary evidence. If the provisions of the Evidence Act had been kept in view, the court would not have arrived at the characterization at which it did arrive. The result was correct. This documentary evidence was relevant as establishing original facts and admissible. Characterization as documentary evidence or real evidence has nothing to do with relevance of the facts which the evidence establishes.[35] Real evidence, by definition, must always be original evidence, since real evidence is evidence which constitutes the fact which it proves. But documentary evidence may be hearsay[36] or original evidence or circumstantial evidence[37] or evidence of consistency[38] or aids to refreshing the memory. Had the court's attention been directed to section 3, the correct characterization would have followed.

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[34] [1991] 1 MLJ 1.

[35] Neither do ss 93 and 94. As Terrell Ag CJ says in *Boota Singh* v *PP* [1933] MLJ 195, at 196: "These sections ... only deal with the method of proof and do not admit the admissibility of the document in question."

[36] *Aw Kew Urn* v *PP* [1987] 2 MLJ 601.

[37] See, *eg, R* v *Haworth* (1830) 4 Car & P 254; *Gaskill* v *Skene* (1850) 19 Jur (NS) 275.

[38] See *Sekhon* (1987) 85 Cr App R 19; *Mills & Rose* (1962) Cr App R 336.

The restrictiveness of section 3 is a definite shortcoming. Why should documentary and real evidence be antipodean concepts? At common law, there is some recognition that a document may be real evidence. Its contents may be real evidence as well when inspected by the trier of fact. In *Garner* v *DPP*[39] the English Court of Appeal held that a print-out of a breath-testing device used to ascertain the proportion of alcohol in a breath specimen was real evidence. In the words of Stocker LJ, the print-out was "an admissible document at common law as representing real evidence."[40] There is also ample recognition that a video or other recording of a relevant fact or fact in issue is real evidence.[41]

This appears to be a much sounder position to take, one consonant with principle and not just derived by inspiration from pragmatism.[42] But section 3 is uncompromising and nothing short of amending it can accommodate the common law position.

III. PRINCIPLE OF FREE PROOF

The role of documentary evidence is necessarily affected by a principle of free proof. One of the most striking illustrations of this principle is *Lucas v Williams & Sons.*[43] The Court of Appeal in that case allowed proof of infringement of copyright in a picture by oral testimony of a witness (the plaintiff) that he had seen the picture and that he had an engraving of the picture (which he produced) made under the painter's supervision and that a photograph sold by the defendants (which he produced) was an exact copy of the original picture. The court rejected the contention that the failure by the plaintiff to produce the original picture was fatal. Lord Esher MR said of the oral evidence of seeing the picture: "That is not secondary evidence, but original evidence. Different kinds of evidence may be used to prove the same fact, and this is another way of proving the fact that the picture sold is a copy of the original in respect of which there is copyright."[44]

Another interesting case is *Hunt*[45] where a charge was brought against the accused for unlawful assembly and the accused was convicted largely upon the oral evidence of witnesses as to what was inscribed on the banners which had been carried, Abbott CJ confirmed its reception in these terms:

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[39] (1990) 90 Cr App R 178.
[40] *Ibid,* at 183.
[41] See the discussion *infra.*
[42] See YL Tan, "As Good As Real" (to be published).
[43] [1892] 2 QB 113.
[44] See also *Ex p Zaman Shah* (1911) 11 SR (NSW) 343.
[45] (1820) 3 B & Ald 444 at 566.

> If we were to hold that words inscribed on a banner so exhibited could not be proved without the production of the banner, I know not upon what reason a witness should be allowed to mention the colour of the banner, or even to say that he saw a banner displayed.[46]

The result was to allow oral evidence of the contents of a document, namely the writing on the banners. This decision makes perfect sense as an application of the principle of free proof; the oral evidence was not secondary evidence but original evidence.

A more modern case is *Owen* v *Chesters.*[47] An arrested motorist had provided two specimens of breath for test and analysis by an intoximeter. As the print-out had not been served on the motorist as required by the statute, it could not be admitted as evidence. A police officer testified as to the readings on the intoximeter which he had observed. On a case stated, Watkins LJ held that that oral evidence was admissible.[48] It was direct evidence of what the police officer had seen recorded on the intoximeter. This holding implies that oral evidence could be given of the contents of a document, the reading on the intoximeter constituting a document.

Again, in a question whether a marriage was contracted, the party alleging the fact of constitution of marriage may adduce oral evidence of witnesses to the ceremony. He may rely on subsequent conduct raising a presumption of marriage. Or he may put in a marriage certificate as documentary evidence of the marriage.[49] There is no constraint on the type of evidence which may prove the relevant fact of marriage.

Admittedly, *Hunt's case* is not regarded by some writers as an illustration of free proof. Some call it a leading case but by their explanations create doubts as to why it should be a leading case.[50] When that case is explained in effect as anomalous, because the writing is said to be in the nature of speeches, why should it be a leading case?[51] But the explanation vouchsafed seems to agree better with the tenor of Abbott CJ's judgment.

Others such as *Phipson* place such cases as exceptions to the principle requiring constitutive writing to be proved by the writing itself as the local section 93 also requires.[52] But these exceptions hardly look like exceptions

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46 *Ibid,* at 575.

47 [1984] RTR 191.

48 The statute merely provided a method of proof by the print-out which would avoid the trouble and expense of calling as a witness the police officer who was present when specimens were provided by the accused: see *Gamer* v *DPP* (1990) 90 Cr App R 178 at 186.

49 *Limerick (Countess)* v *Limerick (Earl)* (1863) 32 LJ P & M 92. *Cf Tan Geok Kwang* v *PP* [1949] MLJ 203 at 205.

50 See Taylor, note 32; Nokes, "Real Evidence" (1949) 65 LQR 57. For a description and critique of their explanations, see YL Tan, "As Good As Real", *supra,* note 42.

51 See Taylor, note 32.

52 *Phipson on Evidence* (14th ed, 1990), at 1011-1019.

when they are so numerous in quantity and disparate in quality. On the other hand, as illustrations of the principle of free proof they make perfect sense.

To concede the principle of free proof is not to deny the existence of some bias here and there. Sometimes there may be attempts to insist on production of real evidence.[53] As late as the 1940s, Viscount Caldecote CJ was provoked to protest that:

> it is much too late, even if it was ever possible, to suppose that evidence of the nature of chattels cannot be given by witnesses who have seen them and speak to their condition. To suppose that all the articles about which issues are raised in a great variety of cases ought to be produced in court would lead to consequences which would show how impossible the suggested rule would be in practice.[54]

A more recent case is *Uxbridge JJ, ex p Sofaer.*[55] The charge concerned aircraft parts for export to South Africa which the prosecution claimed were usable aircraft parts but which the defence claimed were scrap. The prosecution took photographs of the offending goods before destroying them. Those photographs which were tendered were complained of as being inadequate for arriving at a proper conclusion as to the nature of the offending goods. The Divisional Court, having also inspected these photographs, held that since there was such a large quantity of parts packed or heaped in crates, all one could do would be to look at the parts and say: "Are they serviceable or are they not?" The examination of every single part by an expert, which was what the defence was contending for, was unrealistic and impossible. Therefore no prejudice was occasioned by the destruction of the evidence.[56]

The principle of free proof not only removes obstacles of proof but manifests itself in the refusal to draw adverse inferences from the employment of one particular type of evidence as opposed to another.[57] This is

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[53] The old case of *Chenie* v *Watson* (1797) Peake Add Cas 123 where the court refused to accept oral evidence as to the size of a bushel measure is not really a case of real evidence. Lord Kenyon evidently treated the bushel measures as documentary admissible hearsay (rightly because these were not the actual measures used in the transaction in issue). The court insisted on production of the measure because of the analogy to the case of a tradesman attempting to give evidence of memoranda made in his book, without producing the originals. The fact that a coroner must view the body has to do with the duties laid upon him.

[54] *Hocking* v *Ahlquist Bros Ltd* [1944] 1 KB 120 at 123-124.

[55] (1987) 85 Cr App R 367.

[56] The photographs were obviously real evidence. It is a pity that Croom-Johnson LJ lapsed into the language of documentary evidence at 377 of the report.

[57] The foundation for this is s 116(g). See also *Munusamy* v *PP* [1987] 1 MLJ 492. The court will sometimes refuse to draw adverse inferences from non-production of documentary

not to say that there are no exceptions. There clearly may be proper cases in which when real evidence should be forthcoming, oral evidence is proffered instead. The possibility is acknowledged by Lord Esher MR: "If the jury were not satisfied, it would be open to them to say, "You could have produced better evidence; you have not produced the original picture; we will not act upon this evidence, though it is legal evidence."[58]

A definite preference for documentary evidence is nowadays inescapable. The oral proof was traditionally more important. The insistence on oral evidence was a particularly striking feature of the common law. In civilian systems, nothing is more clearly agreed upon than the deficiency of oral testimonial evidence. It invites greater or lesser reserve because to a smaller or greater extent, it is perceived by them as depending upon the frail powers of observation and recall of men. Hence its inferiority to written evidence. But in the common law, oral evidence was the primary source of proof. Of all the means of proof, it enjoyed pre-eminence, at least traditionally; the commitment of the common law to adversarial trial (compurgation being its precursor) being in no small way responsible for this slant. But times have changed and documentary evidence has assumed a more important role and remarkable inroads are being made in Singapore. Examination-in-chief may be required to be reduced to writing before the trial. A witness who cannot appear in the trial may make a deposition. Written admissions and decisory oaths are acceptable. Written affidavit evidence is in certain circumstances available to the judge.[59] This is a definite trend and for good reasons. The use of documentary evidence may shorten the course of a trial. If informed ahead of evidence-in-chief, better preparation for cross-examination is facilitated. Surprises are minimized. Clients are put at less risk of mismanagement of trial proceedings. More expeditious trials in turn lessen the costs of litigation and provide increased access to court. In short, the changes introduce a bias in favour of documentary evidence but come short of eliminating the principle of free proof.

Section 61 of the Evidence Act seems to be a negation of the principle of free proof. It says that all facts, except the contents of documents, may be proved by oral evidence. It must naturally be read with section 66 which requires the contents of a document to be proved by production of the document. The combined operation of both provisions read literally will preclude proof by oral evidence of the contents of a document in a case

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evidence which is confidential in nature: *MMC Marketing Sdn Bhd* v *Syarikat Pengangkutan Sdn Bhd* [1988] 3 MLJ 277.

[58] *Lucas* v *Williams & Sons* [1892] 2 QB 113 at 116.

[59] Especially in civil proceedings. See, *eg, Tan Bok Choon* v *Tahasan Sdn Bhd* [1987] 1 MLJ 433; *Foo Yin Shung* v *Foo Ngit Tse & Bros Sdn Bhd* [1989] 2 MLJ 369 at 371.

such as *Lucas v Williams & Sons;*[60] or proof of the contents of the banners in a case such as *Hunt.*[61] This would be an awkward result.

Sections 61 and 66 are embodiments of the best evidence rule. That rule too, unless properly understood, will negate the principle of free proof instead of complementing it, as it should. One can understand why the best evidence rule is necessary in the case of admissible hearsay. To admit oral evidence of admissible written hearsay would be to aggravate the problems of hearsay. In these circumstances, insistence on the best evidence rule is clearly right. In *R* v *Hinley*[62] Maule J refused to allow oral evidence of the directions written on a hamper which was alleged to have contained some of the stolen goods. The hamper had been sent by a son, charged with theft, to his father, charged with knowing receipt. The reason for refusing was this, the production of the hamper would be so much a better way of proving it, than having it from the memory of anyone else. The direction on the hamper could only be relevant as admissible hearsay to prove the identity of the recipient. Maule J's comments are an insistence on the best evidence of the hearsay statement and are entirely correct and necessary to avoid the problems of hearsay.

The case of *Darby* v *Ouseley*[63] is similar. In that case the Court of Exchequer Chamber refused to admit oral evidence that the plaintiff's name appeared in a book of the Roman Catholic Society. That evidence could not be admitted without proof of the book. The plaintiff brought a libel suit against the defendant for calling him a rebel and defence counsel's purpose in adducing the evidence was to justify the libel. The rejection of oral evidence was necessary to avoid aggravating the problems of hearsay, for the appearance of the plaintiffs name in that book was admissible, if at all, as admissible hearsay of membership of the Society.

But where the contents of a document are original evidence, there is little danger of aggravating the problems of hearsay. There will be those cases in which the policy of the law will require constitution of a relevant fact or fact in issue by writing. In those cases, the writing will be the sole evidence or compulsory proof of the fact. But where the policy of the law does not require constitution by writing, then as the cases in the present view show, proof of the contents of a document may comprise oral evidence, which is original evidence. The best evidence rule merely prohibits proof of the contents of a document by secondary evidence and has nothing to say about original evidence. Suppose letters written by the accused to a third party are found which are original evidence of motive. These are clearly

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[60] [1892] 2 QB 113.

[61] (1820) 3 B & Ald 444, 566.

[62] (1843) 1 Cox CC 12.

[63] (1856) 25 LJ Ex 227. See also *R* v *Gay* (1835) 7 Car & P 230.

not required by law to be so constituted. If only the letters are available but the third party cannot be found, the best evidence rule will rightly preclude oral evidence of the letters being given by someone who has read them. But if that third party can be found to give evidence of what he read in the letters which were written to him, why should it be insisted that the letters themselves must be produced?[64] The third party would merely be giving original evidence of the motive as expressed in those letters. Anyone else who reads the letters afterwards and testifies to their contents would be giving secondary evidence, but not original evidence.[65] In *Harjit Singh* v *R*[66] Winslow J rejected the oral evidence of a medical officer who had examined an X-ray photograph of a skull fracture. This was rightly held to be secondary evidence of a document and inadmissible without a proper foundation being laid for its introduction.[67]

To accommodate the proof of the contents of a document by original evidence, section 61 should be read as follows: all facts, except the contents of a document *which is produced for inspection,* may be proved by oral evidence. A document which is produced for inspection may be admissible hearsay, original evidence or compulsory documentary evidence. If produced, section 61 read in this way requires the document itself to be produced. Thus read, section 61 will by no means constrain the rule of free proof. It will not be saying anything about free proof and about when documentary evidence should or must be produced. The way is clear to proving other facts (where the contents are original evidence) by oral evidence, which is original evidence.

A case of refreshing the memory is outside the reach of section 61. A witness who refreshes his memory from a document is not making the contents of the document evidence in the case. He is not offering them as proof of relevant facts or facts in issue. He is not proving the contents of the document. But a case of refreshing the memory is dealt with by section 161(3) which states that, for the purposes of refreshing his memory from a document, a witness may, with the permission of the court, refer to a copy of such document. The proviso is that there must be sufficient reason for the non-production of the original.[68]

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[64] See *Cheng Sink How* v *PP* [1953] MLJ 178 at 179.

[65] Likewise, a witness should be able to give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts. See the explanation and illustration accompanying s 146.

[66] [1963] MLJ 287.

[67] The statement that in these circumstances the fracture could not be proved without admission of hearsay evidence is mysterious. The X-ray would be real evidence of the skull fracture. No question of hearsay would be involved in its introduction.

[68] At common law, the best evidence rule extends to producing the original document for purposes of refreshing the memory or impeaching credit: *Jones* v *Stroud* (1825) 2 Car & P 196.

IV. SCOPE OF SECTION 93

There is a definite advantage in a restrictive reading of section 61. It will make it consonant with section 93 which is the only and the real constraint on the principle of free proof. The effect of section 93 is to make certain original documentary evidence the sole evidence allowed of a relevant fact or fact in issue. Section 93 confirms the desirability of putting a restrictive construction on section 61. A wide and contrary interpretation would make nonsense of section 93. If the effect of section 61 is that every time the contents of a document are in issue, that document must be produced, why bother to enact section 93?[69] Section 93 would be superfluous if section 61 had the effect of compelling proof of the contents of a document by the document itself.

Section 93 states:

> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself...

Its implication is that in any other case not within these two categories the writing if it exists will not be the sole evidence of the fact which it constitutes.

A. *First Limb*

Section 93 contains two limbs, the first of which looks like and has been accepted by many judges as an embodiment of the parol evidence rule.[70]

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[69] There is unfortunately little awareness of this in *Goh Leng Sai* v *R* [1959] MLJ 121. In *Teoh Kee Keong* v *Tambun Mining Co Ltd* [1968] 1 MLJ 39 at 42-43, s 93 was described as the best evidence rule; see also *Strother* v *Barr* (1828) 5 Ring 137.

[70] See, *eg*. *Tractors Malaysia Bhd* v *Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129. The Indian provisions are *in pan materia: Seow Kim Hoi* v *Wei Yin Chen* [1968] 2 MLJ 193 at 195. Murison CJ in *Somasundram Chetty* v *Lint Ham Kai* [1929] SSLR 64 thought that there was a difference between the English and the local law in so far as rules of equity would in England but not locally permit facts to be established by proof at large. He "recanted" in *Raman Chettiar* v *Sarkies* [1929] SSLR 128. The Straits Settlements Court of Appeal at length resolved the controversy in *NS Narainan Pillay* v *The Nederlandsche Handel Maatschappij* [1936] MLJ 227. Bucknill CJ said at 229: "the Evidence Ordinance of 1893 [cannot] be so construed as to oust the general powers [especially the equitable powers] possessed by this Court." See also Edmonds J at 249.

Suppose a contract has not been reduced to writing. It is an oral contract. Testimonial oral evidence certainly can be received as to its contents. The testimonial evidence is original evidence of a verbal act or of operative words.[71] But the first limb shuts out oral evidence as soon as that contract is reduced to writing.[72] It cannot be proved apart from the writing.[73] This is not a blanket prohibition on the reception of oral evidence. The exceptions are spelled out in section 94. Fraud may be proved orally. If accepted, the whole written contract may be set aside. Quite apart from the written contract, the existence of a oral collateral contract may be shown by oral evidence. If a secret trust is created, notwithstanding that the written terms show an absolute disposition, a separate oral agreement may be proved by oral evidence that that absolute disposition was intended to be subject to a condition precedent.[74] Section 21 creates another exception of sorts. Oral admissions may prove the contents of a document if certain conditions are fulfilled. If no exception exists, whether under section 94 or section 21, whoever asserts a written contract is bound to produce that in writing.[75]

The substance of the agreement, and not the form, is the touchstone by which to judge whether documentary proof is compulsory. In *Jones* v *Tarleton*[76] as an answer to a suit for trover, the defendant pleaded knowledge of the plaintiff of a general notice that all goods to be carried by the defendant were subject to a general lien. That portable notice was not produced at the trial (nor had a notice to produce been served); and the oral evidence was rejected because the notice, being in substance the basis of the contract between the parties, ought itself to have been produced. As Parke B said:[77] "As to the notice to produce, this was not a document with respect to which no notice to produce is necessary, like a notice to quit, but was an intimation of the terms of the contract between the parties, which cannot be proved unless a notice has been given to produce it, in the ordinary way."[78]

So also, when a corporation incorporated by charter is obliged by that charter to hold periodical meetings and its minute book contains an original entry of the business done at such a meeting, the written minutes are a

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[71] See, eg, *Doe* v *Price* (1832) 1 Bing 356; *Woodhouse* v *Hall* (1980) 72 Cr App R 39. *Cf Smith* v *Simmes* (1796) 1 Esp 330.

[72] See also *Ex p Parsons* (1883) 16 QBD 532; *Newlove* v *Shrewsbury* (1888) 21 QBD 41; *Morris* v *Delobbel-Flipo* [1892] 2 Ch 352.

[73] See also *Bonsor* v *Element* (1833) 6 Car & P 230.

[74] This reference is not intended to be exhaustive.

[75] Notice that the reduction of a statement of a party to a form of a document which is not a contract or disposition of property is not caught by s 93 unless the law requires its reduction.

[76] (1842) 9 M & W 675.

[77] *Ibid,* at 677.

[78] See also *Robinson* v *Brown* (1846) 3 CB 754 and *Whitford* v *Tutin* (1833) 6 Car & P 228 where by virtue of the contract between the company and the secretary having been reduced into writing, it was held that the writing, namely the books of the committee, must be proved.

reduction to writing of some agreement. The minutes will be tendered to show that the corporation did agree to that which it purports to have agreed to in the minutes. Not only is such evidence admissible; it is the only evidence which can be produced.[79]

Again, if the terms of a grant or other disposition of property have been reduced to the form of a document, regardless whether the law requires the reduction to the form of a document, the document itself is compulsory proof. Since there are few dispositions of property which are not required by law to be reduced to the form of a document, which is dealt with by the second limb, the scope of this part of the first limb is extremely limited.[80] But the principle is the same. So, where the plaintiff landlord sued his tenant for injury to his reversion, the plaintiff must prove the terms of the leasehold by the written agreement.[81] So, the lease must be produced to prove the rent, the premises leased, the names of landlord and tenant and the terms and conditions of the lease.[82]

There must be a reduction to writing.[83] Reading from minutes the terms of a lease to which the lessee assented would not be a reduction to writing.[84] Again, where a new tenant agreed to hold according to the former written terms but orally agreed as to the duration of the lease, the duration would not be reduced to writing and may be proved by oral evidence.[85] Again, there might be an oral tenancy incorporating certain terms in writing as to the cultivation of the land; in which case, an alteration in the written terms as to an immaterial term cannot affect the contract.[86] In *Lockett* v *Nicklin*[87] the defendant ordered goods by a letter, which did not mention any time for payment. The plaintiff sent the goods and an invoice. The Court of Exchequer Chamber held that oral evidence of the credit terms

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79 See Lord Blackburn in *The Lauderdale Peerage* (1885) LR 10 Sc & Div 693 at 701. (On this point, there is no difference between English law and Scottish law.)

80 The bill of lading in *Borneo Co (M) Sdn Bhd* v *Penang Port Commission* [1975] 2 MLJ 204 is an example. See also *Re AEG Unit Trust (Managers) Ltd's Deed* [1957] 1 Ch 415.

81 *Cotterill* v *Hobby* (1825) 4 B & C 465. See also *Fenn* v *Griffith* (1830) 6 Bing 533; *R* v *Inhabitants of Castle Morton* 3 B & Ald 588.

82 Best CJ in *Strother* v *Barr* (1828) 5 Bing 137 at 153.

83 Notice that the contract may be contained in several documents: *K S Panicker* v *Indian Overseas Bank Ltd* [1959] MLJ 270. In *Hussey* v *Home-Payne* (1879) 4 App Cas 311 the purported contract contained in certain letters was shown to be incomplete by the occurrence of subsequent oral negotiations as to an important term.

84 *Trewhitt* v *Lambert* (1839) 10 A & E 470. Similarly, a written paper containing the terms of a lease was delivered by the auctioneer to the bidder, not being signed by any party, was "perfectly collateral to the taking, and was no more than if the auctioneer had told the defendant on what terms he was to hold, and was not like an original minute.": *Ramsbottom* v *Tunbridge* (1814) 2 M & S 434.

85 See *Hey* v *Moorhouse* (1839) 6 Bing NC 52.

86 *Falmouth (Earl)* v *Roberts* (1842) 9 M & W 469.

87 (1848) 2 Ex 93.

was rightly admitted. The contract was partly written and partly oral. The plaintiff could adduce oral evidence of what the oral terms were.[88] In *Eden* v *Blake*[89] a sale by auction was concluded after a clarificatory statement was made by the auctioneer that the printed catalogue contained a mistake and that the item would be sold as having plated fittings. It was held that the terms of the contract existed only in parol and the subsequent signing of the printed particulars made no difference. The plaintiff buyer could therefore prove the oral contract inspite of the printed particulars. In *Stones* v *Dowler*[90] the defendant made a written proposal to the plaintiff. In the course of conversations afterwards, the plaintiff assented to the terms in the written proposal but he also intimated that the old engine was not to be removed until the new was fitted up. Since the written proposal had not been accepted, *simpliciter,* the real contract was by parol.

There are cases in which the courts have held that although the bought and sold notes constitute the contract,[91] yet where there are no bought and sold notes, the broker's book entry may be resorted to.[92] These cases do not detract from the proposition in the first limb of section 93. Where bought and sold notes are absent, the contract is oral and the book entry is the memorandum.[93]

The importance of proper analysis cannot be over-stated. Careful analysis would have prevented injustice in *Tea Siew Peng* v *Guok Sing Ong.*[94] In that case an option in writing, granted upon payment of an option price, provided that it was exercisable upon payment by a specified date of 10% of the purchase price. Later the parties orally agreed that the option price would be deductible from the 10%. The purchaser, acting upon this oral agreement, tendered a sum of 10% of the purchase price less the option price. That, both the first instance and appellate courts held, was a bad tender. No cognizance of the oral agreement was possible with the unfortunate result that the purchaser lost his bargain. Both courts assumed that an option in writing was within the scope of section 93. This could only happen if either the option was a contract or a disposition of interest in land. But if an option was an irrevocable offer (reduced no doubt to writing), it would have been open to the plaintiff to show what the true terms of the offer,

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[88] See also *Hiap Soon & Co (Pte) Ltd* v *Chip Hong Trading Co* [1986] 1 MLJ 127.

[89] (1845) 13 M & W 614.

[90] (1860) 29 LJ Ex 122.

[91] *Hawes* v *Forster* (1834) 1 *M & Rob* 369; *Thornton* v *Kempster* (1814) 5 Taunt 786; *Thornton* v *Meux* (1827) M & M 43.

[92] *Townend* v *Drakeford* (1843) 1 Car & K 20.

[93] Where the sale is effected through a broker who issues bought and sold notes, but the notes not being signed do not constitute a memorandum against the buyer, the signed book entry of the broker will be a sufficient memorandum of the contract made by admission: *Thompson* v *Gardiner* (1876) 1 CPD 777.

[94] [1983] 1 MLJ 132.

to be accepted by performance, as modified were. The contract would not exist in writing alone but partly in parol, namely that the earlier deposit would count as part of the option moneys. In truth, the option is capable of several perspectives. This is what the recent case of *Spiro* v *Glencrown Properties Ltd*[95] shows. Although Hoffman J in that case preferred to conceptualise an option as a contract rather than an irrevocable offer, he accepted that a degree of contextualization was possible. The option may be regarded as a contract for some purposes and as an irrevocable offer for other purposes. Why should it not be regarded as an irrevocable offer for purposes of section 93? If that had been realized, the manifest injustice in the local case could have been averted.

Careful analysis for purposes of section 93 may be of considerable practical importance. It often happens that an intended insured is assisted by the insurer's agent in filling out the proposal for an insurance policy. He states that he has made previous claims on other motor vehicle policies but as these were made more than three years ago, the agent ignores them in the written proposal. Or, he states that he recently had a minor road accident and the agent ignores it in the written proposal. Where the insurance policy provides that the truth of the statements and answers in the proposal shall be a condition precedent to liability under the policy, a majority of the Federal Court has held in *China Insurance Co Ltd* v *Ngau Ah Kau*[96] that section 93 precludes any attempt to contradict the written statements that no claim had been made under any motor vehicle policy. The result seems harsh. The insured who is without fault loses his cover. The insurers whose agent filled out the proposal and decided against disclosure succeed without merit in avoiding the policy.

The majority apparently thought that in such cases there is a reduction into writing of the statements and answers as promissory conditions. But it is not the statements and answers but the truth of these statements and answers that is the promissory condition. As to the truth of these statements and answers, section 93 has nothing to say. The truth of these statements and answers has to be ascertained by examination of the context in which, and the intention with which, they were made. The fact that the amanuensis was the insured's agent will be material in determining the truth or falsehood of the statements and answers. If the amanuensis was the insurer's agent, chances are the statements will be true since the insurer would have accepted them as true as a consequence of imputing the agent's knowledge to the principal. This exercise will involve some contradiction of the written answers and statements. But there will be no contradiction of the terms of the policy. The dissenting judgment of Suffian FJ is substantially to this

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95 [1991] 2 WLR 931.

96 [1972] 1 MLJ 54.

effect. With respect, it is superior. The majority may well have applied the reasoning in *Newsholme Bros* v *Road Transport and General Insurance Co Ltd*[97] where the insured was not allowed to rely on the fact that he had given orally the true answers which his agent either mistakenly or negligently transcribed into false answers. But as appears from Scrutton LJ's judgment there was really no need to refer to the parol evidence rule. Only Greer LJ resolved the issue partly in terms of the parol evidence rule. That might be reasonable where, as it happened, the statements and answers are stated as forming the basis of the contract. Then not only their truth but the actual shape and description of the statements and answers must be ascertained from the written contract alone. Even so, the term that the statements and answers will form the basis of the contract arguably does not add anything new apart from reinforcement that the truth of these statements and answers will be a promissory condition. This might explain why Scrutton LJ saw no need to refer to the parol evidence rule. If the question was whether the statements were true or false, the parol evidence rule should be immaterial.

B. *Second Limb*

The second limb of section 93 refers to matters which are required by substantive law to be reduced to writing. The Statute of Frauds is a law requiring effecting in writing in some cases. The effect of section 93 then is that an assignment of the equitable interest must be proved by documentary evidence, and no other.

There is clearly a vast and various host of statutes which compel reduction into writing. The provision that imposes a duty to reduce a charge to writing is an example.[98] The combined operation of that statute and section 93 will render that writing alone the evidence of the relevant fact. So if prosecutions must be brought within a stipulated time frame, and the prosecutor wishes to prove that that was the case, he must prove it by producing the written warrant to commit or apprehend.[99] Similarly, the record of conviction is the sole evidence of lawful custody under a sentence of imprisonment where statute directs the court to reduce the conviction to record.[100]

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97 [1929] 2 KB 53. *Cf National Enterprise Mutual General Insurance Association Ltd* v *Globe Trawlers Pte Ltd* [1991] 2 MLJ 92.

98 See also *R* v *Fearshire* (1779) 1 Lea 201. Civil claims may also be required to be reduced to writing: see *Doe d Welsh* (1847) 16 M & W 497.

99 *R* v *Phillips* (1818) R & R 368.

100 *R* v *Bourdon* (1847) 2 Car & K 366. See also *Inspector-General of Police* v *Alan Noor bin Kamat* [1988] 1 MLJ 260. S 124 of the Criminal Procedure Code which empowers a magistrate to record a confession imposes a duty to record in writing, if the power is exercised. Therefore parol evidence may not contradict the recorded confession: *R* v *Harris* (1832) 1 Mood 338. See also *Abdullah bin Awang Bangkok* v *PP* [1956] MLJ 90.

That a witness was not incompetent by virtue of his bankruptcy is required to be proved by his certificate of bankruptcy and release.[101] Thus, also the issue and notice of trial indorsed will be the only evidence of the date of trial.[102] Statute may require that meetings and deliberations be drawn up and entered or recorded in a book.[103] That book consequently becomes the sole evidence of the meetings and deliberations.

A similar effect is created although the statute has not required that notice in writing be given, but merely provides that any notice which is necessary should be signed and take a particular form; it will be necessary to prove a notice complying with that form.[104] This results from a combination of statutory prescription of the form and section 93. The Bills of Sale Act (1878) Amendment Act 1882[105] is another interesting example. For the protection of impecunious debtors, the legislature laid down a form of bill of sale; and rendered any bill not drawn up in conformity to that form void. No doubt, this is a law requiring writing, and not only that, but writing in conformity with the prescribed form.[106]

Forgery cases are evidently similar. The English Forgery Act 1913[107] created a number of offences. One was the offence of possession of bank paper (commonly known as "Bank of Engraving" notes) intended to resemble and pass as genuine bank notes. Since no writing was required for the purposes of this offence, it could be prosecuted even without production of the bank notes, although they might have writing on them. But another was knowingly using or possessing paper upon which any such words, figures, *etc,* had been printed. Since by law the offence was constituted by the utterance of writing, the writing alleged to be a forgery must be produced.[108]

There is no restriction to written law. Where the law that requires reduction to the form of a document is unwritten law, that will satisfy the provision.

At common law, libel cases must be proved by production of the libel itself. This follows from the substantive distinction between slander and

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[101] *Goodhay* v *Henry* (1829) M & M 319.

[102] *Thomas* v *Ansley* (1806) 6 Esp 80.

[103] The requirement that the minutes shall be signed by the chairman at the end of the meeting does not mean that the signature must be affixed at the end of the proceedings themselves but merely defines the proceedings which he is to sign: *Southampton Dock Co* v *Richards* (1840) 1 Man & G 448; *Miles* v *Bough* (1842) LJ QB 74.

[104] *Miles* v *Bough* (1842) LJ QB 74.

[105] 45 & 46 Vict, c 43. As to differences between the English Act and the local Act, see *Fook Lee Tin Mining Kongsi* v *Gurdev Singh* [1952] MLJ 55.

[106] See *Fook Lee Tin Mining Kongsi* v *Gurdev Singh* [1952] MLJ 55 at 56.

[107] 3 & 4 Geo 5, c 27.

[108] See, *eg, Hall* (1872) 12 Cox CC 159; *Forbes* (1835) 7 Car & P 224; *cf Woods* (1922) 38 TLR 493. See also *Governor of Pentonville Prison, ex p Osman* (1990) 90 Cr App R 281 at 381. Similarly when it is sought to admit similar fact evidence of forgery: see, *eg, R* v *Millard* (1813) R & R 245; *R* v *Forbes* (1835) 7 Car & P 224.

libel. As soon as that is taken, the legal significance of the writing is established in that the intention must ordinarily be gathered from the writing itself,[109] unless explained by the mode of publication or other circumstances. It follows that a libel must be proved by the libel.[110] The importance of compelling proof by the libel appears also in the rule that:

> if the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to shew that the printing and publication were by direction of the defendant.[111]

What does section 93 say as to this situation? The answer is the same. The defamatory matter is required by the law of libel to be reduced to the form of a document; therefore libel must be proved by production of the libel; no one will quibble that strictly speaking this expression that the law of libel requires the defamatory matter to be reduced to a form of document is clumsy.

C. *is There a Third Category?*

Taylor when writing about the common law apparently thought that there was a third class of compulsory documentary evidence comprising "every writing not falling within the previous two classes (which are captured by section 93) when it is a matter of the existence or contents which is material to an issue between the parties and which is not a mere memorandum of some other fact."[112] If this truly was the common law, section 93 would be narrower; for this third class evidently is omitted from the provision. The principal authority relied upon by Taylor is perhaps *Boosey* v *Davidson.*[113] He deduces that "it is very doubtful whether the contents of handbills written or dictated at a meeting of conspirators can be proved by oral testimony";[114] but *Hunt's case*[115] would not fall within this third class because the contents, in Taylor's view, were in the nature of speeches. This submission of Taylor is hard to justify. This third class is non-existent. The authority relied on, when examined, proves to be an illustration of the second class, namely

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109 *Burden* (1820) 4 B & Ald 95.

110 See, *eg, Rosenstein* (1826) 2 Car & P 414; *Foster* v *Pointer* (1841) 9 Car & P 718; *Burdett* (1820) 4 B & Ald 95.

111 *Lovett* (1841) 9 Car & P 462, at 466. *Cf R* v *Johnson* (1805) 7 East 65.

112 *Supra,* note 32, at 317. See note 7 especially.

113 (1849) 13 QB 257. Doubted in *Gerapulo* v *Weiler* (1851) 10 CB 690 at 696.

114 *Supra,* note 32, at 317. See note 7 especially.

115 (1820) 3 B & Ald 444, 566.

that class comprising relevant facts or facts in issue which are required by law to be constituted in writing. A statute (5 & 6 Vict, c 45, s 11) provided that registration of a copyright was *prima facie* evidence of copyright. By virtue of section 16, the burden was upon a defendant wishing to prove prior publication to give notice stating when and by whom that was done. Clearly then, the prior publication was required by law to be proved by the prior publication itself. So when the court refused to allow oral evidence of prior publication but insisted that the actual prior publication was the sole evidence of prior publication, it was simply giving effect to the demand of the statute. Taylor, with respect, has mistaken the combined effect of the best evidence rule for the rule as to compulsory original documentary evidence.

D. *Qualification to Free Proof*

The importance of section 93 is as an exception to free proof. Free proof is excepted where the substantive law requires a matter or transaction to be constituted in writing. Then that writing alone is the requisite evidence. The corollary to that is obvious. If two parties reduce their contract to writing, that writing is not only the transaction concluded, but it is the evidence of it as well.[116]

This policy of section 93 in requiring some transactions to be constituted in writing is more substantive than evidentiary in nature. By insisting that only written evidence is receivable,[117] and therefore encouraging its preconstitution, nothing is lost in point of truth, as Bentham well puts it, while everything may be gained in point of permanence.[118] In addition, many other policies are sought to be advanced when the substantive law compels reduction into writing. By compelling the effecting of an assignment of an equitable interest in writing, it is sought to prevent fraud on trustees. In other situations, the purpose may be to maintain a permanent record for purposes of taxation, or payment of fees,[119] and even for the purposes

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[116] See, *eg, Lord Barrymore* v *Taylor* (1796) 1 Esp 326; *Doe* v *Price* (1832) 1 Bing 356; *cf Smith* v *Simmes* (1796) 1 Esp 330. For a modern controversial application, see *Woodhouse v Hall* (1980) 72 Cr App R 39.

[117] See, *eg, Bate* v *Kinsey* (1834) 1 C M & R 38; *Newlove* v *Shrewsbury* (1888) 21 QBD 41; *Grove* v *Warr* (1817) 2 Stark 174; *cf Coppock* v *Bower* (1838) 4 M & W 361.

[118] Explaining why production of a written lease is vital, Best CJ in *Strother* v *Barr* (1828) 5 Bing 137 at 159: "There is more probability of mistake in the statement of these facts than in the statement of the amount of rent. These are complicated facts, as to which the most accurate witness may be mistaken."

[119] See, *eg, Williams* v *Stoughton* (1817) 2 Stark 292; *Duffil* v *Spottiswoode* (1828) 3 Car & P 435; *R* v *Inhabitants of Castle Morton* (1820) 3 B & Ald 588; *Hodges v Darkeford* (1805) 1 B & P (NR) 270. *Cf Coppock* v *Bower* (1838) 4 M & W 361, *Dover* v *Mestaer* (1803) 5 Esp 92. An unstamped document is inadmissible but it would now be unprofessional of

of facilitating commercial efficacy.[120]

Bills of exchange cases are singularly instructive in showing that the considerations here are more substantive than evidentiary. In *Ramuz* v *Cruz,*[121] an action by a payee of a negotiable bill of exchange against the acceptor for recovery of its amount was held to fail for lack of evidence. The payee had lost the bill of exchange. But it was held that he could not be allowed to prove it orally. This was so even though the payee was also the drawer of the bill and had lost the bill whilst, in possession of it (*ie*, he had not transferred nor indorsed it and there was therefore no one else who could sue on it but him.) Despite these circumstances, the Court of Exchequer would brook no exception to the general rule that by the law merchant the acceptor was not bound to pay except upon delivery of the instrument itself. There is implicit acceptance that had the bill not been negotiable but payable to the plaintiff only, an action in those circumstances would be good and the oral evidence receivable. But the bill was negotiable and although the court did not say so, an action must expose the acceptor to subsequent harassment by whoever found the bill and delivered it up.

Whenever the writing constitutes a relevant fact or fact in issue, it will be original evidence of that fact. The written contract is original evidence of the contract as much as the grant of land by deed is the original evidence of the transfer. The charge is original evidence of the indictment. The recorded conviction is original evidence of conviction. The certificate of bankruptcy and the release are both original evidence of legally operative facts in issue. When such constitution is contractual or a disposition of property or the law requires such constitution, the effect of section 93 is to compel proof by this original written evidence.

But, if the law is that I may do an act doubly, either oral or documentary evidence will be good proof. I am not constrained to rely solely on documentary evidence. That is why I may tell the court that I paid for the goods, which it is alleged I stole, or I may produce the receipt of payment. The law says I may do either. It does not require when there is an either facility.[122] Either will be original evidence. Again, the law may simply not require constitution

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counsel to take the objection: *Malayan Banking Bhd* v *Agencies Service Bureau Sdn Bhd* [1982] 1 MLJ 198.

[120] Best CJ in *Strother* v *Barr* (1828) 5 Bing 137 at 159 considers the rule essential to the security of property, of character, and of life.

[121] (1847) 11 Jur 715. Another interesting case is *Augustien* v. *Challis* (1847) 1 Ex 279 where a sheriff executing a *fi fa* was held to be negligent in withdrawing on the mere say-so of the landlord that rent was due. He should have asked to see the written lease before he withdrew, since that was the sole evidence recognized by law. Parke B said at 280: "There would be plenty of nominal landlords, if we were to hold the sheriff not responsible."

[122] See Lord Ellenborough in *Smith* v *Young* (1808) 1 Camp 439 at 440: "I may do an act of this sort doubly. I may make a demand in words and a demand in writing; and both being perfect, either may be proved as evidence."

of a relevant fact in writing. So payment of money may be proved by oral evidence, though a receipt is also taken.[123] A verbal demand of goods may be shown although a written demand was made simultaneously.[124] The admission of a debt may be proved by oral testimony although a written promise was simultaneously given.[125] Again, the incorporation of a company is not a reduction into writing and oral evidence may be given of the act of incorporation.[126] Where orders and instructions directed by the Governor to an officer to arrest and destroy property of the plaintiff, the court assumed that he could have given oral evidence of these orders if it were not for reasons of public policy.[127] The reason is that the law does not require such orders to be constituted in writing.

The difficult and little explored question is whether section 93 also deals with non-constitutive writing. English case law seems to assume a negative answer. The Privy Council when discussing the equivalent Indian provisions in *Tyagaraja Mudaliar* v *Vedathani*[128] similarly assumed that only written contracts as opposed to oral contracts evidenced in writing are within the section. If so, the subject matter of section 93 would be constitutive writing whether made by consent of the parties or as required by law. In that case, evidence was admitted to show that a seemingly binding contract in writing was in fact merely a recording of some matter for evidentiary purposes. This assumption seems to be justified.

Read literally, the operative condition of reduction to writing can include evidencing or recording by writing; although where the document evidences or records a transaction in issue, it can never constitute that transaction in issue.[129] It will constitute, if at all, some other and narrower fact, namely, the memorandum or record of evidence. Where the terms of an oral contract are recorded in writing, clearly, the contract exists as an oral contract. The terms of the contract are however evidenced in the memorandum. If evidencing the terms of a contract is a reduction to the form of a document by the parties, section 93 will be attracted. This implies that the oral contract may be proved by oral evidence; but the terms of that contract must be proved by the written evidence or memorandum. In the absence of that written evidence, the terms will be non-provable.

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[123] *Rambert* v *Cohen* (1802) 4 Esp 213.

[124] See *Smith* v *Young* (1808) 1 Camp 439; *Kine* v *Beaumont* (1822) 2 B & B 288; *Swain* v *Lewis* (1835) 2 C M & R 261.

[125] *Singleton* v *Barrett* (1832) 1 LJ Ex 134.

[126] See *R* v *Langton* (1876) 2 QBD 296.

[127] *Cooke* v *Maxwell* (1817) 2 Stark. 183.

[128] [1936] MLJ 62. See also *Mohamed Mustafa* v *Kandasami* [1979] MLJ 109 at 113.

[129] So where there is an oral agreement independently of any writing, a mere receipt is not the reduction of the agreement into writing: *Newlove* v *Shrewsbury* (1888) 21 QBD 41; *Nawab Major Sir Mohamed Akhbar Khan* v *Attar Singh* [1936] MLJ 167.

Read in the light of the common law assumption, section 93 has nothing to do with writing which merely evidences or records a transaction. This seems preferable. A document which evidences or records a transaction in issue which need not be contemporaneously made would not preclude proof by original and oral evidence of the terms of the oral contract. Unless some other statute makes the recorded writing essential to an action, section 93 has not the effect of requiring proof of the contract which is oral by the memorandum.[130] Something else must make the memorandum essential to the action. Suppose a verbal agreement is made and a memorandum drawn up. In this situation nothing makes the memorandum in effect compulsory proof unless some other legislation such as the Statute of Frauds 1677[131] does so. By section 4 of the Statute of Frauds, a contract for the sale of land must be evidenced by a memorandum in writing appropriately signed and the contract is not enforceable in the absence of this evidence. Section 4 is, on this view, not a requirement that the matter be reduced to the form of a document; for evidencing or recording is not reduction to writing. It has its own independent effect. The result is that the party must take care to obtain and preserve this admissible evidence if he wishes to enforce the contract.

In *Shelton* v *Livius*[132] there was a sale of land by auction and in order to comply with the Statute of Frauds, the auctioneer signed the conditions of sale as stated in the catalogue. The court refused extrinsic evidence of an intended alteration. In short, there may be an oral agreement (such as a service agreement) but without a memorandum it cannot be enforced against that party. The effect is to compel proof by the memorandum. In *Delaney* v. *TP Smith Ltd,*[133] the plaintiff claimed to be a tenant pursuant to an oral agreement made with the defendant freeholders. He sued the defendants in trespass but as they were his landlord, he was bound to confess and avoid, by admitting their title and pleading a demise. Said Wynn-Parry J: "Where, therefore, in such circumstances he relies on a demise or a tenancy, he must prove it, and in order to do so he must comply with section 40 of the Law of Property Act, 1925."[134] But where the memorandum is defective, and there have been acts of part performance, evidence of these acts is receivable, although nothing in section 94 refers to part performance as

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[130] *Cf* statutes which make a specified certificate a condition precedent to a legal act: *PP* v *Fonseka* [1957] MLJ 72.

[131] 29 Car 2, c 3. This statute as well as s 40 of the Law of Property Act 1925 must be pleaded: *Delaney* v *TP Smith Ltd* [1946] 1 KB 393; *Sigma Cable Co Ltd* v *Nam Huat Electric & Sanitary Co* [1972] 1 MLJ 7.

[132] (1832) 2 C & J 411.

[133] [1946] 1 KB 393.

[134] *Ibid,* at 400.

an exception to section 93. The reason is simply that part performance is a qualification to the Statute of Frauds; not section 93.[135]

Similarly, though a document seems to have been drawn up at the same time as a transfer of property is carried out, yet the transfer may be *de hors* the document. The document would not be intended to transfer the property but merely to record the transfer. Title would be obtained by virtue of the transaction, not the document. Proof of title would not depend upon the document; with the consequence that where the document contains the terms of the advance those terms may be proved by original evidence.[136]

The precise relevant fact or fact in issue of which the writing is the constitution must be carefully ascertained. In those cases where the law requires the evidence of a witness to be taken down in writing,[137] the writing constitutes the fact of giving the evidence. It does not constitute the relevant fact or fact in issue which evidence proves unless some statute, apart from section 93, makes it so. Suppose an accused person states the facts of his defence at a preliminary inquiry. Although the examining magistrate is required to take down these statements in writing, section 93 does not have the effect of compelling proof of the facts by this writing. The accused person certainly may take the stand in the trial and give evidence of these facts. Section 93 merely prevents him from referring to what he said at the preliminary inquiry. If for some reason he wishes to tender evidence of what he said at the preliminary inquiry, then section 93 compels him to prove by the writing.[138] If he is charged with having committed perjury in making those statements, then section 93 compels proof by the written information.[139] Within the scope of section 93 will be statements made by the prisoner while cross-examining a witness at a preliminary inquiry which were reduced to writing as part of the depositions.[140] In these circumstances,

> [t]he rule of law is the compass by which the Court ought to be guided. ...[A]s the law requires that his examination before the Magistrate shall be reduced into writing, and returned to the Court, the particulars of such examination cannot be given in evidence *viva voce,* unless it be clearly proved, that in fact such examination never was reduced into writing.[141]

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[135] *Cf Tan Chooi Siak* v *Abdullah bin Haji Drashid* [1946] MLJ at 152.

[136] In *Ex p Hubbard* (1886) 17 QBD 690 the document of record was produced; so the point need not be raised.

[137] At common law, there is a presumption that where an information was taken down in writing, it was required to be so taken: *R* v *Coll* (1889) 24 LR Ir 522 at 550.

[138] See *R* v *Coll* (1889) 24 LR Ir 522.

[139] *R* v *Dillon* (1877) 14 Cox CC 4; *PP* v *Moduli Kutti* (1915) 3 FMSLR 1; *PP* v *Mit Singh* (1917) 3 FMSLR 2. *Cf PP* v *Harnam Singh* (1932) FMSLR 325 at 328-329.

[140] *R* v *Taylor* (1874) 13 Cox CC 77.

[141] *R* v *Jacobs* (1784) 1 Lea 309.

In short, depositions before a magistrate which show for what transactions, offence and time the prisoner was committed must be proved,[142] for they are constitutive of those relevant facts. But the statements of evidence they contain cannot substitute for oral evidence without some other statute saying so.

Thus, depositions taken under such provisions as section 364(1) of the Criminal Procedure Code[143] have a greater impact because they are intended to substitute for oral evidence. The provision itself refers to absence of the witness for one reason or other which would make it expedient that his evidence be introduced as depositions in his absence. Section 33 of the Evidence Act provides that such depositions are evidence of the truth of the facts which they state. The combined effect of section 93 and section 33 is to compel proof solely by the depositions.[144]

All this may be distilled into an observation. Where the law requires reduction to writing of admissible hearsay, there will invariably never be exclusive proof by that writing. In *The Agricultural Cattle Insurance Co* v *Fitzgerald,*[145] it was contended that the certificate of registration of a joint stock company was a necessary part of an action brought by the company for debt against its shareholder to which he had pleaded "never indebted". That contention was rejected because the certificate of an act of registration was not to be equiparated with the act itself. As a certificate of marriage is no part of the marriage ceremony (for the marriage must have taken place before a certificate of it can be granted), so a certificate of registration is no part of the act of registration.[146]

The English licence cases are particularly instructive of the reluctance of the legislature to make admissible hearsay a compulsory means of proof. In *Marshall* v *Ford*[147] Lord Alverstone CJ allowed oral evidence of the identity of the accused by a police officer who testified that he noted the name of the accused driver upon production of his driver's licence. Since such a licence used to prove identity must be hearsay, it should be admitted subject to the best evidence rule. But the argument that the licence itself should have been produced in court (but which was not) was rejected. In *Martin* v *White*[148] Lord Alverstone CJ disclosed the reasons for his earlier

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[142] See also *Parsons* v *Brown* (1852) 3 Car & K 295. The same rule applies in civil proceedings: *Leach* v *Simpson* (1839) 5 M & W 309. *Cf Robinson* v *Vaughton* (1838) 8 Car & P 252.

[143] Cap 68, 1985 Rev Ed.

[144] *Duncan* v *PP* [1980] 2 MLJ 195. Where the depositions are taken by commission, the commission must be proved: *Bayley* v *Wylie* (1806) 6 Esp 83. *Cf* s 368 of the Criminal Procedure Code.

[145] (1851) 16 QB 432.

[146] *Ibid,* at 247.

[147] (1908) 72 JP 480.

[148] [1910] 1 KB 665. See also *Williams* v *Russell* (1933) 149 LT 190.

judgment. The oral evidence of the police officer of the name of the driver on his licence was evidence of an admission made by the driver. He said:

> In my opinion, when a constable upon demand made by him is handed a licence by the driver of a car, that amounts to a statement by the driver that the licence is his and that the name and address mentioned in the licence are his name and address, and it is prima facie evidence at any rate that a person of that name and address was driving the car on that occasion.[149]

So far from rendering the admissible hearsay compulsory proof, Lord Alverstone CJ was prepared to construe the conduct as admission in the light of the objects of the Act:[150]

> one of the objects for which the Act requires the production of the licence [at the time of arrest] is to afford a means, in the interests of the public, for the identification of the driver, without which proceedings cannot be taken against him, because in most cases the constable cannot know the name of the driver.... It is contended that the identity of the appellant with the driver who was stopped at Barnet and who produced the licence to the constable must first be proved before secondary evidence of the contents of the licence can be given. When it is borne in mind that the driver of a car is obliged to have his licence with him, it would be destroying the beneficial effect of this legislation if we were to accede to that argument.[151]

So at common law, certainly when the document is admissible as admissible hearsay, it must be produced if it is sought to adduce it as evidence; to receive oral evidence of what the contents are would be to aggravate the problems of hearsay. But when the contents which are constitutive of a relevant fact or fact in issue are not required by law to be in writing and the sole evidence, why should not oral and original evidence of it be given, even though it be in writing?

Unfortunately, these considerations have been lost sight of in some local cases, leading to confusion. The law in Singapore has in some places required

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[149] *Ibid,* at 680.

[150] Another reason would be that although not impossible, it would be rare for the legislature to make admissible hearsay, as opposed to original documentary evidence, compulsory proof.

[151] [1910] 1 KB 665 at 679-680. Bray J's reasoning is unsatisfactory. He said: "the licence is more than a mere document; it is an article, and there is no rule of evidence that notice to produce is necessary when the question is the identity of an article." With respect, the status of the licence as a material object was irrelevant.

reduction in writing of evidence but without intending to substitute for oral testimonial evidence.[152] Take for instance the legislation dealing with reports made to the police which require them to be reduced to the form of a document. The first information report is dealt with by section 115 which envisages as far as practicable reduction to writing of a complaint of an offence having been or being committed. That is inescapable from reading the section in whole. Then also section 120(1) contains a requirement that the examination of 'witnesses' (who may turn out in the end to be accused persons) by the police shall be reduced into writing and signed by the persons concerned. The section 122(5) statement of the accused must also be reduced to the form of a document.

The worst view was that held by Terrell Ag CJ in *Boota Singh* v *PP*[153] who insisted that "[i]n view of sections 91 and 92 of the Evidence Ordinance, evidence of what the woman said could not be given in any other way"[154] but by the police officer who recorded the woman's complaint. This is manifestly wrong, for in the absence of some other statute, section 93 only compels proof of the police report by the police report. It cannot have the effect of doing away with oral testimonial evidence of relevant facts and facts in issue by the police report.

The majority of judges have rightly continued to receive the testimonial evidence of a complainant, although not assigning any reasons for this. But section 93 has proved to be troublesome in other ways. The redoubtable HT Ong J was prepared to make it conclusive against the complainant. In *Ah Mee* v *PP*[155] he fashioned this novelty:

> Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that 'in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms ... of such matter except the document itself.' The report was information relating to the commission of an offence which shall be reduced to writing pursuant to s 107 of the CPC (Cap 6), and s 92 of the Evidence Ordinance goes on to exclude all parol evidence seeking to contradict or vary what was set out in writing.[156]

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[152] Interestingly, a similar opinion was entertained by some of the judges of England in regard to statements of witnesses which were reduced to writing: see *Darby* v *Ouseley* (1856) 25 LJ Ex 227 at 229.
[153] [1933] MLJ 195.
[154] *Ibid,* at 196.
[155] [1967] 1 MLJ 221.
[156] *Ibid,* at 223.

The result was that the complainant of a rape who gave oral testimony for the prosecution was not allowed in court to vary or contradict her story as told in her complaint in particular her identification of the car allegedly driven by the rapist.

With respect, Ong J's analysis is also flawed. He should simply have held that the police report afforded no corroboration, being inconsistent with the oral testimony of the complainant in a material particular. All that section 93 does is make proof of the police report exclusively by the document reduced to writing. It does not substitute for oral evidence which has been received, wherever there is variance.

The analysis in *PP* v *Tan Huang Hiang*[157] scarcely fares any better. Peh Swee Chin J in that case construed the expression "shall be reduced into writing" to be words directory in nature. The words mean "may be reduced into writing." If these words in relation to a cautioned statement are directory, the same words in relation to a police first information report must also be directory. This construction, which is not extremely persuasive, makes all the difference. It means that a cautioned statement, taken down in writing, no longer is sole evidence of what was said by the accused in his cautioned statement. The recording officer might be called to give original evidence of what he said, provided of course that what he said was relevant.[158] The cautioned written statement itself might be tendered; or if a proper foundation for secondary evidence exists, secondary evidence might be given for the benefit of the defence, as in the case itself. If this construction is correct, a duty to record in writing, which in some circumstances is relieved from, has been rendered not a duty at all. There is merely a power to record in writing; with respect, this is an odd conclusion inconsistent with previous authority that such provisions are laws which require a matter to be reduced to the form of a document.

In *Pavone* v *PP*[159] the defence was rightly held entitled to apply for a certified copy of the record of an earlier trial for the purposes of cross-examination of a prosecution witness. The record in view of the provisions of the Criminal Procedure Code which required the evidence of witnesses to be reduced to writing must be the sole evidence of what was said in the trial. With respect, there was no need to endorse[160] the correctness of the decision in *Ah Mee* v *PP,* for that was dealing with a very different

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[157] [1990] 2 MLJ 24.

[158] The s 122(5) statement is admissible evidence.

[159] [1986] 1 MLJ 72.

[160] *Ibid,* at 74.

situation in which the evidence of what was said earlier was admissible as evidence in the case, not just for purposes of impeaching credit.

(To be continued)

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