Letterhead of The Sociery of Scotland

Mrs. Percy, MA.,
Clerk to the Bills Committee,
Legislative Council,
Legislative Council Building,
8 Jackson Road,
Central,
HONG KONG.

OUR REF:
LS.100/14/BAR/JEM
YOUR REF:
CB2/BC/2/98
DATE:
18 August 1998

Dear Mrs. Percy,

HEARSAY EVIDENCE IN CIVIL PROCEEDINGS

I refer again to your letter of 31st July and now enclose a copy of a letter from Andrew Renton of Messrs. Simpson & Marwick, W.S., a leading firm of Edinburgh solicitors who act for many insurance companies defending civil litigation in Scotland. I hope to be able to forward the views of pursuers' agents shortly.

Yours sincerely,

Bruce A. Ritchie
Deputy Secretary (Professional Practice).

Telefax

To: MRS PERCY
Fax:
From: BA RITCHIE
Date: 1818198 Pages: 3

LETTERHEAD OF SIMPSON & MARWICK W.S.

SOLICITORS

FAO MR BRUCE RITCHIE
The Law Society of Scotland
DX ED1
EDINBURGH

OUR REF AR/M/LR
YOUR REF LS/44/2/BAR

12 August 1998

Dear Bruce,

Hearsay Evidence & Civil Proceedings

I am grateful to you for your letter of 4th August 1998 and confirm that I would be happy to respond from a Defender's point of view, but the subject is not quite as easy as the letter from the Clerk to the Bills Committee suggests and for that reason I have given a little detail to the reasons for my view.

In Scots Law hearsay evidence was generally regarded within the terms of the text by Walker and Walker on Evidence, which stated:-

> *"Hearsay evidence is evidence of what another person has said. So defined it includes both secondary hearsay, which may be admissible as indirect evidence of the facts alleged in the statement and primary hearsay, which may be admissible as direct evidence that the statement was made, irrespective of its truth or falsehood."*

In Scots Law primary hearsay, (i.e. evidence that a statement was made, whether or not it is true or false), was always admissible evidence so long as it was relevant to the issue.

The important change which is referred to under the Civil Evidence (Scotland) Act 1988, is that secondary hearsay which was generally inadmissible, became admissible.

As I understand and recollect the reasoning for this, it was because the rule or view that secondary hearsay was not the "best evidence" made it inadmissible.

There were of course exceptions under statutory rulings or where evidence as to facts were allowed when the maker of any particular statement was dead or permanently insane (I think there was also an exception in relation to prisoners in foreign jurisdictions).

In Scotland a great deal of criticism in relation to allowable evidence arose out of the imposition of the rules adopted by the Civil Evidence Act 1968, which sought to impose some form of code.

The recommendation of the Royal Commission sought to allow hearsay evidence which was contained in a hearsay statement, which would have been admissible had its original maker given the same evidence in Court.

Within the Act, the word "statement" includes any representation of fact or opinion (however made or expressed) and it is therefore important to notice that there is a wide range of types of hearsay evidence admitted under the 1988 Act which was not previously not allowed.

My personal experience of the application of the rule is that the Courts are now able to adduce the whole evidence which might be relevant to the case and parties are not periled in their position by either taking an objection to evidence or failing to take a timeous objection to hearsay evidence.

The application of the rule has meant that the time consuming arguments over admissibility of hearsay as an exception to the previous rules no longer arise and parties can focus on the true issues which have to be resolved, rather than the admissibility of evidence. Parties can still make submissions on the admissibility and reliability of evidence at the close of evidence and in many cases the trend is to try and identify for the Court the appropriate weight which should be applied to the type of evidence given to the Court, so that there is a clear scale of weight attaching to each type of evidence and the Courts have in my view, adopted a very sensible and rational approach in applying their reliance on evidence where it has doubtful reliability because of its hearsay nature.

Overall therefore, I believe that the reform of the law contained in the 1988 Act has been a successful and progressive step towards increasing the likelihood that the Court hearing any case has before it the fullest information available, in order to allow it to come to the best decision it can on the evidence available.

I hope this is of some assistance to those who would like my views. If a more detailed view is required then I will try and be more specific in relation to any points which might be raised.

Yours sincerely

ANDREW L RENTON
Simpson & Marwick WS