SCOTTISH LAW COMMISSION

MEMORANDUM NO. 8

DRAFT EVIDENCE CODE

(FIRST PART)

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This Memorandum is circulated for comment and criticism and does not represent the concluded views of the Scottish Law Commission.

DRAFT EVIDENCE CODE

(FIRST PART)

C O N T E N T S

I N T R O D U C T I O N

In specifying the functions of the Law Commissions, section 3(1) of the Law Commissions Act 1965 provides:

> "It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law."

Codification has thus been set by Parliament in the forefront of the methods by which the legal systems of Britain are to be reformed: this was some time ago forecast by Lord Cooper in these trenchant words:

> "All legal systems require a cement to bind them into a coherent whole; and the question which the Common Law systems will very soon have to face is whether a better cement than rigid precedent cannot be found in more codification and in methodised reasoning from clear principles in accordance with the civilian tradition. The judge must not be the parties' oracle, but he must be something more than an animated index to the law reports."[1]

It seemed to the Scottish Law Commission, at the outset of their work, that for many reasons the law of evidence was the branch not only most easily susceptible of codification, but was also that in which a code would be of the highest practical value. That opinion having been endorsed by Ministers, and the proposal having been formally approved by them, the Commission came under a statutory duty to prepare

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[1] Selected Papers, p. 207.

a code. In so doing, they were bound, as is provided by section 3(1)(f) of the 1965 Act, "to obtain such information as to the legal systems of other countries as appears . . . likely to facilitate the performance of . . . their functions." Since the law of evidence has to fit into the framework of substantive law, and also into current court procedures which the Code is not intended to deal with, it is clear that assistance can, for the most part, only be looked for from legal systems which resemble ours in principles, ideals and practice. As a consequence it will be seen that the other jurisdictions most frequently referred to are those of England and the United States. It will also be observed, however, that foreign systems are applied to mainly for explanation and comment; in the particulars in which reform of the law is recommended, our proposals owe very little to foreign sources.

The First Draft

The preparation of a code, even for a branch of law so restricted as this, is a long business. Work has already been going on - though not uninterrupted by other pressing commitments - for nearly three years. The Commission were, however, advised against delaying the placing of their results before the profession and the public until they were complete. It was felt that the more helpful course would be, when a substantial part of the draft was ready, to ask for comment and criticism on its form and substance, so that amendments of

either could be introduced into subsequent chapters. Nor was it thought best to produce first what might be called a self-contained section, but rather to show chapters dealing with a wide variety of topics. It will, however, be noticed that the first five chapters belong, as it were, to the same family, being concerned with the competence of evidence, and the making of it available. Chapter 6, which deals with witnesses rather than evidence, obviously leads into the related question of privilege and confidentiality; when rules on these topics have been drafted, the chapter may require some rearrangement. Chapters 7 and 8 contain examples of articles directed to the actual conduct of trials. What proportion of the whole the first 62 articles represent cannot be accurately estimated. The American Model Code,[1] omitting certain general provisions which may be inappropriate to the present Code, extends to 105 articles, together with a commentary. The way in which the codification of a self-contained branch of the law can reduce the mass of documents necessary for its presentation, in text-books, statutes and reported decisions, is very striking.

The Form of the Code

It is clear that the form of a code must differ radically from that of an existing British statute. The present form of such statutes is conditioned by the fact that they are drafted against the background of the body of existing law, details of which it is desired to change. A code, on the other hand, is designed to set out the whole law relating to a particular subject in a comprehensive and systematic way, and to form the

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[1] See p. 9.

basic source of legal principle in that field. It is neither designed simply to effect alterations to existing law, though it may do so incidentally, nor simply to restate the law, though in fact it may do this; it is designed rather to supplant the existing law completely in a particular field. In this situation the particularised drafting which is thought appropriate to existing legislation would be out of place. It is not desirable to put the Courts in a straitjacket from which they will inevitably seek to escape; the history of foreign codifications suggests that attempts to envisage all possible situations are conspicuous only by their failure.

A code, therefore, should be drafted with the primary aim of enunciating clearly and simply the basic principles of the relevant branch of the law in a form in which they can be readily understood by legal practitioners and others who may wish to consult it. The application of these principles to particular problems, which is often a matter of concern in existing statutes, should be left as a rule to the Courts to determine. It is for the Courts to give effect to those principles against the background of a pattern of life which constantly alters. It is recognised that with the passage of time the interpretation of particular articles may change; this is a result to be sought rather than to be deplored.

The Commentary

The Scottish Law Commission propose that the Code, as it is ultimately approved by the legislature, should be accompanied by a commentary. This commentary is designed -

(a) to justify and explain the principles which the Code embodies;

(b) to indicate its intended field of application;

(c) to make clear in what respects it is intended to alter the substance of the existing law, and

(d) to point out the relationship between the Articles.

The authority to be given to the commentary will naturally be a matter for Parliament, but the Scottish Law Commission hope that it will be accepted as a legitimate extrinsic aid to the construction of the Articles.

The commentary attached to the enacted Code, however, will necessarily differ considerably from that presented with this First Draft. The latter has been prepared primarily for the information of the legal profession, and to assist them in discussing and criticising the Articles themselves. Its form is not necessarily appropriate for public consumption; it is for consideration, for example, whether any citation of sources or authorities is desirable in the final version. It may also be thought necessary to expand or explain the language used, which has been deliberately compressed having regard to the qualifications of its intended audience.

Authority of judicial decisions vis-à-vis the Code

The Code is not intended to be merely a restatement of existing law but is rather intended to supersede it. It is one of the main objectives of a code that constant reference to prior decisions is rendered unnecessary. This has been recognised since the commer-

cial codes were enacted towards the end of the 19th century. In Bank of England v. Vagliano Bros.[1], a case concerning the construction of the Bills of Exchange Act 1882, the conclusion arrived at by a majority of the Court of Appeal was criticised by Lord Herschell on the following grounds:[2]

> "The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned Judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person or his order was, as against the acceptor, in effect a bill payable to bearer, only when the acceptor was aware of the circumstance that the payee was a fictitious person, and further, that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned Judges that if the exception was to be further extended, it would rest upon no principle, and that they might well pause before holding that sect. 7, sub-sect. 3, of the statute was 'intended not merely to codify the existing law, but to alter it and to introduce so remarkable and unintelligible a change'.
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> "My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.
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> "If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead

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[1] [1891] A.C. 107.

[2] At p. 144.

> of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

This passage has been quoted at length because of the amount of valuable advice which it offers upon a topic which is, since codification as opposed to consolidation is not common in English or Scots law, still the subject of doubt and dispute. The problem becomes even more acute in face of a code which for the first time is cast in language foreign to the Parliamentary draftsman, and is to be interpreted not by a minute examination of its express terms but rather by reasoning from general principles. It is hoped that in Scotland, having regard to the traditions of our common law, the form of our ancient statutes, and the freedom from the bonds of stare decisis enjoyed by the Court of Session, there will be the less difficulty in adapting to new methods of stating the law.

Pre-code statutes vis-a-vis the Code

It is the intention that the substance of the pre-code statutes affecting the law of evidence should, so

far as it is to remain in force, be reproduced in the articles themselves. In any such case, as also in the case of a statute the provisions of which are not intended to be incorporated in the Code, the statute itself may be scheduled for repeal in the statute which brings the Code into force. In exceptional cases, a recent statute may be reproduced verbatim in the commentary. In even more exceptional cases, where it is desired not to overload the Code with details in unimportant particulars - e.g. the rules as to the availability of diplomatic witnesses - the appropriate statutes may remain unrepealed, and be merely referred to in the commentary.

The Immediate Object of Publication

The object of the Scottish Law Commission in publishing this draft is to reap the advantage of early consultation with the legal profession and other interested persons; in particular comment and criticism is desired upon (a) the form of the Code, (b) the substance of the Code so far as it has gone, (c) advice upon the treatment of those parts of the law which have not yet been codified, and (d) the interpretation of the Code, and its relationship with judicial decisions, both pre- and post-code. The form which discussions are to take will be for arrangement with the bodies and persons concerned.

The Numbering of the Articles

This First Draft is divided into Chapters and Articles. The numbering of the Articles is consecutive within each Chapter, the first Article of each Chapter being numbered 1.

Thus the Article defining an expert witness may be cited as "Article 2.4(a)".

Table of References

Alison - Alison, Principles and Practice of the Criminal Law of Scotland, 1832-33.

American Model Code - Model Code of Evidence as adopted and promulgated by the American Law Institute, 1942.

Boland and Sayer - Boland and Sayer, Oaths and Affirmations, 2nd Edition, 1961.

Cooper - Lord Cooper, Selected Papers 1922-1954, 1957.

Cross - Cross, Evidence, 3rd Edition, 1967.

Dickson - Dickson, A Treatise on the Law of Evidence in Scotland, 2nd Edition, 1887.

Hume - Baron Hume, Commentaries on the Law of Scotland respecting Crimes, 4th Edition, 1844.

Law Reform Committee 13th Report - Law Reform Committee 13th Report, "Hearsay Evidence in Civil Proceedings", Cmnd. 2964, 1966.

Lewis - Lewis, Manual of the Law of Evidence in Scotland, 1925.

Phipson - Phipson on Evidence, 10th Edition, 1963.

Renton and Brown - Renton and Brown, Criminal Procedure according to the Law of Scotland, 3rd Edition, 1964.

Stair - Viscount Stair, The Institutions of the Law of Scotland (More's Edition), 1832.

Walkers - A.G. Walker and N.M.L. Walker, The Law of Evidence in Scotland, 1964.

CHAPTER 1

HEARSAY

The rule against hearsay is not, according to the American Model Code, historically a concession to the weaknesses of the average jury, but "is the child of the adversary system".[1] Whatever may be said of the first part of the proposition, the second is not easy to reconcile with the history of Scottish practice. Stair, writing in 1693 (2nd Edition), states the rule;[2] yet it was only by the statute James VII 1686, c. 18 that the examination of witnesses, until then conducted privately by the judge and his clerk, had been directed to be carried on in the presence of the parties or their advocates, but, "no other ought to be admitted".[3] The proceedings were at least until that date clearly of an inquisitorial character.

The objections which are normally stated to the acceptance of hearsay are that evidence is laid before the Court (a) otherwise than by a witness on oath, (b) in a form which renders it immune from cross-examination, and (c) which is not always the best evidence of what it speaks to. It has also been claimed (d) that the admission of hearsay would result in the proliferation of marginally relevant evidence, with the obvious consequences of delay and expense. Some degree of validity may be allowed to all these objections. On the other hand, there is a growing feeling, to which this Code tries to give effect, that all relevant evidence ought to be competent. Since so many of the decisions which judges and jurymen take in

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[1] p. 218.

[2] "Testimonies ex auditu prove not, that is, where the witness gives for the reason of his knowledge, that he heard the matter by relation of others." iv.43.15. See Dickson §244.

[3] Stair iv.43.14.

their private lives proceed in whole or in part on the evaluation of hearsay, it is hard to claim that such evidence is a priori incompetent when offered in court. That it is not the best evidence is true in some cases but not in others. Which of the following answers gives the more reliable information, it being understood that the questions are being put at a trial taking place two years after the incident described? W 1 says, "To the best of my recollection I was 100 feet from the accident when it happened." W 2 says, "W 1 came running to me and said he had just seen an accident. I asked him how far away he was, and he said 10 feet. I took a note of that, which I produce." Furthermore, if W 1 says on oath, "I saw A there at the time", that is the best evidence. If W 2 says on oath, "W 1 told me at the time he had seen A there", that is second best evidence of A's presence, but that does not make it worthless. It is useful in support of W 1's credibility. That is the basis of the acceptance of the de recenti statement in cases especially of sexual assault. It is not strictly corroboration, (though the distinction is an unreal one) but it supports the credibility of a witness by proving that his conduct at the time of the incident was consistent with the evidence he is now giving. The adoption of this Code will do away with the de recenti doctrine, or to put it another way, there will no longer be any special rules for de recenti statements. In short, hearsay will in future be classified in the same way as all other evidence - the weight of it will vary. In many cases it may be necessary to warn juries of its lesser value, for any of the reasons set out above, but this lesser value provides no reason for its rejection, only for comment.

Article 1.1 Hearsay evidence is evidence by a witness of an oral statement made, or alleged to have been made, by another person.

Article 1.2 Except as provided in the following Articles, hearsay evidence is not admissible for the purpose of establishing the truth or falsity of facts asserted in the statement.

Article 1.3 Hearsay evidence is admissible under the following Articles only where the person who made, or is alleged to have made, the statement would himself have been a competent witness at the time when the statement was made, and had personal knowledge of the matters dealt with in the statement.

COMMENTARY

The definition contained in Article 1.1 has been compiled from a number of sources with the object of circumscribing the subject dealt with in this Chapter.

Firstly, it is so worded as to exclude what is sometimes called "self-corroboration",[1] or "the rule against narrative",[2] that is, evidence given by a witness of something which he himself has said. "From the etymological point of view it certainly strains language to refer to what was previously said by a person who is presently testifying as 'hearsay'."[3] Such evidence is already competent for the purpose of discrediting a witness,[4] and in terms of this Code it will become competent for other purposes as well. According to Phipson[5] this would be a reversion to English law as it was in the 17th century, but is no longer.

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1 Phipson § 1573.

2 Law Reform Committee 13th Report, para.5.

3 Cross p.387.

4 Evidence (Scotland) Act 1852, s.3.

5 loc.cit.

Secondly, it will be observed that the definition itself does not make the familiar distinction between a statement by another which is offered as proof of the assertions contained in it, and a statement made by another which is offered as proof that the statement was in fact made. A simple illustration makes the distinction clear. "I heard A say that he had seen B strike C", if offered by the prosecutor at the trial of B for assault, falls into the first category, but if offered by B in an action of defamation at his instance against A, falls into the second. So also, in cases where reputation, common report or the like are in issue, evidence would be admissible of statements made by others than the witness. It is felt that both categories must, semantically, fall under the head of hearsay, and the relaxation of the rule in favour of the second category is secured by the terms of Article 1.2.

Article 1.3 is necessary, lest evidence which at first hand would have been inadmissible become admissible merely because it falls, as secondary evidence, under one of the exceptions to Article 1.2. It also has the effect of excluding secondary hearsay. "I heard A say that he had heard B say that he had seen C there" is inadmissible, since C's presence was not within the personal knowledge of A.

It will be observed that the definition includes as hearsay what are called "implied assertions". Cross[1] gives as an example, where the matter to be proved is X's presence at a certain place and time, evidence that A had been heard at that place and time to say, "Hullo X". Provision is made by Article 1.6 to except such ejaculations from the rule as being part of the res gestae. Although the learned author points out that the American Model Code confines the rules about hearsay to express

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[1] pp. 383-385.

assertions, and that Kenny[1] takes the same view, it is felt that implied assertions are truly hearsay, and ought to be expressly enfranchised.

Article 1.4 (a) Hearsay evidence is admissible if the maker of the reported statement has already given evidence, or is to be called subsequently, as a witness in the case.

(b) The calling of the maker of the statement may be waived of consent.

COMMENTARY

While the "best evidence" rule ought not to exclude hearsay, neither ought hearsay to be readily accepted in lieu of the best evidence, but rather in support of it. The admission of hearsay is therefore generally conditional upon the maker of the statement also giving evidence, if he is available and called for by another party.

The current (English) Civil Evidence Bill makes detailed provision as to what is to be prescribed by way of notice and counter-notice when oral hearsay is to be adduced. It is thought that it should be left to the Judges to regulate such matters by administrative act. The condition that the maker of the statement must, if possible, be called as a witness is consistent with the American Model Code.

Article 1.5 (a) Hearsay evidence is admissible if the maker of the reported statement is missing or dead or has subsequently to making the statement become an incompetent witness, or if for any other reason the Court considers it impracticable to require his evidence to be adduced.

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[1] Outlines of Criminal Law, 19th Edn. p.500.

(b) It is competent to lead evidence for the purpose of impugning the credibility of a person whose statement has been adduced under this Article.

COMMENTARY

The present law of Scotland as to the admissibility of the statements of deceased persons is more liberal than that of England, where at common law or under the Evidence Act 1938, "Six kinds of statement by deceased persons that are admissible as evidence of the truth of their contents are, declarations against interest, declarations in the course of duty, declarations as to public or general rights, pedigree declarations, dying declarations and statements by testators concerning the contents of their wills."[1] The general admission in Scotland of statements by the dead is justified on the view that, since the declarant can no longer give oral evidence, his declaration then becomes the "best" evidence available. It is submitted that this rule should be generalised and applied, in both civil and criminal proceedings, whenever it is impracticable to call as a witness the maker of a statement who has personal knowledge of the matters in issue. It is true that such evidence cannot be tested by cross-examination. This is relevant, however, not to the admissibility of the statement, but to its weight. Article 1.5(b) is consistent with the law of England as affected by the Civil Evidence Bill and with Rule 531 of the American Model Code.

Article 1.6 Hearsay evidence is admissible if the reported statement was made by a person as a natural, spontaneous and immediate reaction to an event which took place in his presence, sight or hearing, so as to form part of that event and be explicatory of it.

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COMMENTARY

This Article states the rule as to res gestae, which is dealt with in every work on evidence, as an exception to the hearsay rule. As already pointed out, it includes the "implied assertion". This class of evidence was described in non-technical language by Lord Young: "Res gestae is the whole thing that happened. Explanations uttered or things done at the time by those concerned are part of the res gestae, and may be spoken to by those who heard or saw them. But an account given by anyone, whether child or adult, on going home, or at any time thereafter, is an account only, and not res gestae."[1]

The important thing about the res gestae is that in certain circumstances a thing which is said may be an act inseparable from and homogeneous with another act, namely a thing which is done. There has been a good deal of confusion on this topic, mainly arising from a failure to distinguish between a statement which is part of the res gestae and a de recenti statement. "Proof of a de recenti statement is admitted for its bearing on the credibility of a witness, and is therefore confined to statements by witnesses. It is not corroboration, and it may have been made after some interval. A statement forming part of the res gestae, on the other hand, may have been made by some unknown person; it must be part of the event; and it is independent, and possibly corroborative, evidence. Indeed, if a de recenti statement is one made shortly after the occurrence it cannot by definition be part of the occurrence. This seems to have been overlooked in O'Hara v. Central S.M.T. Co.,[2] where two of the judges in defining res gestae said that the statement should be at least de recenti and not after an interval which

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[1] Greer v. Stirlingshire Road Trustees (1882) 9.R. 1069 at p.1076

[2] 1941 S.C. 363.

would allow time for reflection and for concocting a story. These are almost the very words used in an earlier case to define a de recenti statement,[1] and they leave out of account that no 'story' can be part of the res gestae."[2]

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[1] Gilmour v. Hansen 1920 S.C.598, per L.P. Clyde at p.603.

[2] Walkers p.400, § 378. It may respectfully be doubted whether the illustrations given in Hume at p.406 (note a), the first of which is quoted by Dickson in § 254, would be accepted today as instances of evidence admissible under the res gestae rule.

C H A P T E R 2

OPINION EVIDENCE

Article 2.1 Opinion evidence is evidence of an inference drawn by a witness from facts known or established or assumed by way of hypothesis.

Article 2.2 It is not a valid objection to a question that it calls for opinion evidence, except as hereinafter provided.

COMMENTARY

The distinction between evidence of fact and evidence of opinion may be narrow, unreal and difficult to reduce to one of form. Walkers give an excellent example - "Identification of a person is an instance (of opinion evidence). This may range from 'That is my partner' to 'That is the stranger I saw in the close that night'. Each statement on analysis is one of belief founded on inferences, but, while the former would normally be accepted as a statement of fact, the latter is obviously one of belief."[1] The series could be extended to illustrate further - "I inferred that he was on his way home"; "I inferred that he was in a diabetic coma". The proofs of these two inferences respectively will require different kinds of evidence; expert evidence, upon which the second will depend, is dealt with in succeeding Articles.

The supposed distinction criticised by Walkers is firmly dealt with by the American Model Code: "Where a witness is attempting to communicate the impressions made upon his senses by what he has perceived, any attempt to distinguish between

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[1] p. 431, §411(a).

so-called fact and opinion is likely to result in profitless quibbling. Analytically no such distinction is possible."[1] The antithesis stated by Dickson, "the examination of witnesses must be on facts which fell under their own observation, not on matters of opinion or inference, which are for the jury, not for the witnesses"[2], is, it is submitted, unsound.

Article 2.3 It is not a valid objection to opinion evidence, that an inference drawn from it leads to a conclusion which answers the whole or part of the question in issue.

COMMENTARY

This objection is dealt with separately, instead of being left to fall under the general rule of Article 2.2, because the code proposes an alteration in the present law. It is submitted that the present rule, which excludes evidence of this character, is inconsistent with a proper distinction between competence and weight. When W says, "I saw A driving at about 35 m.p.h. down a narrow and congested street on a wet night on the wrong side of the road", the jury may be entitled to draw an inference about the quality of A's driving. But they were not there at the time, in a position to evaluate all the circumstances simultaneously, and to come to a conclusion on them, as W was. Nevertheless, we at present disallow the next obvious question, "Was A driving with proper care?" The person who <u>was</u> in a position to draw a contemporary inference may not say what that inference was. It is submitted that that inference is plainly

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[1] Commentary to Rule 401, p. 201.

[2] §391.

of value, although it would be necessary to remind the jury that it was for them to come to a conclusion independently of, but not necessarily uninfluenced by, that arrived at by W. The degree of that influence would depend on the weight given to the evidence. It is difficult to justify its rejection as incompetent.

Article 2.4 (a) An expert witness is a witness who, because of his training or experience in a particular subject, is a person who is qualified to give an opinion on that subject. It is for the judge to decide, should a dispute arise, whether in the circumstances a witness is such a person.

(b) Expert evidence is opinion evidence given by such a person on the particular subject in which he is qualified.

(c) The conclusions arrived at by one who is to be called as an expert witness, together with the observations, data and opinions upon which they are based, must be reduced by him into the form of a report, a copy of which must be lodged in process or otherwise intimated to o th e r parties in accordance with Rules to be made by the Court.

(d) If a witness who is qualified as an expert is giving evidence other than opinion evidence, it is for the judge to decide whether notice of his conclusions must be given under Article 2.4(c).

COMMENTARY

The Scottish (and English) view of the expert (other than the official assessor, who has different functions) is that he is definitely a witness and no more. It is submitted that this is right. Any other view may encourage a blind acceptance of the expert's conclusions, whereas the proper use of experts' opinions is for the Court "to form (its) own independent judgment".[1] It has been pointed out that "the parties have invoked the decision of a judicial tribunal, and not an oracular pronouncement by an expert"[1].

The definitions in Articles 2.4(a) and 2.4(b) have been drawn in terms which are wider than would confine the expert to a formal professionalism. The courts are in the habit, justifiably, of relying on the integrity of opinion evidence given by craftsmen of standing. Article 2.4(d) recognises that such a craftsman may be asked in the same case for his evidence as an eye-witness and his opinion as an expert. This problem must be solved for each case, in accordance with the rules of the Court.

Article 2.4(c) is adapted from the American Model Code[2].

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[1] per Lord President Cooper in Davie v. Mags. of Edinburgh 1953 S.C. 34 at p. 40.

[2] Rules 405, 406.

It accords with a practice invariably followed by the Crown in criminal cases, and is increasingly resorted to, as regards medical opinions, by parties in the civil courts. It is intended to express recognition of the fact that the expert, although a witness, is a witness of a very special character. He is nearly always a professional man, with professional ethical standards, and the Court should be entitled to repose complete confidence in his integrity while reserving the right to disagree with his conclusions. It would not be said today that "skilled witnesses come with such a bias on their minds to support the case in which they are embarked that hardly any weight should be given to their evidence"[1]. So also Dickson's well-known philippic[2] against handwriting evidence is not now taken seriously[3]. The purport of the evidence which this special kind of witness is prepared to give ought, accordingly, to be in the hands of both parties before the trial, in order that the experts consulted by either party may have their minds directed to such matters as may be in controversy between them, and be in the better position to help the Court to a conclusion on them. It is also remarkable, in civil cases at least, how often the early exchange of medical opinions makes possible the formulation of an agreed statement, so that the valuable time of skilled witnesses is not wasted. It would be a mistake to attempt to draft rules for the exchange of reports. This is left to the courts themselves.

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1 per Lord Campbell C.J. in Tracy Peerage Case 10 Cl. & F. 154 at p. 191.

2 §§404-409.

3 Richardson v. Clark 1957 J.C. 7.

Article 2.5 It is a valid objection to a question that it calls for an inference which could only be reliably drawn by a person qualified as an expert witness, and that the witness is not such a person.

COMMENTARY

This, the only exception stated to the generality of Article 2.3, is so obviously necessary as not to call for comment.

Article 2.6 In cases where the Court is sitting with an assessor, rules may be made for the exclusion or regulation of expert evidence.

COMMENTARY

As at the date of this Code, expert evidence on nautical matters is not competent where the Court is sitting with a nautical assessor.[1] In the Court of Session, where an assessor is sitting in a patent or other case, rules have been made for the restriction of expert witnesses to one on each side.[2]

Article 2.7 Provided that no objection is raised by a party, an expert witness may be present in court while evidence of the facts upon which his evidence is required is being given. He may be required

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[1] Court of Session Rule 146; the Sheriff Court presumably follows the rule laid down by Lord Hunter in The Bogota v. The Alconda 1923 S.C. 526 at p. 542.

[2] Rules 38, 42. Since the repeal of s. 31 of the Patents and Designs Act 1907 there appears to be no power to appoint assessors in patent cases in the Sheriff Court.

to withdraw when another expert witness is to give evidence upon the matter upon which he himself is to give evidence.

COMMENTARY

This is current practice. Strictly speaking, an expert who is also to give non-expert evidence should be excluded while parallel non-expert evidence is being given by another witness. But since there must be some flexibility here, this matter is left to the good sense and fairness of counsel and solicitors.

CHAPTER 3

DOCUMENTARY EVIDENCE

In one sense evidence given by W of the contents of a document prepared by A can be classified as hearsay,[1] but again, as in "self-corroboration", the usage seems etymologically strange. For that reason the Articles on documentary evidence are collected in a separate Chapter.

These Articles go much further than either American or English law. The American Model Code enfranchises "Business Entries and the Like",[2] "Written Statements by Public Officials", "Written Statements by Persons Required to Report Authorised Acts" and "Certificates of Marriage".[3] The current (English) Civil Evidence Bill gives effect to the recommendation of the Law Reform Committee's 13th Report,[4] that a document is admissible if it is "a record compiled by a person acting under a duty". It is proposed in the present Code that no distinction be made between statements made by persons under a duty, or official persons, and other statements; in accordance with the main principle of the Code it is submitted that the status and quality of the maker of the statement may affect the value of the statement for evidential purposes, i.e. its weight as evidence, but ought not to govern its admissibility.

The current Scottish rules, hedged about as they are with innumerable exceptions, are difficult to attribute to any settled principle. The basic rule is that a document does

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1 As in the American Model Code.

2 Business "includes every kind of occupation and regular organised activity, whether conducted for profit or not" (Rule 514(3)).

3 Rules 514-518.

4 para.16(b).

not prove itself, nor is it generally evidence of facts stated in it, since these must be proved by evidence given on oath; in the absence of such evidence, the document, if admitted, would be hearsay of the person who prepared it. An exception is provided by the rule relating to entries in business books, which was formulated as early as 1672, primarily in order to avoid the injustices which would result to merchants in consequence of the then exclusion of parties from the witness box.[1] In one case[2] it was pointed out concerning business books, anticipating in a sense s. 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, that "from their minuteness and multiplicity, it cannot be that the testimony of witnesses, unaided by reference to them, could be expected to supply the requisite evidence".[3]

Clearly the relaxation of the rules in the case of business books arises out of the practical requirements of commerce and of the administration of justice, and is not based on a systematic legal philosophy. The same is true of other instances in which documents either do not have to be proved in order to authenticate themselves, or whose contents may be accepted as factual without the need of further evidence. In some cases that acceptation is, by statute, mandatory, that is to say, the document is of a class in which contradiction of the truth of the contents is neither required nor permitted.

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[1] Walkers p. 241, §228.

[2] Grant v. Johnston (1845) 7 D 390.

[3] per Lord Medwyn at p. 393.

Article 3.1 All relevant statements recorded in writing are admissible, unless they fall to be excluded under another Article of the Code.

Article 3.2 When a document has been produced in the process its identity, including its date and its origin or authorship, may be held proved from the terms of the document itself, unless such identity shall have been formally challenged within a reasonable time after production.

Article 3.3 When a document has been produced in the process the facts stated therein may be held to be proved without their being spoken to by a witness, unless their accuracy shall have been formally challenged within a reasonable time after production.

Article 3.4 The Court may by rule prescribe the times within which the document is to be produced and challenged respectively.

COMMENTARY

The governing principle is, that a document which has passed the test of relevance, and which is not excluded by any such objection as, for example, confidentiality, is available as evidence for what it is worth. Copies or photographs of documents, including microfilms and enlargements from them, will thus speak with the same authority as originals, unless challenged under Article 3.2 or Article 3.3. Where information is "processed" by computers or other machines, and the results of the "processing" are produced in a directly legible form, this Chapter of the Code will apply, unless a successful

challenge is made. Since most documents upon which parties would wish to found are genuine, not only in the sense of being authentic but also in the sense of containing statements which are true, it should almost always be possible to avoid the time-wasting process of calling witnesses to speak to them. The regulation of this principle is left to the rules of the Court.

At the time of drafting, legislation on the matters dealt with in these Articles is before Parliament, and clearly account must be taken of the measures therein proposed. The expedient we have meantime adopted is to distil, as it were, the principles contained in those measures, setting them out in the Articles: there will, in due course, be added to this Commentary the text of the relevant statutory provisions.

Article 3.5 If a document which has been produced is challenged, either as to its identity or as to the accuracy of the facts stated in it, the party producing it shall either (i) call oral evidence to prove the identity or speak to the accuracy of the facts stated therein, or (ii) satisfy the Court that such evidence cannot be called because a witness is dead, or is unidentifiable, or is not reasonably available.

COMMENTARY

The "unidentifiable" witness is provided for, in consequence of such a situation as arose in Myers v. D.P.P.,[1]

[1] [1965] A.C. 1001.

that is where a routine record is compiled by a large number of different people, none of whom can speak to the accuracy of any individual entry in the record.

The rule as stated in the Article will replace the provisions of the Criminal Evidence Act 1965 (which was passed in order to alter the law as laid down in Myers v. D.P.P.) and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s. 7. These Acts apply only to documents which are, or form part of, a record compiled in the performance of a duty to record information. For the reasons given above, it is submitted that this enfranchisement is too narrow.[1]

Article 3.6 A witness may be cross-examined as to the terms of a document of which he is or is alleged to be the author, although the document has not been produced in the process.

COMMENTARY

The object of Article 3.6 is to clarify and amplify the rule laid down in Paterson & Sons v. Kit Coffee Co. Ltd.[2]; there seems to be no reason why the use of documents "in order to test the credibility of a witness or to refresh his memory" should be confined to the case where the witness is not a party, as that case is usually understood to decide.

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[1] These Acts would not, for example, have covered the situation in Patel v. Comptroller of Customs [1966] A.C. 357, nor, apparently, in Jones v. Metcalfe [1967] 1 W.L.R. 1287 or R. v. McLean 1967 S.J. 925.

[2] 1908 16 S.L.T. 180.

Incidentally, if the present proposals be adopted, the whole idea of refreshing the memory of a witness from a document, which is not logically consistent with the exclusion of hearsay, will go. If a witness cannot answer a question until he has seen what is written in a document, then it is what is written in the document that constitutes his evidence.

Article 3.7 It is not a valid objection to the admissibility of a statement which can otherwise competently be proved in terms of this Code that it was given by way of precognition.

COMMENTARY

The use of a witness's precognition may be desired for examination in chief, or more commonly for the purpose of impugning the credibility of that witness. The competency of the latter at least seems to be clearly laid down by the plain words of s. 3 of the Evidence (Scotland) Act 1852. The authorities are conflicting,[1] although no doubt the more modern cases are to the effect that precognitions are an exception to the statements referred to in the Act; it is submitted that the law ought to be changed to the effect of overruling such cases.[2]

The usual objection stated to the proving of precognitions is that they are the statements, not of the examinee, but of

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[1] See Walkers p. 368, §343.

[2] e.g. Livingstone v. Strachan, Crerar & Jones 1923 S.C. 794.

the examiner. This is true to a limited extent; it is a fair comment on their reliability, but, as is pointed out in several passages of the Commentary on this Code, that is not a good reason for rejecting them. And although it is regrettably true that precognitions are sometimes carelessly or unskilfully taken, nevertheless the examiner must be supposed to be trying to record what the witness has said to him, and not to be completely wasting his time, or attempting to deceive himself, his client, and his client's counsel. In many cases again, since the witness will have the opportunity of denying or explaining the precognition, it ought to be admitted for what it is worth.

CHAPTER 4

RECOVERY OF DOCUMENTS

This Chapter deals with the powers of the Court to regulate, by the use of compulsion if necessary, the production of documents for use by a party in substantiating his case. The Code does not do more than set down the principles upon which such powers are exercised; the means by which the documents are made available are appropriate to works on the procedure of the courts concerned. Nor does the Chapter deal with the exclusion from recovery of documents which are protected by the privilege of confidentiality or of the exigencies of the public interest; since these restrictions affect oral as well as written evidence, they are treated separately.

Article 3.1 of the Code renders much of the present law on this subject obsolete. That law is contained in cases which are numerous, technical and conflicting. If, however, a document is admissible in evidence, clearly it ought in principle to be recoverable. It should therefore be sufficient to say that all documents are recoverable if they are relevant, and not protected by privilege or confidentiality. It is in fact upon the test of relevancy that those documents which have been excluded in the past have usually failed. It is necessary to emphasize that "relevant" in this context - a pre-trial context - means relevant to the facts averred in the pleadings. An illustration is seen in the "fishing diligence", where the specification includes documents which are not relevant to the case which has been pleaded, but which it is expected will be relevant to the case which it is hoped to make

with the assistance of the documents. The present law is, it is submitted, correctly stated by Walkers as follows:- "Subject to confidentiality and relevancy, a document is recoverable if it is a deed granted by or in favour of a party or his predecessor in title, or is a communication sent to, or by or on behalf of a party, or a written record kept by or on behalf of a party."[1] In spite of the wider terms of Article 4.1, it is not expected that that Article will embrace many documents excluded by the existing law. In any event, since by definition such documents are relevant, they are necessary to the justice of the case.

Article 4.1 Documents which are admissible are recoverable.

Article 4.2 The Court has power to compel any person to produce documents in his possession if they are recoverable.

Article 4.3 In a criminal cause, documents are recoverable if the accused's legal adviser states, or the Court considers, that they are necessary for the conduct of the case.

COMMENTARY

Article 4.3 follows a recommendation made in Renton and Brown[2], where it is pointed out that the present state of the law is unsatisfactory. Documents are recoverable by the prosecutor under the rules relating to criminal procedure.

Article 4.4 (a) In civil causes, documents are not normally recoverable until after the record has been closed.

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[1] p. 321, § 289(b).

[2] p.77.

(b) If a party or an accused person can satisfy the Court that he will ultimately be entitled to recovery of a document, and that such recovery is reasonably necessary for the preparation of his case, an order may be granted at any time accordingly.

COMMENTARY

Article 4.4(b) is based on a quotation from Dickson[1]. The distinction between the facilities granted by the Court before and those granted after the record has been closed is an implicit consequence of what has already been stated, namely that the relevance of the document demanded must be judged by the pleadings, as finally adjusted. The courts are, however, today more willing to order production at an earlier stage. Nevertheless, it is right that this should be seen as a measure requiring special justification.

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[1] § 1370.

CHAPTER 5

EXTRAJUDICIAL ADMISSIONS AND CONFESSIONS

Article 5.1 (a) An extrajudicial admission is an admission made by a party to a civil cause which to his knowledge was against his interest, otherwise than (i) by way of minute of admissions, or (ii) in finally adjusted pleadings, or (iii) by himself, his counsel or his solicitor at the bar.

(b) An extrajudicial confession is an admission made by an accused person which to his knowledge was against his interest otherwise than by a plea of guilty or by way of minute of admissions.

COMMENTARY

Dickson has observed that "statements made by a party . . . to his own prejudice", are admitted because "they are more likely to be true than false"[1]. The judicial admission, as here defined by exclusion, is conclusive, and renders incompetent any extraneous proof of the matters admitted. The judicial confession, when in the form of a plea of guilty, may be rejected either by the procecutor or by the Court. Alison[2] reports a capital case in which the Court refused to accept a plea of guilty, and a verdict of not proven was ultimately returned. In another case[3] in which a plea of guilty had been tendered, the Court insisted on some evidence being led "for the satisfaction of the court and the country in general". The use of minutes of admission in criminal proceedings is limited, for obvious reasons which are outside the scope of this Commentary.

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[1] § 297.

[2] II, 368.

[3] H.M. Advocate v. James McKean, 12th December, 1796.

Article 5.2 An extrajudicial admission is competent evidence against the party making it, unless (a) it was extorted by threats, or (b) it was made in an attempt to settle or compromise a legal claim.

COMMENTARY

These exceptions are made in the interests of public policy. The first has a basis not dissimilar from that made in the next Article; there is no Scottish example, but it appears to be consistent with the law of England.[1] The second is stated by Dickson,[2] and reflects the policy ut sit finis litium. Anything which discourages negotiations for settlement is against public policy. To be rejected under this rule, it is not necessary that an admission, if documentary, should be covered by the words "without prejudice".

Article 5.3 An extrajudicial confession is competent evidence against the person making it, unless (a) it was made as a consequence of threats, inducements, promises, or abuse of influence on the part of any person having the party in custody or officially concerned with the investigation of the crime with which the party is charged, or (b) it would in all the circumstances be unfair to the accused to receive the confession in evidence.

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1 See Phipson § 691. "Admissions obtained under compulsion are evidence against a party, provided the compulsion was legal and not illegal." But see Ibrahim v. Rex [1914] A.C. 599 at p. 610.

2 § 305.

COMMENTARY

The objection to receiving confessions extorted by threats is two-fold. (1) They may be so unreliable as to be incapable of being evaluated, as when a man under "third degree" examination makes the admission he thinks will stop the proceedings. (2) When they are not unreliable, for example, when they result in the discovery of the murder weapon, the objection is that they are incompatible with the dignity of man. On balance, the community prefers that crime go unpunished rather than that the authorities resort to extortion. The cases in Scotland are numerous, but since the principle they lay down may be summed up in the second exception, which is wider than the first, it is not thought necessary to refer to them. The circumstances of cases differ so widely that one can scarcely form a precedent for another. The admissibility of evidence illegally obtained belongs to another chapter.

Article 5.4 An extrajudicial admission binds only him who made it, and is not evidence against any other party.

COMMENTARY

This Article is declaratory of a very well known principle. It follows from the nature of the reasoning which allows the evidence of admissions of parties: it cannot be said that an admission by A against B's interest is more likely to be true than false even though both are parties. In fact, such a statement does not fall within the definition of Article 5.1. On the other hand, the result is that an admission by A (defender) of adultery with B (co-defender) is evidence that A committed adultery with B, but not against B that he committed adultery with A. This, though quite acceptable to the lawyer, is so absurd to the ordinary citizen that it may be that the principle is unsound.

On the other hand, it is submitted that a general change is not called for, since admissions made by one party can be made use of,

under the Code, by another party as hearsay statements, in so far as the reception of such statements has been made competent in Chapter 1.

Article 5.5 No person may be convicted upon evidence of an extra-judicial confession uncorroborated by other competent and relevant evidence.

COMMENTARY

This is not the law of England.[1]

Article 5.6 A judicial admission or a judicial confession made in one cause may competently be proved in a subsequent cause as an extrajudicial admission against the maker of the admission or confession.

Article 5.7 A finding of guilt by a criminal court may be admissible evidence against the person found guilty in any subsequent civil proceedings.

Article 5.8 A finding by a competent court that a person has committed adultery or is the father of a child may be admissible evidence against that person in any subsequent civil proceedings.

Article 5.9 In an action for defamation in which the question whether a person committed a crime is relevent, proof that, at the time of the action, that person stands convicted of the crime is conclusive evidence that he committed it.

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[1] Phipson S S 795.

COMMENTARY

Article 5.6, which is confined to the effect in subsequent proceedings of an admission on record or a plea of guilty in antecedent proceedings, substantially states the common law.

Articles 5.7 - 5.9 provide an illustration of the difficulty of the proper relationship between the Code and existing statutes, especially recent statutes, when it is intended to re-state the law contained in them. To reprint the statutory provisions verbatim would clearly defeat the object of the Code, which is to lay down principles and not, as is the aim of the Parliamentary draftsman, to deal as far as practicable by anticipation with any doubt or question which may arise. At the time of drafting, legislation on the matters dealt with in these Articles is before Parliament, and clearly account must be taken of the measures therein proposed. The expedient we have meantime adopted is to distil, as it were, the principles contained in those measures, setting them out in the Articles; there will in due course be added to this Commentary the text of the relevant statutory provisions.

Article 5.10 The conduct of a party may be construed as an extrajudicial admission or confession of a fact adverse to his interest when that conduct is consistent with no other reasonable explanation than that he believed that fact to be true.

COMMENTARY

It may be objected that this Article deals with weight rather than admissibility, and is merely declaratory of inferences which may be drawn from circumstances proved. Admission by conduct, however, is a well-known category of evidence, and an attempt is made here to define it. Although

the concept appears to apply also to confessions, some limitation has been set upon it, or perhaps it is more accurate to say that the Courts have refused to allow certain inferences to be drawn. Thus, while Dickson[1] declares that "the silence of a party, when charged directly with guilt, is admissible, as indicating a tacit confession, the reason being that an innocent person would probably not admit such an allegation to be made in his presence without contradicting it", this is no longer accepted as sound. No such inference can be drawn.[2] On the other hand, it is still the practice to aver in an indictment and to prove that "you, being conscious of your guilt in the premises, did abscond and flee from justice".[3] This must be on the footing of admission by conduct.

Article 5.11 An admission made by the servant or agent of a party is not competent evidence against the party unless the admission was made either by the express or implied authority of the party, or in circumstances in which it was part of the normal duty or practice of the servant or agent to make the admission.

COMMENTARY

This Article deals with what have been called "vicarious admissions", and the term is acceptable, since it implies that the maker of the admission can properly be regarded as the substitute for the person against whose interest the admission is made, in the sense that in the circumstances the making of the statement was the function of him who made it. This distinguishes the admission made by a servant in a case of "vicarious liability" for

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1 § 370.

2 Robertson v. Maxwell 1951 JC 11.

3 H.M. Advocate v. Mulholland 1968 S.L.T. 18.

negligence: the driver of the defender's vehicle drives as substitute for the defender, because he has been employed to do so, but he does not necessarily make admissions of negligence vicariously, since to do so is no part of his servient duty, and consequently, if made, they do not bind the defender.

When admissions are contained in a report made by a servant or agent, either to his employer or another, that report may be admissible, and the report itself therefore recoverable by diligence, or it may not. The circumstances in which such a report is admissible, and thus recoverable, in the context of confidentiality are dealt with in a Chapter to be published subsequently.

Article 5.12 An admission made by a person having an interest in any property, which admission was adverse to that interest, is competent evidence, in any proceedings relating to the property, against any successor in title to, or party deriving right from, the person who made the admission.

Article 5.13 An extrajudicial admission made by one of several persons having rights or interests in common in any property, which admission was adverse to such rights or interests, is competent evidence in any proceedings relating to those rights or interests, unless the maker of the admission had an interest adverse to his right or interest in the property.

COMMENTARY

These Articles attempt to state the principles underlying the numerous examples given in Dickson,[1] and adopt in effect the simplification achieved by Walkers.[2] It is submitted that the distinction drawn by Dickson[3] between admissions made by co-owners and those made by parties having a common interest should not now be maintained. The "successor in title" and "party deriving right" referred to in Article 5.12 would include an assignee in a question of a cedent's admission, an executor in a question of the deceased's admission, a body of creditors in a question of a bankrupt's admission. To illustrate Article 5.13, the case of an admission by a partner against the property of the partnership may be figured. This would in general be admissible against the partnership, but not, for example, if the creditors of a partner were seeking to found on an admission by the partner that the partnership was indebted to himself.

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[1] §§ 353 - 357 .

[2] pp. 34-35, § 36 .

[3] S 355

C H A P T E R 6

COMPETENCY AND COMPELLABILITY OF WITNESSES

Article 6.1 Except as otherwise provided in this Code, all persons are competent and compellable witnesses.

COMMENTARY

The progress of theory and practice from an exclusionary to a liberal conception of the admissibility of evidence is exemplified by the two passages which follow:

(F I R S T) "The spirit of the old Scotch Law was to exclude the evidence of every person whose character, whose connection with the parties, or whose interest in the cause, raised a doubt as to the trustworthiness of his evidence. It was then more difficult to discover who were admissible, than who were incompetent, witnesses. For a number of years, however, the prevailing spirit both in the Courts and in the Legislature has been to sweep away the grounds for excluding witnesses, - leaving to the old objections whatever effect they ought to have upon the credibility of witnesses who are open to them."[1]

(S E C O N D) "Except as otherwise provided in these Rules,

(a) every person is qualified to be a witness, and

(b) no person has a privilege to refuse to be a witness, and

(c) no person is disqualified to testify to any matter, and

(d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and

(e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing."[2]

A similar method, namely of detailing exceptions to a wide general admissibility, is followed here.

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[1] Dickson, § 1542.

[2] American Model Code, Rule 9.

Article 6.2 A person is incompetent as a witness if from nonage or from any physical or mental incapacity he is incapable of either (a) understanding the obligation to tell the truth, or (b) giving evidence in a manner in which the same is or can be rendered intelligible to the Court. The competence of a witness under this Article is to be decided by the presiding judge, who may make such investigation, including the calling of witnesses, as he may think fit, and whose decision in the matter is not subject to review.

COMMENTARY

This Article sets out the most obvious of the necessary exceptions to the general rule. Exception (a) is allowed because the evidence of one who is intellectually incapable of understanding the obligation to tell the truth is of no weight at all, as contrasted with the evidence of one who is unaccustomed or undisposed to tell the truth, which is of diminished weight. It will be observed that the requirement has never been that the witness understand the nature of an oath; thus the evidence of young children or mental defectives who may be in that situation is not necessarily rejected. Exception (b) is clearly necessary; what is unintelligible cannot be accepted as evidence at all, since it can have no bearing on the solution of the question in issue. The rule is, of course, phrased in such a way as to permit the employment of such interpretive measures as the Court may approve.

Article 6.3 (a) An accused person is not a competent witness for the prosecution.

(b) If two or more accused be tried simultaneously and any of them give evidence, that evidence may be founded on in favour of any or all of the accused or against any or all of the accused.

(c) An accused person may, with the consent of another accused, call that other accused as a witness on his behalf, or he may cross-examine that other accused if that other accused give evidence, but he cannot do both.

(d) The evidence of a witness called on behalf of one accused is competent evidence for or against another accused.

COMMENTARY

(a). Until the passing of the Criminal Evidence Act 1898 an accused person was in general not a competent witness. It is provided by s.1(a) of that Act that an accused "shall not be called as a witness . . . except upon his own application". This gives statutory effect to the common law privilege of an accused not to be called upon to give evidence, as declared in the Claim of Right.[1] "This", says the American Model Code, "is law everywhere"[2]; that is, however, only true of countries which enjoy an adversary system of criminal procedure. The question of the compellability of the accused, together with the whole doctrine of self-incrimination from the procedural point of view, is under reconsideration; the law, however, is stated in its familiar form.

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[1] 1689 c.13. "That the forceing of the leidges to Depone against themselves in capitall Crymes however the punishment be restricted is Contrary to law".

[2] p.130.

(b) and (c). This represents a considerable simplification of the existing rules. By the Criminal Evidence Act 1898 s.1 the accused was made a competent witness "for the defence", provided that he should "not be called as a witness . . . except upon his own application". It was also provided that he might be cross-examined as to character if he had given evidence against any person charged with the same offence. This provision was interpreted as implying that, should one accused incriminate another, that other was entitled to cross-examine him.[1] The next question is, can one accused be called as a witness on behalf of another? It appears that in England he can, provided that he make application to do so, since "for the defence" in s.1 of the Act has been held to include "for the defence of a co-prisoner."[2]

By the present law of Scotland, one accused cannot be called as a witness for the defence of another accused. This rule has been the cause of many applications, almost all unsuccessful, for the separation of trials. Some of the reports of cases in which unsuccessful applications were made leave the impression that justice has not been done. And when one accused gives evidence on his own behalf, his evidence not incriminating his co-accused, it has been held that that co-accused has no right to cross-examine: Gemmell & McFadyen v. MacNiven.[3] This case seems to proceed upon a misapprehension, Lord Blackburn having observed, at page 10, "The case of Hacksion v. Millar decided, in my opinion, that, where one of two accused goes into the witness box and gives evidence tending to incriminate his companion, he can then, but then only, be

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1 R. v. Hadwen & Ingham [1902] 1 K.B. 882, expressly approved and adopted in Hacksion v. Millar (1906) 8 F. (J) 52, 5 Adam 37.

2 R. v. McDonnell (1909) 25 T.L.R. 808, and see Cross, p.147. See also R. v. Rowland [1910] 1 K.B. 458.

3 1928 J.C. 5.

cross-examined on behalf on his companion." There is no warrant in Hackston v. Millar for the words "but then only".[1]

It is accordingly recommended that, with the exception of the retention for the time being of the privilege of an accused not to be called, either by the prosecutor or by another accused without his consent, the rules as to the evidence of accused persons be the same as those as to the evidence of any other witnesses.[2] The adoption of the suggested rules would mean that it was no longer necessary to consider the competency of another accused when trials have been separated, or the witness has pleaded guilty, or the charge against him has been withdrawn. Nor would different rules have to be applied according as the accused were charged jointly or charged separately, in the latter of which cases, since s.1(f)(iii) of the 1898 Act does not apply, the common law rule remains, i.e. that evidence given for one accused is not evidence against another. It is proposed that this common law rule be revoked. The result is that the expression "co-accused"ceases to have a meaning other than "persons who are being tried simultaneously". Article 6.3(c) is necessary in order that trials may be properly conducted.

Article 6.4 In any criminal cause, if the accused take competent objection, the spouse of that accused shall not be permitted to answer a question inculpating that accused.

Article 6.5 Such objection is competent unless (a) the accused is charged with a crime injurious to

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[1] It seems, however, to be implied in Lee v. H.M. Advocate 1968 S.L.T. (Notes) 25, that an accused is entitled, and may indeed be bound, to cross-examine a co-accused by whom he has not been incriminated.

[2] The difficulties and anomalies attending what is understood to be the present law are set out in the opinion of the Lord Justice - General in Young v. H.M. Advocate 1932 J.C. 63

the property or person of the spouse, (b) where the accused is charged with bigamy, (c) where the accused is charged with incest with or any offence involving moral or bodily injury to a person under seventeen years of age or (d) where the accused is charged with an offence under an enactment which provides that the spouse is a competent witness, or that an offence is one to which this Article applies.

COMMENTARY

The present law upon the availability of the spouse of an accused person is briefly summarised as follows: (1) A spouse is a competent witness (a) where the accused is charged with a crime injurious to the person or property of the witness; (b) where the accused is charged with bigamy; (c) where the accused is charged with incest with or any offence involving bodily injury to a child or young person;[1] (d) where the accused is charged with an offence under an enactment which provides that the spouse is a competent witness. (2) Only in situation (a) above is the spouse a compellable witness against the accused.

The complexity of the present law can be shown if one figures a case of A and B charged together with (1) stealing Mrs. A's ring, (2) assaulting a neighbour's child, and (3) murdering the neighbour. Against A, Mrs. A is compellable on charge 1, competent but not compellable on charge 2, and incompetent on charge 3. Against B she is competent on all three charges. The confusion can be imagined if A and B are

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[1] "Young person" here means a person who is not less than fourteen but under seventeen years of age - Criminal Justice (Scotland) Act 1949 s.78(1).

tried together, as they are almost certain to be.

The exclusion of spouses was no doubt originally on the ground of near relationship, either when called in exculpation of the accused,[1] or for the Crown, "however willing to depone: For if she be willing to appear on such an occasion, it can only be from one of two motives; out of affection to the man, and to save him by her perjury, or to convict him, for the gratification of deadly malice."[2] The modern argument in favour of a limitation on the availability of spouses as witnesses for the Crown (but not for the defence) has been stated as "the danger that marital peace and the confidential nature of the marriage relationship will be unduly disturbed if the spouses are allowed to testify against each other".[3] The doctrine that the spouses must be regarded as a single persona is now discredited.[4] But undoubtedly public opinion will expect that some consideration still be given to the special relationship of husband and wife in the context of requiring one to give inculpatory evidence against the other.

One possible solution is that the spouse be a compellable witness, but entitled to refuse to answer incriminating questions. It seems that this was once the law as regards the evidence of children.

According to Hume, "we will not compel the child to bear evidence against the parent, if he feel that just repugnance to such an office, which may tempt him to perjury; yet he is a receivable witness if he be willing".[5] On the other hand,

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1 Hume II, p.400.

2 Hume II, p.349.

3 Cross, p.155.

4 "All that need be said on this subject is that the doctrine can produce specimens of reasoning in the law of evidence which are as absurd as those produced by it in other branches of the law." Cross, loc. cit.

5 II, p.346.

Hume quotes the case of David Cunningham[1] where the Lord Advocate offered as a witness against the accused, his daughter aged ten:

> "The Lord Justice Clerk (Hope) expressed a doubt of the admissibility of a child, as a witness against its father; and as to the alleged option, competent to the child in such a case, his Lordship said, Can such an option be exercised by a child of ten years of age? Lord Meadowbank said, That, though unwilling definitely to decide a point of so much delicacy and importance, yet he was at present disposed to consider the option ascribed to the child on such an occasion, as something anomalous and unbecoming: That it rather lies with the law to determine, in this conflict between private and public obligations, and not to leave it to the child to make a choice; which, if he gives evidence, renders him in some measure an ultroneous witness, and exposes him to the distressing suspicion of being actuated by improper feelings against his parent. This is not a matter which should be left to the decision of the individual, but ought to be settled by a rule, according to general views of what is best, - whether to maintain sacred the domestic relation, or to make it yield to considerations of public duty. The law has decided in favour of the former, in the case of husband and wife; and in favour of the latter, in the case of brother and sister; and it ought in like manner to cut short the controversy, and exclude all discretion, in the case of parent and child."

The prosecutor withdrew the witness.

This powerful argument against the classifying of witnesses as competent, but not compellable, is equally effective against a proposal that a witness, such as the spouse of an accused person, while compellable, should have a privilege to refuse to answer a question incriminatory of the accused. The exercise of such a privilege could not only expose the spouse "to the distressing suspicion of being actuated by improper feelings", but it would mean the very thing which Lord Meadowbank disapproved of, that is to say, the substitution of the discretion of a witness in a particular case for a clear determination of the law.

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[1] 23rd June, 1806; Hume II, p.346, footnote 3.

The solution which is here suggested is that the spouse be in all cases a compellable witness, but that the accused be in general allowed to object to the witness answering incriminating questions. Thus (a) the law continues the recognition of the special marital relationship, (b) the privilege against answering such questions is conferred upon the person who has an interest to enforce it, and (c) the privilege is not conferred upon a person who, if called upon to exercise an option, could be unfairly placed in a very embarrassing position. At the same time, the law is very much simplified, in as much as all witnesses, regardless of relationships, are compellable. That in some cases spouses can be obliged to answer questions which in other cases the accused can exclude by veto is a situation very much easier to comprehend and to handle.

The retention of the marital privilege, although in altered form, is bound to give rise to certain anomalies, although fewer, it is submitted, than under the present rules. Thus not only may the Crown be deprived of important, if not vital, evidence, but so also may the position of an accused be affected. Thus: A and B are jointly charged with murder. B's defence is that the crime was committed by A alone, and he cites Mrs. A as a witness to prove that. A can competently object to any such evidence by Mrs. A. This is just an example of the obvious fact, that if power is given to suppress evidence, some party will suffer from the exercise of that power.

The privilege is denied to the accused in cases where the spouse is already competent. It is submitted that this exception, though somewhat cumbersome, is inevitable, since otherwise an accused could silence a spouse in circumstances in

which Parliament - and the common law - have directed that a willing spouse be not silenced. The difference is that in future the option, which seems objectionable, is taken away from the witness. The offences in Article 6.5 are defined sufficiently widely to include, e.g. false accusation, or attempted murder,[1] or lewd practices in which no physical lesion occurs.[2] A list of the statutes concerned will eventually be added to the Commentary.

It is because these Articles propose changes which are of a highly controversial character that the matter is discussed at such length. Further, the Articles, since they confer a privilege in relation to evidence, might perhaps be more appropriately placed in a "Privilege" chapter. The topic is included in this Chapter meantime because the alteration of the law of admissibility is concerned.

Article 6.6 In a civil cause, if a party take objection, the spouse of that party shall not give evidence of any matter communicated by the former to the latter during the marriage, except in a consistorial action between the spouses, or where one spouse is being examined in the bankruptcy of the other.

Article 6.7 In a criminal cause, if the accused take objection, the spouse of that party shall not give evidence of any matter communicated by the former to the latter during the marriage.

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[1] MacPhie 1926 S.L.T. 312.

[2] Lee 1923 J.C. 1.

COMMENTARY

These Articles, following the pattern of the preceding ones, transfer the privilege against disclosure of matrimonial secrets from the person to whom they were communicated, where it now illogically[1] lies,[2] to the communicator, who clearly has the interest to conceal them.

Article 6.8 A person conducting a case as or on behalf of the prosecutor is incompetent as a witness in that case.

COMMENTARY

The reason why prosecutors have been held to be excluded from the wide enfranchisement of parties as witnesses "in any action or proceeding in Scotland", effected by s.3 of the Evidence Amendment Act 1853 was stated by Lord Deas.[3] After quoting the section, which also excludes any accused person or his wife in a criminal prosecution, his Lordship went on:

> "It is plain that there must be other cases of incompetency of adducing persons as witnesses besides those expressly mentioned in this enactment. The case of the magistrate shows this. The magistrate is not excepted in words in the Act, but plainly he cannot be both witness and magistrate. If the public prosecutor were not to be understood to be excepted in the Act, the result would be that you might have, either on the one side or the other, the officer of the law who, in the discharge of his duty, had precognosced all the witnesses, or read all the precognitions, adduced as a witness, while it would be impossible for him to divest himself of, or distinguish between, the knowledge he had obtained in his official capacity and what he had obtained otherwise."

It was observed that special arrangements would have to be made in the case in which the public prosecutor happened to be, say,

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[1] See Rumping v. DPP [1964] AC 814 per Lord Reid at p.833.

[2] At any rate in criminal cases - Walkers p.380, §§ 355(c).

[3] Ferguson v. Webster (1869) 1 Couper 370 at p.374.

an eye-witness. Modern authorities support the Article as worded,[1] but the reasoning behind a rule which excludes the legal representative on one side of the bar but not on the other is somewhat obscure. It may be that the rule could be dispensed with.

Article 6.9 A judge is not a competent witness as to judicial proceedings which have taken place before him, except that the judge of a summary criminal court is a competent witness as to the evidence which witnesses have given in a case before him in that court.

COMMENTARY

The present law is taken to be that judges of the superior Courts cannot "be examined on matters which occurred before them judicially as parts of civil or criminal process".[2] The reason for the exception made in this Article is that since in summary cases no shorthand note is taken, the judge's recollection and note of what witnesses have said may be essential, e.g. in a subsequent prosecution for perjury.[3] This would not apply in the case of a Sheriff and jury trial, where a shorthand note is taken.

Article 6.10 (a) Persons who are to give evidence, other than parties and their solicitors, and expert witnesses, should, subject to the provisions of this Article, not be present

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[1] Mackintosh v. Wooster 1919 J.C. 15; Graham v. McLennan 1911 S.C. (J) 16.

[2] Dickson, S 1635.

[3] e.g. Davidson v. McFadzean 1942 J.C. 95.

in court while other witnesses are being examined.

(b) If a person who ought not to have been in court is presented as a witness, the Court shall admit him, unless the Court is satisfied that there has been a deliberate breach of this Article, but the evidence of such a witness is to be scrutinised with exceptional care.

COMMENTARY

This Article alters the existing law. At common law, witnesses who had wrongly been in court were strictly excluded. The effect of the Evidence (Scotland) Act 1840 s.3 is that where a person (other than a party to the case or a solicitor conducting the case or instructing counsel therein) has been present in court during any part of the proceedings without the permission of the Court, the Court may admit the person as a witness where it appears to the Court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the person has not been unduly instructed or influenced by what took place during his presence, or that injustice will not be done by his examination as a witness.

The present law is not altogether satisfactory, since it lays upon the party presenting the witness objected to the burden of satisfying the Court about matters upon which no Court has the means of assuring itself.[1] Moreover, it exhibits a

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[1] See Macdonald v. Mackenzie 1947 J.C. 169, Docherty & Graham v. McLennan 1912 S.C. (J) 102, Perman v. Binny's Trs. 1925 S.L.T. 123.

rigidity of outlook in the admission of evidence which, while characteristic of its date, is not in accordance with modern ideas and practice.

The present rule of practice is that experts may not be present in court while other expert witnesses are giving evidence in the same specialty. In view, however, of the provisions of Article 2.4(c), which means that every expert witness will be aware of the evidence which his colleagues are to give, and will probably be required to give his views upon it, the old exclusion seems to be without point.

Article 6.11 A banker is not, in any action to which the bank is not a party, compellable to produce the books of the bank, the contents of which can be proved by a statutory copy, unless on an order of the Court.

COMMENTARY

The provisions of the Bankers' Books Evidence Act 1879, upon which this Article depends, are succinctly summarised by Walkers in the passage[1] which follows:

> "A copy of any entry in a banker's book is prima facie evidence of such entry and of the matters there recorded, provided it is proved that the book was at the time of making the entry one of the ordinary books of the bank, that the entry was made in ordinary course of business, and that the book is in the custody or control of the bank. This proof may be by a partner or officer of the bank and may be oral or by affidavit. It must further be proved that the copy is correct. A court or judge may authorise a litigant to inspect, and take copies of, entries in a banker's book for the purpose of the proceedings. 'Bank' and 'banker' mean any person, persons, partnership of company carrying on the business of banking, a savings bank and a post office savings bank."

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[1] p.330, S 301.

Article 6.12 Sovereigns are not compellable witnesses.

COMMENTARY

This rule probably flows from the fact that the measures by which witnesses may be compelled to attend are not enforceable against the persons named. There is no Scottish authority to the effect that the Sovereign is an incompetent witness. However, in R. v. Mylius, The Times, 2nd February, 1911, the Attorney-General declared that the British Sovereign "cannot go into the witness box to testify in person . . . . this is not a private privilege which the Sovereign can waive at pleasure, but is an absolute incapacity attached to the sovereignty by the Constitution for reasons of public policy". In the absence of any Scottish authority, it is submitted that, for the reasons given above, sovereigns, British or foreign, are not compellable, but there does not seem to be any reason why they should not be competent.

Article 6.13 A person entitled to diplomatic immunity is not a compellable witness. Immunity may be waived by the State which he represents.

COMMENTARY

The Vienna Convention on Diplomatic Relations now has the force of law in the United Kingdom by virtue of the Diplomatic Privileges Act 1964. Immunity is conferred on heads of missions, members of the diplomatic, administrative and technical staffs of the missions, and members of their families forming part of their respective households. The privilege does not extent to citizens of the United Kingdom and Colonies.

A series of statutes provide that the like immunity from suit and legal process is conceded to the representatives and other officers of international organisations and to Commonwealth diplomats, e.g. the International Organisations (Immunities and Privileges) Act 1950, the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952, the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act 1961, and the Consular Relations Act 1968.

The principle which justifies the immunity is clearly the same as in the case of sovereigns, namely, the incompetence of enforcement measures.

C H A P T E R 7

LEADING QUESTIONS

Article 7.1 A leading question is a question which is so framed as may suggest the answer which the questioner either desires or expects.

COMMENTARY

The definition appears to be consistent with those in the works of reference.[1] The second part of Cross's definition, namely that a leading question is one which "assumes the existence of disputed facts"[2] is, with some hesitation, not adopted, since such a question is better described as unfair, and therefore objectionable on any view.

Article 7.2 It is improper to ask a leading question in examination in chief, except as provided in the immediately succeeding Articles.

COMMENTARY

There is no rule more familiar to the experienced practitioner than that relating to leading questions, and no rule more difficult to circumscribe by accurate definition and rigid application. The just operation of the rule must therefore largely be confided to professional ethics, subject to the exercise of a controlling judicial discretion. The very asking of an unfair leading question, although it be

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[1] Dickson §1771, Walkers p.360 §339(b), Lewis p.217, Phipson §1522, American Model Code Rule 105(g) - where the control of leading questions is entirely subordinated to judicial discretion.

[2] p.188.

successfully objected to, may do as much damage as the answer which is suppressed. It is for that reason that the word "improper" is used in the Article, so as to emphasize that the asking of such questions demonstrates either ignorance or defiance of correct professional conduct.

Article 7.3 In examination in chief the examiner may ask a leading question calling for an answer which he, either on his own responsibility or after agreeing with the examiner for the other party or parties to the cause, is satisfied does not affect the matters in dispute between the parties, or, in an undefended consistorial cause, does not constitute direct evidence of the ground of action.

COMMENTARY

A very large proportion of the questions actually put in examination in chief are, quite properly, leading questions. The purpose of this rule is to emphasize that the decision whether or not to frame a leading question depends primarily on the good sense and fair-mindedness of the examiner.

Article 7.4 It is permissible, after a question has been put to a witness and the witness has failed to answer from want of recollection, for the examiner to suggest to him facts or circumstances which may refresh his memory.

COMMENTARY

It seems to be generally agreed[1] that the rule against leading questions must be relaxed when strict adherence to it would have the effect of depriving the Court of the witness's testimony in consequence of his obtuseness, incoherence or forgetfulness. Again, the practice must be dependent on the fair discretion of counsel, and be subject to the control of the Court.

Article 7.5 It is permissible to ask leading questions in examination in chief if the Court is satisfied that the evidence of the witness is adverse to the interest of the party examining, or that he is deliberately suppressing evidence known to him or is for any reason reluctant or evasive in his answers.

COMMENTARY

It is not the practice in Scotland for an examiner to make formal application to the Court for permission to treat one of "his" witnesses as hostile, but leading questions in the circumstances set out in this Article are said by Dickson to be in accordance with an English rule which "is recognised in the modern practice of our Courts"[2].

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1 Cases cited in Dickson §1772, American Model Code §105, Phipson §1524.

2 §1773.

The basis of the prohibition against leading questions is that a witness will be favourable to the interest of the party for whom he is called, and may even be anxious to oblige him, otherwise the witness would not have been called for that party. But from time to time this basis may have no foundation. The party may have to rely, from shortage of testimony, upon the evidence of someone whom he knows to be hostile, perhaps even the opposing party himself. In other cases a witness turns out, unexpectedly, to be reluctant to tell what he knows. This is not uncommonly true of witnesses for the prosecution in criminal cases. In such circumstances the object of the rule disappears; so far from being anxious to oblige, the witness is determined to obstruct and there is no unfairness in applying methods of interrogation appropriate to cross-examination. See, for an American opinion, the comment on Article 7.7.

Article 7.6 It is generally improper to ask leading questions in re-examination.

COMMENTARY

It is obvious that leading questions asked in re-examination can be even more unfair than those asked in chief. First, the cross-examiner has no opportunity, as a rule, of taking the edge off them. Second, it gives counsel an altogether illegitimate chance of indicating to the witness his (counsel's) estimate of the damaging character of admissions which have fairly been elicited in cross-examination, and of affording the witness an opportunity of retracting them or explaining them away. While

it may be that most judges pay little or no attention to what is said in re-examination, that is probably not true of juries. Although the rule does not constitute an innovation in the law of Scotland, it does not appear in any Scottish authority.[1] The word "generally" is put in to take care of the case where a witness has unexpectedly displayed prejudice or bias in favour of the cross-examiner.

Article 7.7 It is generally no objection to a question asked in cross-examination that it is a leading question.

COMMENTARY

The word "generally" is inserted in this familiar rule because it has been recognised in other systems that, logically, the same rule as to leading questions ought to apply in the case of a friendly witness whether he is being examined in chief or whether he is being cross-examined. "Though leading questions may be put in cross-examination, whether the witness be favourable to the cross-examiner or not, yet where a vehement desire is betrayed to serve the interrogator, it is certainly improper, and greatly lessens the value of evidence, to put the very words into the mouth of the witness which he is expected to echo back."[2] "The reason given for the discrimination is that a witness is assumed to be friendly to the party calling him, and will be inclined to give the answers which that

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[1] It is stated in Phipson §1522, and in Cross, p.222.

[2] Phipson §1543.

party desires; he will, therefore, be tempted to acquiesce in the suggestions communicated by the question. By the same token, he will be disposed to examine all the suggestions of the adverse party and to reject them. If it appears that these assumptions are the converse of the facts, namely, that the witness is hostile, not to the adverse party, but to the party calling him, then the rule which normally applies on direct examination is applied to the cross-examination, and that normally applicable to cross-examination is applied to the direct examination."[1]

Article 7.8 It is in the discretion of the Court to determine in what circumstances a leading question may be put. An appeal on the point will not be entertained.

COMMENTARY

This is an almost literal quotation from Dickson[2]. The reasons for this Article are clearly and forcibly stated in the commentary to the parallel rules in the American Model Code. "These so-called rules are merely means by which the judge endeavors to see to it that the testimony is presented honestly, expeditiously and in such a way as to be understood by the trier. His rulings on their applicability and application should be rarely reviewed, if at all. Indeed most courts say

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[1] American Model Code, p.109.

[2] §1774.

that the trial judge's rulings as to the use of leading questions are not ground for reversal except for abuse of discretion. Unfortunately many decisions, even while recognising this principle, fail to apply it. If trials are to be intelligently conducted under supervision of competent judges, certainly a trial judge must be given control over such details as the form of the questions to be put to witnesses. Supervision of his exercise of this function by an appellate court should be limited to the prevention of arbitrary or capricious action demonstrably harmful to the substantial rights of the objecting party. This clause by putting the matter in the judge's discretion in effect makes his action reviewable only for abuse of that discretion."[1]

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[1] pp.109-110.

C H A P T E R 8

PROMISE (OR AFFIRMATION) OF WITNESS

The Articles contained in this Chapter would make a radical alteration of the law of Scotland. For that reason they are submitted for criticism along with an Appendix, which sets out the law as it is conceived to be at present.

The proposal is that a form of affirmation be substituted for the oath as now administered. The theological foundation of the oath, which is a matter of controversy, is discussed at length by Dickson,[1] and it is unnecessary to elaborate on it. All theories, however, seem to labour under this defect, namely, an unwarranted assumption that the consequences which attend detected perjury when libelled and proved in our criminal courts will also follow in some comparable form at the Great Day of Judgment. But we do not know what view may be taken hereafter of the conduct of a man who, for example, tells a lie on oath to save his friend from disgrace, so we cannot say that in taking the oath he is influenced by the "Supreme Being . . . whose vengeance he imprecates if he does not speak the truth".[2] Some theory, however, which assumes the certainty of divine punishment is necessary, since no respectable religion could be found to declare that there is no moral obligation to implement a solemn promise unless it be coupled in some way with invocation of a Deity.

Theoretical objections to the oath, are, however, of little value in comparison with considerations of its practical utility. This is summed up by Dickson[2] as follows:- "The

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[1] Note to §1757.

[2] Dickson, loc. cit.

practice is founded on the well-known fact, that perjury is rare compared with false or coloured statements made without the sanction of an oath." This is undoubtedly in accordance with experience, provided that for "oath" be substituted the words "oath or affirmation"; if this alteration were not accepted, it could only be on the view that an affirmation is a less powerful deterrent to perjury than an oath, and would thus raise the inference that he who affirms is a less reliable witness than he who swears. Such an inference is not permissible. Both classes are equiparated by statute.

The strongest objection to the present practice is that persons who do not wish to take an oath, and have an absolute right not to do so, are obliged to make a public declaration of their religious beliefs, or the absence of them. This may put them in a position of some indignity and embarrassment by exposing them to the criticism of the ignorant and narrow-minded. Moreover, refusal to take an oath is sometimes founded on political opinions which may be locally or temporarily unpopular; it is equally objectionable that a man should be called upon to make a public profession of them. In the eyes of some people, the quality of his evidence might be, quite unjustly, impaired. Another disadvantage of the present law is that it calls for the recognition and occasional adoption of several different religious procedures, if reasonably practicable. Not only can this lead to inconveniences, but some of the procedures called for are hardly compatible with our notions of judicial dignity.

It is probable that the indisputable effectiveness of the oath as an admonition that the witness take care to tell the truth as he knows it lies not so much in the words which are

repeated as in the circumstances in which it is administered. Here the Scottish form, as at present followed, is preferable to others, and should be retained.

It would be possible to provide for the oath being made an alternative to the affirmation, to be used by such persons as should make application so to do. It has already been suggested, however, that it is impossible to rationalise the moral conscience of one who declines to promise to tell the truth on the ground that he will be bound to do so only if he make oath to that effect.

It will be necessary to make statutory provision for the punishment of those who break their promise to tell the truth.

Article 8.1 All persons called to give evidence shall promise to tell the truth.

Article 8.2 Evidence for the purpose of the preceding Article means evidence given before a tribunal which has power to require, and does require, that evidence be given on oath or under promise in accordance with this Code.

Article 8.3 The usual form of making the promise shall be: "I solemnly and faithfully promise that the evidence which I shall give shall be the truth, the whole truth, and nothing but the truth." The words of the promise shall be repeated by the witness after the presiding judge, each standing with his hand raised.

Article 8.4 In place of the above form, the judge may admonish, in such terms as he may select, a child of tender years or a person of defective mental capacity, that he promise to tell the truth.

APPENDIX TO CHAPTER 8

Oath of Witness

1. The general rule is that no person may be admitted to give evidence unless he has taken an oath in the following terms: "I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth and nothing but the truth." The immediately succeeding paragraphs set out the exceptions to that rule.

2. The words "and as I shall answer to God at the great day of judgment" may be omitted at the discretion of the presiding judge.

3. A child of tender years or a person of defective mental capacity may, at the discretion of the presiding judge, be admonished to tell the truth instead of being sworn.

4. Any person objecting to be sworn and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath, in the following terms and no other, "I A.B. do solemnly, sincerely and truly declare and affirm that I will tell the truth, the whole truth, and nothing but the truth."

5. The words of the oath, as of the affirmation, are repeated by the witness after the presiding judge,[1] each standing with his hand raised, except that a person may be sworn in the manner appropriate to his own religious belief; but if in the opinion of the presiding judge it is not reasonably practicable without inconvenience or delay to administer the oath in that manner, he may be required to make his solemn affirmation.

COMMENT

The Scottish form of oath is sanctioned by the common law; the method of its administration is recognised by s. 5 of the

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[1] Forms 23 and 24 given in Boland and Sayer, p.107 are incorrect in using the word "officer".

Oaths Act 1888. This Act makes it unnecessary to repeat the special statutory provisions made from time to time in favour of Quakers and Moravians.[1] The provisions of the Circuit Courts (Scotland) Act 1828 in that regard are obsolete though unrepealed. The provisions of s. 1 of the Oaths Act 1961 are given effect to in paragraph 5 of this Appendix. That the exact words of the affirmation must be used was decided in McCubbin v. Turnbull[2].

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[1] e.g. the Quakers and Moravians Act 1833.

[2] 1850 12 D. 1123.