

Scottish Law Commission

(SCOT. LAW COM. NO. 100)

EVIDENCE

REPORT ON CORROBORATION, HEARSAY AND RELATED MATTERS IN CIVIL PROCEEDINGS

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by the Lord Advocate
under section 3(2) of the Law Commissions Act 1965*

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the Law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Item 1 of the First Programme

EVIDENCE

**REPORT ON CORROBORATION, HEARSAY
AND RELATED MATTERS IN CIVIL PROCEEDINGS**

*To: The Right Honourable the Lord Cameron of Lochbroom, Q.C.,
Her Majesty's Advocate*

We have the honour to submit our Report on
Corroboration, Hearsay and Related Matters in Civil Proceedings.

(Signed) PETER MAXWELL, *Chairman*
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28th February 1986

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PART I INTRODUCTION

1.1 The law of evidence was included in our First Programme of Law Reform¹ and in September 1980 we published a Consultative Memorandum² inviting comments on propositions for reform of many aspects of that area of the law. We are grateful for the many constructive comments which we received. A list of those who commented on the propositions relevant to this Report is published as Appendix B. We also acknowledge the assistance which we have derived in the preparation of this Report from the Research Paper on the Law of Evidence written for us by Sheriff I D Macphail and published in April 1979.³

1.2 We have already reported on a somewhat specialised aspect of the law of evidence in criminal cases.⁴ In this Report, we make recommendations for reform of two major areas of the law applicable in civil proceedings, namely the rule requiring corroboration and the rule against hearsay.

1.3 Of the five guiding principles stated in Memorandum No. 46, those which have weighed most heavily in the formulation of our recommendations in this Report are as follows:

- (1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.
- (2) As a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible.⁵

PART II CORROBORATION

Introduction

2.1 As a general rule in civil proceedings, unsupported evidence from any source is not sufficient to prove a fact which is crucial to the establishment of the grounds of action.⁶ Under the law of evidence the general rule is that an essential fact cannot be proved by the testimony of one witness alone, but that that witness's testimony must be supported by corroborative evidence.⁷ The requirement of corroboration has been regarded as a safeguard against the acceptance of unreliable evidence.⁸ Our consideration of current law and practice in civil proceedings, however, has now led us to the opinion that a formal requirement of corroboration in such proceedings is not in the overall interests of justice.

¹Scot. Law Com. No. 1, 1965.

²Consultative Memorandum No. 46, "Law of Evidence", in this Report, referred to as "Memorandum No. 46".

³In this Report, referred to as the "Research Paper".

⁴Report on Evidence in Cases of Rape and other Sexual Offences (Scot. Law Com. No. 78), published on 20 July 1983.

⁵See Memo. No. 46, para. A.03.

⁶Walker and Walker, *Law of Evidence in Scotland* (referred to below as "*Walkers*"), para. 382.

⁷*Douglas v. Provident Clothing and Supply Co.* 1969 S.C. 32 at p. 36, *per* Lord President Clyde.

⁸Research Paper, para. 23.02.

The present law

2.2 There are no hard and fast rules as to what the law presently requires by way of corroboration. Corroborative, or supporting, evidence may be provided by the testimony of another eye-witness. However, in practice, it is commonly found in a combination of direct testimony and circumstantial evidence.¹ The classic statement of the principle to be applied in such situations is that of Lord President Normand in the case of *O'Hara v. Central SMT Co. Ltd.* as follows:

“Corroboration may be by facts and circumstances proved by other evidence than that of the single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of a single witness but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied.”²

2.3 It is possible for crucial facts to be proved, without the evidence of any direct witness, by two or more items of circumstantial evidence from which the same crucial fact may be inferred.³ However, circumstantial evidence is inherently ambiguous. Its value depends on the inferences which may be drawn from it, in combination with other circumstantial or direct evidence. Thus, in any case which depends largely or wholly on the interpretation of circumstantial evidence, there may be considerable room for doubt as to whether the requirement of corroboration has been satisfied.⁴ For example, in one case⁵ it was admitted that the pursuer had fallen from of bus which swerved violently and unexpectedly but four appeal court judges reached differing conclusions on which facts corroborated the evidence of the defender. All four judges found corroboration of the defender’s account of events in evidence as to the manner in which the bus had been driven before and after the accident.⁶ One found additional corroboration in the bus driver’s subsequent challenge of a pedestrian,⁷ evidence which was specifically stated by two other judges not to amount to corroboration.⁸ Two judges found corroboration in a statement made by the pedestrian,⁹ but another regarded that statement as “inconclusive and incompetent”.¹⁰

2.4 Lord President Normand’s statement of principle in *O'Hara* was applied in the subsequent case of *Cleisham v. British Transport Commission*,¹¹ which went to the House of Lords. However, in that case, the pursuer was successful despite the fact that the “main surrounding circumstance” contradicted her

¹Dickson, *Law of Evidence in Scotland* (referred to below as “*Dickson*”), paras. 1808 and 1811.

²1941 S.C. 363, at p. 379

³See further, *Walkers*, para. 386.

⁴Research Paper, para. 23.08.

⁵*O'Hara*, cited above.

⁶Lord President Normand at p. 380, Lord Fleming at p. 385, Lord Moncrieff at p. 389 and Lord Carmont at p. 394.

⁷Lord Moncrieff at p.389.

⁸Lord President Normand at p. 380 and Lord Fleming at p. 385.

⁹Lord Fleming at p. 386 and Lord Carmont at p. 394.

¹⁰Lord Moncrieff at p. 389.

¹¹1964 S.C. (H.L.) 8.

evidence in court¹ and despite the dissenting opinions of the two Scottish judges in the House of Lords.² Corroboration was found by the majority in evidence that the train from which the pursuer fell had moved without warning and “ought not to have moved forward as and when it did”,³ in “the probabilities disclosed by evidence of the . . . witnesses as to the general practice of cleaners”⁴ and in “probabilities”.⁵ It would appear, therefore, that very little may be required by way of corroboration.

2.5 In some cases, the requirement has been removed altogether by statute. Section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968⁶ provides that, in actions of damages for personal injuries:

“...any rule of law whereby in any proceedings evidence tending to establish any fact, unless it is corroborated by other evidence, is not to be taken as sufficient proof of that fact shall cease to have effect in relation to any action to which this section applies, and accordingly, subject as aforesaid, in any such action the court shall be entitled, if they are satisfied that any fact has been established by evidence which has been given in that action, to find that fact proved by that evidence, notwithstanding that the evidence is not corroborated.”⁷

2.6 The courts’ initial reaction to section 9 of the 1968 Act was cautious. In *Morrison v. J. Kelly & Sons Ltd.*,⁸ a case heard before the Inner House of the Court of Session shortly after the Act came into force, it was held that the presence or absence of corroboration remained an important consideration in deciding whether or not a fact had been proved.⁹ However, there have subsequently been indications of a relaxation in judicial attitudes to the need for corroboration in personal injury cases. In his dissenting opinion in *McLaren v. Caldwell’s Paper Mill Co. Ltd.*,¹⁰ Lord Stott explained his view of the application of section 9 as follows:

“The terms of the section do not suggest that it was intended to benefit only the man working alone. They are general and comprehensive, and appear to have been chosen not with reference to any special set of circumstances but as a general remedy for the anomaly and injustice arising from a rule of law whereby the court, convinced that an injured man had given a truthful

¹ Per Lord Hodson at p. 21, Lord Gest at p. 23 and Lord Devlin at p. 25. Cf. Lord Migdale in *Morrison v. J. Kelly & Sons Ltd.* 1970 S.C. 65 at p. 87.

² See Lord Reid at pp. 12–13 and Lord Guest at p. 23.

³ Per Lord Morris of Borth-y-Guest at p. 18.

⁴ Per Lord Hodson at p. 22.

⁵ Per Lord Devlin at p. 25.

⁶ Referred to below as “the 1968 Act”.

⁷ Subsection (2).

⁸ 1970 S.C. 65.

⁹ Lord President Clyde stated that: “[Section 9(2)] does not dispense with the well-settled rules regarding the testing of the reliability of witnesses. These rules must still be observed. . . . Indeed the subsection appears to make it all the more necessary for these rules to be strictly observed in a case where the court is dispensing with the safeguard of corroboration” (at pp. 77–78). He also stated that: “Where corroboration or contradiction of the pursuer’s account of the matter is available, a court would obviously be very slow indeed to proceed upon the pursuer’s evidence alone” (at p. 79). See also Lord Guthrie at p. 80.

¹⁰ 1973 S.L.T. 158.

account of his accident, were nevertheless bound to reject it from lack of corroboration.”¹

A similar view appears to have prevailed in other cases.²

2.7 Certain types of civil dispute, involving matters of considerable importance to the parties, are determined outwith the courts, in statutory tribunals and inquiries.³ Many of these bodies are not bound by the rules of evidence applied in the courts. It has been decided that “rules relating to corroboration” do not apply to proceedings before tribunals in which facts may be proved without sworn testimony.⁴ Thus, although corroborated evidence will be valuable,⁵ the requirement of corroboration does not operate as a legal rule in proceedings before, for example, Industrial Tribunals⁶ or the Lands Tribunal for Scotland,⁷ although the latter Tribunal may as matter of practice insist upon the strict court rules of evidence being applied in particular cases.⁸

The need for reform—general

2.8 The presence or absence of corroboration may of course always play an important part in reaching decisions on disputed issues. When an issue is in dispute and a party who could readily have provided corroboration if his account were true fails to do so, this may well raise a question as to his reliability. No-one suggests that the significance of corroboration in relation to the ascertainment of the truth should be discounted but the question we are considering is whether, as a matter of law, a party should always be precluded from success if he does not and perhaps cannot provide corroboration on every point necessary for the establishment of his case. As regards standard of proof, civil law requires only that a party should establish his case on a balance of probabilities. It is arguably inconsistent with this principle and we think, in any event, may be inconsistent with justice that a party, though he may have an honest and credible case, must nevertheless necessarily fail if, through circumstances over which perhaps he has no control, corroboration is not available. It may be thought that the courts in a number of cases have in substance recognised this and have accordingly found it possible when satisfied as to the reliability of the principal witness to find the technical requirements of corroboration met from circumstantial evidence of flimsy or doubtful import.⁹ It might, of course, be said that as corroboration can, where necessary, be found so readily, the retention of the

¹ At p. 169. There appears to be implied support for this view in Lord Kissen’s opinion, at p. 165.

² In *Ward v. U.C.S. Ltd.* 1973 S.L.T. 182, the pursuer succeeded on the basis of uncorroborated evidence, despite a finding of contributory negligence. In *Thomson v. Tough Ropes Ltd.* 1978 S.L.T. (Notes) 5, the pursuer was again successful on the basis of uncorroborated evidence, even though her evidence was contradicted by that of the only eye-witness. Cf. *Mason v. S.L.D. Olding Ltd.* 1982 S.L.T. (Notes) 385 and *McArthur v. Organon Laboratories Ltd.* 1982 S.L.T. (Notes) 425.

³ For a brief exposition of their development, scope and nature, see the Discussion Paper, “Review of Administrative Law in the United Kingdom” published by Justice—All Souls in April 1981, Parts D and E.

⁴ *Douglas v. Provident Clothing and Supply Co.* 1969 S.C. 32.

⁵ See *Gibbon v. Commissioners of Inland Revenue* 1980 S.L.T. (Lands Tribunal) 3.

⁶ The Industrial Tribunals (Rules of Procedure) (Scotland) Regulations 1980 (S.I. No. 885), Sch. I para. 8.1.

⁷ The Lands Tribunal for Scotland Rules 1971 (S.I. No. 218), paras. 20 and 23.

⁸ See *Bell v. Inland Revenue Commissioners* 1985 S.L.T. (Lands Tribunal) 52.

⁹ E.g. *O’Hara v. Central S.M.T. Co. Ltd.* 1941 S.C. 363; *Cleisham v. British Transport Commission* 1964 S.C. (H.L.) 8.

requirement does little harm. Cases are not difficult to find, nonetheless, in which the Court has regretfully been compelled to find for a party by reason of the failure of the other party to find corroboration.¹ However, we think that a better conclusion is that while on the one hand the requirement may be an impediment to justice, on the other it scarcely serves any useful purpose. Moreover, the extreme difficulty in the light of authorities in determining what will or will not be sufficient to meet the requirements of corroboration introduces an undesirable element of uncertainty into our law.

2.9 A further criticism of the present law which has been made to us by some commentators and which we think of considerable practical importance is that the requirement can lead to unnecessary expense, delays and inconvenience. It is not always easy to judge what are the essential facts which require to be proved in any particular case but each of these essential facts under the present law requires to be established by corroborated evidence, even though it may be a relatively minor link in the chain of facts required to be proved. Moreover, it may be a matter which is not in fact likely to be contested. Nevertheless, a party's advisers preparing a case cannot run the risk of the case failing as a result of an argument that some matter of this kind has not been corroborated. It is thought that much unnecessary expense and work and indeed court time could be saved, at least in some cases, if the requirement were removed. No doubt a party's advisers would still seek to find corroborative evidence on points which are likely to be the major matters in dispute but they would feel free to do without it on points which, though technically essential for the case, are likely in practice to be little more than formalities.

2.10 We have noted above that there are certain types of civil proceeding in which corroboration is not now required, notably proceedings before tribunals and cases falling under section 9 of the 1968 Act. We are not aware that there is any serious complaint regarding the absence of a requirement of corroboration in tribunals. As for section 9, although some initial difficulties may have been experienced, we consider that it has been generally satisfactory in its operation. There is, so far as we are aware, no evidence that section 9 has led to a flood of weak claims. We note that while a majority of our commentators favoured further relaxation of the rule on corroboration, none of them favoured a return to the pre-1968 position. We ourselves can find no good reason either in principle or on practical grounds for preserving the situation where corroboration remains a general requirement in civil litigation, but is not required in what is numerically one of the most important classes of case where, moreover, the abolition of the requirement has not, we believe, had any adverse effect on the administration of justice. We, accordingly, **recommend that:**

- 1. The requirement of corroboration in civil proceedings in so far as it still applies should be abolished.**

Consistorial actions

2.11 We have considered whether there is any particular class of case to which the preceding recommendation should not apply. In particular we have

¹ E.g. *Prangnell-O'Neill v. Lady Skiffington* 1984 S.L.T. 282, see also Scot. Law Com. No. 4, at para. 5.

considered consistorial actions,¹ including notably divorce. In most civil proceedings the pursuer does not have to prove anything if his action is not defended. If there is no defence, he obtains “decree in absence”. However, because consistorial actions involve questions of status and accordingly have effect beyond the parties to the litigation, they form an exception to this rule. The pursuer in such actions requires to establish his case by evidence even if the action is undefended. So far as the Court of Session is concerned, the law is set out in section 36 of the Court of Session Act 1830 (as amended) which provides that “no decree or judgment in favour of the pursuer shall be pronounced in any of the consistorial actions herein before enumerated, whether appearance shall or shall not be made for the defendant *sic* until the grounds of action shall be substantiated by sufficient evidence”. While this provision applies in terms only to the Court of Session, a similar rule has been held to apply to those consistorial actions which have been competent in the sheriff court² and, presumably, will now also be applied to divorce actions in the sheriff court. In so far as the rule requires some evidence to be led for the pursuer, even in undefended cases, we do not propose any alteration, this being beyond the scope of a review of the law on corroboration. We also do not propose any alteration or extension of the procedural rules first introduced in the Court of Session in 1978 by virtue of which in certain limited circumstances evidence in undefended divorce actions may be taken in the form of affidavits as opposed to requiring the attendance of a witness in court. This, again, is outwith the scope of the present review.

2.12 Two questions arise. First, whether our general proposals for the abolition of the requirement of corroboration should extend to consistorial actions and, second, if so, whether and to what extent the provisions in section 36 of the 1830 Act and the corresponding rule in the sheriff court should be preserved and qualified.

2.13 As regards the first question, at one time the standard of proof in certain divorce actions, notably those founded on adultery, required proof “beyond reasonable doubt” as opposed to the normal civil requirement of proof on a balance of probabilities. If that had still been the situation, it would perhaps have been arguable that the requirement of corroboration should also be retained in such cases. But that argument no longer obtains since the Divorce (Scotland) Act 1976 reduced the standard of proof in all divorce actions to that of a balance of probabilities.³ Moreover, as we have mentioned,⁴ one argument against retaining the need for corroboration is that it sits somewhat uneasily with the concept of proof on a balance of probabilities. Further, as regards undefended divorce actions power is already vested in the Lord Advocate, under section

¹These are actions for divorce, separation or declarator of marriage, legitimacy or bastardy. In line with the recommendations in our Report on Illegitimacy (Scot. Law Com. No. 82—see recommendation 21 and Clause 7 of the draft Bill annexed thereto) we now refer to the last named action as one of declarator of illegitimacy and also include within the category of consistorial actions declarators of legitimation.

²*Walkers*: para. 159; Dobie, *Sheriff Court Practice*: 130, 498, 524.

³A similar argument could be used in regard to certain cases where a presumption of paternity can only be rebutted by a high standard of proof. However, we have already recommended that that rule should be changed and that the standard of proof in such cases should be the ordinary civil standard.—Report on Illegitimacy (Scot. Law Com. No. 82—recommendation 18).

⁴See para. 2.8.

2(2) of the Divorce Jurisdiction Court Fees and Legal Aid (Scotland) Act 1983, to prescribe classes of undefended divorce actions in which corroboration is not required.¹ Bearing these considerations in mind, while we appreciate that divorce and other actions concerning status may be of great importance to the individual, we are not satisfied that there is a good reason why the requirement of corroboration should be retained in those actions alone. We suspect that the requirement at the present time can sometimes lead to unnecessary expense and inconvenience and perhaps in some cases to unnecessary distress. We accordingly **recommend that:**

2. The abolition of the requirement of corroboration in civil proceedings should extend to all civil proceedings, including consistorial proceedings.

2.14 As to the second question, we do not wish in this context to disturb the existing requirement under section 36 of the Court of Session Act of 1830 that in consistorial causes the grounds of action should be established by evidence. We consider, nonetheless, that a modern provision to that effect would be desirable to put it beyond doubt that this rule would also apply in consistorial actions before the sheriff court. For certain consistorial actions, however, the term “sufficient evidence” in section 36 of the 1830 Act has been given additional meaning by the courts. This is to the effect that in actions for divorce or declarator of marriage or nullity of marriage the evidence required to substantiate the grounds of action should come from a source other than a party to the marriage.² So where a party to a marriage speaks to particular grounds of action, that evidence alone will not suffice, and there will have to be evidence from some other source as well to establish the ground of action. This requirement has been introduced to guard against the risk of collusion between the parties to such actions. The rule has not been applied to actions for separation.³ However, since this matter was considered by the courts statute has provided that in a divorce action the court may treat an extract decree of separation lodged in process as sufficient proof of the facts upon which the decree was granted.⁴ We do not think it desirable that parties should be able to circumvent the rules relating to divorce by proceeding via a preliminary action of separation and, accordingly, are of the opinion that the same evidential requirements should apply to both classes of action. Apart from this consideration, in the context of this Report we do not wish to recommend any change in the rule discussed above, although we think it should now be stated expressly in statute. However, since policy considerations affecting this category of consistorial actions might be liable to change, we consider that power should be given by rules of court to relax the requirement in such cases that the requisite evidence should come from a source other than a party to the marriage. In light of all of the above considerations we accordingly **recommend that:**

¹Orders have been made prescribing for this purpose undefended actions based on two or five year separations subject to certain further conditions.

²See *Macfarlane v. Macfarlane* 1956 S.C. 472, and *Keenan v. Keenan* 1974 S.L.T. (Notes) 10 (on divorce and declarators of nullity of marriage). On declarators of marriage see E. M. Clive, *Husband and Wife*, 2nd ed. p. 118.

³See *Dickson*, para. 284, as approved by Lord President Clyde in *Macfarlane*, above, at p. 482. The rule also is not appropriate to declarators of legitimacy, illegitimacy or legitimation.

⁴See the Divorce (Scotland) Act 1976, s. 3(1) and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s. 11.

3. In any consistorial action (whether or not appearance has been entered for the defender) no decree or judgment should be pronounced until the grounds of action have been established by evidence.
4. In any action for divorce, separation, declarator of marriage or nullity of marriage the evidence required to establish the grounds of action should consist of or include evidence other than that of a party to the marriage.
5. Power should be given to derogate by rules of court from the requirement stated in recommendation 4 above.

2.15 If the foregoing recommendations are adopted, the provisions of section 36 of the Court of Session Act 1830, section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 and section 2 of the Divorce Jurisdiction Court Fees and Legal Aid (Scotland) Act 1983 would be overtaken and we recommend that:

6. The above mentioned provisions should be repealed.

Corroboration by false denial

2.16 The law has developed a special rule applicable only to actions of affiliation. Under this rule denial by the defender in the witness box of a material fact which is proved to be true may be accepted as corroboration of the pursuer's evidence as to the paternity of the child. While the rule is well-established, it has been described as "at best a doubtful doctrine" and as a "highly exceptional and not quite intelligible rule of evidence" and the court has declined to extend it to cases other than affiliation cases.¹ The fact that the difficulty in finding corroboration in a particular class of case has given rise to the introduction of a special and rather artificial extension of the concept of corroboration confined to that particular class of case may be thought to add further doubt as to the need for the requirement of corroboration at all. In almost any class of case, there will be instances where any reasonably substantial corroboration is difficult to find. The majority of those who commented on Memorandum No. 46 were against retention of the doctrine of corroboration by false denial even if the requirement for corroboration generally were retained, though the number of cases in which the doctrine has been relied on may suggest that without it a pursuer with an honest claim in an affiliation case might have had great difficulty in otherwise securing justice. However, if our proposal to abolish the legal requirement of corroboration generally in civil cases is accepted, the need for the doctrine will disappear. We think that in those circumstances it would be confusing nevertheless to leave the doctrine standing as part of our law and we accordingly recommend that:

7. The doctrine of corroboration by false denial in civil proceedings should be abolished.

PART III—HEARSAY

The present rule

3.1 The rule against hearsay is, broadly speaking, to the effect that statements made other than by a witness giving evidence in court are not admissible. The

¹*Davies v. Hunter* 1934 S.C. 10, Lord Justice-Clerk Aitchison at 17, and Lord Anderson at 19.

rule extends both to verbal statements and to written statements (to which we refer later). There is also a view that it extends to evidence of conduct from which assertions as to facts may be inferred. The law relating to hearsay as it has developed, has acquired qualifications and exceptions which make the law complex and difficult and which, particularly in the case of the *res gestae* exception,¹ involve fine and difficult distinctions. The qualifications and exceptions also involve the result that in some cases evidence of statements made other than by a witness in court, must be taken into account for some purposes while being ignored for others. We think it self-evident that this is undesirable and should, so far as practicable, be avoided. Hearsay may be “simple hearsay” in the sense that it is evidence by a witness of what another told him where that other is speaking of what he himself perceived, or it may be “multiple” or as it is sometimes called “hearsay of hearsay”, where the person who passed the information to the witness has himself received the information from another; and of course there can be a long chain of persons passing on the information between the person who reports his own perception and the person who gives evidence as a witness.

3.2 Evidence of a statement made other than by a witness in court is admissible for the purpose of showing the mere fact that the statement was made where that fact is a relevant fact. This may arise, for example, where it is desired to show that something was within somebody’s knowledge at a particular time and the making of the statement in question demonstrates that this is so. It will also arise where the statement is relevant to explain a subsequent course of action by a particular person. Again, it may be necessary, and it will be admissible, to prove the terms of an allegedly defamatory statement in an action of defamation. Where evidence of a statement is admissible for these purposes, the fact that the statement has been made can be taken into account by the court, but the contents of the statement cannot normally be used for the purposes of establishing the truth of those contents. It is sometimes said that the admission of a statement simply as evidence that the statement was made is not truly an exception to the rule against hearsay but is an example of a case which does not fall within the rule at all. Some writers, nonetheless, do term this type of evidence as “primary hearsay” as opposed to “secondary hearsay” which, when admissible, can be used as evidence of the facts stated. We find this particular usage rather confusing, however, and do not adopt it in this Report.

Miscellaneous exceptions to the rule

3.3 A number of exceptions to the rule against hearsay have grown up at common law or been created by statute. We did not attempt, in Memorandum No. 46, to make out a comprehensive list of the exceptions. Nor do we consider that there would be any benefit to be gained by doing so here. We shall therefore limit our consideration to a number of the principal exceptions.²

¹See para. 3.4 below.

²For a discussion of the number and extent of exceptions recognised by Scots law, see A. B. Wilkinson, “The Rule Against Hearsay in Scotland,” 1982 Jur. Rev. 213, at pp. 218–219 (referred to below as “*Wilkinson*”).

(a) *Res gestae*

3.4 Statements which form an integral part of or are closely connected with the facts in issue are admitted under the *res gestae* exception to the hearsay rule.¹ Although the term “*res gestae*” is widely used it does not have a fixed meaning, a fact which has contributed to considerable confusion surrounding the extent and nature of the exception. The Sheriffs Walker describe *res gestae* statements as a type of real evidence and attempt to define the exception narrowly. However, they recognise that “the duration of the *res gestae* varies according to circumstances” and their examination of the leading cases reveals wide differences of judicial opinion as to what does and does not fall within the *res gestae* exception.² Dickson recognised that there were circumstances in which words and actions were so inextricably bound up that the one could not be understood without the other. Thus, he regarded the admissibility of *res gestae* statements as a matter of practical necessity, noting also that to exclude evidence of such statements would destroy “the connectedness and intelligibility” of the witness’s narrative.³ The topic is analysed in the Research Paper with reference to more recent case law.⁴ There, it is suggested that the exception need operate only in respect of “spontaneous or contemporaneous statement[s] relating to an event in issue . . . made by a participant or observer”.⁵ Although opinions vary as to the extent and effect of the *res gestae* exception, we consider that, as suggested in the Research Paper, it is of most significance in relation to spontaneous utterances which may be admitted as evidence of the facts stated in them.⁶ While *res gestae* statements bear some resemblance to statements which are admitted when the mere fact that the statement has been made is relevant, we think that the admission of the latter is probably more correctly looked upon as an exception to the hearsay rule since the statements which are admitted under the *res gestae* exception can be used for the purposes of proof of the truth of the contents of the statement.

(b) *Prior statements by witness who gives evidence*

3.5 There are two cases where statements made other than by a witness when giving evidence in court are admissible for the limited purpose of testing credibility but for no other purpose. The first of these is that provided for by section 3 of the Evidence (Scotland) Act 1852 which states that “It shall be competent to examine any witness who may be adduced in any action or proceeding as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified”. Although the section does not say so expressly, it has been interpreted as permitting prior statements to be proved solely for the purpose of challenging the witness’s credibility and it cannot therefore be used to admit evidence of a statement for any other purpose.⁷ Moreover, except as regards *de recenti* statements mentioned below,

¹ See Dickson, paras. 255–257; Walkers, para. 377.

² *Ibid.*

³ Op. cit., para. 254.

⁴ See paras. 19.69–19.74.

⁵ *Ibid.*, para. 19.69.

⁶ See also Wilkinson, at p. 220.

⁷ See *Muldoon v. Herron* 1970 J.C. 30, per Lord Justice-Clerk Grant at p. 35.

statements made by a witness on previous occasions which are consistent with the evidence they give in the witness box, cannot be used for any purpose at all and in particular they cannot be used in order to set up the witness's credibility.¹ We have some difficulty in understanding the logic or principle of this. The other case in which evidence of prior statements can be used, but solely in relation to credibility, involves what are known as *de recenti* statements. The rule here has the reverse effect from the exception last mentioned in that it permits, in certain very limited circumstances, evidence of a prior statement made by a witness but for the purpose only of setting up that witness's credibility. The bounds of this exception are by no means clear; it is most commonly used in relation to incidents such as sexual assaults and it permits evidence to be given of statements made by the alleged victim very shortly after the incident in question in order to demonstrate that her evidence in the witness box is likely to be true.

(c) Death or insanity

3.6 Statements made by persons who have died or become permanently insane are admissible at common law as evidence of the facts stated in them. Admissibility depends on the person having been capable of being a competent witness at the time the statement was made. Additionally, because other parties have no opportunity to test the credibility of the maker of the statement by cross-examination, such statements as are admitted are to be treated with caution and, if ambiguous, are construed in the sense least favourable to the party seeking to found on the statement. Such statements are, however, inadmissible if there are grounds for suspecting that the statement does not truly reflect what was in the mind of the person who made it.² The reasons for admitting such statements as evidence have been stated as follows:

“... it is the best which the circumstances admit of; . . . there is no ground for suspecting it is tendered for an improper purpose; and . . . injustice would more frequently arise from excluding it than from admitting it . . .”³

(d) Prisoners of war

3.7 For similar reasons, a further exception is recognised for statements by persons who have become prisoners of war.⁴ It should be noted, however, that the exception does not extend to other persons who are unavailable to give evidence in person because they have gone abroad and cannot be expected to return, or because their whereabouts are unknown or because there is no means of making contact with them, though the reasoning which permits hearsay statements for the purpose of proving the truth of the contents of the statements in the case of the dead, the insane and prisoners of war seems to be equally applicable to other cases where the person who made the statement cannot be called as a witness.

¹See Research Paper, paras. 19.38–19.40, but see also *Wilkinson* at pp. 221–222.

²See *Walkers*, paras. 371–372; *Dickson*, paras. 266 and 268.

³*Dickson*, para. 266.

⁴See *Dickson*, para. 268; *Walkers*, para. 371. Unlike the exceptions noted above, this exception is not admitted in criminal proceedings.

(e) Pedigree cases

3.8 It is sometimes suggested that another exception exists for so-called pedigree cases.¹ In a series of such cases at the end of the 19th century,² principles were developed concerning the admissibility of statements relating to “family tradition”. However, in our view, these principles are no more than a distillation, with particular reference to pedigree cases, of the general principles on the basis of which the statements of deceased persons are admitted as hearsay in other cases.

(f) Extra-judicial admissions

3.9 According to Dickson:

“Statements made by a party extrajudicially to his own prejudice may be proved against him . . . for the . . . reason . . . that they are more likely to be true than false.”³

Under the present law, an admission “is not full proof of the issue, but must be corroborated by other evidence”.⁴ This exception to the rule against hearsay is not limited to oral admissions but extends to certain admissions in writing.⁵ Where statements are admissible under this exception they are admissible as evidence of the facts stated therein and not merely for purposes of credibility. It is, however, subject to a number of important qualifications, which are fully discussed in the Research Paper.⁶ For example, a statement against interest by one defender is admissible against himself but not as evidence against a co-defender.⁷ This is one example of the situation in which the Court has the difficult task of having to admit a statement for one purpose but to ignore it for another. An extra-judicial admission by an employee relating to his alleged negligence is admissible against him, if he is cited as a defender. However, it will not be admissible against the employer where the action is based on the employer’s negligence.⁸ It is suggested in the Research Paper⁹ that clarification is required of the law as to the admissibility of admissions by employees for whose negligence the employer is alleged to be vicariously liable. The question appears to turn on whether the making of the admission was within the employee’s implied authority.¹⁰

(g) Documentary hearsay

3.10 Statements contained in documents (sometimes referred to as “documentary hearsay”) are subject to the rule against hearsay. The law here is somewhat complex. First, a document cannot be used at all unless it is lodged in court but this is subject to some very limited statutory exceptions which permit copies

¹ See *Dickson*, para. 275; *Walkers*, para. 374.

² E.g. *Alexander v. Officers of State* (1868) 6 M. (H.L.) 54, *Macpherson v. Reid's Trs.* (1877) 4 R. (H.L.) 87, *Deans's J. F. v. Deans* 1912 S.C. 441, *Dysart Peerage Case* (1881) 6 App. Cas. 489, *Lauderdale Peerage Case* (1885) 10 App. Cas. 692, *Lovat Peerage Case* (1885) 10 App. Cas. 763.

³ *Op. cit.*, para. 297.

⁴ *Dickson*, para. 310; *Walkers*, para. 29.

⁵ See *Dickson*, paras. 298 *et seq.*; *Walkers*, para. 29 and cases cited therein.

⁶ See paras. 20.02–20.08.

⁷ *Ibid.*, para. 20.06.

⁸ See Research Paper, para. 20.07.

⁹ *Idem.*

¹⁰ See *Walkers*, para. 36.

to be used instead of originals and, of course, parties can and frequently do agree to the use of copies rather than originals. Second, again subject to limited statutory exception or the agreement of parties, documents cannot be used at all unless they are identified by a witness who speaks to them in court. Assuming these hurdles are overcome, the law relating to oral hearsay, broadly speaking, applies also to them. Thus, for example, assuming a document is lodged and proved and the issue is whether a statement contained in the document has come to the knowledge of someone other than the writer, that can, in appropriate cases, be established by proving that the other person had seen the document; but the document cannot normally be used as proof of the truth of the statement in the document. For that, the writer of the document must be called as a witness if what he wrote is a report of what he himself has perceived. If the writing records something which the writer had been told by another, the person from whom the information was derived must be called. The rule against the use of documentary hearsay is probably subject to most of the exceptions to the rule against oral hearsay. For example, a document written by a witness may be used under section 3 of the 1852 Act for the purpose of attacking his credibility by showing that he made a different statement on another occasion. It is possible that a document could be admissible to prove the truth of a statement in certain cases under the *res gestae* principle though we are not aware of any such case. There is a distinction between cases where a document purports to record the writer's own perception and where it purports to record what has been reported to him by another, although both are sometimes referred to as "documentary hearsay".¹ In the latter case, the use of the document is subject to all the alleged objections mentioned later² against the use of hearsay evidence and particularly the objection that the statement may have been distorted in the telling and the objection that the original maker of the statement is not available for cross-examination. In the former case, the objection regarding distortion does not apply and, of course, the objection regarding lack of possibility of cross-examination also does not apply if, in addition to the document being lodged and proved, the writer is called as a witness. Perhaps it is for this reason that in so far as a document records the writer's own perception and the writer is also a witness, the document may normally be used to allow the writer to "refresh his memory" as it is put. A very common example of this is the use of a doctor's notes or entries made by him in hospital records provided the doctor is a witness and speaks to these notes or entries. They will in effect be admitted to prove the truth of the statement in the notes or records so far as those statements represent the doctor's own perception at the time when he made the entries, for example the condition of a patient as observed by him and the conclusions and opinions he in fact formed at the time. They can also be used, as in the case of oral hearsay, to establish what the patient told the doctor, not for the purpose of proving the truth of what the patient said but only for the limited purpose of showing the information on which the doctor proceeded, for example in making his diagnosis or ordering a course of treatment. It is worth noting in connection with documents that they may contain information derived from a number of original sources and may in fact be a combination of information derived from different persons together, perhaps, with an original input by the person who wrote or

¹See *Myers v. D.P.P.* [1965] A.C. 1001.

²Para. 3.15.

otherwise produced the document. This applies particularly under modern conditions in relation to documents produced by computers but, of course, it can apply in any type of document.

3.11 The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, section 7 provides one important exception to the application of the rule against hearsay in cases of certain documents of what one might call a routine nature. Where the Act applies the documents may be used as evidence of the facts stated therein not only where the maker of the statement is dead or insane but also in a number of other circumstances where it is impracticable to call him as a witness. We refer to this in more detail in paragraph 3.66 below. This statutory exception for documentary hearsay goes considerably further than the common law exceptions for oral hearsay: it recognises once again the potential value of hearsay in circumstances where direct evidence is unavailable or where it is impracticable to lead such evidence. Moreover, special provision is also made in sections 13 to 15 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 for the admission in certain circumstances of a statement contained in a document produced by a computer. Such statements frequently will include a hearsay element. We discuss these provisions in paragraphs 3.61 to 3.64 below.

The need for reform

3.12 The foregoing survey of the present rule against hearsay reveals a number of problems and inconsistencies which point towards the need for relaxation of the rule. Where original evidence is unavailable, hearsay is likely to be the best available evidence. To exclude it in such circumstances may well lead to a risk of injustice. But there are also many situations in which although original evidence may be in some sense available to be led, to use that fact to exclude evidence by application of the rule against hearsay is not conducive to the interests of justice. In many cases the point to which the evidence is directed is a minor or uncontroversial one which the other party would not be likely to dispute if the rule against hearsay were not available to him. Although such evidence is in practice frequently admitted without objection a party cannot be sure that this will be so. Where original evidence and hearsay of an inherently reliable type are both available, but the expense or difficulty of adducing the original evidence is out of all proportion to the importance of the point at issue, the rule against hearsay may well operate to increase the cost of litigation unnecessarily. Even when a witness who made the statement is available and is in fact called as a witness, there are many cases where hearsay evidence of what he said on a previous occasion may in fact be better evidence of the facts contained in the statement than any evidence the witness is able to give in the witness box. This applies particularly where the statement was made at a much earlier time than the time when the witness is giving evidence. Thus, of a report prepared shortly after a railway accident, the House of Lords said:

“It is clear that the due administration of justice strongly requires disclosure and production of this report. It was contemporary. It contained statements by witnesses on the spot. It would be not merely relevant evidence but almost certainly the best evidence as to the cause of the accident.”¹

¹*Waugh v. British Railways Board* [1980] A.C. 521 per Lord Wilberforce at 531.

The application of the rule against hearsay may therefore, we think, have the result that the best evidence is in fact denied to the courts. Furthermore, the application of the rule against hearsay can, in practice, give rise to the interruption of the natural flow of testimony of a witness. Apart from the waste of time so caused, this interruption, and the problems in adducing evidence when it occurs, may have an adverse effect on the accuracy of the witness's evidence.

3.13 The present exceptions are an inadequate response to the problems noted in the preceding paragraph. Not only are they too limited in scope, but they also contribute to the complex and confused state of the present rule. The exceptions have been developed on an *ad hoc* basis, to meet particular difficulties. They do not provide a rational, satisfactory solution to the problem of the exclusion of valuable evidence. They frequently, as we have mentioned, result in the court having to take account of a piece of evidence for one purpose, while at the same time ignoring it for other purposes. Moreover, in practice it is fairly common for hearsay, at least in matters not considered of much importance, to be adduced without objection in the courts.

3.14 A further factor cited in the Research Paper as contributing towards the need for reform is the divergence between the evidence available to the civil courts and to tribunals, inquiries, arbitrations and other proceedings.¹ We have noted above the growth over recent years in the scope and importance of the disputes which may be settled in such bodies, which are not all bound by the rules of evidence and in particular do not exclude evidence on the grounds that it is hearsay, and that the system appears to be operating satisfactorily.² This suggests that, with appropriate safeguards, the hearsay rule could be relaxed in the courts without any diminution in the standard of justice. Indeed, as we have indicated, relaxation of the rule might help, in certain circumstances, to avoid injustice.

Arguments for retention of the rule

3.15 The arguments against reform are listed in the Research Paper³ as follows:

- (a) hearsay is evidence of a statement made by a person when not under oath and not subject to cross-examination or the scrutiny of the court;
- (b) hearsay is not “the best evidence”;
- (c) there is a danger of inaccuracy through the repetition of the statement;
- (d) juries would be unable to evaluate hearsay accurately;
- (e) hearsay may be superfluous;
- (f) hearsay may be concocted.

Leaving over until later the question of “cross-examination” and “the scrutiny of the court”, we refer to these arguments *seriatim*.

(a) Hearsay as evidence not under oath

3.16 While the taking of the oath and the solemnity of court proceedings may cause many witnesses to concentrate on the need to give accurate testimony,

¹See Research Paper, paras. 19.10 and 19.16.

²See Para. 2.27 above.

³At para. 19.03.

and to seek to do so to the best of their ability, there are others who may be flustered by the strangeness of the surroundings and the formality of the court, and in the result give testimony which is forced and unnatural. The fact that evidence is given on oath is considered by some to make the witness less likely to be deceitful; others take leave to doubt whether the taking of the oath has any significant effect in this respect. Also, the lapse of time between an event and questioning relating to it in court may tax a witness's memory. While it is impossible to generalise on this, we think that in some cases a statement made in court and in the context of a litigation may in fact be more likely to be untruthful, or may at least be less reliable, than a statement made outwith that context. It is true that the taking of the oath or affirmation carries with it the sanction of perjury. However, the fact that the sanction of perjury may not be available does not appear to us to be a sufficient reason for excluding hearsay evidence where it may assist the court in arriving at the truth.

(b) and (c) Hearsay as not the best evidence and inaccurate by reason of repetition

3.17 To support the retention of the rule against hearsay on the ground that it is not "the best evidence" seems to beg the question. At the present time it is not the "best evidence" merely because the law says it is not the best evidence. It seems illogical that the application of the best evidence rule may result in the courts being required to rely on evidence which may be less accurate than the available hearsay evidence and which, as we have already noted, the House of Lords has accepted in a particular case would be "almost certainly the best evidence".¹ We think that there is rather more force in the argument that the original statement may become distorted through repetition and especially through repeated repetition, but we are inclined to the view that this is better dealt with in general by permitting the court to consider what weight is to be attached to the hearsay rather than by simply excluding hearsay altogether which results in exclusion of evidence of statements where the risk of such distortion is slight or minimal, as well as excluding hearsay where the risk is greater. Normally, we would expect that a witness reporting hearsay will be able to give some explanation to the court as to the source of the information and the circumstances in which it was transmitted which will provide the court with material on which to judge its weight.

(d) Hearsay as too difficult for juries to evaluate

3.18 The argument that juries will be unable to evaluate hearsay evidence accurately has only limited relevance for civil proceedings. Civil jury trials were abolished in the sheriff court by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.² In the Court of Session, jury trials are competent only in the types of action enumerated in the Court of Session Act 1825.³ In these actions, a proof will be allowed unless a jury trial is sought by one of the parties and even where it is it may be disallowed on limited grounds. In practice the numbers of cases which have proceeded to jury trial in recent years are very

¹*Waugh v. British Railways Board* [1980] A.C. 521 per Lord Wilberforce at 531; c.f., in the criminal law context, *R v. Blastland* [1985] 3 W.L.R. 345, per Lord Bridge at p. 350, quoting Lord Normand in *Teper v. The Queen* [1952] A.C. 480, at p. 486.

²S. 11.

³S. 28, as restricted by s. 49 of the Court of Session Act 1850. See generally "Civil Jury Trial in Scotland", Cmnd. 851, 1959.

small.¹ Even where cases are tried before a civil jury, hearsay is admissible if it falls within any of the exceptions to the general rule. Thus, juries presently not only have to evaluate hearsay evidence in some cases but may also be required to distinguish between hearsay admitted as evidence of the facts stated and hearsay which is admitted for a more limited purpose and therefore use the same piece of evidence for one purpose while ignoring it for others. A jury might, for example, have to consider the probative value of an extra-judicial admission by one defender which is nevertheless inadmissible as regards a co-defender. This in our view is a more inappropriate task to impose on juries than the task of assessing the weight to be attached to hearsay. If it is accepted that the jury is capable of performing the former, it is difficult to see why they should be thought incapable of assessing the value of hearsay in general, particularly as it is something which is so often encountered in everyday life outwith the confines of the courts.

(e) Hearsay as superfluous

3.19 There have been suggestions that to relax the hearsay rule would open the floodgates, permitting the courts to be swamped by superfluous hearsay. However, we do not consider that the risk would be any greater in relation to hearsay than it is in relation to other types of evidence. Hearsay which is superfluous will be dealt with by the courts in the same way as superfluous non-hearsay evidence. A party who has wasted time has to bear the expense of doing so if he is unsuccessful and may be penalised in expenses even if he is successful.

(f) Hearsay as concocted evidence

3.20 With regard to the argument about concoction, if the suggestion is that the witness reporting the hearsay is likely to concoct, the answer, we think, is that he is neither more nor less likely to concoct in relation to a report of hearsay than he is in relation to any other matter on which he is giving evidence. If the suggestion is that it is the original maker of the statement who would concoct, as we have mentioned above in relation to the question of the oath, in some instances a statement made outwith the context of a litigation is perhaps less likely to be concocted than one made within that context.

Hearsay as not subject to cross-examination and scrutiny

3.21 With regard to the question of cross-examination and the closely associated question of the scrutiny of the court when a witness is present in court and particularly when he is being cross-examined, in our view the fact that a person whose statement is reported to the court by another witness is not subject to cross-examination is much the most important reason for not simply abolishing the rule against hearsay. No doubt cross-examination may sometimes be unduly prolonged but in our view under our system of adversary procedure it can often be an essential tool for extracting the truth. Sometimes, though perhaps not very frequently, it enables one party to demonstrate that his opponent's witness

¹1981:1, 1982:4, 1983:5, 1984:4, 1985:4. We understand that proposals are currently being considered for the introduction of optional simplified procedures, in actions of damages for personal injuries, under which parties would forego their right to a jury trial. While the implementation of these proposals might possibly reduce even further the number of civil jury trials, their existence is indicative of a willingness in the Court of Session to abandon that method of trying the issues.

is dishonest. More often, it enables the real import and weight of evidence, which is not actually dishonest, to be ascertained by an exploration of the sources, basis and context of the evidence in chief. Even more important, in our view it enables the witness to be asked questions about matters which may be relevant to the case but on which he has not been examined in chief. If hearsay were always to be permitted without further safeguard, it would enable any person through the medium of hearsay to give evidence on some matters while remaining shielded from questions on other matters. We consider that in many instances it may be essential in the interests of justice that a person should be required to tell the whole story so far as relevant and within his knowledge and not merely such part of it as he or the litigant might choose to reveal by means of hearsay evidence. For these reasons we could not recommend a simple abolition of the rule against hearsay without making some further provision. However, this argument is not an argument for retaining the rule against hearsay as such. Rather it is an argument for not permitting hearsay unless, in appropriate cases, the person who made the statement which is reported as hearsay is also a witness and therefore exposed to cross-examination and the court's scrutiny. Related to this is the further point that on some occasions at least it may be wrong that a person alleged to have made a statement on some prior occasion should always be at risk of having that alleged statement proved in court without having the opportunity either to deny that he ever made such a statement or to qualify or explain it. This, however, is an objection similar to that referred to in relation to cross-examination in that it also is not an objection to hearsay as such but an objection to hearsay in the case where the person alleged to have made the statement is not also a witness.

Conclusion

3.22 If it is accepted that some hearsay which is excluded by the present law may be valuable evidence, either because it is the best available evidence in the circumstances or because it is of a type which is generally reliable, then consideration has to be given to the question whether the arguments for retention of the present rule outweigh its shortcomings. We recognise the need for proper evaluation of evidence and the problems faced by the courts in evaluating certain types of hearsay. Nevertheless, we consider that the rule against hearsay, in addition to being unduly complex, operates unreasonably to exclude potentially valuable evidence. We have therefore concluded that reform of the rule is required in the interests of justice. A number of possible options were put forward in Memorandum No. 46. These are examined briefly in the following paragraphs.

Options for reform

(a) Abolition of the rule

3.23 In Memorandum No. 46, we invited comments on the possibility of simple abolition of the rule against hearsay, without expressing any view on the question.¹ This is clearly the most radical option for reform. It has not been adopted in any of the other jurisdictions which we have examined. It does, however, have the attraction of removing the complexity and artificiality of the rule and permitting the admissibility of relevant evidence, whether hearsay or

¹Proposition 202, para. T.02.

not. The views of those who commented were divided. Although some were strongly opposed to the idea, others were more favourably disposed towards it, particularly for civil proceedings. One suggested that hearsay should be admissible at the judge's discretion. In our opinion particularly for reasons already stated in relation to cross-examination, simple abolition without more would go too far. While there is more attraction in giving a general discretion to the court, the degree of uncertainty this would involve would, we think, be unacceptable both to the court and to the litigant.

(b) Limited statutory reforms

3.24 Other, less radical options were considered. The first of these proposed a series of statutory reforms to cover particular difficulties identified in the Research Paper.¹ It is apparent that all who commented thought that some reform of the hearsay rule was required. However, opinions varied as to the direction in which reform should proceed and as to how far it should go. For example, most commentators agreed that the present exception for statements by persons who have died or become permanently insane should be extended to cover statements by persons who have become temporarily insane,² provided that due attention is given to the weight to be attached to such evidence. There was also general approval of a suggestion for clarification of the admissibility of statements under the *res gestae* exception as evidence of the facts stated,³ and of a proposal to the effect that witnesses' prior consistent statements should be admissible where the witnesses' credibility had been challenged.⁴ However, many were opposed to the admissibility of prior inconsistent statements as evidence of the facts stated,⁵ and to the admissibility of statements against interest by one defender as evidence against a co-defender.⁶

3.25 There is ample precedent, in Scotland and elsewhere, for resort to piecemeal reform to resolve particular difficulties.⁷ However, there is a danger that such reform may complicate, rather than simplify, the law.⁸ That is particularly so where the reforms attempt to deal with numerous difficulties, such as those which are created by the complicated and confused state of the present rule against hearsay and its exceptions.

¹ See paras. T.03 *et seq.*

² Proposition 203, para. T.05.

³ Proposition 223, para. T.28.

⁴ Proposition 216, para. T.16.

⁵ Proposition 221, para. T.23.

⁶ Proposition 226, para. T.33.

⁷ E.g. Bankers' Books Evidence Act 1879 as amended by the Banking Act 1979; Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 7, referred to in para. 3.11 above. Cf. New South Wales Evidence (Amendment) Act 1976, introducing new provisions in the Evidence Act 1898—Part IIA relating to the admissibility of documentary evidence as to facts in issue in civil proceedings and Part IIC relating to the admissibility of business records.

See also Research Paper, para. 19.18; the New South Wales Law Reform Commission, Report on the Rule Against Hearsay, 1978, comments as follows in relation to the creation of piecemeal statutory exceptions to the hearsay rule as occasion demands: "Although this is easy to achieve and preserves continuity with the common law, it does increase complication in that it produces a lengthy list of overlapping and often irrational exceptions." (para. 1.3.2) Also, the Law Reform Commission of Australia, in its Report of 1985 on the law of evidence, has recommended that the hearsay rule should be affirmed, but that there should be a simplified and "comprehensive set of exceptions" to the rule and a "restatement of exceptions based on a sound conceptual framework." See Volume I of the Report, at page 373 and pages 373 to 405.

(c) Codification

3.26 Another option considered in Memorandum No. 46 was codification of the present rule and its exceptions.¹ This approach, which was mooted in our Memorandum No. 8,² has been adopted in the United States. A series of proposed reforms, beginning with the Model Code of Evidence adopted by the American Law Institute in 1942, have proceeded on roughly similar lines. The most recent and most influential of these, the Federal Rules of Evidence, came into effect in federal courts³ in 1975 and have since been adopted⁴ in at least 27 states. The basic structure of Article VIII (Hearsay) of the Federal Rules involves a definition of hearsay, a statement of the general rule of inadmissibility, and an exhaustive list of exceptions to that rule.

3.27 In Article VIII, “statement” is the key concept. As defined, it includes oral or written assertions and “non-verbal conduct of a person if it is intended by him as an assertion”.⁵ Hearsay is limited to statements which are “offered in evidence to prove the truth of the matter asserted”.⁶ It should be noted that prior statements by witnesses and admissions by parties are specifically excluded from the definition of hearsay.⁷ That means that their admissibility is not dependent on satisfying the conditions for the admissibility of hearsay. The general rule is that “hearsay is not admissible except as provided by these rules”.⁸ The rules then provide for two groups of exceptions. Exceptions within the first group are recognised whether or not the maker of the statement (“the declarant”) is available to give evidence,⁹ whereas the second group of exceptions are only admissible if the declarant’s evidence is unavailable.¹⁰

3.28 In the first group, there are 23 specific exceptions, derived and developed from pre-existing common law exceptions and an additional general exception for statements “not specifically covered by any of the foregoing exceptions but having, equivalent circumstantial guarantees of trustworthiness”.¹¹ It appears that the drafters of the Rules intended that the specific exceptions should be seen as examples rather than as “an extensive series of minute categories into some one of which a proffered hearsay statement must be fitted under penalty of exclusion”.¹²

3.29 The second group contains fewer examples, with only four specific exceptions. However, as with the first group, the Rules incorporate a general exception for statements having “equivalent circumstantial guarantees of trustworthiness”.¹³ The inclusion of this group of exceptions recognises that,

¹ See para. T.03.

² Draft Evidence Code—First Part, 1968.

³ I.e. U.S. District Courts, Courts of Appeals, the Court of Claims and proceedings before U.S. magistrates: Rule 1101(a).

⁴ In some cases, subject to modifications.

⁵ Rule 801(a).

⁶ Rule 801(c).

⁷ Rule 801(d).

⁸ Rule 802.

⁹ Rule 803.

¹⁰ Rule 804.

¹¹ Rule 803(24).

¹² Advisory Committee’s Note to Rule 803, quoted in Ulrich, “Reform of the Law of Hearsay”, 1974 *Anglo-American Law Rev.*, 184 at p. 222 (referred to below as “Ulrich”).

¹³ Rule 804(5).

although the direct evidence of the maker of the statement will be preferred, it may be better to have the evidence as hearsay than to lose it altogether.

3.30 The fact that so many examples were required indicates the difficulty of attempting to codify the present rule and its exceptions. The presence of the general exception concerning “equivalent circumstantial guarantees of trustworthiness” illustrates the impossibility of foreseeing all of the circumstances in which hearsay may be valuable evidence. The effect of the specific exceptions taken with the general exception appears to be to qualify a set of complex and rigid rules by a provision of rather obscure vagueness. We are therefore of the view that codification on the American model would not reduce but would in fact increase the complexity of the law. The New South Wales Law Reform Commission observed that the proposals on which the Federal Rules are based “retain far too much of the technicality and distortion-riddled quality of the present law”.¹

(d) Civil Evidence Act 1968

3.31 A further option for reform, not explored in any detail in Memorandum No. 46, is exemplified by Part I of the Civil Evidence Act 1968,² which applies to civil proceedings in England and Wales. It falls somewhere between the American codifications and more limited piecemeal reforms.³ The 1968 Act codifies, in as much as it abolishes the common law rule and its exceptions and replaces them with a series of statutory rules. At the same time, it modifies and extends some of the pre-existing exceptions to the rule against hearsay. As a code, however, it is incomplete, since the admissibility of certain types of hearsay depends, at least in theory, on compliance with detailed procedural rules which are not found in the statute.⁴

3.32 The procedural rules made under Part I of the 1968 Act are undeniably complex. Indeed, it has been suggested that because the procedures are so cumbersome parties and their advisers tend to ignore them⁵ and to rely instead on the courts’ discretion to admit hearsay even in cases where the procedures have not been observed.⁶ The exception may therefore have become the rule. Nevertheless, the Act appears to be working in practice and such enquiries as

¹*Op. cit.*, Appendix B, para. 1.15. The Report expresses approval for eventual total abolition of the hearsay rule (para. 1.3.3.) but draws back from making a recommendation to that effect. Instead, the Commission recommend abolition of the common law rules and their replacement by a general statutory prohibition of proof of facts by way of hearsay evidence, subject to a number of “gateways” designed to allow “a great increase in the admissibility of hearsay evidence and provides a rational basis for distinguishing between what is and what is not admissible” (p. 55). The result is a Bill containing more than 40 clauses dealing with hearsay generally and with particular types of hearsay statement. The Bill also includes a general discretion in the court to admit a statement which is not otherwise admissible if “there are reasonable grounds, in the light of the circumstances in which it was made and other relevant circumstances, for thinking the statement may be reliable” (S.74(1)), or, in criminal proceedings, it would tend to support the acquittal of the accused (S.74(2)).

²The Act came into effect on 1 October 1969.

³See Research Paper, para. 19.20.

⁴See Rules of the Supreme Court, Order 38, rules 20–34.

⁵See, e.g., *Ulrich*, *op. cit.*, p. 209; and see also Heydon, *Evidence, Cases and Materials*, 2nd ed., pp. 361–362.

⁶Order 38, rule 29; see also s. 8(3)(a) of the Act.

we have been able to make suggest that it is thought to have much improved the civil litigation process. A number of interesting features may be noted.

3.33 The principal feature is the abolition of the common law rule of inadmissibility of hearsay. The rule is replaced by the statute which declares hearsay to be admissible by agreement of the parties or, if certain conditions are met, under specific provisions relating to particular types of hearsay. Even if these conditions are not met, the courts have a discretion to admit hearsay.¹ That discretion is exercised within a radically different framework from the old common law rule. Another interesting feature is that witnesses' prior statements, where admissible, are admitted as evidence of the facts stated;² this does not appear to be causing undue difficulties in practice. Finally, the Act avoids defining hearsay. As with the American Federal Rules,³ the key concept is "statement" which is defined as including "any representation of fact, whether made in words or otherwise".⁴

3.34 It is suggested in the Research Paper that the Civil Evidence Act 1968 does not provide a convenient model for reform of the law of Scotland.⁵ The Act appears, when taken along with the relevant rules of court, to be rather complex. And on a number of matters reference back to the pre-existing common law may be required. Nevertheless we consider that certain conclusions can be drawn from the successful operation of that Act. These are first that, subject to adequate safeguards, the civil courts can operate satisfactorily within a framework of general admissibility of hearsay and second, that notice procedures if too elaborate are likely to be little used in practice and, in their place, parties and their advisers may rely on the exercise of judicial discretion.

Recommendations for reform

(a) General

3.35 We have noted the difficulty of defining the precise scope of the present rule against hearsay and its exceptions.⁶ This part of the law of evidence is therefore characterised by a degree of uncertainty. It is also unnecessarily complex, as a result of the way in which the rule and its exceptions have developed. The boundaries of the exceptions are in some cases rather artificial⁷ and in others somewhat vague. We have argued that the rule may operate as a technical obstacle to the admissibility of valuable evidence and therefore to the establishment of facts which turn on such evidence.⁸ In some circumstances, hearsay may be the best available evidence and yet not be admissible under any of the existing exceptions. Thus, at the very least, some relaxation and rationalisation of the rule is required, in the interests of justice.

¹Order 38, rule 29; see also s. 8(3)(a) of the Act.

²See ss. 2 and 3. By virtue of s. 2(2)(a) or s. 4(2)(a), the leave of the court is required before evidence of a witness's prior statement may be led.

³See para. 3.27 above.

⁴s. 10. By s. 1 of the Civil Evidence Act 1972, it now includes representations of opinion also, except in relation to statements produced by computers.

⁵Para. 19.20.

⁶See paras. 3.1–3.11 above.

⁷See e.g. paras. 3.4 and 3.5 above.

⁸See para. 3.17 above.

3.36 We have commented on the main arguments for retention of the rule. We also accept that in some cases the court might be faced with a difficult task in evaluating hearsay. However, we consider that in general, and subject to certain safeguards, all relevant evidence should be admitted for what it is worth. Where hearsay is admitted at present, either because it falls within one of the recognised exceptions or because no party objects to its admissibility, the courts are able to evaluate it. If hearsay were more widely admissible, there would quite often be opportunities for examining, where necessary, the circumstances in which statements were made and the method by which they are reported, and these would of course be valuable aids to the evaluation of such evidence.

3.37 A number of options for reform have been considered. We are of the view that abolition of the hearsay rule, without any safeguards, would be too radical. On the other hand, piecemeal reforms would not be adequate. Codification on the American model would perpetuate many of the unsatisfactory distinctions of the present law and would not lead to any simplification. The compromise approach of the Civil Evidence Act 1968 is we think unsatisfactory for Scotland, particularly in respect of the complicated procedural rules by which it is supposed to operate. Nevertheless, we favour that approach in so far as it moves towards general admissibility of hearsay. In our view, the arguments discussed above¹ do not justify the retention of a general rule of inadmissibility. Although there may be good reasons for excluding hearsay in particular circumstances, exclusion should be regarded as the exception rather than as the rule. What we regard as the principal dangers of admitting hearsay more freely could be reduced by the provision of adequate safeguards. Moreover, the risk of admitting some unreliable evidence would be outweighed by the removal of a technical obstacle to a fair hearing and by the wider availability of valuable evidence. In making this recommendation we do not intend to render admissible evidence of statements made by another if direct oral evidence of the matter contained in the statement would not have been admissible if offered by the original maker of the statement. In other words we are concerned only with evidence which is presently inadmissible because of the rule against hearsay, not with evidence which may be inadmissible for other reasons, for example, by reason of confidentiality. Therefore, subject to the safeguards outlined below,² we **recommend that:**

- 8. The rule against hearsay should be abolished and any statement made by a person otherwise than as a witness in court should be admissible as evidence of any matter contained in the statement which could competently have been given by that person as direct oral evidence. We further recommend that this should apply to multiple as well as to simple hearsay.³**

(b) Qualification to general recommendation

3.38 We have already noted that in our view the principal objection to a simple admission of hearsay without more is that the person alleged to have made the statement may not be available to be cross-examined and will not have an

¹See paras. 3.15–3.21.

²See paras. 3.38–3.54.

³We accordingly define hearsay in the draft Bill annexed hereto as “including hearsay of whatever degree”. We discuss multiple hearsay at para. 3.52 below.

opportunity to deny or explain the statement.¹ It may be suggested that this problem could be met by some statutory direction that the court should attach little or no weight to hearsay in appropriate circumstances. However, we doubt whether this would always achieve a useful result. In some cases it would only be if the person alleged to have made the statement had been examined in relation to it that the court would really have any adequate material on which to decide what weight should be given to it. In any event, this solution would not really be any answer to the problem we have noted that a person having knowledge of the facts in issue should not be enabled, through the medium of hearsay, to give evidence on some matters while being shielded from cross-examination on others. We have concluded that the only safe way to deal with this is to confer upon the court a power to exclude hearsay evidence in certain prescribed circumstances unless the original maker of the statement has been called as a witness and has been examined in relation to the statement.

3.39 There are in our view several factors which the court should be entitled to take into account in determining whether, in any given case, the general rule of admissibility of hearsay should be departed from with the result that a particular hearsay statement may be held to be inadmissible. In the following paragraphs we consider each of these in turn.

3.40 As we have mentioned above, there are under the existing law certain cases where hearsay is admissible because it is not practicable, or indeed possible, for the maker of the hearsay statement to be called as a witness.² The most important of these is the case where the maker is dead. Our recommendation that the rule against hearsay should be abolished would of itself remove any need for the court to consider whether or not it was practicable for the maker of a statement to be called as a witness. We have come to the conclusion, however, that the court should have a power to refuse to admit a hearsay statement where it considers that it is practicable for the maker of a statement to be called as a witness and examined as to the statement unless and until he has been so called and examined. Subject to what we say below about the additional qualification of reasonableness, this would mean that in appropriate cases, where it was perfectly practicable for the maker of a statement to be called as a witness, the court could refuse to admit the statement unless and until the maker was called as a witness, and was thereby exposed to cross-examination. We think that the risk of witnesses, who could very well give evidence on a number of matters, confining their evidence to certain particular matters by giving it through the medium of hearsay would be largely overcome if the court had this proposed power. We also think, however, that in some cases, while it would strictly speaking be practicable for the maker of the statement to be called as a witness, it would be unreasonable for the court to insist on his appearance in the witness box as a condition of admitting the hearsay. The statement could, for example, refer to a matter which was of relatively trivial importance in the dispute or upon which there appeared to be little difference between the parties. Again, the nature of the hearsay might be such that the expense, trouble and delay of calling the alleged maker of the statement would be out of all proportion to its utility. We accordingly propose that the court's power to exclude a hearsay statement unless and until the maker

¹See para. 3.21 above.

²See paras. 3.6–3.8 and para. 3.11.

of the statement has been led as a witness should only arise where that is not only practicable but also is reasonable. In other words the court should be entitled to refuse to admit a hearsay statement only where it considers that it is both reasonable and practicable for the maker of the statement to be led as a witness.

3.41 When we propose above that the court should have power to exclude hearsay, unless the maker of the statement has been called as a witness and questioned thereon, if the calling of the maker would be "reasonable", we have principally in mind the cases where, for example, the trouble and expense would not be justified; but there is one special case to which we should make reference. A party leading in the proof may wish to rely on hearsay of a statement alleged to have been made by one of the other parties or by a person who is likely to be led by one of the other parties as a witness. It would no doubt be practicable for the party seeking to rely on the hearsay to call the opposing party or his witness and question him about the statement so as to lay the foundation for leading the hearsay. However, we do not think that it would be reasonable that he should be required to do so for he may well wish to have the advantage of cross-examining the other party or his witness rather than having to lead his evidence in chief. Accordingly, we think it should be made clear in the statute that the court may hold it not to be reasonable for a party to lead and examine the maker of a statement where that person is another party to the proceedings or a person who is likely to be led as a witness by another party. In either of these cases we do not think the opposing party would be prejudiced because he would always be in a position to lead the evidence of the maker of the statement to rebut or explain the alleged hearsay evidence.

3.42 A question arises as to whether the court's power to exclude hearsay should be exercisable *ex proprio motu* or only on the application of a party. We are of the view that hearsay should always be admissible in civil proceedings in the absence of any objection from the parties and that accordingly the court should have no power to exclude in the circumstances outlined in the preceding paragraphs except on the application of a party.

(c) Notice procedure

3.43 We are conscious of the danger of uncertainty resulting from the implementation of a scheme for the admissibility of hearsay evidence which relies substantially on the exercise of judicial discretion. Parties considering litigation may be uncertain as to whether they will be able to rely on a particular item of hearsay unless the maker of the statement is also called. The danger will doubtless recede as practice develops. However, we consider that it may in large measure be averted by providing parties with a means of establishing, in advance of a proof or hearing, the attitude of other parties to the leading of hearsay which might be thought to give rise to an objection if the maker of the statement had not been called as a witness. Although it will always be open to parties to make such enquiries informally, we think it preferable to incorporate a more formal procedure within the scheme which we are recommending. The procedural rules adopted under the Civil Evidence Act 1968 are very complex, and under-used.¹ We have therefore attempted to devise a simpler procedure which we hope is easier to understand and operate.

¹See para. 3.32 above.

3.44 In our opinion, the minimum procedural steps would be service, by the party wishing to establish the position, of a notice of intention to lead hearsay, without also calling as a witness the maker of the statement,¹ on all other parties, coupled with a right in the recipients to serve a counter-notice. The original notice (“notice of intention”) would specify the hearsay by reference to its origin, where known, and its purport, and would indicate the means by which it was proposed to adduce it. The counter-notice would merely require to record an objection to the hearsay being led without the maker of the statement being called as a witness. It would not be necessary to state the basis for the objection, since that could only be either that the objector wished to have an opportunity to cross-examine the alleged maker of the hearsay statement or that it was thought that the maker might wish to deny that he made the statement or to qualify or explain it in some way.² The party in receipt of a counter-notice might decide to call as a witness the maker of the statement or might decide to abandon the attempt to lead hearsay. Alternatively he might try to persuade the objecting party to withdraw his counter-notice, or he might decide to endeavour to persuade the court that it was a case where the court could not or should not refuse evidence of the statement in the absence of its maker. We understand that the last of these approaches is frequently adopted in cases proceeding under the Civil Evidence Act 1968.³

3.45 The purpose of our proposed notice procedure is simply to enable in appropriate cases a party to ascertain in advance the attitude of his opponent and so, perhaps, save unnecessary trouble, expense and delay. Accordingly, where both a notice and counter-notice are served, the court’s decision as to whether the hearsay should be admitted without the maker of the statement having been called as a witness would be the same as it would have been if no notice had been served though conceivably the court might penalise a party in expenses if his attitude in relation to a notice was wholly unreasonable. For example, a party might be so penalised if he served a counter-notice in a case where it would clearly be quite unreasonable for the party serving the notice to have to call the maker of the statement. If, however, a notice was served and there was no counter-notice, this would be equivalent in effect to agreement that the evidence of the statement could be led without calling the maker of the statement as a witness. We also think that, since parties who have served notices or counter-notices may subsequently wish to deal with the matter by a negotiation or agreement, it should be possible for notices and counter-notices to be withdrawn and where there is any such withdrawal the notice or counter-notice should be deemed for the purposes of the statute not to have been served.

3.46 We have suggested that the notice of intention should specify the hearsay in question by reference to its origin and purport.⁴ The particulars which are available and relevant will vary from one case to another. For example, in the straightforward case of an oral statement to be reported by the person to whom it was made, the information to be included in the notice would be the names

¹In view of our recommendation that all prior statements of witnesses should be admissible as evidence of the facts stated (Recommendation 8), the procedure would be relevant only where a party intended to adduce evidence of a statement made by a witness from whom he did not intend to lead evidence.

²See para. 3.21 above.

³See para. 3.32 above.

⁴See para. 3.44 above.

and addresses of both the person who is alleged to have made the statement, where that is known, and the person whom it is proposed to call as a witness to speak to the statement, the time when, and possibly the place where, the statement was made and its content. With routine records, it may not be possible to identify the original maker of the statement nor might it be practicable to specify all of the information contained, other than in general terms. On the other hand, it will often be possible to attach a copy of the relevant part of the record to the notice of intention. In England and Wales, different forms of notice have been devised for use in relation to different types of hearsay evidence.¹ We think that it would be undesirable to attempt to cover all eventualities in a statute and that the information to be included in notices of intention should therefore be prescribed in Rules of Court.

3.47 We have given some thought to the time-scale within which the notice procedure should operate. The procedure should, in our view, be completed in sufficient time to enable negotiations to take place between the parties which might lead to a notice or counter-notice being withdrawn, or to enable the maker of a statement to be traced and cited to give evidence, in the event of a counter-notice being served. We suggest that a notice of intention should require to be served not later than 28 days before a proof, and that a counter-notice should require to be served not later than seven days after service of a notice of intention. In order to avoid the possibility of undue delay in the service of counter-notices, the period for their service should be calculated by reference to the date of service of the notice of intention rather than by reference to the date of the proof or hearing. If the notice of intention has been served some months in advance of the proof, it would be most unfair if the party serving it had to wait until very close to the date of the proof before finding out whether or not a counter-notice was to be served. In addition, there is always the possibility of the date of the proof being altered after service of the notice of intention. We consider it wise to allow for different periods to be prescribed in the event of those which we recommend being shown by experience to be unsuitable.

(d) Order of witnesses

3.48 It will be seen from what we have proposed that, according to our scheme, where a party seeks to rely on evidence of a statement made by a person without that person having been called as a witness and questioned with regard to the statement and where objection is taken by another party, the court may have to determine either or both of two matters. These are first, whether it would be practicable for the party seeking to rely on the evidence of the statement to call the person who made the statement as a witness—and, second, whether it would also be reasonable for that party to be required to call that person as a witness. Normally the only party who would be in a position to provide the information which would enable the court to reach a decision on these questions mentioned above would be the party seeking to rely on the statement. Usually, we would expect that the party's counsel or solicitors would be fore-armed with the necessary information to give to the court at the time when the question arises, but this would not invariably be the case. For example, a party's witness might unexpectedly, in the course of his evidence, start to give evidence

¹See *The Supreme Court Practice*, 1985, Vol. 2, para. 601–604.

regarding a statement made by another on which the party would wish to rely. If in such circumstances the party was unable at that point to give sufficient information to the court we propose that the court should for that reason have power to refuse to admit the evidence of the statement unless and until the person who made the statement has been called as a witness and questioned in relation thereto. This should not prevent the party seeking to rely on the statement asking leave to recall the witness to give evidence of the statement when he is in a position to furnish the court with the relevant information.

3.49 We propose that the power of the court to refuse to admit evidence of the statement in the absence from the witness box of the person alleged to have made the statement should be expressed as a power to refuse “unless and until” the original maker of the statement has been led as a witness at the proof. In other words the power to refuse would apply unless the maker of the statement had already given evidence and been questioned about the alleged statement before evidence of the statement was adduced. It is only in that way that the court, when it considers that, in accordance with the power we propose, the original maker of the statement ought to be a witness and, therefore, subject to cross-examination, can ensure that he will be. We are conscious that this could in some cases give rise to problems as to the ordering of witnesses. The matter referred to at the end of the last paragraph is an example. If a witness unexpectedly starts to give hearsay evidence and the maker of the statement has not already been adduced, we think that the court should be empowered to stop that evidence at that stage until afforded sufficient information on the questions of the practicability and reasonableness of the attendance and examination of the maker of the statement. We think, however, that the party seeking to rely on the hearsay should be entitled to take the rest of the witness’s evidence and later, if he is able to call as a witness the maker of the statement or to satisfy the court that it is a case where the evidence of the statement should be admitted even although the maker of the statement has not given evidence, he should be able to recall the first witness to give evidence regarding the statement.

3.50 Again, a party may wish or need to lead a witness, for example the pursuer, as his first witness. The pursuer may be in a position to lead evidence of a statement made by a person who is in fact later to be a witness for the pursuer. Here again we think it should be possible for the pursuer to give all his evidence, apart from the hearsay, for the original maker of the statement then to be called as a witness and to be questioned amongst other things about the statement and for the pursuer thereafter to be recalled to give evidence about the statement. Further, while evidence of statements made other than by witnesses in the witness box will normally be evidence of statements made prior to the commencement of a proof, we think that admissibility of evidence of statements, subject to the safeguards we propose, should also apply to statements made at any time before the commencement of closing submissions and there will no doubt be other examples where the adherence to the rules proposed would cause problems relating to the order in which witnesses were called. In the circumstances, we propose a clause in the draft Bill annexed to this Report (though it may not be strictly necessary to provide for this by statute) expressly empowering, with leave of the court and for the purposes of our

proposals, witnesses to be recalled or persons to be called as additional witnesses at any stage before counsel make their closing submissions.

3.51 Under existing law and practice the court may sometimes refuse to allow a person to be called as a witness if he has previously been present in court, though the power to refuse is limited by the provisions of section 3 of the Evidence (Scotland) Act 1840. We consider that the express power which we now propose to allow a person to be called or recalled as a witness should not in any way be restricted by the fact that that person has been present in court, that this should be made plain in the statute, and that the provisions of section 3 should accordingly not apply in such cases. While we consider that this power to call or recall is probably a necessary ingredient for the working of the scheme, we think that in many cases it would have to be resorted to. A court could always, if it thought fit, hear evidence of a statement under reservation and subsequently disallow that evidence if at that later stage the court held that in terms of our proposals the maker of the statement could and should have been called as a witness and examined as to the statement.

(e) Multiple hearsay

3.52 In some cases evidence to which objection is taken will be evidence of a statement which is itself derived at several removes from the originator. It will not always be apparent how many links there may be in the chain. Moreover, it may be reasonable and practicable to lead as witnesses some but not all the persons who made the statements from which the statement sought to be given in evidence is derived. For example it may not be reasonable and practicable to call as a witness some intermediary who passed the statement on, but both reasonable and practicable to call the original maker of the statement. In the circumstances where multiple hearsay is involved, we propose that the court should have a discretion to refuse to admit evidence of the statement proffered unless and until such one or more as the court may direct of those who made statements from which that statement is directly or indirectly derived shall have been led as a witness and examined as to the statement made by him. In such cases the court will be able to apply the whole tests as to reasonableness, practicability etc to each link in the chain.

Summary

3.53 In addition to allowing evidence which we believe ought to be allowed but is presently excluded by the rule against hearsay, we believe that our proposals will simplify the working of the law in practice by making it unnecessary in future to consider the sometimes fine distinctions involved in the exceptions against the hearsay rule. We should emphasise that if our proposals are accepted, then a statement made by a person who does give evidence and is asked questions about that statement will automatically be admissible as evidence of the facts contained therein. We appreciate that our proposals to empower the court to disallow evidence of a statement when the maker of the statement has not given evidence and been asked about the statement might, at least in theory, render some evidence liable to the possibility of exclusion which could not be excluded under the present law. We do not believe that this is a serious problem, however. The power which we propose to disallow evidence is only a power and we think it unlikely that the court will use it to

the effect of disallowing evidence which presently is admissible, for example under the *res gestae* rule. As mentioned above, however, evidence of a statement is, under the present law, always admissible to prove the mere fact that the statement was made where the fact is relevant, for example to show that something was within someone's knowledge. We do not intend and we do not think that our suggested reforms will have any effect on the existing law in this respect. For the avoidance of doubt, however, we have included an appropriate clause in the draft Bill annexed to this Report.¹

3.54 In making the proposals we do, it is not our intention that evidence which is rendered admissible in accordance with them should be regarded as having any special status. We do not consider that there is any risk that courts would feel constrained to place any reliance upon a statement which is rendered admissible by virtue of these proposals merely by reason of its being admissible. We do not consider that there is any need to give the courts any statutory guidance as to the weight if any they may choose to attach to a statement in the whole circumstances of the case.

We therefore recommend that:

9. The court should have power, on the application of a party, to hold a statement not to be admissible as evidence of any matter contained in it unless and until such one or more of the makers of the statement and any statements from which that statement is directly or indirectly derived as the court may determine has been led as a witness and examined as to the statement made by him in the following circumstances:

- (a) the court considers it reasonable and practicable for the maker or makers of any of those statements to be led as witnesses and examined in relation thereto by the party intending to use the statement as evidence.**
- (b) the court is not provided with sufficient information on which to reach a view under paragraph (a).**

10. The court should be entitled to consider it not reasonable for the party intending to use the statement to lead the maker as a witness where he is another party to the proceedings, or seems likely to be led as a witness by another party to the proceedings.

11. The court should have no such power as is mentioned in Recommendation 9 where:

- (a) the maker of the statement has been called as a witness and examined at the proof in relation thereto; or**
- (b) notice has been served in accordance with Recommendation 12 below specifying a party's intention to rely on the statement and the party making application under Recommendation 9 has not served a counter-notice within the period allowed under Recommendation 13 below.**

12. A procedure should be introduced under which:

¹See clause 2(7).

- (a) parties intending to rely on hearsay without leading the maker of the statement as a witness may serve notice of their intention on all other parties to the proceedings; and
 - (b) parties in receipt of such a notice may serve a counter-notice objecting to the leading of the evidence specified in the original notice.
13. Unless other periods are prescribed, notices of intention to lead hearsay should be served not less than 28 days in advance of the date fixed for the proof or hearing and any counter-notice should be served within seven days of the date of service of the relevant notice of intention.
 14. Notices of intention and counter-notices may be withdrawn and any notice or counter-notice which is withdrawn after service should be treated as if it had not been served.
 15. For the purposes of the preceding recommendations it should be expressly provided that the court should have power to allow a witness to be recalled or an additional witness to be called at any time before the commencement of the stage of closing submissions and the fact that a person has been present in court should not preclude his call or recall for these purposes.

(f) Prior statements of witness

3.55 As we have noted, under the present law prior statements made by a witness can, by virtue of section 3 of the Evidence (Scotland) Act 1852, be used but only for the limited purpose of attacking his credibility.¹ Evidence of prior consistent statements can never be used to support credibility, except in the comparatively rare case of *de recenti* statements and conceivably also in the case of statements falling within the *res gestae* rule. We have said that we have difficulty in appreciating the logic and principle of this. Moreover, the rule in our view deprives the court of evidence which could, in some cases, be of real value in ascertaining the truth. If the truth of what a witness has said in the witness box is in issue and if, for example, it can be shown that what he said in the witness box is the same as what he has repeatedly said on previous occasions outside the context of the litigation, it seems to us that in many cases evidence to that effect would be of great assistance to the court in reaching a decision and should not be precluded by any technical rules. It may be that the result which we wish to achieve in this respect would, however, in substance be largely achieved by our previous proposals. In the situation we are now concerned with, the maker of the statement is already a witness and, provided that he has been questioned about the statement, the statement will be admissible under our previous proposals as evidence of any matter contained in the statement. Where the statement is consistent with evidence given in the witness box, the distinction between that use of the statement as evidence of the facts contained in it and the use of the statement to support the witness's credibility, is perhaps only theoretical. Nevertheless, in light of the existing law, we think that the matter should be made clear by an express provision. We think that this should be to the effect that statements, made otherwise than in the course of the proof by a person who at the proof is examined as to the statement,

¹See para. 3.5 above.

should be admissible as evidence in so far as it tends to reflect favourably or unfavourably on that person's credibility. If the matter is put in this way, section 3 of the 1852 Act would become otiose and could be repealed.

3.56 Questions may arise as to the credibility of a person whose statement is reported as hearsay. This is covered by specific provision in the Civil Evidence Act 1968.¹ However, we doubt whether any such provision is required for Scotland. We think that if evidence of a statement alleged to have been made by a person other than a witness were to be adduced, the court would be bound to admit any other evidence relevant to the reliability of the statement.

(g) Precognitions

3.57 There is one particular kind of statement which has caused us considerable difficulty. We refer to statements made on precognition. At present they are generally inadmissible. With some hesitation and realising that there is room for two views on this, we are of the opinion that they should remain inadmissible as evidence of any matter contained in the statement. They have two special qualities. First, they are or may in effect be the combined product of the person giving the statement and the precognoscer who, himself, does not normally have any knowledge of the facts. They are not or may not be in the actual words of the person making the statement and may sometimes contain glosses provided by the precognoscer. Second, they are of course prepared for the purposes of the litigation and what they contain may well include matters elicited by questioning or prompting by the precognoscer who is of course concerned with the interests of the party for whom he acts. We are not here insinuating that there is or, if they were made admissible, that there would be, anything improper in the way professional people in Scotland normally prepare precognitions, but their essential characteristics are such that they may be thought inappropriate as a means of conveying evidence of fact. We should add that we did not find any sufficient support on consultation for a change of the law in this respect. However, we do think that there is a case for allowing the use of precognitions for the limited purpose of challenging a witness's credibility. If, for example, a person is precognosed on behalf of one party to a litigation and when called as a witness for another party, gives evidence in flat contradiction of what he said on precognition, we think that this is a matter which should properly be available to the court. Although in this instance that entails us recommending the preservation of a feature of the present law which we are seeking in general to eliminate, namely the availability of the same piece of evidence for one purpose but not for another, we consider that it would be unjust if a precognition could not be used to challenge credibility.

Summary

3.58 Where evidence of a statement made on another occasion by a witness is used for the purpose of demonstrating that witness's credibility or incredibility, we think that the statement should also be admissible as evidence of the facts contained in the statement. However, it is not necessary to make special provision to that effect. The question of evidence of prior statements to reflect on the credibility of a witness only arises if the witness has already been in the

¹S. 7.

witness box and been questioned about the statement. In that case, under our earlier proposals,¹ the statement is automatically admissible as evidence of the facts contained therein. We therefore **recommend that:**

- 16. Statements by witnesses which are consistent with their evidence in court, other than statements contained in precognitions, should be admissible for the purpose of supporting the witnesses' credibility.**
- 17. Statements by witnesses which are inconsistent with their evidence in court, including statements contained in precognitions, should be admissible for the purpose of challenging the witnesses' credibility.**
- 18. Section 3 of the Evidence (Scotland) Act 1852 should be repealed.**
- 19. Statements by witnesses proved for the purpose of supporting or challenging the witnesses' credibility, other than statements contained in precognitions, should also be admissible as evidence of any matter contained therein.**

3.59 We have mentioned in relation to our previous proposals the desirability of an express power being conferred on the court to allow witnesses to be recalled or additional witnesses to be called.² We think that this power should also be available for the purposes of recommendations 16 and 17 above. For example, a pursuer's first witness might be in a position to give evidence of a prior consistent statement made by a witness who is to be called for the pursuer later in the proof. It should be possible for the first witness to be recalled for this purpose after the later witness has given evidence. Again, a pursuer might be in a position to lead evidence of a prior inconsistent statement by one of the defender's witnesses. We therefore **recommend that:**

- 20. For the purposes of Recommendations 16 and 17 the court should have power to allow a witness to be recalled or an additional witness to be called at any time before the commencement of the stage of closing submissions and the fact that a person has been present in court should not preclude his call or recall for these purposes.**

Particular types of hearsay

3.60 Hearsay consists of statements.³ These may be statements of fact, statements of opinion or a mixture of the two. They may be made orally or in writing. As we have suggested above,⁴ they may even involve gestures rather than words. Hearsay may be reported orally or may appear as part of a written or visual record. The record may be a straightforward note of what a particular person said or it may be a compilation from various sources. The compilation may have been carried out automatically, as with computerised records of banking transactions, possibly involving the addition of non-hearsay material such as the operations carried by the computer itself on material supplied to it. Many of these different types of hearsay which are covered by the recommendations in this Report have hitherto received special treatment. We turn therefore to consider the effect of our recommendations on them.

¹See Recommendation 11(a) in particular, at para. 3.54 above.

²See Recommendation 15, at para. 3.54 above.

³See paras. 3.27 and 3.33, respectively, above for the definitions adopted in the U.S. Federal Rules and in the Civil Evidence Act 1968.

⁴See para. 3.1.

(a) Opinion evidence

3.61 In the Research Paper, a distinction is drawn between ordinary and expert witnesses in relation to the admissibility of opinion evidence. Two rules relating to the giving of opinion evidence by witnesses are examined.¹ They are to the effect that ordinary witnesses must depone to facts, not opinions, and that no witness, whether ordinary or expert, may state an opinion on the issues which it is solely the function of the judge to determine. The rules are criticised on the ground that they are out-dated, impose undue restrictions on the manner in which evidence is given, and are therefore frequently not observed in practice. They have been relaxed or abolished in some comparable jurisdictions.² Nevertheless, some commentators opposed suggestions made in Memorandum No. 46 for relaxation of the rules.³ In any event we do not consider that this particular Report would be an appropriate context in which to recommend any relaxation of those rules. However, if, as we propose, the rule against hearsay is to be abolished subject to safeguards with regard to the power of the court to insist in certain circumstances on the maker of the hearsay statement being called as a witness, we see no reason why those proposals should not apply to statements of opinion as well as to statements of fact, if the statement of opinion would be admissible if given in direct oral evidence by its maker. To retain special hearsay rules as regards opinion evidence would, in our view, be unnecessary and would cause undesirable confusion, especially in cases where a statement contains both matters of fact and matters of opinion. We accordingly recommend that:

- 21. Subject to the power of the court, already referred to, to refuse hearsay evidence when the maker of the statement has not been called as a witness and examined as to the statement, evidence of statements of opinion should be admissible where the opinion would be admissible if expressed by the maker of the statement in direct oral evidence.**

(b) Documents

3.62 It is our intention that our proposals regarding the admissibility of hearsay should be applied not only to oral statements but also to statements in documents of all kinds. We seek to achieve this in the draft Bill annexed hereto by providing that what is to be admissible is, subject to the safeguards we have referred to, a "statement" and we define "statement" as including any representation, however made, of fact or opinion. We define "document" as including, in addition to ordinary documents in writing, a great many other things such as maps, photographs, tapes, and films.⁴ Many statements will accordingly be contained in documents. At the present time, subject to certain statutory qualifications, particularly that contained in section 7(3A) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 to which we refer later, a document in order to be used in any way for evidential purposes requires to be identified by a witness who speaks to it in court. We are not proposing to alter this rule generally, though we make certain recommendations relating to it.⁵ Accordingly, under our proposals, before a document can be used as evidence of a

¹See paras. 17.01 *et seq.*

²See Research Paper, paras. 17.08–17.10.

³Propositions 175 and 176, paras. R.02 and R.05.

⁴See draft Bill, clause 12.

⁵See paras. 3.70–3.71 below.

statement, it will usually have to be proved by a witness in the normal way. As we have already mentioned, documents may record statements by the person who wrote the document or by another person or consist of a compilation of statements made by a number of persons. We seek to apply our recommendations that the court should be able to refuse to admit hearsay unless the maker of the statement is called as a witness and examined in relation thereto to all these situations by providing that the person, whose attendance the court can in certain circumstances require as a precondition of admitting the statement, is a person who made the statement or who supplied the information from which the statement is "derived". This is particularly important in relation to documents produced by computers but it could, we think, be important in relation to other documents which may contain information derived from a number of sources.

(c) Computer evidence

3.63 The admissibility in civil proceedings of evidence contained in documents produced by computers is presently subject to special regulation under sections 13–15 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. Such evidence will frequently contain a hearsay element since there will most often be a human input into the computer. Moreover, the person feeding information into the computer in many instances will have obtained that information from another. It may, however, also comprise original evidence resulting from some calculation made by the computer itself. Were it not for the provisions of the 1968 Act, the "original" element of the computer evidence would be admissible at common law. With the abolition of the hearsay rule, the 1968 provisions will therefore constitute the only bar to the admissibility of computer evidence.¹ These provisions are open to criticism on a number of grounds.²

3.64 The 1968 provisions were drafted at a time when the use of computers was exceptional. Computers tended to be large and very expensive. Today, many small, inexpensive computers are available. With the rapid increase in the use of computers for a wide range of commercial and administrative tasks, much documentary evidence is already produced by computers and this tendency is likely to increase.

3.65 Section 13 of the 1968 Act sets out pre-conditions for the admissibility of computer evidence. These conditions were designed principally to ensure that only output based on information regularly supplied to the computer for storage or processing in the ordinary course of those activities is admitted. Thus, as with written, routine records, regularly kept computer records are regarded as generally trustworthy. However, these requirements based on the regularity of the supply, storing or processing of information mean that the results of tests designed to establish whether the computer is running properly and other such irregular exercises may not be admissible. Section 13 also requires that the computer should have been operating properly throughout the relevant period. If it was, then it is not easy to understand why output which is irregular or out

¹Other than possible exclusion by the court under Recommendation 9 above.

²For detailed criticism of the terms of section 5 of the Civil Evidence Act 1968, which applies to England and Wales computer evidence provisions in identical terms to those of section 13 of the Scottish legislation of 1968, see Tapper, *Computer Law* (2nd ed.) p. 168 *et seq.* and Kelman and Sizer, *The Computer in Court*, p. 21 *et seq.*

of the ordinary should not also be admissible. However, the requirements as to proper operation are inadequate in that they do not take account of the possibility of the reliability of the output being affected by defective software. According to the Professional Advisory Committee of the British Computer Society:

“The Act was passed at a time when many computer manufacturers provided both hardware and software as a matter of course. The two were separated in 1970 and the software industry thereafter expanded providing both systems and application software on a large scale. Today, though computer manufacturers themselves still provide software, “software houses” design and produce sets of programs to run on specific computers. The quality and accuracy of a computer’s output depends as much on the quality of the software as it does on the hardware...”¹

3.66 The provisions of sections 13–15 of the 1968 Act are very complex and elaborate. So much are they so that we understand that they are rarely, if ever, invoked. In Memorandum No. 46, we suggested that the elaborate procedural requirements of these sections could with advantage be simplified. We also proposed that the admissibility of all records, including those kept by a computer, should be governed by a single provision.² Most of those who commented agreed with the suggestion and the proposition. On reflection, we think that the right approach is simply to apply our general provisions on hearsay to the hearsay element in computer print-outs.³ Accordingly, in so far as they contain elements of hearsay, they will be admissible subject to a power in the court in certain circumstances to exclude evidence of statements contained in the print-out unless the person or persons from whom the information fed into the computer is derived has or have been called as witnesses and examined on the matter. As regards what we have called the “original” element of the computer output, we appreciate that computers are complex and, for the uninformed are difficult to understand. They are, however, increasingly becoming part of everyday life and we are not convinced that there is any sufficient reason for treating them differently to the way in which the courts are accustomed to deal with questions of the reliability of any other machine from which a product emerges.⁴ We therefore **recommend that:**

22. Sections 13–15 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 should be repealed.

¹Quoted in *Computer Generated Output as Admissible Evidence in Civil and Criminal Cases*, 1982, ed. Sizer and Kelman, at p. 11.

²See para. L. 19 and proposition 152.

³This approach has been adopted in the recent draft Canada Evidence Act (S-33, 1982). The Law Reform Commission of Australia in its Report of 1985 entitled “Evidence” (Report No. 26, Interim) also has not made special provision for computer evidence as such, but rather has decided to treat all evidence produced by machines or processes in the same way as regards proof (see Report, Vol. 1, para. 988 and Vol. 2, draft Bill, Clause 120). Cf. The South African Law Commission’s “Report on the Admissibility in Civil Proceedings of Evidence Generated by Computers”, 1982 and the South African Computer Evidence Act 1983.

⁴E.g. see *Tudhope v. Lee* 1982 S.C.C.R. 409; *H.M.A. v. Swift* 1983 S.C.C.R. 204; and *R. v. Wood* [1983] 76 Cr. App. R. 23. These are criminal cases but illustrate the general point that courts frequently have to hear evidence on the workings, reliability and accuracy of complex machinery, other than computers, when such matters are disputed.

(d) Business books

3.67 There are rules of common law and more importantly in statute relaxing the ordinary requirements of the law in relation to certain business books and records. These provisions are of two kinds (though in the statutes they are somewhat intertwined). In some instances they in effect relax the rule against hearsay in relation to statements contained in the document; in others they relax the ordinary rules of procedure as to how the document itself is proved or identified. We turn first to the former aspect of these rules. Business books are presumed at common law to be accurate, if regularly kept.¹ They will frequently contain a large element of hearsay.¹ Nevertheless, they are admissible as evidence of the transactions recorded in them, both for and against the party whose records they are. Admissibility depends on the books appearing to have been regularly kept in the ordinary course of business and is limited to "such matters as fall directly within their province, and of which they are the ordinary and proper record".² The scope and effect of this exception in so far as it is an exception to the hearsay rule is somewhat uncertain but in any event we think that in practice it should be largely if not wholly superseded by our proposals, which extend, of course, to documentary as well as to oral hearsay. It is theoretically possible that our proposals could in some circumstances empower the court to insist on the original maker of the statement being called as a witness in cases where, under this common law exception, the evidence of the entry in the books as evidence of the facts contained in the entry would at present be admissible. We think that this would very rarely happen, however, and in cases where the court did have such a power and thought it appropriate to use it, we think that this would be advantageous.

3.68 It is also the case that under Section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (leaving aside for the moment subsection 3A) in civil proceedings certain documents are admissible as evidence of the facts stated in them. The documents in question are documents which are or form part of a record compiled in the course of performance of a duty to record information supplied by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply. However, it is a condition of this exception to the rule against hearsay that the person who supplied the information contained in the document is dead, or beyond the seas or unfit by reason of his bodily or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied. This section then adds certain guidelines, as to the estimation of the weight to be attached to a statement admissible as evidence under the provision, which we consider are unnecessary.³ The comparison between these provisions and our proposals shows that, despite the differences in the wording, in almost all the cases where hearsay is admissible under section 7, under our proposals the court would be bound to admit the hearsay without requiring the attendance of the maker of the statement on the basis that such attendance would be unreasonable or

¹See *Dickson*, paras. 114 and 1104; *Walkers*, para. 60.

²*Dickson*, para. 1227 and see paras. 1225-1227.

³See para. 3.74 below.

impracticable whether or not the original maker of the statement was called as a witness. Here again, if there is any case covered by section 7 where the court would under our proposals have power to insist on the maker of the statement being called as a precondition to admitting the document, we think that it would be most unlikely to exercise such power; and, if there were a case where the court thought it appropriate to do so, this requirement would be justified. We accordingly consider that the provisions of section 7 to which we have referred should be superseded by our general recommendations and, since for reasons mentioned below,¹ we also think that subsection 3A should be superseded. We recommend that:

23. Section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 be repealed.

(e) Bankers' books

3.69 Section 3 of the Bankers' Books Evidence Act 1879 provides that:

“subject to the provisions of this Act a copy of any entry in a banker's book shall, in all legal proceedings be received as *prima facie* evidence of such entry and of the matters transactions and accounts recorded therein.”

The expression “banker's book” in this section has been given an extended meaning by an amendment in the Banking Act 1979 to include, in addition to records in written form, records kept by any form of mechanical or electronic data retrieval mechanism. Sections 3 to 5 of the 1879 Act are, to a large extent, concerned with the second aspect we have referred to, namely the procedure for proof of the existence of the entry, but the words which we have emphasised above in section 3 show that they go further and that the documents in question can be used as evidence of the facts recorded in the books and to this extent they appear to constitute an exception to the rules against hearsay. However, there is some limitation on this in that “bankers' books” are, for this purpose, limited to books used in “the ordinary course of the business of the bank”, (section 9), and for a copy of an entry to be received in evidence the entry must have been made “in the usual and ordinary course of business”, (section 4). Here, again, it is at least theoretically possible that section 3 could require admission of statements as evidence of the facts stated therein without any power in the court to insist on the maker of the statement being called as a witness and accordingly any repeal or disapplication of these provisions in the light of our proposals could conceivably restrict the relaxation of the hearsay rule provided for in the 1879 Act. We think that this is most unlikely to be a real problem and, in any event, again if there were ever a case where the court thought it both reasonable and practicable to insist on the presence in the witness box of the person from whom the statement in the entry in the books was derived, we think it desirable that the court should have that power. Accordingly, we propose that the provisions of the 1879 Act, so far as relaxing the rule against hearsay, should be superseded by our proposals and, therefore, recommend that:

24. Bankers' books should be treated in accordance with our recommendations relating to documentary evidence and hearsay. Thus section 3 of

¹See para. 3.70.

the Bankers' Books Evidence Act 1879, which entitles copies of entries in bankers' books to be received as *prima facie* evidence of the matters, transactions and accounts recorded therein, should be disappplied to civil proceedings (we do not recommend total repeal at this time since the 1879 Act applies also to criminal proceedings with which this Report is not concerned).

(f) Business and bankers' books—procedural and other aspects

3.70 Turning to the other aspect we mentioned in paragraph 3.65 above, namely the procedural requirements for proof of documents, as we have said documents, before they can be used for any purpose, have normally to be proved, that is to say identified by a witness speaking to them in court. This involves expense and trouble which, in some cases, is hard to justify. Section 7(3A) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 modifies that rule by permitting certain documents to be proved by their mere production in court. In other words, a witness does not have to be called to speak to them. However, section 7(3A) only applies to documents falling within section 7, that is to say having the characteristics referred to in paragraph 3.66 above. In our view, the approach adopted by section 7(3A) is most useful and could safely be extended with considerable saving of expense and inconvenience. We propose that it should be applied to any document which forms part of the records of a business or undertaking. We refer specifically to "undertakings" so as to cover large organisations which might not fall under the description of "business", for example the National Health Service. However, we think that two qualifications should be made to the section 7(3A) model. First, while section 7(3A) does make provision for certification of copies, it appears to allow the original document to prove itself by its mere presence in court though it may be difficult to see how, if there is no evidence relating to it, the court can determine whether the document is of a kind falling within section 7 at all. In our view, for a document, which forms part of a business or undertaking, to be admissible as evidence, it is desirable that it should bear some authentication. Second, while in the majority of cases, we think that the insistence on the appearance of a witness to identify the document would be wholly unnecessary, we believe that there could be cases where an opposing party might quite reasonably wish to challenge or enquire into the document's origin or authenticity. We, therefore, consider that the court should always have a discretionary power to direct in particular cases that this relaxation of the rule requiring documents to be identified by a witness should not apply. Once a document has, in terms of this proposal, proved itself, we intend that our rules regarding the admissibility of the document to prove matters contained in statements in the document should apply as they would to any document proved in the normal way. We accordingly **recommend that:**

- 25. Unless the court otherwise directs, a document may be taken to form part of the records of a business or undertaking if it is certified as such by a docquet bearing the signature or facsimile of the signature of an officer of the business or undertaking and a statement contained in such document may be proved by the production of the document. This recommendation would supersede section 7(3A) of the 1966 Act.**

3.71 Section 7(3A) of the 1966 Act and sections 4 and 5 of the Bankers' Books Evidence Act 1879 also, in respect of the limited class of documents to which they refer, relax the rule that only original documents, not copies, may be used. The solution in section 7(3A) is to admit copies which "purport to be certified or otherwise authenticated by a person responsible for making the copy or in such other manner as the court shall approve". This raises a rebuttable presumption that the copy is a true copy. The solution under sections 4 and 5 of the 1879 Act is to admit a copy of an entry in a banker's book if "the book was at the time of making the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank" and if it is "proved that the copy has been examined with the original entry and is correct" and "such proof shall be given by some person who has examined the copy with the original entry and may be given orally or by [a sworn affidavit]". We do not doubt the utility of these provisions. It can be extremely inconvenient and disruptive to have to lodge original documents in court where they may have to remain for a long time, especially if they are required for continuing use in a business. However, we think that the statutory provisions could and should be superseded by a simple provision which is also wider in scope. We see no reason why authenticated copies should not be admissible generally in place of originals. However, we do not think that this could be made an absolute rule. There may, for example, be cases where one of the parties reasonably wishes to question the accuracy of an alleged copy or indeed whether the document is truly a copy of another document at all. Again, in some cases, it may be important to be able to examine the original, for example in the case of a plan where the colouring may be significant. We think that the court should have and could properly be granted a complete discretion in this matter. We accordingly recommend that:

26. A copy of a document purporting to be authenticated by a person responsible for making the copy shall, unless the court otherwise directs, be deemed to be a true copy and treated for evidential purposes as if it were the original. This recommendation would supersede section 7(3A) of the 1966 Act and sections 4 and 5 of the 1879 Act in so far as they relate to civil proceedings.

3.72 We also proposed in Memorandum No. 46 that there should be a provision making it possible to prove by the affidavit of a prescribed official that a person does not have an account with a bank or financial institution.¹ Most commentators were in agreement with the suggestion. However, we have since concluded that in the form originally proposed it would be inoperable. It is clearly impossible to be certain as to whether a particular person has an account with a bank or other institutions. All that can be said is that there is no record of an account held in a particular name. Nonetheless, as the law stands, it may not be possible to prove even that without producing in court and laboriously examining all of the relevant records.² The problem will arise in relation to proof of the absence of any type of record, not simply the absence of a bank or

¹Proposition 156, para. L.22.

²See T. R. S. Allan, "Inferences from the Absence of Evidence and the Rule Against Hearsay", 1984, 100 L.Q.R. 175.

other account. The problem has emerged in recent reported cases in England.¹ However, we are not aware of any relevant Scottish authority.

3.73 In order to avoid difficulties arising in the future over this type of problem, we consider that it would be prudent to make provision for proof of the absence of a particular statement in the records of a business or undertaking without the necessity of producing the records. In our view, proof should be allowed either in the usual form of witnesses' evidence or, if the court is so minded, by means of the affidavit of an officer of the business or undertaking. We therefore **recommend that:**

- 27. Evidence should be admissible as to the absence of a statement in the records of a business or undertaking, either by the oral evidence of an officer of the business or undertaking or, unless the court directs otherwise, by his affidavit, without the necessity of producing the relevant records.**

3.74 The sections of the Miscellaneous Provisions Acts whose repeal we have recommended include provisions as to the factors to be taken into account in estimating the weight to be attached to evidence admissible under them. Two factors are referred to specifically. The first is whether the recording or supply of information took place contemporaneously with the events in question. The second is whether the persons involved had any incentive to conceal or misrepresent the facts. These appear to have their origin in equivalent English provisions on which they are modelled. We have come to the conclusion that these provisions do no more than give examples of factors which a court would in any event take into account when evaluating such evidence. In our opinion, it is otiose to make express provision for such matters and we consider, therefore, that they need not be retained.

PART IV—APPLICATION OF RECOMMENDATIONS

Non-statutory tribunals and arbitrations

4.1 The recommendations set out in Parts II and III above are stated to apply to civil proceedings in general, that is to all civil proceedings before courts, tribunals and inquiries, and to arbitrations. Most of our recommendations involve relaxation of the rules and procedures presently governing the leading of evidence in civil proceedings and should therefore apply across the board. However, we consider that it would not be appropriate for the notice procedure described in recommendations 12 to 14² to be applied by law in non-statutory tribunals or arbitrations, in which the degree of procedural formality is determined not by the law of evidence but by the parties themselves or the arbiter. In our view, the parties to such informal proceedings should be free to choose whether or not to import the notice procedure. We therefore **recommend that:**

- 28. The notice procedure described in recommendations 12 to 14 above should not apply in proceedings before non-statutory tribunals and arbitrations.**

We do not consider it necessary to make a similar recommendation in respect of statutory tribunals and arbitrations. There, the law of evidence applies subject

¹*R. v. Shone* [1983] 76 Cr. App. R. 72; *R. v. Muir* [1984] Crim. L.R. 101.

²See paras. 3.43–3.47 above.

to such modifications or exclusions as may be prescribed by regulation or by the tribunals themselves.¹

Section 42—Social Work (Scotland) Act 1968

4.2 The classification of certain types of proceedings, such as proceedings in respect of breach of interdict, as civil or criminal or quasi-criminal may be problematic. This is a general problem and not confined to questions with which this report is concerned. We accordingly make in general no recommendation as to whether our proposals in this respect should apply to such proceedings. It will be for the court to determine in any particular case whether the proceedings are civil proceedings or not. One particular form of judicial hearing, however, which the courts have treated as civil proceedings *sui generis* is that by a sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a child's case to a children's hearing are established.² For the purposes of the operation of the legislation which we have recommended we would not wish there to be any doubt that the reforms proposed should apply to such proceedings.³ Of the various grounds of referral contained in subsection 32(2) of the 1968 Act, however, ground (g) is that the child has committed an offence. It is clear under the Act that where proceedings in respect of that ground are involved, the standard of proof required is that of criminal proceedings⁴ and we consider, therefore, that the rules of evidence in that instance should be those applicable to criminal proceedings. Thus we **recommend that:**

- 29. Civil proceedings for the purposes of these recommendations should include a hearing by the sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a case to a children's hearing are established except in so far as the application relates to a ground mentioned in section 32(2)(g) of that Act.**

Affidavits

4.3 We do not intend that our recommendations should affect the existing law and practice concerning the use of affidavits in civil proceedings. We do not intend that our proposals should be capable of rendering affidavits potentially inadmissible in circumstances where under existing law and practice they would be admissible. However, insofar as an affidavit contains hearsay statements we do envisage that the rules and procedures we have proposed in respect of such evidence should apply. Accordingly we **recommend that:**

- 30. The foregoing recommendations should not affect the law and practice whereby evidence is given by means of affidavit, except if and insofar as an**

¹See, e.g., The Industrial Tribunals (Rules of Procedure) (Scotland) Regulations 1980 (S.I. No. 885), Sch. 1, para. 8(1), and The Lands Tribunal for Scotland Rules 1971 (S.I. No. 218), para. 20.

²*McGregor v. D.* 1977 S.L.T. 182, *per* Lord President Emslie at p. 185; see also *Kennedy v. O.* 1975 S.L.T. 235 at p. 237.

³Indeed we have received representations from the Scottish Branch of the British Association for the Study and Prevention of Child Abuse and Neglect which in particular have sought relaxation of the present rules on corroboration for such proceedings.

⁴Social Work (Scotland) Act 1968, section 42(6); see also *McGregor v. T.* 1975 S.L.T. 76.

affidavit contains a hearsay statement; in which case our recommendations should apply to that statement.

Proceedings in progress

4.4 Assuming that our recommendations are to be implemented, questions arise in relation to their application to proceedings which are already in progress. Clearly, their application to proceedings in which some evidence has already been led would be unfair, and productive of confusion. On the other hand, their application only to proceedings commenced after the recommendations are implemented could lead to a lengthy period of overlap, during which courts and other tribunals would require to deal with cases governed by two separate sets of rules of evidence. Since our notice procedure requires 28 days for its proposed operation, we have concluded that the best solution would be for the reforms to apply immediately to all cases except those in which any evidence is led prior to or within 35 days after their introduction. In that way, neither party will be prejudiced. We have chosen the period of 35 days to allow one week of the operation of new legislation to enable a party to make use of the notice procedure.¹ We therefore recommend that:

- 31. On their implementation, our recommendations should apply immediately to all cases except those in which the hearing of evidence has commenced at any time before the date occurring 35 days after the commencement of the Act.²**

Miscellaneous exceptions

4.5 Special provision has been made in a number of statutes for the admissibility and probative value of particular British and foreign public documents. In view of their particular and limited effect, we consider that these statutory provisions should not be affected by our recommendations in this Report. We therefore recommend that:

- 32. The foregoing recommendations should not be taken to have any effect on the operation of the following statutory provisions: the Documentary Evidence Act 1868, section 2; the Documentary Evidence Act 1882, section 2; the Evidence (Colonial Statutes) Act 1907, section 1; the Evidence (Foreign Dominion and Colonial Documents) Act 1933, section 1; and the Oaths and Evidence (Overseas Authorities and Countries) Act 1963, section 5.**

PART V—SUMMARY OF RECOMMENDATIONS

1. The requirement of corroboration in civil proceedings in so far as it still applies should be abolished. (Paragraph 2.10; Clause 1(1).)
2. The abolition of the requirement of corroboration in civil proceedings should extend to all civil proceedings, including consistorial proceedings. (Paragraph 2.13; Clause 1(1).)

¹If a period other than 28 days were to be chosen for the notice procedure, a corresponding adjustment should be made to the 35 day period suggested above.

²cf. s. 9(4) of The Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.

3. In any consistorial action (whether or not appearance has been entered for the defender) no decree or judgment should be pronounced until the grounds of action have been established by evidence. (Paragraph 2.14; Clause 11(1).)
4. In any action for divorce, separation, declarator of marriage or nullity of marriage the evidence required to establish the grounds of action should consist of or include evidence other than that of a party to the marriage. (Paragraph 2.14; Clause 11(2).)
5. Power should be given to derogate by rules of court from the requirement stated in recommendation 4 above. (Paragraph 2.14; Clause 11(3).)
6. Section 36 of the Court of Session Act 1830, section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 and section 2 of the Divorce Jurisdiction Court Fees and Legal Aid (Scotland) Act 1983 should be repealed. (Paragraph 2.15; Clause 14(1) and Schedule.)
7. The doctrine of corroboration by false denial in civil proceedings should be abolished. (Paragraph 2.16; Clause 1(2).)
8. The rule against hearsay should be abolished and any statement made by a person otherwise than as a witness in court should be admissible as evidence of any matter contained in the statement which could competently have been given by that person in direct oral evidence. This provision should apply to multiple as well as to simple hearsay. (Paragraph 3.37; Clause 2(1); Clause 12.)
9. The court should have power on the application of a party to hold a statement not to be admissible of any matter contained in it unless and until such one or more of the makers of the statement and any statements from which that statement is directly or indirectly derived as the court may determine has been led as a witness and examined as to the statement made by him in the following circumstances:
 - (a) the court considers it reasonable and practicable for the maker or makers of any of those statements to be led as witnesses and examined in relation thereto by the party intending to use the statement as evidence; or
 - (b) the court is not provided with sufficient information on which to reach a view under paragraph (a). (Paragraph 3.54; Clause 2(2), 2(3) and 2(5).)
10. The court should be entitled to consider it not reasonable for the party intending to use the statement to lead the maker as a witness where he is another party to the proceedings, or seems likely to be led as a witness by another party to the proceedings. (Paragraph 3.54; Clause 2(4).)
11. The court should have no such power as is mentioned in Recommendation 9 where:
 - (a) the maker of the statement has been called as a witness and examined at the proof in relation thereto; or
 - (b) notice has been served in accordance with Recommendation 12 below specifying a party's intention to rely on the statement and the party making application under Recommendation 9 has not served a counter-notice within the period allowed under Recommendation 13. (Paragraph 3.54; Clause 2(2).)
12. A procedure should be introduced under which:

- (a) parties intending to rely on hearsay without leading the maker of the statement as a witness may serve notice of their intention on all other parties to the proceedings; and
- (b) parties in receipt of such a notice may serve a counter-notice objecting to the leading of the evidence specified in the original notice. (Paragraph 3.54; Clause 3.)

13. Unless other periods are prescribed, notices of intention to lead hearsay should be served not less than 28 days in advance of the date fixed for the proof or hearing and any counter-notice should be served within 7 days of the date of service of the relevant notice of intention. (Paragraph 3.54; Clause 3.)

14. Notices of intention and counter-notices may be withdrawn and any notice or counter-notice which is withdrawn after service should be treated as if it had not been served. (Paragraph 3.54; Clause 2(6).)

15. For the purposes of the preceding recommendations it should be expressly provided that the court should have power to allow a witness to be recalled or an additional witness to be called at any time before the commencement of the stage of closing submissions; and the fact that a person has been present in court should not preclude his call or recall for these purposes. (Paragraph 3.54; Clause 6.)

16. Statements by witnesses which are consistent with their evidence in court, other than statements contained in precognitions, should be admissible for the purpose of supporting the witnesses' credibility. (Paragraphs 3.58; Clauses 2(1) and 4.)

17. Statements by witnesses which are inconsistent with their evidence in court, including statements contained in precognitions, should be admissible for the purpose of challenging the witnesses' credibility. (Paragraph 3.58; Clauses 2(1), 4 and 5.)

18. Section 3 of the Evidence (Scotland) Act 1852 should be repealed. (Paragraph 3.58; Clause 14(1) and Schedule.)

19. Statements by witnesses proved for the purpose of supporting or challenging the witnesses' credibility other than statements contained in precognitions, should also be admissible as evidence of any matter contained therein. (Paragraph 3.58; Clauses 2(1) and 4.)

20. For the purposes of Recommendations 16 and 17, the court should have power to allow a witness to be recalled or an additional witness to be called at any time before the commencement of the stage of closing submissions; and the fact that a person has been present in court should not preclude his call or recall for these purposes. (Paragraph 3.59; Clause 6.)

21. Subject to the power of the court, already referred to, to refuse hearsay evidence when the maker of the statement has not been called as a witness and examined as to the statement, evidence of statements of opinion should be admissible where the opinion would be admissible if expressed by the maker of the statement in direct oral evidence. (Paragraph 3.61; Clause 12.)

22. Sections 13–15 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 should be repealed. (Paragraph 3.66; Clause 14(1) and Schedule.)

23. Section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 should be repealed. (Paragraph 3.68; Clause 14(1) and Schedule.)
24. Bankers' books should be treated in accordance with our recommendations relating to documentary evidence and hearsay. Thus section 3 of the Bankers' Books Evidence Act 1879, which entitles copies of entries in bankers' books to be received as *prima facie* evidence of the matters, transactions and accounts recorded therein, should be disapplied to civil proceedings (we do not recommend total repeal at this time since the 1879 Act applies also to criminal proceedings with which this Report is not concerned.) (Paragraph 3.69; Clause 14(1) and Schedule.)
25. Unless the court otherwise directs, a document may be taken to form part of the records of a business or undertaking if it is certified as such by a docquet bearing the signature or facsimile of the signature of an officer of the business or undertaking and a statement contained in such document may be proved by the production of the document. (Paragraph 3.70; Clause 7.)
26. A copy of a document purporting to be authenticated by a person responsible for making the copy shall, unless the court otherwise directs, be deemed to be a true copy and treated for evidential purposes as if it were the original. (Paragraph 3.71; Clause 8.)
27. Evidence should be admissible as to the absence of a statement in the records of a business or undertaking, either by the oral evidence of an officer of the business or undertaking or, unless the court directs otherwise, by his affidavit, without the necessity of producing the relevant records. (Paragraph 3.73; Clause 9.)
28. The notice procedure described in Recommendations 12 to 14 above should not apply in proceedings before non-statutory tribunals and arbitrations. (Paragraph 4.1; Clause 2(9).)
29. Civil proceedings for the purposes of these recommendations should include a hearing by the sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a case to a children's hearing are established except in so far as the application relates to a ground mentioned in section 32(2)(g) of that Act. (Paragraph 4.2; Clause 12.)
30. The foregoing recommendations should not affect the law and practice whereby evidence is given by means of affidavit, except if and in so far as an affidavit contains a hearsay statement; in which case our recommendations should apply to that statement. (Paragraph 4.3; Clause 2(8).)
31. On their implementation, our recommendations should apply immediately to all cases except those in which the hearing of evidence has commenced at any time before the date occurring [35] days after the commencement of the Act. (Paragraph 4.4; Clause 14(2).)
32. The foregoing recommendations should not be taken to have any effect on the operation of the following statutory provisions: the Documentary Evidence Act 1868 section 2; the Documentary Evidence Act 1882, section 2; the Evidence

(Colonial Statutes) Act 1907, section 1; the Evidence (Foreign Dominion and Colonial Documents) Act 1933, section 1; and the Oaths and Evidence (Overseas Authorities and Countries) Act 1963, section 5. (Paragraph 4.5; Clause 14(3).)

APPENDIX A

EVIDENCE (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

Clause

1. Rule requiring corroboration abolished.
 2. Admissibility of hearsay.
 3. Notice procedure.
 4. Statement as evidence as to credibility.
 5. Precognition as evidence as to credibility.
 6. Leading of additional evidence.
 7. Document as part of business records.
 8. Production of copy document.
 9. Statement not contained in business records.
 10. Amendment of s.6 of the Bankers' Books Evidence Act 1879.
 11. Consistorial actions.
 12. Interpretation.
 13. Regulations.
 14. Repeals and savings.
 15. Citation, commencement and extent.
- Schedule—Enactments repealed.

DRAFT
OF A
BILL
TO

Make fresh provision in relation to civil proceedings in Scotland A.D. 1986
regarding corroboration of evidence, the admissibility of
hearsay and other evidence and the admissibility as evidence of
precognitions; and for connected purposes.

BE IT ENACTED, by the Queen's most Excellent Majesty, by and with the
advice and consent of the Lords Spiritual and Temporal, and Commons,
in this present Parliament assembled, and by the authority of the same,
as follows:—

Evidence (Scotland) Bill

Rule requiring corroboration abolished.

1.—(1) Any rule of law whereby evidence tending to establish any fact, unless it is corroborated by other evidence, is not to be taken as sufficient proof of that fact shall cease to have effect in relation to any civil proceedings and, accordingly, in any civil proceedings the court or, as the case may be, the jury, if they are satisfied that any fact has been established by evidence in those proceedings, shall be entitled to find that fact proved by that evidence notwithstanding that the evidence is not corroborated.

(2) Any rule of law whereby any evidence may be taken to be corroborated by a false denial shall in any civil proceedings cease to have effect.

Admissibility of hearsay.

2.—(1) In any civil proceedings—

(a) evidence shall no longer be excluded solely on the ground that it is hearsay;

(b) a statement made by a person otherwise than in the course of the proof shall, subject to the following provisions of this section, be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible.

(2) Where under section 3 below no notice has been served, or both a notice and a counter-notice have been served, a party to the proceedings may object to the admissibility as aforesaid of any statement referred to in subsection (1)(b) above on the ground that the person who made the statement has not been led as a witness at the proof and examined as to the statement.

(3) Where—

(a) under subsection (2) above objection has been taken to the admissibility as aforesaid of a statement, and

(b) it is reasonable and practicable in all the circumstances for the person who made that statement, or any other person who made a statement from which that statement is directly or indirectly derived, to be led as a witness at the proof and to be examined as to the statement he made by the party to the proceedings who seeks to use the statement as evidence,

the court may, subject to the following provisions of this section, hold any such statement not to be admissible as aforesaid unless and until such one or more (as the court thinks fit) of the persons to whom paragraph (b) above relates have been led and examined as aforesaid.

(4) Without prejudice to the generality of sub-section (3)(b) above, the court may hold it not to be reasonable for a person to be led and examined as aforesaid by one party to the proceedings if he is, or seems likely to be led as a witness by, another party.

EXPLANATORY NOTES

Clause 1 implements Recommendations 1, 2 and 7.

Subsection (1) implements Recommendations 1 and 2 and abolishes the legal requirement of corroboration in civil proceedings in so far as it still applies (see paragraphs 2.1 to 2.10).

Subsection (2) implements Recommendation 7 and abolishes the doctrine of corroboration by false denial which currently is applicable to actions of affiliation (see paragraph 2.16).

Clause 2 implements Recommendations 8, 9, 10, 11, 14, 16, 17, 19 and 30 and abolishes the rule against the admission of hearsay in civil proceedings, subject to various qualifications.

Subsection (1), in paragraph (a) reverses the present general rule which excludes the admission of hearsay evidence (see paragraphs 3.1–3.37 and Recommendation 8). Paragraph (b) states the new general rule that a statement made by a person otherwise than as a witness in court should be admissible as evidence of any matter contained in the statement which could competently have been given by that person in direct oral evidence (see paragraphs 3.35–3.37 and Recommendation 8). This provision also has the effect of admitting as evidence of the facts contained in them the prior statements of witnesses, other than precognitions, which could be used for supporting or challenging the witnesses' credibility (see paragraph 3.58, Recommendations 16, 17, and 19 and Clause 4).

Subsection (2), introduces an important qualification to the general rule of subsection (1) and implements Recommendations 9 and 11. It gives a party to proceedings a right to object to the admissibility of a statement where its maker is not examined before the court as to the statement in the circumstances specified (see paragraphs 3.38–3.42 and 3.54).

Subsection (3) implements Recommendation 9. It gives the court a power under the circumstances and subject to the conditions specified to hold a statement not to be admissible unless and until the maker of the statement is led as a witness at the proof and examined as to the statement. The provision is also in terms suitable for instances of multiple hearsay (a chain of reported statements), (see paragraphs 3.38–3.42 and 3.52–3.54).

Subsection (4) implements Recommendation 10 and gives guidance to the court as to when it may not be reasonable, in respect of subsection (3), for a person to be led and examined by one party to the proceedings as to a statement. If that person is or seems likely to be led as a witness by another party to the proceedings the provision envisages that it would not be reasonable for the party wishing to rely on hearsay of that person to lead him as a witness given that this would deprive him of the advantage of cross-examining him (see paragraph 3.41).

Evidence (Scotland) Bill

(5) Where the court has insufficient information before it to enable it to determine the matters of reasonableness and practicability mentioned in this section, it may hold the statement in question not to be admissible as aforesaid unless and until it has sufficient information to do so.

(6) In this section, any notice or counter-notice which is withdrawn after service shall be deemed not to have been served.

(7) Nothing in this section shall affect the admissibility of any statement as evidence of the fact that the statement was made.

(8) Where evidence is, in accordance with existing law and practice, given by means of affidavit, the affidavit itself shall not, for the purposes of this section, be treated as a statement made otherwise than in the course of the proof, but if and insofar as any such affidavit refers to a statement made by a person other than the maker of the affidavit, the provisions of this section shall apply to that statement.

(9) Nothing in section 3 below shall apply to an arbitration or tribunal not set up under an enactment.

Notice procedure.

3.—(1) A party who in any civil proceedings intends to adduce as evidence a statement without also leading as a witness the person who made the statement may, not later than 28 days (or such other period as may be prescribed) before the proof, serve on the other parties a notice in the prescribed form setting out his intention to do so.

(2) Where a notice has, under subsection (1) above, been served on a party to the proceedings, he may, not later than seven days (or such other period as may be prescribed) from the service on him of the notice, serve on the other parties a counter-notice in the prescribed form.

Statement as evidence as to credibility.

4.—Without prejudice to section 2(1)(b) above, in any civil proceedings a statement made otherwise than in the course of the proof by a person who at the proof is examined as to the statement shall be admissible as evidence insofar as it tends to reflect favourably or unfavourably on that person's credibility.

Precognition as evidence as to credibility.

5.—In any civil proceedings a statement in the precognition of a person who at the proof is examined as to the statement shall be admissible as evidence insofar as it tends to reflect unfavourably on that person's credibility.

EXPLANATORY NOTES

Subsection (5) implements Recommendation 9(b), (see paragraph 3.48).

Subsection (6) implements Recommendation 14 and envisages that even after the notice procedure provided by Clause 3 has been followed, the parties may wish to deal with the question of the admissibility of statements by negotiation and agreement and consequently that it should be possible to withdraw a notice or counter-notice (see paragraph 3.45).

Subsection (7), for the avoidance of doubt, maintains the existing law on the admissibility of statements as evidence simply of the fact that such a statement was made (see paragraph 3.53).

Subsection (8) implements Recommendation 30 and is designed to preserve the admissibility of affidavits in line with current law and practice, but at the same time submitting any hearsay statements contained in an affidavit to the same rules and procedures otherwise specified in Clause 2 (see paragraph 4.3).

Subsection (9) implements Recommendation 28 and disapplies the notice procedure specified in Clause 3 to non-statutory tribunals and arbitrations, given that in those instances the degree of procedural formality should be determined by the parties or the arbiter (see paragraph 4.1).

Clause 3 implements Recommendations 12 and 13 and sets out the notice procedure regarding the leading of hearsay evidence (see paragraphs 3.43–3.47 and Clause 2).

Clause 4 implements Recommendations 16, 17 and 19. This provision goes beyond that of section 3 of the Evidence (Scotland) Act 1852 (the repeal of which is proposed in Recommendation 18) which merely provides that evidence may be led to establish that a witness made a statement on a previous occasion different from that given by him in the legal proceedings. Such evidence at present can be used only for attacking the credibility of the witness. Clause 4 permits prior statements, whether consistent or inconsistent with court testimony, to be used to support or attack a witness's credibility. Moreover, as previously stated in relation to Clause 2(1), prior statements of a witness, other than precognitions, should be admissible as evidence of the facts contained in them (see paragraph 3.5 and paragraphs 3.55–3.57). As regards precognitions, see Clause 5.

Clause 5 implements a provision of Recommendation 17 and permits precognitions to be used for the limited purpose of attacking a witness's credibility (see paragraph 3.57).

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Leading of additional evidence.

6.—(1) For the purposes of section 2, 4 or 5 above, any person may at the proof, with leave of the court, at any time before the commencement of the stage of closing submissions—

(a) be recalled as a witness whether or not he has been present in court since giving evidence initially; or

(b) be called as an additional witness whether or not he has been present in court before-hand.

1840 c. 59.

(2) Nothing in section 3 of the Evidence (Scotland) Act 1840 shall apply to the provisions of this section.

Document as part of business records.

7.—(1) Unless the court otherwise directs, a document may in any civil proceedings be taken to form part of the records of a business or undertaking if it is certified as such by a document purporting to be signed by an officer of the business or undertaking to which the records belong; and, without prejudice to section 2 above, a statement contained in any document certified as aforesaid may be proved by the production of such document.

(2) For the purposes of this section, a facsimile of a signature shall be treated as a signature.

Production of copy document.

8.—(1) Where a document is proposed to be adduced as evidence in civil proceedings, a copy of that document, purporting to be authenticated by a person responsible for the making of the copy, shall, unless the court otherwise directs, be—

(a) deemed to be a true copy; and

(b) treated for evidential purposes as if it were the document itself.

(2) In this section, “copy” includes a transcript or reproduction.

Statement not contained in business records.

9.—(1) In any civil proceedings, the evidence of an officer of a business or undertaking that any particular statement is not contained in the records of the business or undertaking shall be admissible as evidence of that fact whether or not the whole or any part of the records have been produced in the proceedings.

(2) The evidence referred to in subsection (1) above may, unless the court otherwise directs, be given by means of the affidavit of the officer.

Amendment of s. 6 of the Bankers' Books Evidence Act 1879.
1879 c. 11.

10.—Section 6 (case in which banker not compellable to produce book) of the Bankers' Books Evidence Act 1879 is hereby amended by inserting after the word “Act” the words “or under the Evidence (Scotland) Act 1986”.

Consistorial actions.

11.—(1) In any action for divorce, separation or declarator of marriage, nullity of marriage, legitimacy, legitimation or illegitimacy (whether or not appearance has been entered for the defender), no decree or judgment in favour of the pursuer shall be pronounced until the grounds of action have been established by evidence.

EXPLANATORY NOTES

Clause 6 implements Recommendation 15. The terms of subsection (2) disapply the provisions of section 3 of the 1840 Act so as not to preclude the call or recall of a witness simply because he has been present in court during the questioning of other witnesses (see paragraphs 3.48–3.51).

Clause 7 implements Recommendation 25 and permits a document of a business or undertaking to be proved in court, without the need for a witness to speak to it, unless the court otherwise directs. Although, under this clause, a statement can be proved by the production of such document, this is without prejudice to the provisions of Clause 2, whereby the statement may not be admissible unless and until its maker is examined as to it (see paragraph 3.70).

Clause 8 implements Recommendation 26 and permits as a general rule an authenticated copy of a document to be admitted and treated for evidential purposes as if it were the original. A discretion is left in the court, however, to direct that the original be produced. This may be necessary, for instance, where the original includes a coloured plan or the original may require to be examined for erasures, etc. (see paragraph 3.71).

Clause 9 implements Recommendation 27. The fact that an entry has not been made in the records of a business or undertaking, where if a particular transaction or event had occurred it would have, may be of relevance in the course of litigation. Without a provision such as Clause 9, for the absence of a record of a particular kind to be proved it could be necessary for a party to produce all the records of an organisation, and for these to be laboriously examined in court, simply to establish that there is no relevant entry. For most instances this would be unnecessarily time-consuming and hence Clause 9 allows, except where the court otherwise directs, evidence of the absence of a record to be given orally or by the affidavit of an officer of the business or undertaking (see paragraphs 3.72–3.73).

Clause 10 makes an amendment to the Bankers' Books Evidence Act 1879, consequential on the provisions of Clause 9 (see paragraph 3.71).

Clause 11 implements Recommendations 3, 4 and 5 and is intended to clarify and restate the evidential requirements for consistorial actions at present set out in section 36 of the Court of Session Act 1830 and under the common law (see paragraphs 2.14–2.15).

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(2) In any action for divorce, separation or declarator of marriage or nullity of marriage, the evidence referred to in subsection (1) above shall consist of or include evidence other than that of a party to the marriage.

(3) Rules of court may provide that subsection (2) above shall cease to apply in the case of any particular class or classes of action.

Interpretation. **12.**—In this Act the following expressions shall, unless the context otherwise requires, have the following meanings respectively assigned to them—

“business” includes trade or profession;

“civil proceedings” includes, in addition to such proceedings in any of the ordinary courts of law,—

(a) civil proceedings before any tribunal,

(b) an arbitration, whether under an enactment or not,

1968 c. 49.

(c) a hearing by the sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a child’s case to a children’s hearing are established, except insofar as the application relates to a ground mentioned in section 32(2)(g) of that Act (commission by the child of an offence),

and “court” shall be construed accordingly;

“document” includes, in addition to a document in writing,—

(a) any map, plan, graph or drawing;

(b) any photograph;

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are recorded so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(d) any film, negative, tape or other device in which one or more visual images are recorded so as to be capable (as aforesaid) of being reproduced therefrom;

“film” includes a microfilm;

“hearsay” includes hearsay of whatever degree;

“made” includes allegedly made;

“prescribed” means prescribed by rules of court but, in relation to proceedings other than in the ordinary courts of law, means prescribed by regulations made by the Secretary of State;

“proof” includes trial or other hearing of evidence and includes any continued proof;

“records” means records in whatever form;

“statement” includes any representation (however made or expressed) of fact or opinion but, except in section 5 above, does not include a statement in a precognition;

EXPLANATORY NOTES

Clause 12 is the interpretation provision. In respect of the background to some of these terms see: for “civil proceedings”, paragraph 4.2; for “document”, paragraph 3.62; and for “statement”, paragraphs 3.57 and 3.61 regarding precognitions and opinion evidence respectively.

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“undertaking” includes any public or statutory undertaking and any government department.

Regulations.

13.—Any regulation made under this Act shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Repeals and savings.

14.—(1) The enactments specified in columns 1 and 2 of the Schedule to this Act are hereby repealed to the extent specified in column 3 of the Schedule.

(2) Nothing in this Act (including the repeals made thereby) shall apply to proceedings in which the hearing of evidence has commenced at any time before the date occurring [35] days after the commencement of this Act.

(3) Nothing in this Act shall affect the operation of the following enactments—

1868 c. 37.

(a) section 2 of the Documentary Evidence Act 1868;

1882 c. 9.

(b) section 2 of the Documentary Evidence Act 1882;

1907 c. 16.

(c) section 1 of the Evidence (Colonial Statutes) Act 1907;

1933 c. 4.

(d) section 1 of the Evidence (Foreign, Dominion and Colonial Documents) Act 1933;

1963 c. 27.

(e) section 5 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963.

Citation,
commencement
and extent.

15.—(1) This Act may be cited as the Evidence (Scotland) Act 1986.

(2) This Act shall come into force at the end of the period of three months beginning with the date on which it is passed.

(3) This Act shall extend to Scotland only.

EXPLANATORY NOTES

Clause 14 provides for repeals and savings.

Subsection (1) implements Recommendations 6, 18, 22, 23 and 24 regarding the repeal of the provisions therein specified (see Summary of Recommendations).

Subsection (2) implements Recommendation 31 so that the proposed reforms should apply immediately, except as regards those cases in which evidence is led prior to or within 35 days of the introduction of the legislation. The notice procedure requires a minimum of 28 days and accordingly a period of 35 days has been specified here to allow a party one week's leeway from the commencement of the legislation to serve a notice, should he wish to do so (see paragraph 4.3).

Subsection (3) implements Recommendation 32 (see paragraph 4.5).

Enactments Repealed

<i>Chapter</i>	<i>Short Title</i>	<i>Extent of Repeal</i>
11 Geo. 4 & 1 Will. 4, c. 69.	The Court of Session Act 1830	Section 36.
15 & 16 Vict. c. 27.	The Evidence (Scotland) Act 1852.	Section 3.
42 & 43 Vict. c. 11.	The Bankers' Books Evidence Act 1879.	Sections 3 to 5 so far as they relate to civil proceedings.
1966 c. 19.	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966.	Section 7.
1968 c. 70.	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.	Section 9. Sections 13 to 16. In section 17(3), the definition of "computer".
1983 c. 12.	The Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983.	Section 2. In Schedule 1, paragraph 2.

EXPLANATORY NOTES

The *Schedule* implements Recommendations 6, 18, 22, 23 and 24 (see also Clause 14(1)).

APPENDIX B

List of those who submitted written comments on the proposals in Consultative Memorandum No. 46 relating to corroboration, hearsay and related matters in civil proceedings.

Messrs Brechin Robb
British Association for The Study and Prevention of Child Abuse and Neglect (Scottish Branch)
British Insurance Association
Committee of Scottish Clearing Bankers
Committee of Senators of the College of Justice
Mr C. Cox
Faculty of Advocates
Glasgow Bar Association
Sheriff G. H. Gordon, Q.C.
Mr I. G. Inglis, W.S.
Institute of Chartered Secretaries and Administrators
Law Society of Scotland
Mr D. MacLennan, W.S.
Mr F. E. O'Riordan, W.S.
Scottish Courts Administration
Scottish Council for Civil Liberties
Mr I. M. Thomson, W.S.

