SCOTTISH LAW COMMISSION

RESEARCH PAPER

on the

LAW of EVIDENCE

of SCOTLAND

by

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April 1979

(To be considered with Memorandum on Evidence to be issued)

Chapter 16

THE ADMISSIBILITY OF EVIDENCE ON COLLATERAL ISSUES[1]

1. Introduction

16.01 There are some matters which as a general rule are regarded as inadmissible, either because they do not render more probable the existence of the fact in issue or because, although they are not entirely irrelevant in that sense, considerations of convenience and expediency dictate that evidence about them may not be led.[2] There are, however, exceptional cases where such matters are admissible; and the nature and scope of some of these cases are considered in this chapter. First, there is some examination of the rules as to the admissibility of evidence of similar acts in consistorial causes; and the remainder of the chapter is concerned with various questions as to the character, credibility and previous convictions of victims, complainers, witnesses and accused persons.

2. Evidence of similar acts in consistorial causes

16.02 As a general rule, when the question in issue is whether a person did a particular thing at a particular time, evidence that he did a similar thing on some other occasion is inadmissible.[3] The rule is designed to prevent an over-ready acceptance of the argument that the person concerned must have done that particular thing on the occasion under investigation because he is the kind of man who would do that kind of thing: an argument which, although common enough in everyday life, is dangerous in a court of law because it is all too liable to cover up weaknesses/

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[1] Walkers, chap 3.
[2] See Walkers, para 14, n 1; Hart v Royal London Mutual Insurance Co Ltd, 1956 SLT (Notes) 55.
[3] Walkers, para 15.

weaknesses in the evidence concerning that person on the occasion under investigation.[4] It is thought that the operation of the rule in criminal causes is well understood.[5] As to civil proceedings, the rule has been relaxed in actions of divorce for adultery in a manner which seems difficult to justify on logical grounds.

16.03 A pursuer who founds on an act or course of adultery between the defender and a particular paramour may prove, in order to support the probability of the adulterous conduct founded upon, (1) sexual intercourse before the parties' marriage between the defender and the same person, but not between the defender and any other person or persons;[6] (2) the defender's attempted adultery or indecent conduct after the parties' marriage with a person or persons other than the paramour;[7] and (3) the defender's adultery with the paramour[8] or any other person[9] which has been condoned. The pursuer may not, however, found on the paramour's sexual misconduct with persons other than the defender.[10] There appears to be no modern reported example of the admission of evidence of class (1). The admissibility of evidence of class (2) has its origin in Whyte v Whyte,[7] where the court did not refer to the general rule as to the inadmissibility of evidence of similar acts, and adopted English authority/

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[4]Cross and Wilkins, p 203.

[5]Walkers, paras 26-28. HMA v Joseph, 1929 J C 55, referred to at para 28, n 8, was followed in HMA v McIlwain, 1965 J C 40, and approved in Carberry v HMA 1976 SLT 38. And see Dumoulin v HMA 1974 SLT (Notes) 42.

[6]Fraser, Husband and Wife (2nd ed), ii, 1164; Walton, Husband and Wife (3rd ed), p 60.

[7]Whyte v Whyte, (1884) 11 R 710; Wilson v Wilson, 1955 SLT (Notes) 81.

[8]Collins v Collins, (1884) 11 R (HL) 19, Lord Blackburn at p 29; Robertson v Robertson, (1888) 15 R 1001, Lord Young at pp 1003-1004.

[9]Nicol v Nicol, 1938 SLT 98.

[10]King v King, (1842) 4 D 590; Johnston v Johnston, (1903) 5 F 659; Duff v Duff, 1969 SLT (Notes) 53. Such evidence was, however, admitted in Stirling v Stirling, 1909, 1 SLT 288.

authority. In H v P[11] Lord President Dunedin said that the principle laid down in Whyte

> "is limited to matrimonial cases, and for this reason, that, it being the duty of the Court to protect the matrimonial bond against grevious injury, the very strict rule has been in such cases somewhat relaxed."

In Johnston v Johnston[11a] Lord M'Laren said:

> "There is authority for allowing evidence of improprieties by a defender with other women or (when the defender is a woman) with other men, to displace the presumption of his or her good conduct in the married relation. The practice is intelligible when it is confined to the conduct of the spouses. But I am not disposed to extend it."

In Wilson v Wilson[11b] Lord Cameron referred to the exception as "one which has been recognised in practice for many years"; but in Duff v Duff[11c] Lord Stott seemed disposed to question its validity. He said of Whyte:[7]

> "[It] appears to be authority for allowing evidence of impropriety by a defender with other women, apparently to displace some presumption of good conduct in the marriage relations. Whyte was a very special case and it has since been made clear that the Court will not extend the practice which was approved in Whyte beyond circumstances similar to those obtaining in that case."

16.04 It is thought that the law as to the classes of evidence on which the pursuer in a case of adultery may found, as set out at the beginning of the foregoing paragraph, requires some reconsideration. In general, the mere fact that a man or woman has once or more in his or her life acted in a particular way does not make it probable that he or she so acted on a particular occasion. In particular, the fact that a person/

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[11] H v P (1905) 8 F 232, at pp 234-235.
[11a] (1903) 5F 659, at p 662.
[11b] 1955 SLT (Notes) 81.
[11c] 1969 SLT (Notes) 53.

person on one occasion has had sexual intercourse with A does not make it probable that on another occasion he or she had sexual intercourse with B. It therefore seems correct that the pursuer in an action based on adultery should not be permitted to found on acts of impropriety committed by the paramour with persons other than the defender.[10] It also seems correct that, in an action of damages for a slander consisting of a statement that the pursuer, a married woman, had committed adultery with the defender, the defender was not allowed to establish a probability that she committed adultery with him by proving instances of her unchastity with other men.[12] Similarly, it seems right that instances of the complainer's unchastity with other men may not, in general, be proved by the defence in a trial for rape.[13] But it is difficult to understand why a different rule should apply in the case of the defender in an adultery action. It is perhaps understandable that the fact that the defender had committed adultery with A in the past may be thought to make it probable that the defender committed adultery with A on the occasion under investigation, although in order to draw that inference it is necessary to ignore the possibility that in the interval one or other or both of them had experienced a change of sentiment or had determined on amendment of behaviour. It is less understandable, if it is still the law,[13a] that the fact that the defender had had sexual intercourse with A before marriage/

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[12] H v P, (1905) 8 F 232; see also C v M, 1923 SC 1.

[13] Dickie v HMA, (1897) 24 R (J) 82.

[13a] Fraser, Husband and Wife (2nd ed), ii, 1164; Walton, Husband and Wife (3rd ed), p 60.

marriage should be thought to make it probable that intercourse took place between them after the defender's marriage, because in order to draw that inference it is necessary to suppose that the marriage had no effect on their conduct. And it now seems very hard to accept the assumption that the fact that the defender committed some impropriety with a person or persons other than the paramour should make it probable that he committed adultery with the paramour. It may also be said that the rule in Whyte, far from protecting "the matrimonial bond against grievous injury", may allow the dissolution of that bond on rather weak evidence: in Whyte itself, evidence of the defender's indecent conduct with women other than the paramour was used as evidence to support a single witness speaking to one instance of adultery.

16.05 There is some doubt as to the circumstances in which, and the purposes for which, a party may be cross-examined on acts of unchastity about which it has been held to be incompetent to present substantive evidence. Such cross-examination has been said to be competent where fair notice has been given. In A v B Lord President Robertson assumed that cross-examination was permissible, and did not mention the consideration of fair notice, although notice had in fact been given to the extent that averments on the subject had been made on record and excluded from probation. He mentioned the cross-examination, not as a test of credibility, but as producing admissions which might make probable the fact in issue.[14] In H v P Lord Pearson envisaged that the defender might cross-examine the pursuer on matters which his Lordship had deleted from the record, "notice having been given of them."[15]

Similarly/

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[14] "... if the defender admitted at the trial that he had attempted to ravish those two other women, I think the jury might legitimately hold that this made it the more likely that he ravished the pursuer." A v B, (1895) 22 R 402, at p 404.

[15] (1905) 8 F 232, at p 234.

Similarly, in C v M an action of damages for slander consisting of a statement that the pursuer had given birth to an illegitimate child, averments by the defender of acts of adultery between the pursuer and a third party, which were ordered to be deleted from the record, were held to give fair notice, and Lord President Clyde said:

> "... in a question of this kind - as indeed in any question where character and credibility are concerned - it is competent, if notice has been fairly given, to put to the pursuer in cross-examination such specific instances of conduct as those made in the averments to which I have referred, notwithstanding that it is incompetent to present substantive evidence in support of their truth."[16]

Lord Stott referred to the matter in Duff v Duff, where he excluded from probation an averment that the co-defender had formed an adulterous association with another woman. His Lordship said:

> "In view of some of the observations made by Lord President Clyde in the case of C v M, 1923 SC 1, 1922 SLT 634, I should perhaps add that in refusing to remit the averment to probation, as I propose to do, I say nothing as to whether it will or will not be competent for questions bearing on this matter to be put to the co-defender in cross-examination. That is a matter which, as it seems to me, will fall to be determined by the Lord Ordinary who hears the proof in the light of the circumstances and of the course which the proof may take."[16a]

It seems unsatisfactory that the matter should be in doubt. If notice is necessary, to give it by means of irrelevant averments which have to be excluded from probation after debate seems a clumsy and expensive expedient. And the value of such cross-examination, if permissible, would appear to be limited. A mendacious party could not be exposed as such, because his denial could not be contradicted. If he made an admission, to what extent would that affect his credibility? Does the fact/

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[16] See Walkers, para 20(c); MacGregor v MacGregor, 1946 SLT (Notes) 13.

[16a] 1969 SLT (Notes) 53.

fact that he tells the truth about one act of unchastity warrant the inference that he is telling lies about another? Lord Pearson's view is of interest:

> "I have some difficulty in seeing how, upon the conditions laid down in the case of A v B (22 R 402), such cross-examination could be useful as a test of the credibility of the pursuer. If she answered yea - that is, if she confessed to the charge in the cross-examination - then, of course, there would be no further question about it; but, if she denied it, the defender could not follow it up; he must be satisfied with her answer. Such an examination, however, would certainly operate as a steadying influence upon the witness who was being examined, because she would know that she would be liable to prosecution for perjury if she were proved to have sworn falsely."[15]

3. Character, credibility and previous convictions

16.06 This section of the chapter is concerned with various questions as to the character, credibility and previous convictions of victims or complainers, witnesses and accused persons. The law as to such questions in relation to others does not seem to cause difficulty.[16] The admission of evidence of the character and previous convictions of accused persons by virtue of sections 141(f) and 346(f) of the 1975 Act was considered in Chapter 5 above, paras 5.39-5.68.

(1) Victim or complainer

16.07 (a) Murder or assault. It may be useful to notice here two recent cases in which the Court did not require adherence to the general rule that in cases of murder or assault the accused may prove that the injured person was of a violent or quarrelsome disposition, but not the commission of specific acts of violence.[17] In H M Advocate v Kay[18] the/

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[15] (1905) 8 F 232, at p 234.

[16] See Walkers, para 20(c); MacGregor v MacGregor, 1946 SLT (Notes) 13.

[17] Walkers, para 20(a).

[18] 1970 JC 68.

the indictment libelled that the accused murdered her husband and did previously evince malice and ill-will against him. She lodged a special defence of self-defence which stated that on the occasion libelled she reasonably believed that there was imminent danger to her life due to an assault intended by the deceased. In these circumstances it was held that evidence which she proposed to lead, of assaults upon her by the deceased on five previous occasions, would be admissible. Lord Wheatley said:

> "I consider that it would be unfair to allow detailed evidence by the Crown in support of that part of the indictment which alleges that the accused had previously evinced malice and ill-will towards the deceased, without allowing the accused the opportunity of proving in turn by detailed evidence that she had reason to apprehend danger from the deceased."

In H M Advocate v Cunningham,[19] where a woman was charged with murder and lodged a special defence of self-defence, evidence was led that in July 1958 the deceased had been convicted of the culpable homicide of a young woman and sentenced to 15 years' imprisonment.

16.08 (b) Rape and similar assaults. The present law, as stated by the Sheriffs Walker,[20] is that in cases of rape or of similar assaults upon women, the accused may attack the woman's character for chastity, and may lead evidence that at the time she was reputedly of bad moral character,[21] that she associated with prostitutes, but not that her friends were otherwise of bad character,[22] and that she had previously had intercourse with the accused.[21] He may not lead evidence to prove specific acts of intercourse with other men, unless, possibly, these are so closely connected with the alleged rape as to form part of the res gestae/

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[19] High Court, Glasgow: Glasgow Herald 14th February 1974.
[20] Walkers, para 20(a). See also R & B, para 18-76.
[21] Dickie v H M Advocate, (1897) 24 R (J) 82.
[22] Webster, (1847) Ark 269.

res gestae.[21] Evidence of unchastity after the date of the crime is generally inadmissible.[23]

16.09 The admission of evidence of previous intercourse with the accused is relevant to the issue of consent,[24] and the exclusion of evidence of specific acts of intercourse with other men is in accordance with principle.[25] But it is doubtful whether it remains justifiable to introduce evidence that the complainer was reputedly of bad moral character, or that she associated with prostitutes. Such evidence has been said to be admissible on the ground of its relevance to credibility. In Reid Lord Justice-Clerk Inglis said:

> "It is for the panels to show that at the time when the offence is said to have been committed, the woman was of loose and immoral character, not as matter of defence, but as bearing very materially on the effect of the evidence in the minds of the jury. The law has done wisely in making an exception in the case of rape from the general rule, that you cannot raise up a collateral issue, and allow a proof of a witness's character and repute."[26]

Lord Justice-Clerk Macdonald said in Dickie:

> "... it seems a relevant subject of inquiry whether the woman was at the time a person of reputed bad moral character, as bearing upon her credibility when alleging that she has been subjected to criminal violence by one desiring to have intercourse with her."[27]

It is submitted that, notwithstanding the great respect to which these statements are entitled, in cases of rape and the like evidence of the complainer's bad reputation or association with prostitutes should now be made inadmissible, for the following reasons. (1) It is wrong to assume that a witness is less likely to tell the truth because he or she is/

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[23] Leitch, (1838) 2 Swin 112.

[24] Dickie, n 21 supra, Lord Justice-Clerk Macdonald at pp 83-84, Lord Adam at p 87.

[25] See para 15.04, supra.

[26] Jas Reid and Others, (1861) 4 Irv 124, at p 129.

[27] Dickie, n 21 supra, at p 84.

is sexually immoral. (2) Evidence of sexual immorality is, rightly, not generally[28] admitted on the ground of its relevance to credibility in any other class of case. (3) Although the evidence is admitted because of its assumed relevance to credibility, there is a danger that the jury will regard it as having a bearing on the issue of consent. As Professor J C Smith has observed:

> "It is probably nearly impossible in any circumstances for a jury to ignore evidence which is logically relevant but legally inadmissible on one issue which they have been allowed to hear for the purposes of another issue. Here the difficulty is extreme for the jury might be excused if they thought that the prosecutrix's promiscuity had substantially more bearing on whether she consented than on whether she was a liar."[29]

(4) It may be that the present admissibility of evidence of bad reputation has the result that victims of sexual offences who are of bad character are reluctant to report the offences to the police.

16.10 In England, the Heilbron Committee reached the conclusion that in general the previous sexual history of the complainant with other men (which is admissible in English law), including general evidence of bad reputation, ought not to be introduced.[30] They proposed one exception to that rule, whereby the trial judge should have a discretion to admit evidence dealing with her previous sexual history with persons other than the accused if he is satisfied (a) that the evidence relates to behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion of, or in relation to, events immediately preceding or following the alleged offence; and (b) that the degree of relevance of that evidence to issues arising in the trial is such that it/

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[28]See para 16.11 below.

[29]J C Smith, "The Heilbron Report", [1976] Crim LR 97, at p 102.

[30]Report of the Advisory Group on the Law of Rape (Cmnd 6352), para 134.

it would be unfair to the accused to exclude it.[31] The proposed exception was formulated in the light of English case-law, and it has been observed that it would be difficult to state adequately in legislation the principles for the exercise of the judge's discretion.[32] It may be that the Scottish rules which generally exclude evidence of sexual behaviour with other men both before and after the alleged offence[33] are too rigid to be entirely fair to the accused in some unusual cases which may be figured,[34] but it seems difficult to legislate ab ante for such cases, and whether or not any new general rule is introduced in Scotland, it may be best to leave the High Court with a discretion enabling it to admit such evidence if satisfied that any relaxation of the rules is justifiable when such cases arise.

(2) Witnesses

16.11 (a) Prostitutes. The acceptance of the proposition that evidence of sexual immorality should not be admissible on the ground of its relevance to credibility might be thought to involve some modification of the rule that it is competent to ask a woman if she is a prostitute for the purpose of casting doubt on her veracity.[35] It is believed that the questioning of a woman as to whether she was a prostitute, if it was not relevant to the issues in the case, would nowadays be discouraged by the court, and that the matter, which is not of much practical importance, does not require formal regulation.

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[31] Ibid, para 137.

[32] J C Smith, n 29 supra, pp 103-104. Branch (a) of the exception was not adopted in the Sexual Offences (Amendment) Act, 1976 (cap 82), sec 2. On sec 2 see R v Lawrence, [1977] Crim L R 492.

[33] See para 16.08 above.

[34] Eg R v Krausz, (1973) 57 Cr App R 466, where the accused was held entitled to establish his defence of consent by proving that the complainant was in the habit of having sexual intercourse with first acquaintances and thereafter demanding money for her services.

[35] Dickson, para 1616; Walkers para 342(c); R & B, para 18-77; Macdonald, p 310.

16.12 (b) Previous convictions.[36] Under the present law, a person who has been convicted of crime is competent to give evidence, and may be examined on any point tending to affect his credibility;[37] but if he denies that he has previously been convicted, his denial must be accepted, and cannot be contradicted by parole evidence. It is thought that proof of the previous conviction, at least, should be admissible. In Dickie v H M Advocate Lord Justice-Clerk Macdonald observed that if the witness denied the conviction the fact could be vouched by an extract conviction,[38] and the same is stated by Macdonald[39] and Renton and Brown;[40] but the Sheriffs Walker point out that the extract would still have to be applied by parole evidence, and Lord Justice-Clerk Macdonald's observation is not followed in practice.[41] The point may not be of great practical importance, since it may be that few witnesses risk a charge of perjury by maintaining their denial, particularly if they see that the cross-examiner has an extract before him; but it could be met by a simple provision on the lines of section 6 of the English Criminal Procedure Act, 1865,[42] or other provisions derived therefrom such as section 23(1) of the Evidence Act, 1970, of Ontario:

> "A witness may be asked whether he has been convicted of any crime, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved ..."[43]

16.13 Any such provision would, however, have to be linked with a provision enabling the prosecutor to lead evidence of a defence witness's previous convictions/

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[36] See Walkers, paras 7(b), 342(c), 345(b). As to the disclosure of a witness's previous convictions to the defence, see para 25.44 below.
[37] 1975 Act, secs 138(1) and (3), 341(1) and (3).
[38] (1897) 24 R (J) 82, at p 83.
[39] Macdonald, p 310 (not vouched by the reference to Dickson).
[40] R & B, para 18-77 (referring to Macdonald and Dickson).
[41] Walkers, para 345(b), n 34.
[42] 28 and 29 Vict cap 18.
[43] RSO 1970, cap 151.

convictions after he has denied them or refused to answer (see paras 8.56-8.58 above and 16.18 below). It would also have to be so drafted as to take account of such restraints as exist or may be thought desirable on cross-examination as to previous convictions. In some other jurisdictions various rules have been adopted in order to limit the cirumstances in which a witness may be cross-examined as to previous convictions. There may be found limitations as to the type of conviction, related to the seriousness of the offence as measured by the procedure, the penalty imposed or the nature of the offence; as to time, by excluding questioning concerning a conviction for an offence committed prior to a specified time, or in respect of which the penalty has been served prior to a specified time; and discretionary limitations, whereby the trial judge may be given a discretion, to be exercised with or without guidelines, to disallow a question going solely to credibility.[44] It is thought that Scottish practitioners, in general, exercise a wise discretion in the extent to which they cross-examine witnesses as to their previous convictions, and that any tendency to cross-examine too widely is adequately checked by the general rule that if the conviction cannot reasonably be said to be relevant to the witness's credibility, evidence about it will be excluded on the ground that it is irrelevant. The Sheriffs Walker say that since the only legitimate purpose of a question whether the witness has been convicted is to shake credibility, such questions are confined to crimes inferring dishonesty, such as theft or perjury, or possibly/

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[44] Law Reform Commission of Canada, Evidence Project, Study Paper no 3: Credibility, pp 6-7; Ontario Law Reform Commission, Report on the Law of Evidence (1976), pp 193-200; Queensland Law Reform Commission, Report on the Law Relating to Evidence (QLRC 19), p 21; CLRC, paras 159-160, clause 10(1), p 223.

possibly extreme depravity.[45] In England the Criminal Law Revision Committee proposed a statutory provision to the effect that a witness (other than the accused) should not be asked any questions as to his conduct on any occasion, or as to any charge, conviction or acquittal of any offence, unless this is relevant to any issue in the proceedings or to his credibility as a witness.[46] The Thomson Committee, who were not considering the question of proof of previous convictions which was raised in the preceding paragraph, took the view that legislation on the lines proposed by the Criminal Law Revision Committee was neither appropriate nor necessary for Scotland.[47]

(3) The accused, apart from secs 141(f) and 346(f) of the 1975 Act

16.14 The law as to the cross-examination of the accused as to his character and previous convictions, by virtue of sections 141(f) and 346(f) of the 1975 Act, was considered in Chapter 5, paras 5.39-5.68. It is thought that the law as to evidence of the accused's previous convictions which is led as evidence in causa in support of a substantive charge,[48] or which is given by accident or incidentally,[49] does not require comment.

16.15 The general rule that the accused's previous convictions should not be disclosed to the court before the verdict was examined by the Thomson Committee.[50] They considered the discussion of the issues in the/

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[45] Walkers, para 345(c); Dickson para 1618.

[46] CLRC, paras 159-160, cl 10(1), p 223.

[47] Thomson, paras 43.14-43.15.

[48] Walkers, para 22; R & B, para 10-07; 1975 Act, secs 160(2), 357(5); HMA v McIlwain, 1965 JC 40; Carberry v HMA, 1976 SLT 38; Murphy v HMA, 7 October 1977, unreported; Cordiner v HMA, 1978 SLT 118.

[49] Walkers, para 22; R & B, para 10-07; Anon, "Disclosure of Previous Convictions", (1960) 76 Sc L Rev 169; Deighan v MacLeod, 1959 JC 25; Smith v HMA, 1975 SLT (Notes) 89; Millar v HMA, 6 May 1976, unreported.

[50] Thomson, chap 54. In civil law countries the accused's character and background, including previous convictions, are regarded as fully admissible on the question of whether or not he is guilty: Williams, Proof of Guilt (3rd ed), pp 213-214.

the Eleventh Report of the Criminal Law Revision Committee[51] and in an article by Henry Brinton and Lord Fraser,[52] and came to the conclusion that while certain circumstances might be considered as justifying some relaxation of the general rule prohibiting disclosure of an accused's previous convictions, it would not be practicable to frame a rule which would satisfactorily cover only those circumstances.[53] The Criminal Law Revision Committee's proposals for making previous convictions more widely admissible were widely criticised,[54] and the Thomson Committee took the view that these proposals were so prejudicial to accused persons that they themselves did not propose anything on these lines being introduced in Scotland.[55]

16.16 It is submitted with respect that the Thomson Committee reached the correct conclusion. Recent research supports the view that the disclosure of the accused's record may significantly increase the chance of conviction. It was found in an American study that where the judge disagreed with an acquittal by a jury the most common differential feature was the jury's ignorance of the accused's previous record.[56] In England the following conclusions have been tentatively suggested from the research of the London School of Economics Jury Project.

(1) The admission of previous convictions increases the chance of a guilty verdict, but only if those convictions are for offences similar to that charged. If they are dissimilar it is possible for them to have/

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[51] CLRC, paras 70-101.

[52] "Trial and Pre-trial Procedures", (1971) 135 JP 827.

[53] Thomson, para 54.07.

[54] Eg BC, paras 92-110; 338 H L Deb, 14 February 1973, cols 1553, 1577, 1623, 1632, 1648, 1661.

[55] Thomson, para 54.07. For a comment on the severity of Thomson's criticism see J E Adams, "An Englishman Looks at Thomson", [1976] Crim L R 609.

[56] Kalven and Zeisel, The American Jury (1966), p 131, Table 31, cit Colin Tapper, (1973) 36 MLR 56, at p 57.

have an effect that is positively favourable to the accused. Similar previous convictions may adversely affect the outcome for a co-accused. (2) Contrary to common supposition, juries give real weight to an instruction to disregard a previous record wrongly admitted.[57] If similar convictions assist the Crown, while dissimilar ones may favour the defence, it seems best that the jury should not be prejudiced in either direction by the disclosure of any convictions other than by virtue of secs 141(f) and 346(f) of the Act of 1975. The question of the amendment of the Act of 1975 in this regard is considered in Chapter 5.

16.17 The Thomson Committee considered the rule that the only convictions that may be libelled against an accused person are those in respect of a crime committed in any part of the United Kingdom. They recommended that previous convictions outwith the United Kingdom should be libelled against the accused, and that when libelling such convictions the nearest United Kingdom analogue should be listed where necessary for clarification.[58] It is submitted that that would be a desirable reform.

(4) Evidence in rebuttal

16.18 If it is accepted that proof of previous convictions should be admitted, as recommended in paragraphs 16.12-16.13, there will be two exceptions to what seems to be[59] a general rule that a witness's credibility/

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[57] W R Cornish and A P Sealy, "Juries and the Rules of Evidence", [1973] Crim L R 208, at pp 221-222.

[58] Thomson, para 54-08.

[59] The qualification is made because (1) in King v King, (1841) 4 D 124, approved by Dickson, paras 1624-1625, it was held competent not only to cross-examine a witness as to expressions of hostility to a party, but also to prove these by other evidence; and (2) it is said by Macdonald, p 310, and R & B para 18-77, purporting to found on Dickson, para 1621, that the general character of a witness other than the accused or the complainer may be enquired into where it is alleged to be so degraded as to affect credibility.

credibility cannot be assailed by the evidence of other witnesses: (1) in the case of proof of a previous conviction, and (2) in the case of proof of a previous inconsistent statement.[60] If, of course, the facts affecting credibility are also relevant to the questions at issue, evidence relating to them may be led from other witnesses. Otherwise, however, the rule appears to be[59] that apart from these two exceptions, evidence of facts affecting the credibility of a witness, apart from the evidence of the witness himself, is inadmissible.[61] There is a question whether the rule should not be modified further. It has already been suggested that in criminal cases the Court should have power to allow fresh evidence to be led by either side before the commencement of the speeches, and to allow the Crown to lead additional evidence after the close of the defence case for the purpose of contradicting defence evidence or proving a defence witness's previous inconsistent statement.[62] If the recommendation made in paragraphs 16.12-16.13 is accepted, the Crown should also be entitled to lead evidence in proof of a defence witness's previous conviction after the witness has given evidence. But should it also be competent for a party to lead evidence in rebuttal of evidence given by a witness called by his opponent which is relevant to that witness's character or credibility? If so, should this be competent in both civil and criminal cases/

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[60] See paras 19.23-19.32, post.

[61] See Walkers, para 7(b).

[62] See para 3.73, ante.

cases? Suppose, for example, that an essential witness denies in cross-examination that he is biased or lying in favour of the party calling him, but the cross-examiner has strong evidence that the witness has been bribed or tutored[63] by that party, or has had a violent quarrel with the other party. It is thought that evidence of such matters should be admitted, notwithstanding that they go only to the credibility of the witness, because it is on the Court's decision as to his credibility that its decision as to the issue depends. Lord Justice-Clerk Macdonald gave two reasons for the present rule, which would exclude such evidence:

> "First, it is the duty of a Court to protect witnesses from attacks which they cannot be prepared to meet, and which they can claim no right to meet, by leading evidence to rebut them. And second, such inquiries, if entered upon, would necessarily interfere with the conduct of judicial proceedings by introducing collateral issues, which would be most inconvenient and embarrassing, and might often protract proceedings and obscure the true issue which was being tried."[64]

It is submitted, however, that if a responsible advocate considers that there is strong evidence that a crucial witness is prejudiced or even prepared to cheat in order to deceive the court, the considerations of protecting the witness and protracting the proceedings must yield to the public interest in ascertaining whether the witness is in fact open to criticism on such weighty grounds. It seems strange that the court should have to be kept in ignorance of such behaviour by a witness. Dickson[65] refers with approval to the case of King v King[66] where evidence of a witness's prejudice to the defender was admitted. In England, it has always been permissible to call evidence to contradict a witness's denial/

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[63] See R v Hendy, [1976] Crim L R 686.
[64] Dickie v HMA, (1897) 24 R (J) 82, at p 83.
[65] Dickson, paras 1624-1625.
[66] (1841) 4 D 124.

denial of bias or partiality towards one of the parties in the case being tried.[67]

(5) Opinion evidence as to credibility and character

16.19 It seems to be generally understood in practice that, apart from cases where evidence as to the disposition or character of a victim of assault may be given, one witness cannot give evidence as to the reputation of another. Thus, one witness cannot give his opinion on the credibility of another witness.[68] On the basis of reported authority alone, however, the matter is unsettled. In the case of John Buchan, charged with assault with intent to ravish a girl between four and five years old, whose character was not in issue, the prosecutor was allowed to ask the child's mother whether the child was veracious and spoke the truth, and whether she believed her story.[69] But in Thomas and Peter Galloway the defence were not permitted to ask a witness whether two young witnesses of twelve and nine years of age were "veracious boys",[70] or, whether from her knowledge of the boys she could "place any reliance on their recollection of stories."[71] There appears to be no modern reported authority on the point. It is thought that it would be wrong in principle to admit such evidence. The credibility of a witness is a matter for the tribunal of fact to determine, and to introduce the opinion of another witness on the subject, and perhaps further evidence for and against the grounds for his opinion, would confuse and prolong the inquiry. In theory at least, a/

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[67] Cross, pp 235-236.

[68] Cf the practice in Sweden, where it appears that there are facilities for experts to investigate the credibility of witnesses, both by interview and by experiment: see Arne Trankell, Reliability of Evidence.

[69] (1833) Bell's Notes 293. Similar evidence was given by the child's mother in Malcolm M'Lean (1833) Bell's Notes 294, but it is not clear whether the child's character had been impugned.

[70] (1836) Bell's Notes 254, 294.

[71] (1836) 1 Swin 232.

a further witness might be called to impugn or support the veracity of the second witness, and so on.[72] In Canada, on the other hand, evidence of the witness's reputation for untruthfulness and a witness's individual opinion on the subject is admissible to impugn credibility; and his reputation for truthfulness is admissible to support credibility in the event of the witness's credibility being attacked. The Law Reform Commission of Canada propose that an individual's opinion may be used to support, as well as to impugn credibility.[73] For the reasons already given it is thought that such rules should not be introduced into Scottish practice.

16.20 It is submitted, however, that evidence should be admissible to show that a witness suffers from some mental or physical condition which affects the reliability of his evidence. Evidence may be led before the judge as to the mental condition of a person who is alleged to be incompetent to testify by reason of mental incapacity,[74] but in such a case the question is whether the person should be allowed to give evidence at all. It is not clear whether evidence may be given about the condition of a witness who actually gives evidence to the tribunal of fact. It is thought that it should be made clear that such evidence is admissible. In Toohey v Metropolitan Police Commissioner, which established its admissibility in English law, Lord Pearce said:

> "Human evidence shares the frailties of those who give it. It is/

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[72] Cf Cross, p 238.

[73] Law Reform Commission of Canada, Evidence Project, Study Paper no 3: Credibility, pp 4-5. See now the Commission's Report on Evidence, Evidence Code, sec 63: "Evidence of a trait of a witness' character for truthfulness or untruthfulness is inadmissible to attack or support the credibility of the witness unless it is of substantial probative value", and comments at p 95.

[74] Walkers, para 350.

is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them. If a witness purported to give evidence of something which he believed that he had seen at a distance of 50 yards, it must surely be possible to call the evidence of an oculist to the effect that the witness could not possibly see anything at a greater distance than 20 yards, or the evidence of a surgeon who had removed a cataract from which the witness was suffering at the material time and which would have prevented him from seeing what he thought he saw. So, too, must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.

"It is obviously in the interest of justice that such evidence should be available. The only argument that I can see against its admission is that there might be a conflict between the doctors and that there would then be a trial within a trial. But such cases would be rare and, if they arose, they would not create any insuperable difficulty, since there are many cases in practice where a trial within a trial is achieved without difficulty. And in such a case as this (unlike the issues relating to confessions) there would not be the inconvenience of having to exclude the jury since the dispute would be for their use and their instruction."[75]

16.21 Recent decisions in England and the Commonwealth have raised questions as to the extent to which psychiatric evidence may be admitted in relation to the character or credibility of the accused. In Lupien v R[76] the majority of the Supreme Court of Canada held that in a trial for gross indecency expert psychiatric evidence was admissible for the defence to the effect that he had a strong aversion to/

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[75] [1965] AC 595, at p 608. In R v Eades, [1972] Crim LR 99, Nield J held that the Crown might adduce evidence from a psychiatrist that the accused's account of how he had recovered his memory in the interval between giving two statements was not consistent with current medical knowledge. See R S O'Regan, "Impugning the Credit of the Accused by Psychiatric Evidence", [1975] Crim LR 563, and subsequent correspondence, [1976] Crim LR 84.

[76] [1970] SCR 263; (1970) 9 DLR (3d) 1.

to homosexual practices and would not, therefore, knowingly engage in homosexual acts. In Lowery v R,[77] where two men were charged with murder and each alleged that the other had committed the crime, the Judicial Committee of the Privy Council held that one of them was entitled to adduce the evidence of a psychologist as to their respective personalities on the ground that it was relevant to show that his was the more probable version of the facts. In R v Turner[78] a man charged with murder, who was not suffering from mental illness, pleaded provocation and sought to call a psychiatrist to give evidence of his personality and mental state in order to show that his account of the incident was likely to be true and that he would have been provoked by what his victim had told him. It was held in the Court of Appeal that the evidence was inadmissible, on the ground that there was no general rule that, in the absence of mental illness, psychiatric evidence was admissible to prove that the accused was likely to be telling the truth, and that the defendant's veracity and likelihood of having been provoked were matters within the competence and experience of a jury. Lowery was said to have been decided on its special facts. The matters raised in Lupien and Lowery could perhaps be covered by a reformulation of the rule as to the admissibility of evidence of opinion on the issue, the issue in such cases being whether on the occasion under investigation the accused possessed the criminal intention necessary for guilt. That rule is discussed in Chapter 17. Otherwise, it is thought that it is unnecessary to propose any alteration of the law of Scotland in order to take account of these matters; and that a Scottish court would rightly have excluded the evidence considered in Turner.

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[77] [1974] AC 85.

[78] [1975] QB 834.

Chapter 17

EVIDENCE OF OPINION AND EXPERT EVIDENCE[1]

1. Introduction

17.01 This chapter is concerned with the rules as to evidence of opinion. The term "expert evidence", which is of English origin,[2] will be used for convenience to denote the evidence of persons of skill on matters involving scientific knowledge, or acquaintance with the rules of any trade, manufacture or business with which men of ordinary intelligence are not likely to be familiar.[3] Witnesses who are not experts will be referred to as "ordinary witnesses". The first rule to be examined will be that which states that an ordinary witness must depone to facts, not opinions. Next will be considered the rule that a witness, whether ordinary or expert, may not state an opinion on the actual issue before the court. It will be submitted that each of these rules is unsatisfactory and should be replaced by another. Various special rules as to expert evidence will then be noticed, and some general questions will be discussed as to the employment of assessors and court experts, and the disclosure and exchange of experts' reports. Finally, certain aspects of the law relating to evidence of identification will be considered. Opinion evidence as to credibility and character has been discussed in Chapter 16, paragraphs 16.19-16.21.

2. Ordinary witness

17.02 Tait states that in general the opinion of a witness is not evidence: he/

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[1] Dickson, paras 391-411; Walkers, chap 34.

[2] Dickson, para 398.

[3] Dickson, para 397. The question whether a particular witness is a skilled witness may sometimes be difficult to resolve: see Hopes and Lavery v HMA, 1960 JC 104, Lord Sorn at pp 113-114.

he must depone to facts.[4] The equivalent English rule has its origin in a rule which forbade the witness to state notions, guesses and conjectures, but did not prohibit him from offering reasoned conclusions from facts which he had observed. The forbidding of evidence of "opinion" in the latter sense appears to be a comparatively modern development.[5] In any event the modern general rule that a witness must state facts, not opinions, is only laxly applied. As the Sheriffs Walker point out, what is obviously opinion evidence may be admissible from an ordinary witness.[6] To their examples of the identification of handwriting and of property may be added cases where ordinary witnesses have been permitted to state their opinions as to whether a testatrix, through physical weakness and debility, was of sound disposing mind,[7] and as to the safety of the design of a bus.[8] It has been said that an ordinary witness may be asked whether he saw anything dangerous about a pavement.[9] And evidence concerning the speed of a vehicle, distances, and a person's apparent age, emotional state or state of health, is evidence of opinion. Indeed, it is seldom possible for an ordinary witness to communicate his knowledge of an event except in terms which include expressions of opinions which he himself formed by applying his previously acquired knowledge and experience to what he actually perceived with his physical senses at the time of the event.[10] If evidence in/

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[4]George Tait, A Treatise on the Law of Evidence in Scotland (1824), p 432.

[5]Ontario Law Reform Commission, Report on the Law of Evidence (1976), p 149.

[6]Walkers, para 412.

[7]McNaughton v Smith, 1949 SLT (Notes) 53.

[8]Wyngrove's Exrx v Scottish Omnibuses, 1966 SC (HL) 47, Lord Fraser (Ordinary) at p 55.

[9]Hewat v Edinburgh Corporation, 1944 SC 30, Lord Moncrieff and Lord Carmont at p 35.

[10]Law Reform Committee, 17th Report, "Evidence of Opinion and Expert Evidence" (hereafter referred to as LRC 17), para 3.

in such terms were not admitted, it would be impossible for the witness to communicate his account of the event to the court. The admission of such evidence does mean, however, that the general rule as stated is misleading. The true position in practice appears to be that evidence which is partially based on inference is admitted where the witness cannot otherwise tell his story or where it is helpful to the court.[11] It is submitted, therefore, that any reform of the law as to opinion evidence should make it clear that in such circumstances an ordinary witness may give evidence in the form of an expression of his opinion. It is thought that the matter should be considered along with the reform of the rule relating to the inadmissibility of evidence of opinion on the issue before the court, which is considered in the next section.

3. Opinion on the issue

17.03 The rule that a witness may not state an opinion on the issue before the court[12] is uncertain and of doubtful utility as regards ordinary witnesses, and is frequently and necessarily broken in practice by expert witnesses. As has already been noticed, it appears that an ordinary witness may be asked whether a defect in the surface of a street was dangerous;[13] but while in a road accident case he is permitted to testify on such matters as the speeds of the vehicles and relevant distances, he is not permitted to say, "There was nothing the lorry-driver could do to avoid the accident", or, "It was entirely the car-driver's own fault." On this matter the Law Reform Committee made the following observations:

> "The expression by a witness of the opinion which he formed as

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[11] Z Cowen and P B Carter, Essays on the Law of Evidence, pp 164-168.
[12] Walkers, para 411(b).
[13] Hewat v Edinburgh Corporation, 1944 SC 30, Lord Moncrieff and Lord Carmont at p 35.

to the blameworthiness of the conduct of another person which he perceived with his physical senses may be the most vivid, as it is often the most natural, way of conveying to the judge an accurate impression of the event which the witness is describing. Yet where blameworthiness, in the sense of failure to exercise what an ordinary man would regard as reasonable care, is the very issue which the judge has to decide, as it is in many actions for negligence, an expression by a witness of his opinion as to the blameworthiness of a party to the accident is not admissible. In practice this rule can generally be circumvented and the opinion of the witness upon blameworthiness can be elicited circuitously by careful framing of the questions put to him. But this process, for which he cannot see the reason, detracts from the spontaneity of the witness's description of the event and makes it more difficult for the judge to gain an accurate impression of what the witness actually perceived. Recognition of this by judges has led to considerable erosion of the rule in civil cases and a witness is often allowed to tell his story in his own way, notwithstanding that this may involve expressing his own opinion upon the very issue in the case. Nevertheless, the rule still forms part of the law of evidence. We do not think that today it fulfils any useful purpose. It makes it more difficult for the ordinary and honest witness of an event to give his evidence of what he perceived in the way it is most natural for him to do so - and so most helpful to the judge; and the methods which can legitimately be used to circumvent the rule tend to discredit the procedure of the courts in the eyes of ordinary men. We are not suggesting that it should be permissible to ask a non-expert witness a direct question as to his opinion of the blameworthiness of the conduct of another person where this is an issue in the action. To put such a question, even though the judge attaches no weight to the answer, suggests an encroachment on the decision-making function which is his alone. But we do recommend that the answer of a witness to a question put to him to elicit any fact which he has personally perceived should be admissible as evidence of the fact even though given in the form of an expression of his opinion upon the matter directly in issue in the action ..."[14]

17.04 The rule prohibiting a statement of opinion on the question which the court has to decide is disregarded in criminal cases where doctors testify as to the sanity of the accused, and as to whether he was unfit to drive through drink. The following observations of Lord Parker, C J, as to English practice seem equally applicable in Scotland:

"... I cannot help feeling that with the advance of science

more/

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[14]LRC 17, para 4.

> more and more inroads have been made into the old common law principles. Those who practice in the criminal courts see every day cases of experts being called on the question of diminished responsibility, and although technically the final question 'Do you think he was suffering from diminished responsibility?' is strictly inadmissible, it is allowed time and time again without any objection."[15]

As the Criminal Law Revision Committee point out, it is natural that such a question should be allowed, because it would often be artificial for the witness to avoid, or pretend to avoid, giving his opinion on a matter merely because it is the ultimate issue in the case and because his opinion on the ultimate issue may be obvious from the opinions which he has already expressed.[16]

17.05 It is, however, necessary to consider the possible justifications for the rule against evidence of opinion on the issue before the court. Dickson implies that the witness must not "encroach on the province of the jury";[17] and in Campbell v Tyson[18] Lord President Boyle said that to ask skilled witnesses "their opinion upon the whole case" would be "substituting the witnesses for the jury - influencing the latter by the weight of the opinions of these men of skill". But it may be argued that modern juries are more sophisticated than their predecessors of over a century ago, that expert evidence may be led by both sides, and, above all, that it is always open to the tribunal of fact to reject an opinion as valueless. The expert does not "usurp the function"[19] of the tribunal of fact, because it remains the function of that tribunal/

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[15] DPP v A & B C Chewing Gum Ltd, [1968] 1 QB 159, at p 164.
[16] CLRC, para 268.
[17] Dickson, para 399; see also para 391.
[18] (1841) 4 D 342, at p 343.
[19] The expression was employed by L J-C Inglis in Morrison v Maclean's Trs, (1862) 24D 625, at p 631, where medical witnesses were asked to state their opinions on the issue although no question of medical science was involved.

tribunal to decide whether or not to accept his evidence. It may also be pointed out that medical evidence of the type already referred to is admissible although it may leave the tribunal with little choice as to what its decision on the issue will be.

> "The truth is that not only is it to some extent inevitable, but it is also sometimes positively desirable, that a witness should in some measure usurp de facto what is traditionally defined as the function of the jury. This is so on the short ground that he is in some circumstances very much more competent to perform that function than is the jury."[20]

17.06 A second justification of the rule is suggested by Lewis, who seems to indicate that an opinion which is a direct answer to the issue is irrelevant.[21] It is thought, however, that such an opinion may well be relevant, in the sense that it may have probative value. The opinion of an intelligent and fully informed eye-witness, if he is credible and reliable, may well tend to prove or disprove the existence or non-existence of a fact in issue. If he says, for example, that the pavement "was dangerous" or that the accused "was defending himself", he makes a statement that reasonable men would conclude rationally tends to demonstrate the actual state of the pavement or the nature of the actions of the accused.[22] An opinion on the issue should be excluded, it may be suggested, only if it is unhelpful to the tribunal of fact, as where the tribunal could reach that opinion for itself, or the presentation of the witness's opinion would involve undue waste of time. Cowen and Carter offer the following generalisation and comments:

> "'When opinion evidence is excluded it is because its admission/

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[20] Cowen and Carter, n 11 supra, p 170.
[21] Lewis, Manual, pp 47-49.
[22] Cf Law Reform Commission of Canada, Study Paper 7: Opinion and Expert Evidence, p 29.

> admission would not be sufficiently helpful to the jury in the performance of its task, to justify the pro tanto and de facto delegation of that task which such admission would involve.' To repeat the words of Thayer, 'any rule excluding opinion evidence is limited to cases where, in the judgment of the court, it will not be helpful to the jury. Whether accepted in terms or not, this view largely governs the administration of the rule.'[23] Failure to be sufficiently helpful is often due to lack of adequate probative value. Lack of probative value is due to the inadequacy of the data from which the inference was drawn and/or the possible irrationality of the inference itself owing to lack of training and skill on the part of the witness."[24]

17.07 It is thought that the present rules as to the statement of opinions by ordinary witnesses and the statement of opinions on the issue by witnesses both ordinary and expert should now be reviewed in the light of the principle that all relevant evidence should be admissible unless its exclusion can be justified on some clear ground of policy.[25] It has been suggested in the foregoing paragraphs that the present rules may be an interference with a witness's normal manner of describing facts, are impossible to apply generally in practice, and lack justification in principle. It is submitted that they should be replaced by rules which permit non-experts to state their opinions, and permit all witnesses to state opinions on the issues before the court, subject to such qualifications as that a non-expert would be allowed to state an opinion only if it was an intrinsic part of his testimony, or that an opinion on the issue would have to be helpful in order to be admissible. The desirability of such rules has been accepted in England, Canada and the United States of America.

17.08 In England the Law Reform Committee recommended such rules, which/

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[23] Thayer, A Preliminary Treatise on Evidence at the Common Law, p 525.
[24] Cowen and Carter, n 11 supra, pp 171-172.
[25] See Chapter 1, paras 1.03-1.05 above.

which were enacted in section 3 of the Civil Evidence Act, 1972:[26]

> "(1) Subject to any rules of court made in pursuance of Part I of the Civil Evidence Act, 1968 or this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.
> (2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
> (3) In this section 'relevant matter' includes an issue in the proceedings in question."

The Criminal Law Revision Committee recommended similar provisions for criminal proceedings, with the addition of the following subsection:

> "(4) Nothing in this section shall be taken to affect any rule of law as to the topics on which expert evidence is or is not admissible."[27]

Subsection (1), read with subsection (3), makes it clear that an expert is not to be prevented from giving his opinion on a matter on the ground that this is the ultimate issue which the court or jury has to decide, but subsection (4) makes it clear that in order that subsection (1) may apply, the topic under consideration must be one on which expert evidence is admissible under the ordinary rules of law, so that the expert may not give his opinion on the issue if it is one on which a judge or jury is capable of making their own decision. On such an issue the expert's opinion could no doubt be described as unhelpful. Subsection (2) does not allow a witness to say, for example, "In my opinion the accused was driving negligently", or "In my opinion the accused was guilty (or not guilty)", because neither of these would be a "way of conveying relevant facts personally perceived" by the witness; nor does it allow an advocate to/

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[26] 1972, cap 30.

[27] CLRC, paras 266-270, clause 43, pp 252-253.

to ask the witness to give his opinion on a matter. The operation of section 3 does not seem to have caused difficulty, perhaps because its provisions to a large extent accord with the pre-existing practice of the English courts.

17.09 The criterion of helpfulness is employed by the Law Reform Commission of Canada, who include the following sections in their possible formulation of proposed legislation:

> "2. A witness, whether or not he has been accepted as an expert witness, may give his opinion or draw an inference from relevant facts if his opinion or inference is
> (a) rationally based on matters that he has perceived with his own senses; and
> (b) helpful to a clear understanding of his testimony or to the determination of a matter in issue.
>
> 3. A witness who has been qualified as an expert by reason of special knowledge, skill, experience, training or education may be accepted as an expert witness and may give his opinion or otherwise testify when scientific, technical or other specialised knowledge will assist the jury to understand the evidence or to determine an issue.
>
> 4. Testimony of an expert or other witness that is given in the form of an opinion or inference may, if it is otherwise admissible under this Part, be received in evidence, notwithstanding that it embraces an ultimate issue to be decided."[28]

The Draft Evidence Act of the Ontario Law Reform Commission provides:

> "14. Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding.
>
> 15. Where a witness in a proceeding is qualified to give opinion evidence, his evidence in the form of opinions or inferences is not made inadmissible because it embraces an ultimate issue of fact."[29]

In the United States, the equivalent Federal Rules of Evidence provide:

> "701./

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[28] See n 22 ante, pp 23-24.

[29] See n 5 ante, p 256.

"701. If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

704. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[30]

17.10 There is a question whether provisions on such lines could be abused, as by coaching an intelligent witness so that he will insinuate an apparently spontaneous expression of opinion into his evidence, in the hope that it will influence the judge or jury. The question of abuse should be considered in the context of the standards of the courts and the legal profession, and the nature of the adversary system. It is thought that these standards would inhibit any abuse of the provisions, and that an advocate would be aware that a detailed factual account from his witness would be more impressive than a general expression of opinion, and that any weaknesses in the grounds of opinion would be exposed in cross-examination. Another possible danger is that the witness's opinion, although given in good faith, may lack probative value for the reasons given by Cowen and Carter: the inadequacy of the data from which the inference was drawn, or the possible irrationality of the inference itself owing to lack of training and skill on the part of the witness.[30a] These weaknesses should also be exposed by competent cross-examination; but in order to guard against any risks inherent in any new set of rules it may be desirable to confer on the court a discretion to exclude evidence of opinion, either generally, as in England, or where/

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[30] Federal Rules of Evidence, 28 USCA, cit Ontario Law Reform Commission, n 5 supra, pp 152, 158.

[30a] Cowen and Carter, n 11 supra, pp 171-172.

where the probative value of the opinion is outweighed by the danger of misleading the tribunal of fact or unduly delaying the proceeding, as is proposed in Canada.[31]

4. Specialities of expert evidence

17.11 (1) Presence in court.[32] An expert witness is not allowed to be present in court while other experts are giving evidence, but as a general rule he is allowed to hear the evidence of the witnesses to fact unless objection is taken, or unless he himself is to speak to facts as well as opinion. While it seems possible to describe modern practice in these terms, the following matters appear to require clarification or reconsideration. There are conflicting nineteenth-century decisions as to the practice of the High Court which are still cited in modern text-books,[33] and two of these mis-state the law as to the examination as to fact of an expert who is to speak to facts and opinion and has heard other witnesses speaking to these facts.[34] The rule excluding one expert while another is giving evidence appears to be a relic of an age when the courts took what now seems to have been an inordinately cautious attitude to the exclusion of witnesses on the ground of bias. The rules of exclusion which that attitude inspired were abolished by section 1 of the Act of 1852, but even before then Lord Fullerton had doubted the wisdom of excluding a skilled witness because he was aware of the evidence of opinion which other skilled witnesses had given:

"Such witnesses are examined as men of skill, to state their opinion/

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[31] See n 22 supra, p 31.

[32] See Dickson, paras 399, 1597, 1761; Walkers, para 413(d); Chapter 3, para 3.23 above.

[33] Walkers, para 413(d); R & B, 18-70.

[34] Macdonald, p 295, and R & B, para 18-70, ignore the discretion conferred on the court by the 1840 Act, section 3 (1975 Act, secs 140, 343). See Chapter 3, para 3.16 above.

opinion of the value. Now, does it invalidate a witness's opinion on such a point, that he has been told the opinion of another man of skill who was previously examined? I think that would be going too far ..."[35]

17.12 It is submitted that the court should have a discretion to permit an expert witness to be present in court while both witnesses to opinion and witnesses to fact are giving evidence, whether or not the expert witness himself is to give evidence to fact. It is thought that any suspicion that experts are necessarily unreliable[36] or partisan,[37] such as was occasionally expressed in the nineteenth century, is no longer generally well-founded. If any expert's testimony were to take on the flavour of advocacy, that would become obvious through competent cross-examination, he would soon become known to the Bench and the Bar, and his evidence would be discounted. In a civil cause he would in any event find it difficult to trim his evidence in accordance with what he had heard if there were to be such a rule as is discussed below[38] requiring his report to be lodged before the trial. In addition to the consideration that the present rules are based on an unrealistically poor/

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[35] Fraser v Lord Lovat, (1841) 3 D 1132, at p 1133.

[36] Eg Davidson v Davidson, (1860) 22 D 749, L P M'Neill at pp 751-752: "It is the testimony of scientific persons, and we know what that is. I have hardly ever seen a case in which evidence of opinion was required, except perhaps the plainest case of murder by cleaving a man's skull with an axe, or something of that kind, in which a different opinion was not expressed on both sides. And in civil questions, I have hardly ever seen a case in which there was not a conflict of scientific evidence on both sides."

[37] Eg Tracy Peerage Case, (1843) 10 Cl & Fin 154, Lord Campbell C J at p 191: "... hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked ..." See also Thorn v Worthing Skating Rink Co, per Jessell, M R, noted in Plimpton v Spiller, (1877) 6 Ch D 412, at p 416.

[38] Paras 17.31-17.43 below.

poor view of the quality of expert witnesses, is the practical consideration that it might well be in the interests of justice to permit the expert to be in court in order to advise immediately on matters spoken to in evidence by other witnesses so as to assist in the effective cross-examination of that witness. It is thought that a flexible rule, which permits the court to take account of considerations in favour of the expert's presence, is preferable to the rigidity of the present law. The party who desires the expert to be present should apply to the court for permission, and the other side should be entitled to state objections.

17.13 It is submitted that in any event the present law, if otherwise left unchanged, should be altered at least to the extent of making provision for a formal application for permission, because at present (1) a party may be unaware that the other party's expert is in court, and thus have no opportunity of taking an objection before the expert hears evidence; and (2) there are difficulties in the application of section 3 of the 1340 Act,[39] and if the question of the witness's presence were to be raised at the outset, resort to section 3 would be unnecessary.

17.14 (2) Corroboration. It is now clear from the opinions in McKillen v Barclay Curle & Co Ltd[40] that there is no general rule that a skilled witness does not require to be corroborated, such as was thought[41] to have been laid down by Davie v Magistrates of Edinburgh.[42] If the essential fact in dispute is a matter of technical science, it cannot be established by the uncorroborated testimony of a single expert witness/

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[39] See Chapter 3, para 3.19 above.
[40] 1967 SLT 41.
[41] See Walkers, para 413(c).
[42] 1953 SC 34.

witness, except where the rule of law which requires corroboration has been modified by a statutory provision such as section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968. In Galbraith v Galbraith[43] and Bain v Bain,[44] however, in each of which a declarator was sought that a marriage had been dissolved by a decree of a foreign court, the Lord Ordinary did not require corroboration of the expert evidence as to the grounds on which the foreign court exercised jurisdiction. Corroborated expert evidence of foreign law was led by both parties in Scottish National Orchestra Society v Thomson's Executor.[45] The reform of the law relating to corroboration is discussed in Chapter 23 below.

17.15 (3) Deceased expert. In Laidlaw v Paterson's Trustees,[46] an action of damages for personal injuries sustained in a fall down an allegedly defective stair, Lord Hill Watson admitted as evidence a report made on behalf of the pursuer by a builder who had died before the proof, saying:

> "I am of opinion that Mr Davidson's report is competent evidence but in considering its value I am bound to take into consideration that Mr Davidson was not subject to cross-examination."

It seems that in England such a report would be admissible by virtue of section 2 of the Civil Evidence Act, 1968, and section 1 of the Civil Evidence Act, 1972. The law relating to hearsay is considered in Chapter 19 below.

17.16 (4) Citation of expert witness furth of Scotland. The citation of/

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[43] 1971 SC 65.
[44] 1971 SC 146.
[45] 1969 SLT 325.
[46] 1954 SLT (Notes) 5.

of expert witnesses who are resident outwith the jurisdiction of the Scottish supreme courts but within the United Kingdom is discussed in Chapter 24 below, para 24.35.

17.17 (5) Medical examination.[47] The court may order a party, but not a witness, to submit himself for medical examination.[48] There is not, however, any settled practice in consistorial causes.[49] There is a question as to the effect of refusal to submit to examination. The view has been expressed that in nullity cases such refusal may infer an admission of incapacity,[50] but that inference was not drawn in the unusual circumstances of A v B,[51] where the Lord Ordinary intimated that if the wife defender did not submit to a medical examination which established her incapacity, decree would be refused. It has also been said that in cases other than nullity cases refusal to submit to examination would at least probably affect the burden of proof.[52] It appears to be assumed at present that a court order for a medical examination is pronounced under pain of imprisonment for contempt of court.[53] It is submitted that the question as to the effect of a refusal by a pursuer to submit to a medical examination, whether ordered by the court or not, could be satisfactorily resolved if the Scottish courts were to develop a practice of sisting the action in the event of refusal. The English courts/

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[47] Walkers, para 418(a); Jumner v N B Railway Co, (1877) 4 R 686; M'Intyre v M'Intyre, 1920, 1 SLT 207.

[48] As to the medical examination of a paramour, see Davidson v Davidson, (1860) 22 D 749; Borthwick v Borthwick, 1929 SLT 57, Mitchell v Mitchell, 1954 SLT (Sh Ct) 45; Clive and Wilson, p 460.

[49] See Clive and Wilson, pp 49-50. As to blood tests, see Chapter 12, ante, paras 13.02-13.06.

[50] Fraser, Husband and Wife (2nd ed), i, 104.

[51] 1934 SLT 421.

[52] Walkers, para 418(a).

[53] Cf Whitehall v Whitehall, 1958 SC 252, L J-C Thomson at p 258.

courts have in recent years formulated a principle that the court can order a stay if the conduct of the plaintiff in refusing a reasonable request by the defendant for medical examination is such as to prevent the just determination of the cause. Whether or not a stay should be ordered is a matter for the discretion of the judge, bearing in mind the competing considerations of the plaintiff's right to personal liberty and the defendant's right to defend himself in the litigation as he and his advisers think fit.[54] While such a principle appears to be of value in relation to the medical examination of a pursuer, it is difficult to formulate an effective sanction in the case of a refusal by a defender to be medically examined short of the drastic sanction of imprisonment, other than a rule whereby, in the event of refusal, inferences adverse to the defender might be drawn. This may not, however, be a problem of significant practical importance: the medical examination of a defender is very seldom necessary in practice, outside the numerically very small category of actions of declarator of nullity.

17.18 (6) Handwriting.[55] It is now beyond doubt that in criminal cases corroborated expert evidence of the comparison of handwriting may be sufficiently weighty to entitle a court to convict. The argument that such evidence could never, by itself, be enough to convict was rejected obiter in Richardson v Clark[56] and conclusively in Campbell v Mackenzie[57] where the conviction depended solely on the handwriting evidence/

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[54] Starr v National Coal Board, [1977] 1 WLR 63.

[55] See Walkers, para 414.

[56] 1957 JC 7.

[57] 1974 SLT (Notes) 46. Among other recent cases are Davidson v HMA, 1951 JC 33; Camilleri v MacLeod, (1965) 29 JCL 126; Walter Scott Ellis, High Court, February 1965, unreported.

evidence. The following matters, however, await authoritative clarification.

17.19 (a) Date of allegedly genuine document. Dickson states it as a rule that the documents tendered as genuine for the purpose of comparison must be dated before the one in issue, where they are in the handwriting of the person leading the proof, or someone with whom he is in concert; otherwise, he says, documents might be prepared for the purpose of comparison.[58] The Sheriffs Walker point out that Dickson's rule rests on two early cases,[59] and suggest that it may be a relic of the old rules which took such a low view of human nature that a witness with an interest was excluded.[60] It is doubted whether Dickson's rule is, or need be, followed in modern practice. An allegedly genuine document which is dated later than the document in issue would probably require close scrutiny, but there appears to be no valid ground for excluding it.

17.20 (b) Admissibility of allegedly genuine document. It seems clear from H M Advocate v Walsh[61] and Davidson v H M Advocate[62] that in a criminal trial an allegedly genuine document is admissible for the purpose of comparatio literarum although it may be inadmissible for any other purpose. The Sheriffs Walker observe that that may not be so in a civil cause, and they refer to the rules as to the stamping of deeds.[62a] It is suggested that it should be made clear that the same rule is applicable in civil causes.

17.21/

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[58] Dickson, para 411.

[59] Cameron v Fraser & Co, (1830) 9 S 141; Ross v Waddell, (1837) 15 S 1219.

[60] Walkers, para 414(b).

[61] 1922 JC 82.

[62] 1951 JC 33.

[62a] Walkers, para 414(b), n 48. On the admissibility of unstamped deeds see para 8.48, n 23 above.

17.21 (c) Opinion of jury and judges. It has been pointed out that differing views have been expressed as to whether it is competent for the jury to make their own comparison and proceed upon that; that while in some cases the jury have taken the documents with them when they retire, in others the judge has refused to allow them to do so; and that in some cases judges have founded their opinions on private examination of documents.[63] It is thought that the sound view of these matters is as follows. Neither a judge nor a jury should arrive at a decision on the question of the authenticity of a writing upon their own impression of its genuineness, without the aid of evidence. That evidence may be either the testimony of persons familiar with the writing of the person whose handwriting is in question, or expert evidence of comparison.[64] In the latter case, the function of the expert is to point out similarities or differences between the two specimens, and leave the judge or jury to draw their own conclusions.[65] It would be wrong for a judge or jury to make a comparison without the guidance of an expert. Whether the evidence given is that of persons familiar with the writing or expert evidence of comparison, the judge or jury is entitled to examine the writings along with the other evidence in the case.[66] There is a danger that the jury may disregard the evidence of the witnesses and mislead themselves by forming varying and erroneous conjectures which have no foundation in the witnesses' evidence,[67] but/

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[63] Walkers, para 414(c); R & B, para 10-44.
[64] Lewis, Manual, pp 49-50.
[65] Cf Wakefield v Bishop of Lincoln, (1921) 90 LJPC 174.
[66] It is now standard practice to tell juries that they are entitled to have with them in the jury room any of the productions which have been proved so that they can examine them and see them for themselves (see eg, HMA v Hayes, 1973 SLT 202 at p 205).
[67] Robertson, (1849) J Shaw 186; McGall, (1849) J Shaw 194. In neither case is it reported that expert evidence of comparison was led.

but that danger should be guarded against by emphasis upon the customary direction to the jury that their decision must be based only upon the evidence which they have heard. If the foregoing views are accepted, the matter will require formal regulation.

17.22 (7) Foreign law.[68] Some recent cases in which the court relied on expert evidence of foreign law are noted below.[69] Cases on the requirement of corroboration of such evidence have already been noticed.[70]

5. Assessors, men of skill and court experts

17.23 Information which the court requires on matters which call for some specialised knowledge or experience may be communicated to the court by expert witnesses, or by assessors, or by men of business or men of skill. It is thought that the rules as to remits to men of business or men of skill do not call for comment here.[71] Two minor points relating to assessors, and the question whether there should be any procedure for the appointment of court experts, require to be briefly noticed.

17.24 (1) Assessors.[72] The function of assessors is similar to that of/

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[68] Walkers, para 415; G W [Wilton], "Reminiscences of the Scottish Bar: Counsel as Experts", (1953) 69 Sc L Rev 73.

[69] Scottish National Orchestra Society v Thomson's Executor, 1969 SLT 325; Galbraith v Galbraith, 1971 SC 65; Bain v Bain, 1971 SC 146; Broit v Broit, 1972 SLT (Notes) 32.

[70] Para 17.14 above.

[71] See Maclaren, Court of Session Practice, pp 406, 839, 840, 861, 868; Thomson and Middleton, Manual of Court of Session Procedure, pp 397-400; Dobie, Sheriff Court Practice, pp 173-176; Lewis, Manual, pp 141-146.

[72] Maclaren, Court of Session Practice, pp 542-543; Thomson and Middleton, Manual of Court of Session Procedure, pp 159, 166-167; Dobie, Sheriff Court Practice, pp 185-188. As to the duties of a lay magistrate's legal assessor, see Alexander v Boyd, 1966 JC 24. For England, see A Dickey, "The Province and Function of Assessors in English Courts", (1970) 33 MLR 494.

of expert witnesses to the extent that they are sources of information on matters concerning their own special skill or knowledge; but they are not called by the parties, are not sworn, and cannot be cross-examined. When an assessor sits in the Court of Session, the presiding judge must make a note of the questions submitted to the assessor and of his answers thereto and cause it to be lodged in process;[72a] but otherwise, and in other courts, the advice of an assessor is sought and given in private, and disclosed to the parties only at the court's discretion. In the Court of Session, assessors may sit in causes arising out of or relating to maritime matters[73] and in patent actions.[74] In any other cause the Court may summon an assessor on the joint request of the parties.[75] In causes arising out of collisions at sea, where the Court is assisted by a nautical assessor at the proof, the parties may not lead expert evidence of nautical matters.[76] In other cases, if an assessor is sitting, only one expert may be led by each side on any matter within the special qualifications of the assessor, unless leave is obtained on special cause shown.[77] The Scottish Court of Criminal Appeal has never used its power to appoint an assessor.[78] In the sheriff court, provision is made for nautical assessors/

[72a] RC 45.

[73] Nautical Assessors (Scotland) Act, 1894 (57 and 58 Vict cap 40), as amended by the Administration of Jusitce (Scotland) Act, 1933 (23 and 24 Geo V, cap 41), sec 39 and Sched; R C 37, 39-46. An application for an assessor is a useful device for avoiding jury trial in personal injury cases: Prior v Kelvin Shipping Co Ltd, 1954 SLT (Notes) 11; Williamson v Richard Irvin & Sons Ltd, 1960 SLT (Notes) 34.

[74] Patents Act, 1977, (cap 37), sec 98(2); RC 37, 39-45.

[75] Administration of Justice (Scotland) Act, 1933, sec 13; RC 38, 39, 41-45.

[76] RC 146.

[77] RC 42. Two experts would presumably be permitted where the essential fact in dispute is a matter of technical science: see para 17.14 above.

[78] Criminal Appeal (Scotland) Act, 1926, sec 6(e); 1975 Act, sec 252(e). See Carraher v HMA, 1946 JC 108, at p 118.

assessors under the Act of 1894, for assessors with special knowledge and experience of problems connected with race relations in proceedings under the Race Relations Act, 1976,[79] and for assessors at inquiries under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1976.[80] There is no sheriff court rule forbidding the calling of expert evidence in ship collision cases where an assessor is sitting, but there may be a practice to that effect in all cases relating to maritime matters in view of the observations of Lord Hunter in The Bogota v The Alconda.[81]

17.25 (a) Admiralty actions. It may be that these prohibitions on expert evidence of nautical matters could with advantage be replaced by a more flexible rule. In Admiralty actions in England it lies within the discretion of the court whether or not to admit expert evidence when the judge sits with a nautical assessor. The Law Reform Committee described the practice in these terms:

> "The established practice in Admiralty actions is not to allow the parties to call expert witnesses as such upon matters of general seamanship; but it is to be borne in mind that in this kind of case the main witnesses of fact on each side are usually themselves experts in this general field. Leave, however, is given to call experts in cases involving special types of vessels or equipment about which more esoteric knowledge or experience is needed in order to form a reliable opinion."[82]

17.26 (b) Parties' joint request. It is thought that the provision enabling the Court of Session to summon an assessor on the joint request of the parties[75] has been seldom resorted to in practice, and need not be/

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[75] Administration of Justice (Scotland) Act, 1933, sec 13; RC 38, 39, 41-45.

[79] 1976, cap 74, sec 67(4).

[80] 1976, cap 14, sec 4(6).

[81] 1923 SC 526, at pp 542-543.

[82] LRC 17, para 9.

be extended to the sheriff court unless on the general principle of uniformity of procedure in areas of concurrent jurisdiction.[83]

17.27 (2) Court experts.[83a] It is sometimes maintained that the system whereby in adversary procedure each party adduces its own expert evidence is objectionable for two reasons. First, the expert tends to display partisanship in favour of the party calling him; and second, a disagreement between experts may present an insoluble problem for the court. It is therefore sometimes suggested that the court should appoint its own expert, because he would be seen to be independent, and because "obviously it calls for an expert to choose between experts."[84] In countries whose procedure is that of the civil law, the court is permitted to select experts to inform it of their opinion based on their own particular knowledge and experience.[85] Recently, in countries whose practice is based on an adversary rather than an inquisitorial system, the question whether the device of the court experts should be adopted has been widely discussed. It is not generally employed in Scotland,[86] where conflicts of opinion between experts are adjudicated upon frequently and apparently without embarrassment by both judges and juries. The respective functions of the parties' experts and the court were explained in these terms by Lord President Cooper:

> "Their [ie the experts'] duty is to furnish the judge or jury with/

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[83] See para 1.02 above.

[83a] See J Basten, "The Court Expert in Civil Trials - A Comparative Appraisal", (1977) 40 MLR 174.

[84] Williams, Proof of Guilt, pp 126-128.

[85] H A Hammelmann, "Expert Evidence", (1947) 10 MLR 32.

[86] A rare example, if not a unique case, is Irvine v Powrie's Trs, 1915 SC 1006, where the Professor of Chemistry in Edinburgh University was appointed by the Court for the limited purpose of supervising the parties' experts while they removed specimens of paper and ink from a registered deed which the pursuer sought to reduce on the ground of forgery.

> with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge or jury."[87]

It must be acknowledged that there are cases where it is necessary or desirable for an expert to express his opinion on the issue which the judge or jury have to decide,[88] but that does not mean that the courts necessarily accept such an opinion without evaluating it for themselves. There are several reported examples of the Scottish courts' willingness and ability to resolve technical issues which have been the subject of expert evidence. In Lyle & Scott Ltd v Wolsey Ltd,[89] an action for infringement of a patent, Lord Hill Watson emphasised that the construction of the specification is for the court, and not for the witnesses. In R & J Dempster Ltd v Motherwell Bridge and Engineering Co Ltd[90] Lord Wheatley said:

> "I do not conceive it to be the function of the court to sit as a skilled arbitrator in accountancy to determine the niceties of accountancy methods provided by competing and conflicting experts. Rather I deem it to be the function of the court to consider whether the evidence for the pursuers, tested by the criticisms of the defenders' expert, provides on a balance of probabilities a fair basis of assessment or whether the alternative approach of the defenders, correspondingly tested, produces a fairer result."

The Lord Ordinary's resolution of a question of Swedish law in Scottish National Orchestra Society v Thomson's Executor[91] affords a further example.

17.28 It may therefore be said that the Scottish courts traditionally adopt/

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[87] Davie v Magistrates of Edinburgh, 1953 SC 34, at p 40.
[88] See paras 17.03-17.10 above.
[89] 1955 SLT 322, at p 323, following British Celanese Ltd v Courtaulds Ltd, (1935) 52 RPC 171, Lord Tomlin at p 196.
[90] 1964 SLT 113, at p 121; not reported in 1964 SC 308.
[91] 1969 SLT 325.

adopt a discriminating approach to the assessment of conflicting expert evidence, and thus are accustomed to resolve technical issues without excessive difficulty. If it is accepted that that is so, there may be little need for a "court expert" system in Scotland. The experience and opinions of the system which are found in other jurisdictions with an adversary procedure are nevertheless summarised here. In England there has been provision in the Rules of the Supreme Court since 1934 for the appointment of a court expert,[92] but the procedure has been little used,[93] and the Law Reform Committee have concluded that the introduction of a general "court expert" system is not desirable, except in custody cases, where they consider that the court should be able to obtain a medical report by an expert appointed by the court itself. In other cases, they say, the role of a court expert presents great practical difficulties, in relation to the method of his appointment, the manner in which he would inform himself and report where the relevant facts are a matter of controversy, and the extent to which his report could be challenged.[94] In the United States, under the federal criminal procedure, the trial judge is permitted to select an expert in addition to the experts called by the parties; but, once again, the rule is seldom used. It nevertheless forms the basis for rule 706 of the Federal Rules of Evidence which provides that the judge may appoint an expert of his own motion, or on the application of one or both of the parties, and the expert may be cross-examined by any party to/

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[92] Now RSC 1965, Ord 40, rules 1-6.

[93] See In re Saxton, decd, [1962] 1 WLR 968, Lord Denning M R at p 972; The Supreme Court Practice, 1976, i, paras 40/1-6/1, 40/1-6/2.

[94] LRC 17, paras 13-16.

to the action. The justification of rule 706 was explained by the Advisory Committee in this way:

> "The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court-appointed experts acquire an aura of infallibility to which they are not entitled, ... the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services."[95]

That reasoning commended itself to the Ontario Law Reform Commission[95] and the Law Reform Commission of Canada which, like that of Ontario, has recommended a provision for the appointment of court experts. The Canadian Commission observed:

> "... if properly used the section could assist the court in reaching the truth by providing an expert who was not biased by the desire to satisfy the party calling him ... Not only should the possibility of a court-appointed expert curb the over-zealous partiality of partisan experts, but also the possibility that a partisan expert might be called should be sufficient to minimize error on the part of the court-appointed expert."[96]

If it is thought that the dangers referred to by the American and Canadian reformers are also of significance in Scottish practice, consideration should no doubt be given to the introduction of a "court expert" system and the resolution of the practical difficulties mentioned by the English Law Reform Committee. It may be thought, on the other hand, that the expert witness, notwithstanding such criticisms as may be made/

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[95] Federal Rules of Evidence, 28 USCA, rule 706, Advisory Committee's Note, cit Ontario Law Reform Commission, Report on the Law of Evidence, p 164.

[96] Law Reform Commission of Canada, Study Paper no 7: Opinion and Expert Evidence, pp 36-37.

made, is probably the best means compatible with the adversary system of furnishing the judge and jury with information on matters calling for expertise.[97]

6. Disclosure and exchange of experts' reports

17.29 In several jurisdictions which have an adversary system of procedure, considerable attention has been given in recent years to the adoption of various procedural devices with the objectives of reducing to a minimum the matters of expertise which are in issue at the trial and eliminating from the trial as far as possible the element of surprise. With the former objective in view, the Grant Committee stated that it was desirable that matters which are not in dispute should be identified by minutes of admission, by certificates, or in pleadings,[98] and the Thomson Committee recommended that in criminal cases the Crown should take the initiative in reaching agreement on matters to be covered by minutes of admission and agreement.[99] The Scottish courts favour the savings in time and expense which result from the use of joint minutes of admissions; and in a case where a party led evidence from two medical consultants on the matter in which the parties were not at issue the Lord Ordinary refused to certify the two consultants as expert witnesses and directed that the fees paid to them were not to be charged against the opposing party, being of opinion that an attempt should have been made to ascertain what, if any, medical issue was between the parties/

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[97] See Cross, p 386.

[98] Grant paras 532-533. On the form of joint minutes relating to hospital records see McHugh v Leslie, 1961 SLT (Notes) 65.

[99] Thomson, para 36.04.

parties and to obtain a joint medical report and so avoid expense.[1]

17.30 There is now a question whether the civil courts should do more than encourage the use of joint minutes of admissions, and should, with the object of eliminating surprise as well as that of narrowing the matters in issue, require to any extent the disclosure and exchange of experts' reports. In other jurisdictions recommendations on this matter have been made by a number of bodies including the Evershed Committee, the Law Reform Committee, the Ontario Attorney-General's Committee on Medical Evidence in Court in Civil Cases, the Ontario Law Reform Commission and the Advisory Committee on Federal Rules of Civil Procedure in the United States. The recommendations of all these bodies are imbued with a concern to avoid injustice by minimising the element of surprise in relation to expert evidence. Of the two theories about the object and methods of litigation which are discussed in the introduction to Chapter 24 below (paras 24.01-24.06), they preferred the "cards on the table" theory to the "trial by ambush" theory. As to Scottish criminal proceedings the Thomson Committee, while not dealing specifically with experts' reports, expressed the view that in general Crown precognitions should not be made available to the defence, and that defence precognitions should not be made available to the Crown.[2] A rule requiring the disclosure of experts' reports in criminal cases was included in the Draft Code,[3] but it attracted little support. It is clear that such a rule would be a radical departure from the principles of Scottish criminal procedure. The following paragraphs are concerned with civil cases only.

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[1] Ayton v National Coal Board, 1965 SLT (Notes) 24.

[2] Thomson, paras 17.12-17.14.

[3] Draft Code, art 2.4(c).

17.31 The Evershed Committee approached the matter in this way.

> "Para 289. In certain classes of cases the evidence of expert witnesses is necessary to explain the working of a machine or describe some process or other technical matter. Without their assistance counsel might not be able even to explain the case to the Court. At present, the reports and proofs and also the plans and drawings of such experts are privileged. They are not disclosed until the expert goes into the witness box except perhaps in the course of cross-examination. Much time is frequently wasted in cross-examination by counsel trying to understand what the expert witness for the other party is really saying and mastering the technical details of his evidence. A party is apt to rely on his expert's evidence as producing an element of surprise. This often leads to a waste of time and does not assist the Court in coming to an accurate decision as to the facts. The element of surprise is no doubt good tactics under the Rules as they exist at present and on the principles generally adopted today in contesting cases. In our view this element of surprise does not conduce to decisions in accordance with the true facts. The more this element is eliminated, the more correct is likely to be the judgment of the Court. It is, therefore, eminently desirable that each party should know what is the expert evidence to be called for the other side.
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> Para 290. We recommend that the evidence of an expert should not be receivable in evidence unless a copy of his report has been made available for inspection by the other side at least ten days before the trial, unless for special reasons the Court or a Judge otherwise orders. This Rule should also apply to experts' plans, drawings and sketches. The majority of the witnesses before us agreed with this suggestion. It would save time at the trial, reduce the element of surprise and in some cases might lead to agreement between the experts, if not in full, at least as to a considerable portion of their reports."[4]

17.32 The Evershed Committee specified that its views respecting expert evidence in general ought to be applicable to medical witnesses in personal injury actions. No medical evidence would be receivable at trial unless a copy of the witness's report had been previously made available to the other side.[5] A Report of a Joint Committee of the Bar, the/

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[4] Final Report of the Committee on Supreme Court Practice and Procedure (1953 Cmnd 8878), paras 289-290.

[5] Ibid, para 352. See also para 320(14) regarding this requirement for all experts.

the Law Society and the British Medical Association fully supported the recommendations of the Evershed Committee respecting the exchange of medical reports, subject to the qualification that it be implemented only after the more general recommendation applicable to expert evidence as a whole had been considered.[6] Order 30 was added to the Rules of Practice in 1954 to give effect to these recommendations of the Evershed Committee[7] but, since it provided that no information or documents which are privileged from disclosure should be required to be given or produced, the Committee's attempt to secure the exchange of experts' reports before trial was "almost completely nullified".[8]

17.33 In 1968 the Winn Committee made two recommendations as to the simultaneous exchange of medical reports in personal injury cases. First, they strongly recommended that whenever the defendant proposed to call a doctor or tender any medical report about the plaintiff the report of the doctor who examined on the defendant's behalf should be required to be exchanged for the report made by the doctor advising the plaintiff: the reports to be exchanged should be only those reports which it was intended to tender as or use in evidence. Second, except in a case where there was no order for exchange of reports (eg where the defendant had declared his intention of alleging that the plaintiff was or had been malingering), no oral evidence should be received at the trial from a medical witness unless the substance of it had been supplied in writing to the other party not less than 28 days before any date fixed for trial or, where there was no such date, at a reasonable time before trial.[9]

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[6] Report of the Joint Committee on Medical Evidence in Courts of Law.
[7] RSC (Summons for Directions) 1954; see now RSC 1965, Ord 25, esp r 6; Causton v Mann Egerton (Johnsons) Ltd, [1974] 1 WLR 162.
[8] Note in (1955) 71 LQR 314 on Worrall v Reich, [1955] 1 QB 296.
[9] Report of the Committee on Personal Injuries Litigation (1968, Cmnd 3691), paras 278-282.

17.34 In the same year Sir Roger Ormrod published an article[10] in which he recommended that all parties in civil or criminal cases should be obliged by rules of court to disclose, well in advance of trial, the reports of all scientific witnesses whom they intend to call, unless otherwise directed by the court; and that it should be made clear that all expert witnesses have the right to consult together regardless of the wishes of the parties or their legal advisers. He considered, however, that the best solution to the problems of communication and mutual distrust between lawyers and experts,

> "which would satisfy both scientists and lawyers would be the express adoption by all scientific witnesses of some of the conventions which rule the [English] Bar. It is customary to disclose in advance to the opponent a list of cases to be referred to in argument and it is the duty of the advocate to call the attention of the court to any reported decision which in any way is against the submission which he is making. It should be the right and duty of experts to exchange their reports before trial and, if they wish, consult together and it should be a rigorous obligation on all experts to give the court, as clearly as they can, the limits of accuracy of their evidence, whether it is experimental or theoretical, and to disclose, if it be the fact, that other views exist in their profession. It should also be their duty to the court, to indicate what inferences cannot properly be drawn from their evidence."

17.35 In 1970 the Law Reform Committee made the following recommendations. Any compulsory pre-trial disclosure of experts' reports should be limited to cases where the report may be expected to be based on agreed facts, or on facts ascertainable by the expert from his own observation, or which are within his general professional knowledge and experience. They considered that expert medical evidence would in the great majority of cases of personal injury actions fall into that category, and accordingly recommended that, as a general rule, reports/

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[10] "Scientific Evidence in Court", [1968] Crim LR 240.

reports of expert medical witnesses upon whose evidence a party intends to rely should be subject to compulsory disclosure and exchange before the hearing: the onus of showing that this course was inappropriate in the circumstances of a particular case should rest upon a party seeking to avoid disclosure. A party should be entitled to require the attendance, if he is available, as a witness of a medical expert whose report has been disclosed by an opposite party as being a report on which that party intends to rely. But the disclosure of medical reports should not normally be ordered in actions for medical negligence. As to these, and as to the reports of non-medical experts, compulsory disclosure of the reports should be capable of being ordered, but only on the application of the party seeking such disclosure, and the onus should be on that party to show that such disclosure is appropriate. In all cases, the expert, if called as a witness, should not be allowed without good reason to depart in his examination-in-chief from the substance of his report, and a party should be entitled to put in evidence an expert's report disclosed by an opponent.[11] The Law Reform Committee's recommendations were implemented by section 2 of the Civil Evidence Act, 1972,[12] and rules of court which were introduced in 1974.[13]

17.36 In Ontario in 1965 the Report of the Attorney-General's Committee on Medical Evidence in Court in Civil Cases recommended that, in actions involving personal injuries, an exchange of medical reports between the parties ought to be a prerequisite to calling medical testimony/

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[11] LRC 17, pp 31-32.
[12] 1972, cap 30.
[13] RSC Ord 25; Ord 38, rr 37 and 38.

testimony. The Committee emphasised that their recommendations were "designed to improve the administration of justice and to reduce the inconvenience to the members of the medical profession." The Ontario Evidence Act was consequently amended to make compulsory the exchange of medical reports intended to be used by the parties at the trial. The Ontario Law Reform Commission subsequently recommended the compulsory exchange of both medical and non-medical experts' reports.[14]

17.37 Under the Rules of Practice of the Federal Court of Canada a full statement of the proposed evidence-in-chief of an expert witness must be put into the form of an affidavit or other written form and a copy must be filed and served at least ten days before the trial.[15] The Law Reform Commission of Canada has proposed a provision dealing with the prior disclosure of expert evidence in the following terms:

> "A person shall not testify as an expert unless the party who intends to adduce the evidence has given reasonable notice to all other parties and furnished at the time of that notice the name, address and qualifications of the witness, the substance of the proposed testimony and a summary of the grounds for each opinion and inference proposed to be given."[16]

In their study paper the Commission explain the rationale of their proposal in these terms:

> "Under the common law expert witnesses are permitted to testify without disclosing prior to trial the substance of their testimony. This opportunity for surprise at trial weakens the effectiveness of the adversary system. One of the most important premises of that system of fact-finding is that each party in the dispute will be able not only to present his own case in its most favourable light but will also be able to thoroughly challenge his opponent's case. But particularly with expert evidence, which is based on knowledge not possessed by the ordinary lawyer, it is

extremely/

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[14] See Ontario Law Reform Commission, Report on the Law of Evidence, pp 165-171.

[15] Cit Ontario Law Reform Commission, n 14 supra, p 169.

[16] Law Reform Commission of Canada, Report on Evidence, Evidence Code, section 72.

> extremely difficult to effectively probe for weaknesses without advance notice of its substance and an opportunity to prepare. If we are to continue to provide expert assistance to the trier of fact by eliciting testimony from experts called by each party, the effectiveness of the adversary system demands prior disclosure. Prior disclosure might also shorten the time spent at trial by permitting early identification of the areas of actual controversy; this should reduce the number of matters of expertise which need to be litigated at the trial and might lead to agreed reports and obviate the necessity for the attendance of expert witnesses at trial."[17]

17.38 In the United States, the Federal Courts have amended their rules in order to minimise the element of surprise in the case of expert evidence, by permitting a liberalised discovery by both parties of their opponents' expert witnesses.[18]

17.39 It must be observed, however, that although there has been a recent trend in England, Canada and the United States to require by statute mutual disclosure of expert evidence prior to trial, judicial and professional opinion has not been entirely favourable. In Worrall v Reich the Court of Appeal seemed to approve the purposes of the Order which was designed to implement the recommendations of the Evershed Committee, Jenkins L J saying:

> "The object of these provisions clearly is to ensure so far as possible that the parties (to use a colloquialism) put all their cards on the table, so that the real issues between them emerge, and the amount of evidence necessary to be given, whether documentary or oral, may be limited to matters which are really in issue and seriously contested by the parties."[19]

But in In re Saxton decd Lord Denning M R said that the voluntary disclosure of reports by agreement

> "is the familiar practice in all cases where experts are called, such as patent cases, Factory Act cases (where

engineers/

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[17] Law Reform Commission of Canada, Evidence Project, Study Paper no 7: Opinion and Expert Evidence, pp 34-35.

[18] Federal Rules of Civil Procedure, 28 USCA, rule 26, cit Ontario Law Reform Commission, n 14 supra, pp 169-170.

[19] [1955] 1 QB 296, at pp 298-299. See para 17.30, ante.

> engineers are employed) and personal injury cases (where doctors are employed). The reports of experts are often exchanged by agreement, but no compulsion on either side is exercised: see Worrall v Reich. The reason is because, to our way of thinking, the expert should be allowed to give his report fully and frankly to the party who employs him, with all its strength and weakness, and not be made to offer it beforehand as a hostage to the opponent, lest he take unfair advantage of it. In short, it is one of our notions of a fair trial that, except by agreement, you are not entitled to see the proofs of the other side's witnesses."[20]

It has been said, however, that the fears expressed by Lord Denning have not been justified by the practice in Ontario and in the Federal Courts of Canada.[21]

17.40 The Law Reform Committee's Seventeenth Report was signed by Mr R J Parker, QC (as he then was), Mr David Hirst, QC, and Mr G W R Morley subject to the views which they expressed in a Note of Dissent.[22] They did not oppose the introduction of some system for compulsory disclosure of medical reports in personal injury cases if a satisfactory procedure could be devised. They pointed out, however, that the introduction of some procedure for compulsory disclosure and exchange in other cases had been opposed by the General Council of the Bar, the Law Society and the British Insurance Association. As to the disclosure of medical reports in personal injury cases, they said that the practice of exchanging these informally, where parties considered that there was some prospect of reaching agreement, resulted in the elimination of oral expert evidence in the majority of personal injury cases, so that a provision for compulsory disclosure would deal only with a minority of the cases which came to trial. In other cases, non-medical expert evidence was seldom agreed because the facts/

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[20] [1962] 1 WLR 968, at p 972.
[21] Ontario Law Reform Commission, Report on the Law of Evidence, p 171.
[22] LRC 17, pp 41-47.

facts on which the experts were to report were usually in dispute, or there was a clear conflict of expert opinion. There was no evidence of time wasted on non-controversial matters, or ill-preparation on matters truly in issue, because it was very often necessary for an expert to explain and elaborate even a non-controversial matter if the court was fully to understand its significance, and because it was rare that the real matters in controversy were not perfectly well known to both sides before trial. Any time which might be saved by eliminating evidence on non-controversial matters would be more than outweighed by the extra time and thus extra cost involved in pre-trial preparation and in covering the issues which remained in controversy, because it would be the duty of a party's solicitors, when they had seen the opposing expert's report, to make all manner of enquiries for the purpose of assembling material for cross-examination. Moreover, the elaborate preparation involved would to a large extent remove the element of spontaneity from the expert's evidence, and experience showed that it was often, even in a matter of expertise, the really spontaneous answer which afforded the most reliable guide to the truth. As to the nature of the change proposed by the majority, the dissentients pointed out that the proposal was that a party should be compelled to waive the privilege from production of his report if he wanted to call evidence: that went a long way to the abolition, so far as it related to expert evidence, of a privilege which was fundamental to the adversary system and had stood unchallenged and substantially uncriticised for a very long time. Further, the defendant would no longer have the right to decide only at the close of the plaintiff's case whether he would call any, and if so, what, evidence: in order to preserve his right to call evidence/

evidence on a matter of expertise he would have to disclose his expert's report, and the plaintiff's expert would then be forewarned to meet the cross-examination.

17.41 The dissentients also criticised the practicability of the majority's proposed scheme. As to personal injury cases, they proposed that compulsory disclosure should be dealt with

> "not by an elaborate procedure which interferes with the law of privilege and the defendant's right to have the case against him fully proved, but by a simple provision that, if an order were made and not complied with, the court should have the power to award costs on an indemnity basis against the defaulting party in respect of time wasted on adducing evidence on non-controversial matters, or the unnecessary attendance of witnesses. The order would be automatic in all cases so far as expert evidence of diagnosis and prognosis was concerned, no test being necessary, and would fix a date reasonably near to trial when the parties were really in a position to judge whether there was good reason for refusing to comply."[23]

It may be noted that the majority recommended a modified version of their proposed procedure for personal injury cases in the county courts. They recommended that there

> "the general rule should be that in personal injury cases expert evidence should not, subject to the judge's overriding discretion, be admissible unless its substance has been previously disclosed; where a medical report has been disclosed, it should be admissible whether or not the maker, though not called, is available as a witness and without the party seeking to rely on the report being required to give any notice of his intention to do so."[24]

17.42 It is clear that the question whether experts' reports should be compulsorily disclosed and exchanged, and if so to what extent, involves the consideration of important questions of principle and procedure. In the foregoing paragraphs an attempt has been made to do no more than indicate the ideas which underlie the trend of reform in/

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[23]LRC 17, p 47.
[24]LRC 17, paras 68-69, p 32.

in other jurisdictions whose system of procedure is to some extent similar in principle to ours. Before any recommendation is made as to possible changes in our own law, it will be necessary to ascertain the views of all those who have a wide experience of a great variety of cases involving expert evidence in the Scottish courts.

7. Evidence of identification

17.43 Evidence of identification is sometimes conveniently discussed in the context of evidence of opinion, evidence of identity of persons or of things being a matter of opinion and belief, depending for its weight upon the soundness of the comparison made in the mind of the witness between a person or thing recognised on one occasion and the person or thing recognised on another.[1] In this chapter it is proposed to discuss briefly certain recommendations on the subject in Chapter 46 of the Second Report of the Thomson Committee, and in the Report on Identification Procedure under Scottish Criminal Law by a Working Group under the chairmanship of Sheriff Principal W J Bryden, CBE, QC.[2] Evidence of previous identification is considered in Chapter 19 of the present Volume, as an aspect of the law relating to Hearsay.

17.44 The Thomson Committee dealt in Chapter 12 of their Second Report with the procedure for the holding of identification parades by the police prior to the appearance in court of the accused person. In Chapter 46 they considered the procedure for the identification of the accused at his trial, and in Chapter 63 made the following recommendations:

"Identification/

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[1] Lewis, Manual, p 50.

[2] 1978, Cmnd 7096.

"Identification in the routine case

132 In summary cases a new procedure should be introduced whereby where a person has been charged by the police there should be a presumption that the person who answers the complaint is the person who was so charged and that fact would be held as admitted unless challenged by preliminary objection before his plea is recorded (paragraph 46.08).

Identification in the crucial case

133 In indictment cases the procedure should be:

a. if the defence indicate at the first diet that identification is to be an issue in the case, the Crown must arrange for an identification parade to be held in respect of each witness who will be called upon to identify the accused and who has not already attended such a parade and it will not be competent for the Crown to lead at the trial evidence of identification other than evidence of identification at such a parade. If the defence do not so indicate at the first diet, the procedure for identification at the trial will remain as at present subject only to the recommendation we make at 134 below.

b. where an identification parade has been held at which a witness did identify the accused, when that witness is giving evidence at the trial and has confirmed that he did so identify a person at the parade, it should be competent for the prosecutor to ask whether the accused in the dock is that person (paragraph 46.11).

134 In any case in which a witness has viewed an identification parade and has failed to identify the accused it should not be competent for the Crown to ask the witness to identify the accused in court (paragraph 46.13)."

17.45 The Working Group agreed with the Committee's recommendation 132,[3] which was designed to deal with problems of identification by the police in routine cases.[4] The proposed procedure would not, of course, eliminate the necessity of proving that the person who was charged was the/

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[3]Cmnd 7096, paras 5.17, 6.74.

[4]Thomson, para 46.06.

the person who committed the offence. The Working Group also made a suggestion, although not a formal recommendation, on the lines of recommendation 133b, but made no distinction in this respect between solemn and summary procedure. It seems desirable to reduce to the necessary minimum any differences between the two procedures as to the rules in relation to identification.

17.46 Recommendation 133a appears to be open to objection not only because it draws a distinction between summary proceedings and proceedings on indictment, but also because it distinguishes between cases where "identification is to be an issue" and those where it is not. It is submitted that there is no sound basis for the latter distinction: identification is necessarily an issue in all cases, unless admitted in a minute of admissions. It is a crucial fact which requires to be proved by the Crown before there is in effect any necessity for the accused to deny the offence in any other way than by formally tendering a plea of not guilty. Under the Committee's proposals identification will still require to be proved, unless a minute of admissions is lodged, even in cases where the defence do not indicate that identification is to be an issue in the case.

17.47 Recommendation 134 was not supported by the Working Group. It appeared to them to erode the importance of identification on oath. They felt that it was of paramount importance to protect the witness's right to change his mind at the time of the trial and either identify the accused or correct a wrong identification; and to protect the jury's right to have such evidence placed before it. Cross-examination, they considered, could bring out the value (or lack of it) to be attached to such evidence in the particular circumstances.[5] It is submitted/

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[5]Cmnd 7096, para 5.16.

submitted that the Working Group's view is to be preferred. The existing procedure for the identification of the accused in court is admittedly somewhat unsatisfactory, because of the conspicuous position of the accused in the dock; but it is desirable to admit it in all cases. A frightened or recalcitrant witness may identify an accused in court although he might not be prepared to do so at an identification parade. And the failure or refusal by a witness to identify in court may sometimes be very significant, particularly in cases of intimidation. Where the court identification is of doubtful quality the presiding judge will generally warn the jury against the too ready acceptance of such evidence, following the Practice Note by the Lord Justice-General dated 18 February 1977.[6]

17.48 In their chapter on proposed changes in pre-trial procedure the Working Group appear to envisage, but do not formally recommend that if at the trial the defence objects to the admission of evidence on the ground that it was obtained as a result of a breach of the Scottish Home and Health Department Parade Rules,[7] the judge should hear the evidence objected to, and the circumstances in which it was obtained, in the absence of the jury. They say that if, at the conclusion of this "trial within a trial", he finds that there has been a material breach of the Rules and that it would be unfair to the accused to allow the evidence obtained to be placed before the jury, he will no doubt sustain the objection. If, on the other hand, he finds that there has been no breach of the Rules, or no substantial breach, he will probably repel the objection. If, however, he has any doubt about the matter he may allow the evidence to be heard subject to an appropriate/

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[6] Printed in Cmnd 7096, Appendix H.

[7] An extract from these is printed in Cmnd 7096, Appendix D.

appropriate direction in his charge; by which time, of course, all the evidence in the case will have been put before the jury.

17.49 In Chapter 20 of the present Volume the "trial within a trial" procedure is reviewed in the context of the admissibility of extrajudicial confessions, and it is suggested that there is much to be said for leading the evidence once and for all before the jury. It is submitted that the trial within a trial procedure should be either abolished altogether, or retained only for use on rare occasions in the exceptional circumstances envisaged in the recommendations of the Thomson Committee. It is thought that, in view of the criticisms of the procedure which are made in Chapter 20, it would not be advisable to extend its use in the manner suggested by the Working Group.

Chapter 18

PRIVILEGE

1. Introduction

18.01 Privilege, in the law of evidence, is the right of a person to insist on there being withheld from a judicial tribunal information which might assist it to ascertain facts relevant to an issue upon which it is adjudicating.[1] In the law of evidence there are several exclusionary rules, as to the inadmissibility of hearsay, evidence of opinion and the like, whose purpose is to exclude from the tribunal's consideration testimony which is considered to be untrustworthy or irrelevant. But the rules concerning privilege have the effect of excluding evidence which is generally relevant and reliable, and often likely to have a decisive impact on the case. Accordingly, to countenance the existence of a privilege is to accept the imposition of a fetter on the court in the achievement of one of its most basic functions, the investigation of the truth. The only justification of a privilege, therefore, is that there is some interest protected by the privilege which is more important than the investigation of the truth.[2] This chapter discusses the questions whether some of the privileges now recognised by the law can be so justified, and whether there are other interests, not at present protected by the law, for which a privilege may be justifiably claimed.

18.02 For the purposes of the discussion, the various privileges are noticed/

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[1] Law Reform Committee, Sixteenth Report: Privilege in Civil Proceedings (hereafter cited as "LRC 16"), para 1.

[2] See Cross, p 242; Cowen and Carter, Essays in the Law of Evidence, pp 240-241; Law Reform Commission of Canada, Evidence Project, Study Paper no 12: Professional Privileges before the Courts, pp 12-13; H A Hammelmann, "Professional Privilege: A Comparative Study", (1950) 28 Can B R 750.

noticed under the following headings. (1) The first heading is Privileges against Self-incrimination, which are considered in relation to criminal offences and adultery. (2) Under the heading of Privileges in Aid of Litigation there will be found an examination of the rules relating to the lawyer and his client, and to communications post litem motam. (3) The section on Privileges in aid of Settlement and Conciliation notices the legal position of statements made "without prejudice" and the question whether some form of privilege should be extended to mediators in matrimonial disputes. (4) The problems involved in conferring privilege in order to protect other relationships of a confidential character, to which such persons as doctors, ministers of religion and journalists may be parties, are considered under the heading Privileges in Protection of Confidential Relationships. The chapter ends with a brief note on the exclusion of evidence on grounds of public policy.

18.03 Various other privileges are considered elsewhere in this paper. The privilege conferred on communications between spouses, and the privilege concerning marital intercourse, are discussed in relation to civil cases in Chapter 4, and in relation to criminal trials in Chapter 6. The privilege of the accused against self-incrimination is considered in relation to his compellability as a witness and in relation to sections 141 and 346 of the 1975 Act (formerly section 1 of the 1898 Act) in Chapter 5, and in relation to extra-judicial confessions in Chapter 20.

2. Privileges against self-incrimination

(1) General

18.04 A witness is entitled to refuse to answer a question if a true answer/

answer may lead to his conviction for a crime or involves an admission of adultery.[3] It will be necessary to consider the rationale and scope of each of these privileges in turn, but before doing so it will be convenient to consider a number of matters which are common to both. Finally, having examined all these aspects of the present law, an entirely different solution to the problem of the admissibility of self-incriminating evidence will be considered.

18.05 (a) Prohibition of question. At common law, there is nothing to prevent a witness from being placed in the invidious position of being asked a question the answer to which may be incriminating, for the privilege only prevents answers being given: it does not prevent questions being asked. Section 2 of the Evidence Further Amendment (Scotland) Act, 1874, on the other hand, provides:

> "... that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery ..."[4]

Similarly, sections 141(f) and 346(f) of the Criminal Procedure (Scotland) Act, 1975 (formerly section 1(f) of the Criminal Evidence Act, 1898[5]) provide that the accused

> "shall not be asked, and if asked shall not be required to answer/

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[3] Walkers, para 345(a). He may, however, be examined as to whether he has made a previous statement inconsistent with his earlier evidence, notwithstanding that his answer might lead to a charge of perjury in his earlier evidence; but he would be entitled to refuse to answer if the previous statement was made on oath and the question suggested that it was false: see Dickson, para 1789.

[4] 37 and 38 Vict cap 64 (emphasis supplied). The witness may, however, be asked such questions if he knows the object of his examination and the statutory protection and nevertheless is willing to be examined: Bannatyne v Bannatyne, (1886) 13 R 619; M'Dougall v M'Dougall, 1927 SC 666.

[5] 61 and 62 Vict cap 36.

answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless ..."[5]

It is thought that any statutory reformulation of the privilege should prohibit the asking of the question, making it incumbent on the judge to prevent the question being put to the witness, so that the witness is not obliged to decline to answer it.[6] It may be assumed that, under the common law at present, it is not permissible to draw any adverse inference from the fact that the witness declines to answer the question, since otherwise the privilege would be destroyed.[7] It has been held in cases decided under section 2 of the 1874 Act that the witness's refusal to answer should not be recorded[6] and cannot be founded on;[8] and in a case which involved the consideration of section 5(4) of the Fatal Accidents Inquiry (Scotland) Act, 1895, which appears to restate the common law, an averment that a witness, now deceased, had been sworn but had elected not to give evidence at a fatal accident inquiry has been held to be irrelevant.[9] It may be that similar decisions would be reached under the common law. Dickson, on the other hand, states that in general the witness's refusal to answer "serves the party's purpose;"[10] his doing so and his manner on the occasion "are circumstances which fall to be considered in weighing the evidence."[11] In any event, whatever the present common law rule, in practice it may be difficult to prevent a jury/

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[5] 61 and 62 Vict cap 36.

[6] Cook v Cook, (1876) 4 R 78.

[7] So held by the House of Lords in an English appeal: Wentworth v Lloyd, (1864) 10 HLC 589, Lord Chelmsford at pp 590-592. But the American Model Code, rule 233, permits comment by judge and counsel and the drawing of "all reasonable inferences" by the trier of fact.

[8] Hunt v Hunt, 1893, 1 SLT 157.

[9] Campbell v Cook, 1948 SLT (Notes) 44.

[10] Dickson, para 1789.

[11] Dickson, para 1790.

jury or a prosecutor from drawing such an inference and acting upon it, and the mere asking of the question may cause the witness's reputation as much damage as the answer. It seems necessary to keep in view that the witness's refusal to answer does not necessarily indicate guilt:

> "a man may be placed under such circumstances with respect to the commission of a crime, that if he disclosed them he might be fixed upon by his hearers as a guilty person, so that the rule is not always the shield of the guilty, it is sometimes the protector of the innocent."[12]

If it were to be accepted that the putting of the question should be generally prohibited, it would be necessary to amend such statutory provisions as section 5(2) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1976,[13] the successor of the Act of 1895 referred to above, which merely provides:

> "No witness at the inquiry shall be compellable to answer any question tending to show that he is guilty of any crime or offence."

18.06 (b) The role of the judge. At common law, where a witness is asked a question the reply to which may be incriminating, it is the duty of the judge to tell the witness that he need not answer the question.[14] But there appears to be no reported authority in Scotland on the procedure to be followed where the judge does not intervene when a question is put, and the witness objects to answering on the ground that he might be incriminated if he were to do so. Dickson states that it lies with the court to determine from the circumstances of each case whether the question comes within the rule as to self-incrimination; and, he says, the court will generally be satisfied with the witness's statement that it/

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[12] Adams v Lloyd, (1858) 3 H & N 351, Pollock, CB, at p 363.

[13] 1976, cap 14.

[14] Dickson, para 1789.

it does, without requiring him to explain how the question bears upon the charge, for that would often in effect deprive him of his privilege.[15] It is thought that it must be for the court to decide whether or not the witness should answer, and to require him to answer unless the court is satisfied that the answer will tend to place the witness in peril, having regard to the circumstances of the case, the nature of the evidence which the witness is called to give, and the ordinary operation of law in the ordinary course of things.[16] There remains, however, the difficulty that in order to satisfy the court that there are reasonable grounds for his fears, the witness may have to disclose some matters of a damning nature. On that problem Professor Cross makes the following observations:

> "... the danger that the secret must be told in order that the court may see whether it ought to be kept[17] is inevitably present when a claim to privilege is made if the worse evil of allowing the matter to depend exclusively on the claimant's word is to be avoided. If difficulties were to arise in this regard, they could no doubt be surmounted by allowing the witness to make his submission wholly or partially in camera, or under the protection of an undertaking that no use would be made of his statements outside the proceedings in which they were given."[18]

Any rule as to such an undertaking, other than the present rule that a prosecution witness cannot himself be prosecuted for the same crime as that for which the accused is being tried,[19] would involve substantial problems/

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[15] Dickson, para 1790; Walkers, para 345(a).

[16] Cf R v Boyes, (1861) 1 B & S 311; Re Reynolds, ex parte Reynolds, (1882) 20 Ch D 294.

[17] R v Cox and Railton, (1884) 14 QBD 153, Stephen J at p 175: "The privilege must ... be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept."

[18] Cross, p 247.

[19] Macmillan v Murray, 1920 JC 13; M'Ginley and Dowds v MacLeod, 1963 JC 11; see Anon, "Socius or Hostis?" (1963) 79 Sc L Rev 21.

problems: as to the way in which the Crown Office would promise immunity, whether and if so how a promise should be given in civil proceedings to which the State is not a party, and the like.[20] It has been suggested that the following rules might be made in England as to offers of immunity to potential prosecution witnesses: if the judge thinks the witness has nothing to lose by accepting the offer, he should be compelled to do so and answer; if the witness accepts the offer and then breaks his promise to waive privilege, he should again be forced to answer; if he accepts the offer and waives his privilege the court should be able to forbid his later prosecution.[20]

18.07 (c) Admissibility of answer - (i) Common law. There appears to be no reported Scottish authority on the admissibility of an incriminating answer which is given where a claim to privilege has been wrongly rejected, or where the witness could have claimed the privilege but has failed to do so. It seems to be settled in England that in the former case the answer is treated as involuntary and inadmissible in subsequent criminal proceedings against the witness,[21] but in the latter case it is admissible in the same and in later proceedings.[22] It is thought that the same would be held in Scotland in the former case, and in the latter case where the witness had been duly warned by the presiding judge. A question as to the admissibility of an incriminating answer given in the absence of a judicial warning was raised but not decided in Graham v H M Advocate.[23]

18.08/

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[20] J D Heydon, "Obtaining Evidence versus Protecting the Accused: Two Conflicts", [1971] Crim L R 13, at pp 32-33.

[21] R v Garbett, (1847) 1 Den 236.

[22] R v Sloggett, (1856) Dears 656.

[23] 1969 SLT 116.

18.08 (ii) Statutory restrictions on the privilege. A large number of statutes remove for certain purposes the privilege against self-incrimination in regard to criminal offences. They empower State officials to obtain information from citizens under the compulsion of punishment for failure to provide it satisfactorily. As to the admissibility of the information as evidence in subsequent proceedings, some statutes expressly provide that incriminating answers may be used against the person who gives them,[24] other statutes expressly provide that they may not,[25] and others again have no express provision on the matter.[26] In the latter case, the existing legal position appears to be that if the information has been lawfully obtained and the statute does not restrict the use to be made of it, it is admissible in subsequent proceedings.[27] Professor J D Heydon has questioned whether the wide interpretation given by the English courts to statutes compelling information is reconcilable with the policies of the privilege against self-incrimination/

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[24] Eg Companies Act, 1948 (11 and 12 Geo VI, cap 38), sec 270 (not applicable to Scotland).

[25] Eg Explosive Substances Act, (1883) (46 and 47 Vict cap 3), sec 6(2), provides that a witness shall not be excused from answering questions the answers to which may incriminate him, but that the answers shall not be admissible in evidence against him in any proceeding, civil or criminal, except in the case of any criminal proceeding for perjury. There are similar provisions in sec 123(7) of the Representation of the People Act, 1949 (12 and 13 Geo VI, cap 48), sec 123(7)(b). See also Criminal Damage Act, 1971 (cap 48), sec 9 (not applicable to Scotland).

[26] Eg Bankers' Books Evidence Act, 1879 (42 and 43 Vict cap 11), sec 7 (see Williams v Summerfield, [1972] 2 QB 513); Exchange Control Act, 1947 (10 and 11 Geo VI, cap 14), Sched V, Part I, para 1(1), Pt II, para 1(1) (see DPP v Ellis, [1973] 1 WLR 722); Companies Act, 1948 (11 and 12 Geo VI, cap 38), sec 269; Purchase Tax Act, 1963 (cap 9), sec 24(6) (see Commissioners of Customs and Excise v Harz, [1967] 1 AC 760); Road Traffic Act, 1972 (cap 169), sec 168 (held that it might lead the party of whom information was required to make incriminating statements which would be admissible in evidence against him: Foster v Farrell, 1963 JC 46).

[27] R v Scott (1856) Dears & Bell 47; Foster v Farrell, 1963 JC 46; Cross, p 248.

self-incrimination, and has suggested an alternative approach to the construction of statutes which may appear to revoke the privilege. The suggested approach involves balancing the clear polices of the privilege against the policies of the statute under consideration, some of which may be clear and some obscure. In so far as the obscure statutory policies clash with the clear policies of the privilege, the latter prevail; but if the clear statutory policies clash with those of the privilege, the former prevail.[28] The question of the proper approach to the statutory construction of such provisions does not appear to have been fully discussed in the Scottish courts. It is thought that it would be inappropriate to include rules on the matter in a Scottish Evidence Act, because it is difficult to frame rules of interpretation in acceptable legislative form and in any event many of the statutes concerned are United Kingdom measures which have been the subject of persuasive interpretation or comment in the House of Lords or other courts of high authority in England. It seems appropriate that the question of the proper construction of particular statutes should remain within the province of the courts.

18.09 (iii) Possible new general rule. The general problem of the admissibility in subsequent proceedings of incriminating statements made in earlier proceedings has been resolved in Canada in terms which, it is thought, merit careful consideration. Section 5 of the Canada Evidence Act, 1970,[29] abolishes in Canada the common law privilege in regard to self-incrimination in legal proceedings but substitutes certain/

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[28] See J D Heydon, "Statutory Restrictions on the Privilege against Self-incrimination", (1971) 87 LQR 214; also n 20 supra, at pp 31-32.

[29] RSC 1970, c E-10; cit Ontario Law Reform Commission, Report on the Law of Evidence, p 109.

certain statutory protection, so that while a witness can be compelled to answer a question although it may tend to incriminate him or tend to establish liability in civil proceedings, nonetheless if he claims protection under the Act his answer cannot be used against him in any subsequent civil or criminal proceedings. This provision appears to provide sufficient protection for the witness without obstructing the investigation of the truth in the proceedings in which his evidence is required. In Ontario there is a similar provision in section 9 of the Ontario Evidence Act, and the Ontario Law Reform Commission propose to remove the necessity for the witness to object to answer in order to obtain the protection of the section. Section 10 of the Commission's Draft Evidence Act provides:

"Witness must answer questions	(1) A witness in a proceeding shall not be excused from answering any question upon the ground that the answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature.
Protection for witnesses	(2) If with respect to a question or a series of related questions a witness in a proceeding objects to answer upon any of the grounds mentioned in subsection 1 and if, but for this section or any Act of the Parliament of Canada, he would therefore be excused from answering, then, although he is by reason of subsection 1 or by reason of any Act of the Parliament of Canada compelled to answer, the answer shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of the Legislature thereafter taking place.
Objection to answering presumed	(3) Notwithstanding subsection 2, a witness in a proceeding shall be deemed to have objected to answer any question the answer to which may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature."[30]

18.10/

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[30]See Ontario Law Reform Commission, n 29 supra, pp 109, 255.

18.10 It has already been noted that some statutes which extend to Scotland expressly provide that a witness's incriminating statements are inadmissible against him in any subsequent proceedings, civil or criminal.[25] If this were to become the general rule, whether by virtue of provisions on the Canadian lines or otherwise, it would be necessary to enact specific exceptions to it to cover cases where such protection was considered to be inappropriate. There should perhaps be an exception for the case of perjury in respect of the evidence given by the witness, as in the Explosive Substances Act, 1883, section 6(2), and the Representation of the People Act, 1949, section 123(7)(b).[25] And the majority of the Thomson Committee have recommended that if a person makes a sworn statement on oath before a sheriff which directly or indirectly incriminates an accused and at the subsequent trial gives evidence which does not so incriminate the accused, this should be an offence.[31] There would also be a distinction between statements made in legal proceeedings and extrajudicial statements, which may or may not be admissible in subsequent proceedings, depending on the terms of the particular statute under which they were made. Further, it would be necessary to make provision for the position of a witness who reasonably feared that his answer might be used against him in proceedings furth of Scotland, such as by leaving the judge with a discretion not to compel such a witness to answer. This matter is again referred to in paragraph 18.13 below.

18.11/

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[31] Thomson, paras 44.11-44.14. They recommend that such a witness should not enjoy the privilege against self-incrimination.

18.11 An alternative course might be to provide an "immunity bath" for a limited category of cases. That has been done in England by section 31(1) of the Theft Act[32] which provides that a person shall not be excused on the ground of incrimination of himself or his spouse from answering any question put to him in any proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property, or for complying with any order made in such proceedings; but no statement or admission is admissible against him or his spouse (unless they were married after it was made) in proceedings for an offence under the Act. Professor Cross comments:

> "The principle underlying this and similar statutes, of which there is a fairly large number,[33] is that the chances of persons entitled to property or payment would be greatly reduced if reliance could be placed on the privilege against self-incrimination, and it is therefore desirable to encourage full disclosure by the prohibition of the use of the statement in subsequent criminal proceedings. Whether there is a sound empirical basis for the principle is anybody's guess."[34]

(2) Criminal offences

18.12 (a) Incrimination of spouse. The Law Reform Committee found it rather more repellent that a husband should be compelled to incriminate his wife, or a wife her husband, than that either should be compelled to incriminate himself. They recommended that the privilege against self-incrimination should be extended to a privilege against incrimination of a spouse, with the right to waive the privilege being that of the witness, not his spouse.[35] Their recommendation was implemented by section 14(1)(b) of the Civil Evidence Act, 1968.[36] The Criminal/

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[32] 1968, cap 60.
[33] For a full discussion and criticism of their construction see Heydon, n 28 supra.
[34] Cross, p 248.
[35] LRC 16, para 9.
[36] 1968, cap 64; see also sec 18(2).

Criminal Law Revision Committee took the same view. They drew a distinction between offences relevant to the question whether the accused committed the offence charged and offences relevant to his credibility;[37] and clause 15 of their Draft Bill allows the accused no privilege against incriminating his wife except in relation to an offence going to his credibility as a witness. In the words of the Committee:

> "For example, if he was charged with burgling a house in which his wife worked as a servant and she had stolen the key and given it to him to get in with, and the key was found in his possession, it would be curious if he could refuse to say how he got the key because this would show that his wife stole it. The possibility of cross-examining the accused about an offence by his wife for the purpose of impairing the accused's credibility as a witness would seldom if ever occur (one would have to imagine that the accused has made imputations against a witness for the prosecution and is open to cross-examination about his association with his wife in her fraudulent activities); but if the situation did occur, it would be consistent with the protection which the clause gives the accused in relation to his own offences to give him the protection in relation to his wife's offences. Clause 15(3) makes corresponding provision, as seems right in policy, for where the accused's wife gives evidence."[38]

If the views of the two Committees are accepted, consideration should no doubt be given to the enactment of similar provisions for Scotland, complex though they would be. It may be, however, that the matter is of small practical importance.

18.13 (b) Liability to prosecution furth of Scotland.[38a] There appears to be no reported Scottish authority as to whether a witness may claim a privilege to refuse to answer questions or to produce documents which/

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[37] See Chapter 5, para 5.42 above.

[38] CLRC para 172; see cl 15, pp 182-183, 225-226.

[38a] In an English appeal the House of Lords have upheld a claim to the privilege against self-incrimination under sec 14(1) of the Civil Evidence Act, 1968, by witnesses who were contesting an application to produce documents, on the ground that production would tend to expose them to fines under various articles of the EEC Treaty: In re Westinghouse Electric Corporation, [1978] AC 547.

which might incriminate him under foreign law. It is thought that it may be difficult for a Scottish judge or sheriff to decide whether or not to sustain a witness's objection on the ground that he might incriminate himself under foreign law. The Law Reform Committee expressed the view that an English judge was qualified to decide forthwith whether a witness might be incriminated under the law of any part of the United Kingdom;[39] but it may be doubted whether all Scottish judges and sheriffs would consider themselves qualified to pronounce in all cases on the likelihood of a witness being prosecuted by the English authorities for offences under the criminal law of England. In some cases it might be necessary to be familiar with the practices of the English prosecuting authorities as well as with peculiarly difficult areas of the substantive criminal law of England such as the Theft Act, 1968. The English solution was to enact that the privilege against self-incrimination shall apply only to liability to criminal proceedings under the law of a part of the United Kingdom.[40] That solution appears to leave unprotected a witness who might reasonably fear extradition for trial in a foreign jurisdiction for conduct which would appear to an English judge to be obviously criminal. It may be that the appropriate solution for Scotland would be to refrain from making any legislative provision as to self-incrimination under foreign law, including English law, and leave it to the discretion of the court to determine whether any claim should be upheld in the circumstances of the case in which it is made. Any "immunity bath" provision, such as is discussed in paragraph 18.10 above, would have to be so framed as to take account of such a discretion.

18.14/

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[39] LRC 16, para 11.

[40] Civil Evidence Act, 1968 (cap 64), sec 14(1)(a); CLRC, para 169, Draft Bill, cl 15(1), pp 182, 225.

18.14 (c) Bankrupt. It has not been directly decided in Scotland whether at his public examination a bankrupt must answer all questions relating to his affairs whether they tend to criminate him or not. Bell states that he is not bound to do so,[41] but Dickson[42] and Goudy,[43] founding on Sawers v Balgarnie,[44] which is not noticed by Bell's editor, express the view that he must answer. Sections 87 and 89 of the Bankruptcy (Scotland) Act, 1913,[45] like their predecessors sections 91 and 93 of the Act of 1856,[46] oblige him to answer "lawful" questions. In England it is the debtor's duty at his public examination, under section 15(8) of the Bankruptcy Act, 1914,[47] "to answer all such questions as the court may put or allow to be put to him"; and it has been held that he cannot refuse to answer on the ground that he might be incriminated by doing so;[48] but any statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy is not admissible against that person or his spouse (unless they were married after it was made) in any proceedings for an offence under the Theft Act, 1968.[49] It may be that in Scotland it should be made clear that the bankrupt enjoys no privilege against self-incrimination at his public examination, and that it should be provided that any answer shall not be admissible in/

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[41] Bell, Commentaries (7th ed), p 326.
[42] Dickson, para 1787.
[43] Goudy, Law of Bankruptcy in Scotland (4th ed), p 237.
[44] (1858) 21 D 153. See Lord Cowan at p 157.
[45] 3 and 4 Geo V, cap 20.
[46] Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict cap 79).
[47] 4 and 5 Geo V, cap 59.
[48] Re Paget, ex p Official Receiver, [1927] 2 Ch 85; Goudy, p 237.
[49] 1914 Act, n 47 ante, sec 166, as amended by Theft Act, 1968 (cap 60), Sched II, Pt 3.

in evidence against him in at least certain categories of subsequent proceedings.

18.15 (d) Haver. The question whether a haver might be obliged to produce incriminating documents under a commission and diligence to recover documents in criminal proceedings is raised in Chapter 25 below.

18.16 (e) Witness precognosced on oath. The recommendations of the Thomson Committee on this matter have been noticed above, in paragraph 18.10.

(3) Adultery[50]

18.17 At common law a witness is not bound to answer a question tending to show that he has committed adultery. The privilege may be claimed both in civil causes and in criminal trials, and is not confined to cases where adultery is the issue. Section 2 of the Evidence Further Amendment (Scotland) Act, 1874,[51] made the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, competent to give evidence, and further provides:

> "... no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

It has been pointed out that since the words are "witness in any proceeding" and not "witness in any such proceeding", this would appear to be merely a restatement of the common law.

18.18 It is submitted that this privilege should be abolished. In 1886/

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[50] Walkers, para 345(c); Dickson, para 1791; Clive and Wilson, pp 644-645.

[51] 37 and 38 Vict cap 64.

1886 Lord Trayner had this to say about the above passage from section 2 of the 1874 Act:

> "For this limitation I confess I seek justification in vain. Any other question may be put to a witness, the answer to which involves or may involve moral turpitude or disgrace; but why adultery should form the sole exception I do not know. Formerly, when adultery was regarded and punished by the law as a crime, it was right that no one should be asked or be bound to answer a question which would expose him to the criminal law. But this is no longer so. Adultery, no doubt, still stands on the books as a point of dittay; but it stands there merely as a relic of a former time, - a respectable fossil. No one has been indicted for adultery (although not unknown to have happened in recent times) for a period long past the memory of man, and one may safely say, nobody ever will be indicted for it in future. This limitation may reasonably enough be expected to disappear under the provisions of any future Act dealing with the law of evidence."[52]

It is submitted that, for the reasons which he gives, the time has come for the belated fulfilment of Lord Trayner's prophecy. It is conceivable that an admission of adultery by a paramour or other witness could expose him to an action of divorce at the instance of his own spouse, but there is no general rule that a witness may claim to be privileged from answering questions on the ground that the answers will expose him to a civil action.[53] In England a similar, but limited, privilege in proceedings instituted in consequence of adultery, which was originally conferred by statute in 1869, was abolished by section 16(5) of the Civil Evidence Act, 1968, its abolition having been recommended by the Gorrell Commission in 1912, the Denning Committee on Procedure in Matrimonial Causes in 1947, the Morton Commission in 1956 and the Law Reform Committee in 1967.[54] As Lord Denning, M R, subsequently/

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[52] Lord Trayner, "The Advances of a Generation", (1886) 2 Sc L Rev 57, 89, at pp 91-92.

[53] See Dickson, para 1787.

[54] LRC 16, para 45. See Cowen and Carter, Essays in the Law of Evidence, chap 8; Ontario Law Reform Commission, Report on the Law of Evidence, p 111.

subsequently observed, adultery is still a grave moral offence, but not one which enables a person to object to answering questions about it.[55]

3. Privileges in aid of litigation

18.19 The justification of the privileges which are examined in this section is that without them the administration of justice would be impossible. It is essential to the proper preparation of a party's case that he should be entitled to insist upon there being withheld from the court any material which came into existence and any communication which was made wholly or mainly for the purpose of preparing his case in litigation then pending or contemplated by him.[56] But professional communications between a client and his legal advisers are, and should be, protected even where the client does not contemplate litigation, because

> "what distinguishes legal advice from other kinds of professional advice is that it is concerned exclusively with rights and liabilities enforceable in law, ie in the ultimate resort by litigation in the courts or in some administrative tribunal. It is, of course, true that on many matters on which a client consults his solicitor he does not expect litigation and certainly hopes that it will not occur; but there would be no need for him to consult his solicitor to obtain legal advice unless there were some risk of litigation in the future in connection with the matter upon which advice is sought."[57]

It may be possible to countenance infringements of the privilege conferred on communications made post litem motam as regards the examination of witnesses as to previous inconsistent statements made by way of precognition, which is discussed in Chapter 19, and as regards the disclosure and exchange of experts' reports, discussed in Chapter 17. Otherwise, however, it is thought that the privilege conferred on professional/

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[55] Nast v Nast, [1972] Fam 142, at p 151.
[56] LRC 16, para 17.
[57] LRC 16, para 19.

professional communications between the client and his legal advisers, and on communications made post litem motam, should be maintained, and there is a question whether it requires to be strengthened by the removal of possible anomalies: it may be that in the case of the former, it should be made clear that third parties may not be examined as to the communications, and as to the latter, the exception as to reports by servants should be reconsidered.

(1) Solicitor and client[58]

18.20 (a) Rationale. Mr D A O Edward, QC, has made the following valuable observations on the history of this branch of the law:

> "Historically, the Scots law on this subject was closely akin to the continental law - see for example, Stair's Institutions of the Laws of Scotland (1681), IV 43.9(8): 'Advocates ... are suspected witnesses for those who entrust them; but they are not obliged to depone as to any secret committed to them'. This was a principle of Roman law, which was shared by the civil law systems of the continent long before revelation of a professional secret was made a criminal offence. (Cp Nyssens, Introduction a la Vie du Barreau, Brussels, 2nd edition, 1974, S 62). In 1760, the Court of Session held that 'the secrets of the cause' extended to 'everything he [the lawyer] was informed of' as lawyer in the case. (Leslie v Grant, 5 Brown's Supplement, p 874). Thereafter, Scots law developed in the same direction as English law, but 'privilege' in this sense is not a term of art in Scots Law, which refers rather to 'confidentiality'".[58a]

According to the modern law of Scotland, communications between clients and their legal advisers are privileged although they may not relate to any suit/

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[58] Walkers, para 393; Dickson, paras 1663-1683. As to waiver of the privilege see Wylie v Wylie, 1967 SLT (Notes) 9. For a recent example of statutory infringement of the privilege, see Taxes Management Act, 1970 (cap 9), sec 13; cf Finance Act, 1975 (cap 7), Fourth Sched, paras 4-5.

[58a] D A O Edward, "The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community" (Commission Consultative des Barreaux de la Communaute Europeenne, 1976), para 31, n 1. An abbreviated and revised version of this report is printed in (1978) 23 JLSSc 19.

suit depending or contemplated or apprehended.[59] The term "legal advisers" includes counsel and law agents, with their several clerks,[60] but for convenience the privilege is generally referred to as the "solicitor and client" privilege. The justification of the privilege has been given in the foregoing paragraph. It is sometimes maintained that a similar privilege should be granted to communications between other professional men and their clients, doctors and their patients, clergymen and penitents or members of their congregations, and journalists and their sources, on the basis that such communications are confidential. The claims of these relationships to privilege will be considered later in this Chapter;[61] but at this stage it may be observed that the privilege which exists between a client and his legal advisers is not based on confidentiality in the popular sense, but necessarily arises from the principle of the adversary system of litigation. As the Law Reform Commission of Canada have pointed out:

> "... the legal profession is a special case, distinct from all the other professions because of the very nature of the lawyer's role. A lawyer is not merely a professional among others. In addition to being his client's alter ego, he is also an auxiliary of justice, and as such actively participates in its administration. In our present judicial system the lawyer is as indispensable as the judge or jury. To oblige him to reveal in court what his client has revealed to him in all confidence for the purpose of defending his interest, is to interfere with the healthy and equitable administration of justice, irrespective of the effects upon the profession itself and upon its social image.
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> "How is a lawyer to fulfil the role assigned by the judicial system if the existence of the professional relationship to protect the client in the defence of his rights is promoted on the one hand, and, on the other hand, if the disclosures made to him for the very purpose of carrying out such a task may be used against that client? In criminal law/

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[59] M'Cowan v Wright, (1852) 15 D 229, Lord Wood at p 237.

[60] Dickson, para 1665.

[61] See paras 18.32-18.51 below.

law, the fundamental right of the accused to a full and complete defence would become illusory if his legal representative could, during the trial, be compelled to testify on the disclosures made to him by his client for the defence of his rights. The abolition of the privilege would transform the lawyer into an informer and since he is only his client's spokesman by way of representation, it would directly infringe upon the fundamental right of a citizen not to incriminate himself and not to be obliged to supply the prosecution with evidence that may be used against him. With respect to civil law, the abolition of the privilege would warrant a complete re-examination of the concept of representation by counsel. As in criminal law, the lawyer plays a representative role in civil trials. The adversary system, in which each litigant conducts his own case, presents his evidence and in which the judge merely acts as a referee, would disappear to make way to a veritable inquisition. In other words, to abolish the privilege of the legal adviser would question not only the lawyer's role, but also the whole fundamental principles governing our present system of administration of justice.

"In contrast, the non-recognition of a privilege for the medical profession may have unfortunate effects upon its social image, may be very unfair, even prejudicial to the client's interests, but does not interfere per se with the administration of justice itself."[62]

It is thought that the present law of Scotland as to the solicitor and client privilege is reasonably well defined and works satisfactorily in practice.[63] There are, however, two questions which may merit consideration: whether the privilege extends to a statement made by an accused person to a solicitor who declines to act for him; and whether evidence is admissible about a professional communication between a client and his legal adviser which has been improperly obtained.

18.21/

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[62] Law Reform Commission of Canada, Evidence Study Paper no 12: Professional Privileges before the Courts, p 8.

[63] It is thought that it would be inappropriate to comment at this stage on the position of a solicitor to whom a client admits his guilt of a crime for which another man has been convicted. There is a question whether in such a case the public interest in the maintenance of confidentiality between the solicitor and his client should outweigh the public interest that no innocent man should be convicted of crime. The matter was given prominence by HMA v Waddell, The Scotsman, 23rd November 1976. At the time of writing an inquiry is in progress into certain of the circumstances surrounding that case and the earlier case of HMA v Meehan.

18.21 (b) Statement by accused to solicitor who declines to act. The confidentiality of the relationship between the accused and his legal advisers relative to affairs which are to be put in issue at the trial seems to be well established.[64] But a difficult question arose in HM Advocate v Davie.[65] A man consulted a law agent, who declined to act for him in an action for rent in the sheriff court. The action proceeded, and thereafter the man was prosecuted for perjury alleged to have been committed by him in the course of the action. At his trial, he objected to the Crown examining the law agent as a witness. Lord Mure admitted the evidence, but reserved the objection for the consideration of the High Court. However, a verdict of not proven was returned, and it was therefore unnecessary to certify the case to the High Court. The Sheriffs Walker describe as "a hard doctrine" the view that a statement made by an accused to a solicitor who declines to act is not confidential, and point out that the opposite has been held in England.[66] There, legal professional privilege applies to communications made with the object of obtaining a solicitor's services even if these are not in fact retained, provided that the relationship of solicitor and client is at least in contemplation and the communications are fairly referable to that relationship.[67] It may be desirable to consider whether a similar rule should be applicable in Scotland.

18.22 (c) Communications improperly obtained. The second question is this. If a professional communication between a client and his legal adviser, when made orally, is overheard, or if when made in writing/

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[64] Hume, ii, 350; HMA v Parker, 1944 JC 49, Lord Moncrieff at p 52.

[65] (1881) 4 Coup 450.

[66] Walkers, para 393.

[67] Minter v Priest, [1930] AC 558; Cross p 250.

writing it is stolen or otherwise wrongfully obtained, by the client's opponent or a third party, may the client still claim privilege for it, or may the opponent or third party give evidence about it? There appears to be no reported authority on this question in Scotland, no doubt because the circumstances envisaged seldom occur in practice, and professional etiquette would militate against unfair advantage being taken of them.[68] The question should perhaps be considered as part of the larger question of the admissibility of evidence irregularly obtained, which is discussed in Chapter 21.

18.23 In England, on the other hand, the law is that the party who would otherwise have been entitled to claim privilege for the communication can no longer do so. The Law Reform Committee considered that the rule was open to criticism, and that there were strong arguments in favour of the proposition that, at any rate where a privileged document has been obtained as the result of a crime or a deliberate tort, the party concerned should not thereby be deprived of his privilege. They did not, however, make any recommendation on the matter because they did not wish to anticipate the recommendations of the Criminal Law Revision Committee on the admissibility of improperly obtained evidence.[69] But Professor J D Heydon has argued that, whatever the merits of admitting the/

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[68] LRC 16, paras 31-33. In McLeish v Glasgow Bonding Co Ltd, 1965 SLT 39, a letter which the defenders had obtained, not through any improper or illegal means, but through a mistake on the part of a haver, was held to be admissible for the purposes of cross-examination. See also R v Tomkins, [1978] Crim LR 290.

[69] LRC 16, paras 31-33. In the event the CLRC made no recommendations for reform on that matter. They made recommendations as to the admissibility of an inadmissible confession confirmed by consequently discovered facts: see CLRC, paras 68-69.

the ordinary kind of improperly obtained evidence, there are surely stronger arguments against admitting evidence seized in violation of legal privilege. This, he says, involves a double impropriety: the client is the victim of wrongful conduct at the very moment when he thought he was safest against it. He points out that it is instructive to observe the changes over the last thirty years in American law reform proposals. In 1942 the American Law Institute's Model Code of Evidence provided by rule 20(c)(iii) that the privilege only continued when the third person learnt of the confidential communication "as a result of an intentional breach of the lawyer's duty of non-disclosure by the lawyer or his agent or servant." In 1953 the Uniform Rules of Evidence went further in providing, by rule 26(1)(c), that the client could prevent third parties disclosing a privileged communication "if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of breach of the lawyer-client relationship." The 1971 Federal Rules of Evidence, by rule 503(b), makes the client's right to prevent third parties testifying unqualified. Professor Heydon observes that this trend, at a time when American law reformers, like English, advocate restriction or abolition of most other privileges, is significant.[70]

(2) Communications made post litem motam[71]

18.24 (a) Rationale. Communications to or by a litigant in connection with/

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[70] J D Heydon, "Legal Professional Privilege and Third Parties", (1974) 37 MLR 601; Cases and Materials on Evidence, pp 404-407.

[71] Walkers, paras 394-396. It is declared by section 105 of the Patents Act, 1977 (cap 37) that in Scotland the rules of law which confer privilege from disclosure in legal proceedings in respect of communications, reports or other documents (by whomsoever made) made for the purpose of any pending or contemplated proceedings in a court in the United Kingdom extend to communications, reports or other documents made for the purpose of patent proceedings.

with his investigations into an accident, an alleged breach of contract, a consistorial dispute, or other event giving rise to the action, are, generally speaking, confidential.[72] The general rule is that no party can recover from another material which that other party has made in preparing his own case.[73] As already explained,[74] the justification of the rule is that it facilitates the obtaining and preparation of evidence by a party to an action in support of his case:[75]

> "... it is not only settled in practice, but it is a proper consequence of principle that a litigant, in the course of making preparation for the presentment of his ex parte case, is not subject to finding himself having inadvertently made preparation for presentment of the case against him."[76]

18.25 (b) Reports by servants. One matter which appears to require consideration is that by an exception to the general rule reports by a servant present at the time of an accident made to his employer at or about the time of the accident are held not to be confidential.[77] That is so even if the report has been made on a form supplied by and passed to the employer's insurance company,[78] and even if it contains a list of witnesses/

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[72] Walkers, para 394. But in an anomalous Outer House decision not cited by Walkers, Macfarlane v Macfarlane, 1896, 4 SLT 28, an action of divorce for adultery, communications relating to the adultery passing between the defender and a private detective employed by him were held to be recoverable. And in McLeish v Glasgow Bonding Co Ltd, 1965 SLT 39, the Lord Ordinary permitted the defenders to use for the purposes of cross-examination a letter written by the pursuer's solicitors to a medical witness for the pursuer after the action had been raised (see also para 21.13, post).

[73] Anderson v St Andrew's Ambulance Association, 1942 SC 555, L P Normand, at p 557; Robertson v Lanarkshire Steel Co Ltd, 1955 SLT (Notes) 73.

[74] Para 18.19 supra.

[75] LRC 16, para 20.

[76] Anderson, n 73 supra, Lord Moncrieff at p 559.

[77] Walkers, para 395(b); Scott v Portsoy Harbour Co, (1900) 8 SLT 38; Admiralty v Aberdeen Steam Trawling and Fishing Co Ltd, 1909 SC 335; Finlay v Glasgow Corporation, 1915 SC 615; Whitehill v Glasgow Corporation, 1915 SC 1015; Young v National Coal Board, 1957 SC 99; Johnstone v National Coal Board, 1968 SC 128; Dobbie v Forth Ports Authority, 1975 SLT 142.

[78] Brennan v David Lawson Ltd, 1957 SLT (Notes) 46; Russell v W Alexander & Sons Ltd, 1960 SLT (Notes) 92.

witnesses.[79] The exception has frequently been described as arbitrary and incapable of extension.[80] One justification which has been offered for the exception is that the purpose of the report is to enable the employer to improve his methods: it is "presumably made for no other purpose than to put the owners in possession of the true facts."[81] Another is that

> "if such a report is made as part of routine duty, and as a record of the reporter's immediate reaction before he has had the time, opportunity or temptation to indulge in too much reflection, it may well contain an unvarnished account of what happened and consequently be of value in the subsequent proceedings as a touchstone of truth. The same theory underlies the reception in our criminal law of de recenti statements in support of credibility, and the preliminary act in Admiralty causes."[82]

18.26 As to the first of these justifications, the Sheriffs Walker comment:

> "Whatever may have been the position in collisions at sea in 1900, a principal, if not the principal, purpose of the report today, after a traffic or industrial accident, is to enable the employer's insurance company to decide on their attitude to a claim of damages. It remains to be seen whether the rule will be reconsidered on the principle cessante ratione legis, cessat ipsa lex."[83]

In Young v National Coal Board Lord Justice-Clerk Thomson himself observed:

> "... some/

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[79] Macphee v Glasgow Corporation, 1915 SC 990; McCulloch v Glasgow Corporation, 1918 SC 155. Cf Ross v Glasgow Corporation, 1919, 2 SLT 209; M'Bride v Lewis, 1922 SLT 380 (the word "not" seems to have been omitted from the first sentence of the penultimate paragraph of the Lord Ordinary's opinion). As to the exchange of lists of witnesses in civil causes see Chapter 24, para 24.60.

[80] Robertson, n 73 supra; Young, n 77 supra, Lord Walker (Ordinary) at p 101, Lord Mackintosh at p 106, Lord Blades at p 108; Johnstone, n 77 supra, L P Clyde at p 133; Dobbie, n 77 supra, L J-C Wheatley at p 144.

[81] Scott, n 77 supra, cit in Whitehill, n 77 supra, L P Strathclyde at p 1017.

[82] Young, n 77 supra, L J-C Thomson at p 105; Johnstone, n 77 supra, L P Clyde at p 133; see also Lord M'Laren in Admiralty, n 77 supra, at p 341; Black v Bairds & Dalmellington, 1939 SC 472, L J-C Aitchison at p 478.

[83] Walkers, para 395(b).

> "... some potential defenders prepare well in advance against the contingency of accidents, and indeed, under modern conditions, few accidents, and particularly few industrial accidents, can happen without its occurring to one or other party at an early stage that questions of disputed liability may arise."[84]

As to the second justification, it may be noted that de recenti statements by witnesses are not generally recovered in practice,[85] and it seems arbitrary to permit the recovery of a special class of such statements in one category of cases. Further, this justification ignores the possibility that the employee might well report matters which are untrue in order to conceal some failure of his own which contributed to the accident. It therefore seems arguable that the exception to the general rule, which permits the recovery of such reports, cannot be maintained on the grounds stated. Some may therefore favour the abolition of the exception. Abolition would incidentally involve the removal of the anomaly that a party in that category of litigation may by chance recover a list of his opponent's witnesses.[79] On the other hand, advocates of the "cards on the table" theory of litigation[86] would no doubt maintain that the exception assists in the ascertainment of the truth, and therefore ought to remain.

18.27 One possible solution may be to abolish the exception but affirm the principle/

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[84] 1957, SC 99, at p 105.

[85] They are of course recoverable - in Johnston v South of Scotland Electricity Board, 1968 SLT (Notes) 7, recovery was permitted of reports made by servants to their employers who were not parties to the action - but seldom recovered in practice. It is not unknown for lay witnesses of a road accident to make notes immediately afterwards, but such notes are not in practice recovered.

[86] See paras 24.01-24.06 below.

principle that communications between a client and his legal advisers are irrecoverable, and restate the general rule in terms which would permit the recovery of any relevant documents or other material, other than any prepared solely, or perhaps predominantly,[87] for the purposes of the professional relationship, and place upon the party from whom recovery is sought the onus of establishing that the material sought falls within that exception. The employer would therefore have to establish in each case that the employees' de recenti reports were prepared solely (or predominantly) for that purpose. Such a rule would also permit the recovery of statutory reports and records such as accident books (unless these were irrecoverable for other reasons),[88] but would not permit the recovery of precognitions.[89]

4. Privileges in aid of settlement and conciliation

18.28 (1) General. It seems to be well settled, although there appear to be no modern reported Court of Session decisions on the point, that admissions made by a party in the course of abortive negotiations for the settlement of the dispute are not admissible in evidence, since such transactions are commonly arranged upon mutual concessions.[90] It also appears to be well understood that admissions made "without prejudice" are made without prejudice to the position of the party making them if the terms he proposes are not accepted,[91] and therefore are inadmissible in evidence as admissions provided they relate/

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[87] Cf Grant v Downs, (1977) 51 ALJR 198, where the High Court of Australia held that for the claim of legal privilege to succeed it was necessary that the documents had been produced solely or predominantly for the purpose of informing the client's legal advisers of his situation. The claim therefore failed as regards routine administrative reports, albeit compiled with possible legal action in mind.

[88] See paras 25.12-25.15 below.

[89] See paras 24.19-24.20 below.

[90] Dickson, para 305; Walkers, para 29.

[91] Walker v Wilsher, (1889) 23 QBD 335, Lindley L J at p 337.

relate to the proposed settlement.[92] The privilege which is thus accorded to admissions made in negotiations for settlement appears to be well justified by the public interest in the settlement of disputes either without recourse to litigation or, where litigation has ensued, with as little expenditure of time and money as possible. Parties would not readily undertake such negotiations if the concessions which they frequently require could be admitted in evidence against them if the negotiations failed.[93] Similar considerations may be discerned in recent industrial relations legislation where, to ensure that claims or possible claims of unfair dismissal are, so far as is possible, settled by conciliation, it is provided that anything communicated to a conciliation officer in connection with the performance of his functions should not be admissible in evidence in any proceedings before an industrial tribunal except with the consent of the person who communicated it to that officer.[94]

18.29 (2) Matrimonial disputes. There is a question whether it would be desirable to create a special statutory privilege in aid of the settlement of matrimonial disputes, either (a) by conferring on the spouses a privilege attaching to communications made in an endeavour to settle these, or (b) by conferring on professional conciliators (marriage guidance counsellors and the like) a privilege which would entitle them to refuse to disclose communications made to them by spouses in the course of attempts at reconciliation. The question involves issues of social policy rather than pure technicalities of the law of evidence, and those who find themselves/

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[92] Assessor for Dundee v Elder, 1963 SLT (Notes) 35; Burns v Burns, 1964 SLT (Sh Ct) 21; Ware v Edinburgh District Council, 1976 SLT (Lands Tr) 21.

[93] Cf LRC 16, para 34.

[94] Trade Union and Labour Relations Act, 1974 (cap 52), First Sched, Part IV, sec 26(5), re-enacting Industrial Relations Act, 1971 (cap 72), sec 146(6). See M & W Grazebrook v Wallens, [1973] ICR 256.

themselves professionally concerned with the counselling of estranged spouses may be specially interested in offering their views.

18.30 (a) Spouses' privilege. The first of these positions has been achieved in England by judicial decision. It is now settled law there that a mediator in a matrimonial dispute cannot, without the consent of both the spouses, disclose any communications with either of them if made while he was acting as conciliator between them in connection with pending or contemplated matrimonial proceedings. They are made upon the tacit understanding that attempts at reconciliation are meant to be "without prejudice" even though that formula is not expressly used.[95] The principle has been extended to cover direct negotiations between the spouses themselves where no third party intervenes.[96] As to the requirement that matrimonial proceedings must be in contemplation in order that the privilege may attach, the Law Reform Committee observe:

> "... it is, we think, a reasonable inference from the fact that a third party has been called in by one or other of the spouses to act as mediator that such proceedings are sufficiently in contemplation to give rise to the privilege, and the courts today readily draw such inference. Where the negotiations take place directly between the spouses it may be more difficult for the court to decide whether such inference should be drawn; we do not, however, see any distinction of principle between the two situations."[97]

18.31 In Scotland there are no reported decisions on the matter.[1] The Sheriffs Walker observe that the reason behind the English rule is the/

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[95] See LRC 16, para 36; McTaggart v McTaggart, [1949] P 94 (probation officer); Mole v Mole, [1951] P 21 (probation officer); Pool v Pool, [1951] P 470 (counsel); Henley v Henley, [1955] P 202 (clergyman); Pais v Pais, [1971] P 119 (priest).

[96] Theodoropoulas v Theodoropoulas, [1964] P 311.

[97] LRC 16, para 36. The English cases were commented on in D v NSPCC, [1978] AC 171, by Lord Hailsham of St Marylebone at p 215, who spoke of "a new category of public interest exception based on the public interest in the stability of marriage", and Lord Simon of Glaisdale at pp 236-237.

[1] In Whitehall v Whitehall, 1957 SC 30, both parties founded on letters written to the wife by the Soldiers' Sailors and Airmen's Families Association during negotiations for a reconciliation.

the interest of the state that reconciliation should be effected, and that reconciliation is more likely if people can speak freely knowing that what they say cannot be used against them. The learned authors comment that the reason for the rule seems equally strong in Scotland.[2] The Law Reform Committee were satisfied that the English rule works well in practice and has led to no overt criticism, and they did not recommend any change in the law.[3] It may be argued on the other hand that negotiations between spouses are not the equivalent of negotiations for the settlement of a commercial or personal injuries claim, but are part of the history of the marriage in which offers to reform or return and admissions of misbehaviour may be made, about which it is essential that the court should be informed if it is to ascertain the truth; and that the truth is of particular importance in cases where custody is in dispute.[3]

18.32 (b) Conciliator's privilege. The conferment of a privilege on marriage guidance counsellors in relation to communications made to them was recommended in 1956 by the Royal Commission on Marriage and Divorce,[4] but the recommendation was not implemented. In Australia, however, section 12(1) of the Australian (Matrimonial Causes) Act, 1959, provides that a marriage guidance counsellor is neither competent nor compellable as a witness in respect of communications made to him in that capacity.[5] If the mediator were to be made competent but not compellable, he would enjoy a privilege, independent of any privilege of the spouses, which would entitle him, regardless of the spouses' wishes, to refuse to disclose communications made to him by either spouse in the course of attempts at reconciliation. The question whether such a privilege should/

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[2]Walkers, para 398.
[3]LRC 16, para 38.
[4]Report (the Morton Report), Cmnd 9678, paras 358-359, p 101.
[5]Cit Pais, n 95 supra, at p 121.

should be given to the mediator is obviously linked to the question whether a privilege should be given to the spouses. If the spouses were to have no privilege to refuse to disclose communications made for the purpose of reconciliation, it would be anomalous to confer a privilege on the conciliator, for if the parties were at issue as to the communications, it would be strange if the conciliator could be allowed to decline to assist the court to ascertain the truth. If the spouses did have such a privilege, which they were jointly entitled to waive, and the conciliator also had a privilege, which he was entitled to waive, four different situations could, in theory, arise. First, the spouses refuse to waive their privilege but the conciliator waives his: this seems extremely unlikely to arise in practice. Second, all parties refuse to waive their privileges: the court might thus be deprived of valuable information as to the truth of the matters in issue; and one spouse might have a very understandable sense of grievance if he wished to waive the privilege but the other spouse did not agree and the conciliator refused to waive his. Third, the spouses waive their privilege, and the conciliator waives his: the position thus achieved would be the same as the present law of Scotland. Fourth, and perhaps the most likely situation to arise in practice, the spouses waive their privilege but the conciliator refuses. The position here is the same as that where he refuses when the spouses have no privilege. It was in regard to this fourth position that the Law Reform Committee, considering the matter on the basis that the law of England entitles the spouses, if both consent, to give evidence of the negotiations, expressed the view that it was neither practicable nor justifiable to confer the privilege under consideration on the mediator:

> "If the spouses do give such evidence and there is a conflict between/

> between them, the refusal of the conciliator to give evidence himself could only deprive the court of the best means of resolving the conflict and ascertaining the truth. Yet we think it likely that, certainly as far as the court welfare officers and marriage guidance counsellors are concerned, the conciliator would always insist on his privilege. The conclusion is that the proposed statutory privilege for conciliators would either be ineffective, or would cause injustice, unless the spouses were themselves deprived of their right of waiver and, in principle, we do not think that they should be so deprived. There may be circumstances, particularly where the welfare of the children of the marriage is concerned, in which such waiver may be justified and in which the right to waive the privilege is likely to be exercised. In our view, if it is right that negotiations for the purpose of reconciliation should be subject, as they now are, to any privilege, that privilege should continue to be the joint privilege of the parties and to be capable of being waived by them if both so wish."[6]

The question of a privilege for the conciliator may also be considered in the light of Wigmore's requirements for the establishment of a privilege for a professional relationship, which are set out in paragraph 18.37 below.

5. Privileges in protection of confidential relationships

18.33 (1) General. This section of the chapter is concerned with all relationships which are confidential in the popular sense of the term, including those already discussed in this Chapter but excluding the relationship between spouses, which is discussed elsewhere.[7] It may be appropriate to consider whether any new rules should be formulated as to privilege for such relationships. The present law may be briefly stated. In the course of many different types of relationship, communications are made in confidence that they will not be disclosed; and if the confidant thereafter discloses the confidence to another, he may be held to have acted in breach of his professional code of ethics, or/

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[6] LRC 16, para 40.

[7] Chapter 4, paras 4.06-4.15; Chapter 6, paras 6.26-6.29.

or may be liable in damages for breach of confidence,[8] or both. But in the case of all communications except those between a solicitor and his client and possibly those made in confidence to a clergyman, the confidant cannot refuse to testify in court, because there the ascertainment of the truth is given precedence over the respect due to the confidential nature of the communication or the professional code of the confidant. The justification for treating the solicitor and client relationship as a special case has already been discussed,[9] and the uncertain state of the law regarding communications to clergymen will be considered below.[10] In all other cases it is the duty of the confidant to answer any question which is both competent and relevant. If, in quite exceptional circumstances, a relevant question is put to him which in the opinion of the court is unnecessary or not useful, there remains a residual discretion in the court to excuse him if he seeks to be excused upon a ground of conscience; but such circumstances are hard to figure.[11] That residual discretion may be compared with the wide discretion which the common law of England has been said to accord to the English judge to permit a witness, whether a party to the proceedings or not, to refuse to disclose information where disclosure would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed. Where under this discretionary power disclosure is compelled, the court can impose such limitations as it thinks fit as to the persons to whom the information is to be disclosed and as to the use to be made of it outside/

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[3] Walker, Delict, ii, pp 712-713.
[9] Paras 18.19-18.20 above.
[10] Paras 18.38-18.44 below.
[11] HMA v Airs, 1975 SLT 177, at p 180.

outside the particular proceedings in which it is disclosed.[12]

18.34 If the present law relating to privileges for confidential relationships is thought to be unsatisfactory, four different legislative policies for its reformulation may be considered.[13] One policy is to decline to sanction any claim to privilege whatsoever; but the abolition of the solicitor and client privilege would make the administration of justice impossible, and such a policy has never been seriously proposed. A second policy is to protect confidences in court if the person who confided reasonably expected confidentiality: the test for admissibility would be whether the person who confided subjectively perceived the communication as being of a confidential nature; but the privilege would then be easy to claim and difficult to withhold, and the administration of justice would be seriously obstructed. The third and fourth policies assume the validity and existence of the solicitor and client privilege. The third policy is to endow the court with a discretionary power to confer a privilege in other circumstances, and the fourth is to identify any particular relationships on which it would be justifiable to confer a privilege analogous to that on communications between solicitor and client. These two latter polices are now examined in some detail.

18.35 (2) Recognition of a discretionary judicial power. The third policy is to sanction the solicitor and client privilege and to give the judge a discretionary power to recognise a privilege in other circumstances, without/

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[12] LRC 16, para 1, citing A-G v Clough, [1963] 1 QB 773, A-G v Mulholland and Foster, [1963] 2 QB 477. In D v NSPCC, [1978] AC 171, the Committee's statement as to judicial discretion was approved by Lord Hailsham of St Marylebone at p 227, with whom Lord Kilbrandon agreed at p 242, but was treated with reservation by Lord Simon of Glaisdale at p 239 and Lord Edmund-Davies at pp 244-245.

[13] The discussion in the following paragraphs owes much to the Law Reform Commission of Canada's Evidence Project Study Paper no 12: Professional Privileges before the Court.

without necessarily identifying these circumstances with a specific type of relationship, whenever he deems that a certain number of objective conditions have been met. The following guidelines would be required. Firstly, the principle according to which the privilege protects the person confiding, and not the confidant, should be maintained. Secondly, the privilege should apply only to the facts revealed to the confidant for the purpose of obtaining professional assistance. Thirdly, the limitations on the solicitor and client privilege should be applicable: the statement should not be confidential if the only purpose is to show that it was made, or if the existence of the relationship is in issue, or if it is maintained that the communication was made for the purpose of obtaining advice or assistance in committing a crime or other illegal act.[14] Fourthly, the court before granting the privilege should be convinced that, in the circumstances, disclosure would be more prejudicial than helpful to the administration of justice. In this respect, the burden of proof would thus rest on the person invoking the privilege.

18.36 It is said that a scheme of that kind would promote the exercise and development of certain professions deemed socially useful, such as that of the social worker, that it eliminates the necessity for specifying in legislation the particular professions entitled to privilege, and that it is sufficiently flexible to be considered as a long-term reform. The Law Reform Commission of Canada observe:

> "By not focusing on the existence of a particular professional relationship but rather by insisting on the values to be preserved the law would not limit the protection of privileges to a specific segment of society. Moreover, no single
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> profession/

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[14] Walkers, para 393.

> profession can be said to enjoy an absolute presumption as guardian of the values that the right to secrecy is made to sanction and protect. It would be up to future courts to establish a judicial policy in this regard. Some may object to this general solution on the grounds that the courts of common law countries have had a very conservative attitude towards privileges and that there would thus be a risk of missing the aims of a reform directed to an extension of privileges. A clear legislative drafting showing clearly the intentions of the reform would probably be sufficient to overcome this difficulty."[15]

It may perhaps be suggested, on the other hand, that however clear the drafting may be, there would be a risk of inconsistent decisions at first instance and considerable delay before any judicial policy could be developed by the Court of Session and the High Court; and that the more widely the privilege of non-disclosure is conferred, the wider are the areas closed to the judicial process in its search for the truth.

18.37 (3) Ratification of privilege for other relationships. The fourth, and most conventional, policy is to try to identify any relationships which may deserve protection before the courts, and to confer only on them a privilege identical to that enjoyed by the clients of solicitors and counsel. It is convenient to employ as the test of identification Wigmore's four requirements for the establishment of what is known in the common law world as a "professional privilege":

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

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

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

(4) The injury that would inure to the relation by the disclosure of a/

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[15] Law Reform Commission of Canada, n 13 supra, p 21.

a communication must be greater than the benefit thereby gained for the correct disposal of litigation.[16]

There are two classes of communications which may appear to meet these criteria: those to clergymen, and those to doctors. It is therefore necessary to consider whether it is practicable or justifiable to confer any privilege in these cases. Communications to journalists and communications between partners also require to be discussed.

18.38 (a) Clergymen.[17] It is not clear whether the law of Scotland confers any privilege on communications to clergymen. The authorities are few and inconclusive. The earliest case cited by the textbook-writers is Anderson and Marshall where, according to Hume,

> "... one of the ministers of Linlithgow, whom Anderson had sent for to disburden his conscience, is allowed to give evidence respecting a confession made in his presence, and that of two of the bailies of the burgh, though afterwards retracted and denied."[18]

In view of the presence of the bailies, the confession cannot be said to have been made in confidence to the minister. Anderson and Marshall is the only case on the subject which is noticed by Hume. He considers the subject in two places. Firstly, in his chapter "Of Proof by Confession, and by Declaration", after giving the above narrative, he observes:

> "But there is room to question the propriety of allowing such a disclosure; since it tends to deprive the unfortunate prisoner of the benefit of that spiritual consolation, which he so often is in need of, if he cannot have it but at the risk of his life, by filling up the measure of the evidence against him."[18]

Secondly/

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[16] Wigmore, Evidence in Trials at Common Law, (1961 ed), vol 8, no 2285, p 527; referred to in D v NSPCC, [1978] AC 171, by Lord Simon of Glaisdale at pp 237, 241; cit Law Reform Commission of Canada, n 13 supra, p 7.

[17] F G D, "The Confidentiality of Communications to Clergymen", (1898) 14 Sc L Rev 291.

[18] (1728), Hume, ii, 335.

Secondly, in his chapter "Of Proof by Witnesses", after laying down that the privilege conferred on communications to the prisoner's legal advisers is limited to communications made for professional purposes, he continues:

> "Still less is there any privilege on the part of other, though professional and confidential advisers, such as surgeons, physicians, or clergymen, with respect even to circumstances of a secret nature, which have been revealed to them in the course of their duty. It is true, no call will probably ever be made (so I have said elsewhere [ie at p 335[18]]) on a clergyman, to disclose any confession of guilt, however spontaneous, which the panel may have made to him when in gaol, and preparing for his trial, to relieve his mind, and with a view to spiritual consolation. Such a conference is a separate and a later incident, and no part of the story of the man's guilt. But put such a case as this: That a man has attempted to poison his wife; that being in bad health and seized with compunction, he has disburdened himself of this load on his conscience, to the clergyman of his parish; and that afterwards, having recovered, he returns to his cruel practices, and in the end dispatches the woman. In such a case, the interests of justice and humanity will not suffer the clergyman to suppress this confession, which is a fact in the history of the murder, and a strong circumstance in the train of the evidence against the pannel. Certainly it is desirable, that all should receive, who truly stand in need of spiritual consolation: But it is not expedient to hearten criminals in the prosecution of their crimes, or to nourish them in the hope of impunity and peace of mind, by securing the secrecy, in every event, of such communications."[19]

18.39 In Janet Hope or Walker[20] the accused made a confession to the keeper of the prison which was held to be inadmissible. The circumstances were very special. She had had frequent conversations with him on religion, and he had also been the medium of communication between her and her friends regarding her defence. Thus, although the jailer may be regarded as having been her spiritual adviser, the fact that he was also functioning as an intermediary in the preparations for the trial may have entered into the decision. Lord Justice-Clerk Hope reserved his opinion on the question "how far/

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[18](1728), Hume, ii, 335.
[19]Hume, ii, 350.
[20](1845) 2 Broun 465.

far, where a party voluntarily unbosoms himself to a clergyman, that disclosure is to be protected".[21] In David Ross, where the accused was charged with murder by poisoning, it was held that the prison chaplain might state whether or not he had asked the accused if he had bought poison, but that he might not state the answer to the question. The Court stated that no general question arose for decision. The general question of the confidentiality of a confession made by an individual to his spiritual adviser was argued but not decided in M'Laughlin v Douglas and Kidston.[22] It was assumed in the judgment that a confession by a penitent to a priest might be confidential, but it was held that the priest was bound to answer the particular question put to him in that case because the circumstances would not have brought it within the privilege if it existed. The case is only authority for the proposition that the mere fact that a statement is made to a clergyman does not make it confidential.[23] In HM Advocate v Parker[24] Lord Moncrieff, repelling an objection to the admission of evidence of a statement made by the accused to his brother when in prison awaiting his trial, stated that the plea of confidentiality protected only statements made to a spouse or to a solicitor.

18.40 Of the textbook-writers, Tait, founding on Hume, states that evidence of a confession made to a clergyman by a prisoner when in custody and preparing for his trial, in order to obtain spiritual advice and comfort, will be excluded.[25] Alison also understands that to be the law as laid down by Hume, but argues for the extension of the privilege to confessions made to a clergyman at any time, in order to unburden the/

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[21](1859) 3 Irv 434.
[22](1863) 4 Irv 273.
[23]Walkers, para 397(d).
[24]1944 JC 49, at p 52.
[25]George Tait, A Treatise on the Law of Evidence in Scotland (1824), p 396.

the conscience and obtain spiritual consolation.[26] Both Tait and Alison appear to misunderstand Hume. Dickson's view is that the question whether confessions made to a clergyman are privileged must be considered as open; and that it is not likely that the court would refuse to protect communications of that nature unless in some extreme case such as that of the wife-poisoner put by Hume. He adds that if the privilege exists at all, it is for the protection of the prisoner, and the clergyman ought not to be allowed to waive it.[27] Macdonald states that the question has not been absolutely decided, but:

> "Where the communing is strictly of a religious character, it would probably be held privileged. It is thought that unless in very special circumstances, the Court would not think it proper to allow the disclosure of such statements."[28]

In Renton and Brown it is said that the position is not clear.[29] Lewis states that the question would evidently fall to be decided according to the nature of the communications and the circumstances of each particular case.[30] In Green's Encyclopaedia of the Laws of Scotland the writers of the articles on "Confidential Communications" note that the question has not been made the subject of express decision,[31] but in his article on "Evidence" Mr James Walker (later Lord Walker), citing M'Laughlin v Douglas and Kidston,[32] states categorically that no privilege is accorded to clergymen to refuse to depone the matters communicated to them under seal of secrecy.[33] The Sheriffs Walker cite M'Laughlin[32] for the proposition/

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[26] Alison, ii, 471, 537, 586.
[27] Dickson, para 1685. See note (c).
[28] Macdonald, pp 314-315.
[29] R & B, para 18-43.
[30] Manual, p 127.
[31] 1896 ed, vol iii, p 185; 1927 ed, vol iv, p 352.
[32] (1863) 4 Irv 273.
[33] 1928 ed, vol vi, p 430.

proposition that the mere fact that a statement is made to a clergyman does not render it confidential,[33a] and note that according to Hume a voluntary confession is not confidential. After citing Macdonald, Alison and Parker they observe that there would be something unsatisfactory about a rule which encouraged the criminal to have the best of both worlds, easing his conscience and evading punishment at the same time.[34]

18.41 In England the authorities are against the existence of any privilege,[35] and both the Law Reform Committee[36] and the Criminal Law Revision Committee[37] were opposed to any change in the law. A privilege is, however, recognised by the law of various parts of the Commonwealth[38] and by the American Uniform Rules of Evidence, Model Code of Evidence and Proposed Federal Rules of Evidence.[39]

18.42 Before summarising some of the arguments on the question of the formal recognition of a privilege in favour of communications to clergymen in the law of Scotland, it may be observed that in Scotland the question appears to be of little practical importance. The communication is known only to the clergyman and the person who made it, and it is difficult to envisage circumstances in which, as a practical matter, there is any likelihood of the clergyman being asked to disclose it in the/

[33a] Cf Minter v Priest, [1930] AC 558, Lord Buckmaster at p 568: "The mere fact that the person speaking is a solicitor and the person to whom he speaks is his client affords no protection."

[34] Walkers, para 397(d).

[35] Cross, p 256.

[36] LRC paras 46-47.

[37] CLRC paras 272-275.

[38] Eg Newfoundland Evidence Act, R S Nf 1952, ch 120, art 6; Code of Civil Procedure of Quebec, art 308: cit Law Reform Commission of Canada n 13 ante, p 7.

[39] Cit Law Reform Commission of Canada, n 13 supra, p 12. Rule 219 of the Model Code defines a "penitential communication" as "a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of the discipline or practice of the church or religious denomination or organisation of which the witness is a member". See Cross, p 257.

the Scottish courts. As the paucity of reported authority demonstrates, such a situation hardly ever occurs. In a civil case, if the clergyman were called as a witness to some other fact, it is most unlikely that a question would be put to him about the communication. In a criminal case it is even more unlikely that the Crown would call him to speak to the communication in order to secure a conviction. In either type of case, even if the question were put, it seems improbable that the presiding judge would find him guilty of contempt of court for refusing to answer it, because if he did so the public's respect for the judicial process would not be enhanced. So far, the Scottish legal system has avoided confrontations of this sort. It may also be noted, as a minor consideration, that a clergyman might be held to be entitled not to answer in the following situations. Firstly, if a privilege relating to the conciliation of estranged spouses were to be recognised by the law of Scotland, a clergyman might be able to rely on it in a case where he had taken part in negotiations between such spouses.[40] Secondly, if in any case he sought to be excused from giving evidence about a communication in answer to a relevant question which the court deemed to be neither necessary nor useful - a highly unlikely eventuality - the court might excuse him in the exercise of its residual discretion.[41]

18.43 Among the arguments in favour of the conferment of a privilege are that it would enable a wrongdoer to obtain spiritual consolation and encouragement to lead a better life, and that it would avoid the possibility of a conflict between the duty imposed on a priest by the rules/

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[40] See ante, paras 18.29-18.32.

[41] HMA v Airs, 1975 SLT 177, at p 180.

rules of his church to keep secret a confidence, in particular one made during confession, and his legal duty to obey a requirement to reveal the confidence in court. The contrary arguments are thus expressed in the Eleventh Report of the Criminal Law Revision Committee:

> "274. But the great majority of the committee, while fully sympathizing with the arguments above, are opposed to recommending the conferment of a privilege in respect of these communications. Their main reason is that there should be no restriction on the right of a party to criminal proceedings to compel a witness to give any information in his possession which is relevant to the charge, unless there is a compelling reason in policy for the restriction, and that the arguments for the proposal are not strong enough for this purpose. No serious difficulty has arisen for a great many years, and the majority are satisfied that the prosecuting authorities and the courts would always be able to prevent a clash such as mentioned above. In a case where the accused had told a minister of religion that he had committed the offence charged - or, say, that he had a propensity to commit an offence of this kind - it would be exceptional for the prosecution to know of the communication, and there would have to be a strong reason for the prosecution to seek to compel the minister to give evidence about the communication or for the court to insist that he should give the evidence. On the other hand, it might occasionally happen that one of two accused persons had confessed to a minister that he alone, and not his co-accused, committed the offence. Even if any minister of religion felt able to stand by and let a possibly innocent person be convicted when the minister was in a position to exculpate him by giving evidence, we should not wish to recommend legislation which would allow this. It is possible, therefore, that any provision which might be enacted should apply only to information given by the accused about his own conduct. We have no doubt that the legislation would have to secure that the minister should be compellable to give evidence about a disclosure which the person who made it was willing to have disclosed.[42] Whether the minister should be free (so far as the law is concerned) to give the evidence without the consent of the person who made the disclosure is a more difficult question, and the fact that it would arise is an additional reason for our preference for not legislating but for leaving it to the courts and prosecuting authorities to deal with any case which might arise in practice."

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[42]This would be contrary to the rule in Cook v Carroll, [1945] IR 515, in the Republic of Ireland, where Gavan Duffy J held that a Roman Catholic priest had the right to refuse to reveal a statement made to him in his character as a priest, and irrespective of the wishes of the person who made it. The decision was based partly on the common law but also took account of the "special position" of the Roman Catholic Church as recognised in the constitution.

18.44 The English Committees began their deliberations from the point that, although there was no conclusive decision in English law, the overwhelming weight of authority, both judicial and in books on the law, is to the effect that English law did not attach any privilege to communications to ministers of religion. In Scotland, on the other hand, in view of the uncertain effect of the decisions and the statements of writers subsequent to Hume the position is not so clear. It would, however, be difficult to legislate on the matter. If it were to be declared that no privilege existed, it might not be generally understood that such a declaration did not effect any practical change in the administration of the law in the courts. If it were to be declared that some privilege did exist, it would be necessary to formulate a generally acceptable definition of the communications to which the privilege attached, to resolve the difficulties mentioned by the Criminal Law Revision Committee, and to identify the clergymen to whom the privilege applied having regard to the increasing number of movements of religious or supposedly religious character which exist in modern Scotland.[42a] It may be thought that if no new provisions of any kind were to be enacted, any problems which might arise in practice would arise in most unusual circumstances and would be most suitably resolved by judicial decision.

18.45 (b) Doctors. A doctor must, if called on, give in evidence information which he has obtained about his patient from observation.[43] It is thought that an oral or written communication made by the patient to the doctor is not privileged, unless made in connection with the dispute/

[42a] The problem of identification could perhaps be overcome by providing for prescription by regulations, as in the Marriage (Scotland) Act, 1977 (cap 15), sec 8.

[43] AB v CD, (1851) 14 D 177, Lord Fullerton at p 180.

dispute.[44] Dickson states the law in this way:

> "Communications made by a person to his medical attendant are not privileged; for the discovery of truth is in general more important than the preservation of the confidence which has often to be reposed in a physician or surgeon. At the same time, good feeling should induce a party not to force a medical man to disclose communications of a confidential nature, unless the interests of justice make that really necessary."[45]

Like a clergyman, a doctor might, in the event of the recognition of a privilege in aid of matrimonial conciliation, be entitled to claim such a privilege if he had acted as a conciliator of spouses;[46] and he might, in circumstances very difficult to conceive, be excused from answering a relevant question which was held to be neither necessary nor useful.[47]

18.46 In English law no privilege is recognised, but the judge, by virtue of the overriding discretion to control his court which all English judges have, may if he thinks fit, having regard to the importance of the potential answer to the issues being tried, tell a doctor that he need not answer a question about matters which the doctor would normally regard as confidential.[48] Both the Law Reform Committee[49] and the Criminal Law Revision Committee[50] recommended that the law should not be altered. On the other hand, some privilege is granted by the laws/

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[44] Walkers, para 397(c). In Rogerson v Rogerson, 1964 SLT (Notes) 89, the question whether the defender in a divorce action could object on the ground of confidentiality to the disclosure of psychiatric records relating to him was raised but not decided.

[45] Dickson, para 1688.

[46] See paras 18.29-18.32 above.

[47] HMA v Airs, 1975 SLT 177, at p 180.

[48] Cross, p 258; Hunter v Mann, [1974] QB 767.

[49] LRC, paras 48-52. The Committee's criticism of Nuttall v Nuttall, (1964) 108 Sol J 105, at para 51, was in turn criticised by Lord Edmund-Davies in D v NSPCC, [1978] AC 171, at pp 244-245.

[50] CLRC, para 276.

laws of New Zealand, Victoria, Tasmania, and most American states and by the Uniform Rules, Model Code and Proposed Federal Rules.[51] In favour of granting a privilege in the law of Scotland it may be argued that the doctor and patient relationship fulfils all Wigmore's criteria for the recognition of a privilege:[52] as to the fourth of these, that the injury done to the relationship by disclosure must be greater than the benefit gained for the correct disposal of litigation, it may be contended that a confidential relationship is necessary for the restoration and maintenance of health, which is at least as important as, if not more important than, the administration of justice. But here, as in the case of the clergyman, the questions arise whether the present law creates any significant practical problem, and if so, whether it is practicable to confer any statutory privilege.

18.47 If there is evidence that medical treatment is hampered to any material degree by the absence of some kind of privilege, or that the existence of a privilege would significantly improve the health of the community by encouraging persons to seek medical advice and treatment who would not otherwise do so, it would clearly be justifiable to attempt to formulate a statutory provision. Whether such evidence exists is a matter about which information may be obtainable from the medical profession. As to the practicalities which confront the lawyer, it may be observed that in the civil courts doctors are most commonly called as witnesses in actions of damages for personal injuries, where averments about the pursuer's injuries and treatment are made by the pursuer himself and, frequently, by the defender, and all the relevant medical records are/

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[51] See LRC 16, para 48; Law Reform Commission of Canada, n 13 supra p 12; Cross, p 258.

[52] See para 18.37 above.

are recovered. If a statutory privilege were created, it would be necessary to make an exception to deal with this very common situation. There are other classes of civil litigation where justice cannot be done without the disclosure by a doctor of information which he has obtained in the course of his relationship with a patient, such as cases of medical negligence or cases where the issue is the sanity or facility or testamentary capacity of the patient, or the truth of statements made by him in order to obtain insurance. There may be a case for limiting any privilege to communications between a patient and his psychiatrist, on the ground that confidentiality is of particular importance in the treatment of an ailment of a mental or emotional nature.[53] Several models of legislation, especially the American Proposed Federal Rules of Evidence, accord a privilege to psychotherapists but not to physicians in general; but it is said that the main difficulty raised by such a limitation is the impossibility that very often exists of distinguishing the physical ailment from the mental one.[54]

18.48 It may be convenient to set out here the views of the Law Reform Committee, the Criminal Law Revision Committee, and the Law Reform Commission of Canada. The Law Reform Committee stated their views on a privilege for psychiatrists, and on the whole matter, as follows:

> "It is said, no doubt with justification, that successful psychiatric treatment is dependent upon the utmost candour and confidence between doctor and patient and that psychiatrists are the recipients of a wide variety of confidences which might be relevant as admissions upon issues other than the health of the patient. But we find it difficult to envisage situations which are not fanciful in which a psychiatrist is likely to be called as a witness except on an issue as to the mental or emotional state of a patient; and, since a psychiatric diagnosis depends largely upon what the patient has told the

psychiatrist/

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[53] See Rogerson, n 44 supra.
[54] Law Reform Commission of Canada, n 13 supra, p 19.

psychiatrist, we find it impracticable to draw any line a priori between communications by the patient which ought to be disclosed to enable the accuracy of the diagnosis to be tested and those which it is unnecessary to disclose for this purpose.

"51. These considerations have driven us to the conclusion that, where a doctor is called, whether by the patient himself or by some other party, to give evidence upon an issue as to the mental or physical condition of one of his patients, it is impracticable to define in a statute the circumstances in which he should be permitted to refuse to answer questions upon information obtained from the patient as his medical adviser unless the patient consents to his doing so. The propriety of allowing him to refuse must depend upon all the circumstances of the case and is, we think, best left, as at present, to the judge. The way in which judges have exercised that discretion in the past in civil cases has given little ground for complaint from the medical profession and we think that they can be relied on in the future to hold the balance fairly between the Hippocratic oath[55] and the witness's oath to tell the whole truth."[56]

18.49 The Criminal Law Revision Committee observed that there was a difficult question as to what should be the scope of the privilege, if given. It might be a wide one which would allow the doctor to refuse to give evidence (without the patient's consent) about any communication made to him by the patient in confidence, even one concerning a physical ailment or injury or, perhaps, even about the facts of any treatment given. They commented:

"... we think that, even if any privilege were given, it would be wrong to go as far as this. To do so might exclude information which it was important in the interests of justice to have before the court. For example, it would be a scandal if a criminal who had been injured when blowing a safe or committing a robbery could prevent the doctor who had attended him from revealing what the criminal told him about how he came by his injury. There would be a stronger case for giving a narrower privilege according to which a person who had told a doctor practising psychiatry, in confidence, about an offence which he had committed, or a criminal propensity to which he was subject, for the purpose of obtaining advice or treatment which

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[55] It is said that very few British medical schools require their graduands to swear the Hippocratic oath: Donald Gould, "Should a Doctor Tell?", New Statesman, 5th July 1974.

[56] LRC, paras 50-51.

might help him to avoid committing offences in future, could object to the doctor's giving evidence about this. It is undoubtedly desirable that a person should consult a doctor for this purpose; and it can be argued that the possibility that this would bring about a reform in the conduct of the person in question is a good enough reason for conferring the privilege. The British Medical Association, in a memorandum sent to the Law Reform Committee and ourselves, argued in favour of conferring a medical privilege and said that, while the possibility of a conflict between medical and legal obligations applied to all physicians, 'the dilemma is most acute in the field of psychiatry'. They added:

> 'If a psychiatrist is to assist his patient, and in criminal cases possibly to assist the court to the best of his ability, it is essential that his interviews with his patient should be free and frank. In the course of such frank discussions matters may be brought to light which, whilst relevant to the mental state of the person concerned, will be gravely prejudicial to his interest, if the doctor is, as now, compelled to report them in open court'.

When we discussed this question, the general view was that the privilege, if given, should be the narrower one mentioned above, although it might sometimes be difficult to decide whether the case was a psychiatric or an ordinary medical one. For example, an unsophisticated person might consult a general practitioner about a problem about which a more sophisticated person would consult a psychiatrist, or a doctor might see that what a patient thought was a physical condition was in fact the result of psychological disturbance. In any event, we thought that some exceptions would have to be made. An example would be where the accused called the doctor as a witness in order to make out a defence of insanity, diminished responsibility, or some other defence depending on his mental state, and the prosecution wished to cross-examine the doctor in order to rebut the defence. However, in the end we decided, by a large majority, that for reasons similar to those in relation to ministers of religion - in particular the unlikelihood that any difficulty would arise in practice - we should not recommend that any privilege should be conferred in relation to medical practitoners."[57]

18.50 The Law Reform Commission of Canada considered what the limitations on any privilege should be:

> "As in the case of all the other categories of confidants, the recognition of a privilege in this matter should be subject to strict limitations. All legislation provide exceptions to the

rule/

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[57] CLRC, para 276.

rule, dictated by higher legal or social considerations, even those which, like French law, sanction the absolute character of the privilege. Thus, disclosures made by a patient to a doctor for the purpose of perpetrating a crime, fraud or offence, should not be protected. Such is the classical case of fraud or false statements in matters of life insurance. Furthermore, the law should sometimes compel a physician to depart from his obligations to keep silent when this is required by the superior interest of society or of the group, even when the patient objects. Such is the case when a patient suffering from a contagious or a veneral disease refuses treatment, thus creating the risk of an epidemic, or when a patient suffers from an illness which makes driving a car a hazard to others.

"The recognition of privilege does not mean absolute protection to all confidences, in all cases and under all circumstances. It would be advisable for the legislator to list the specific limitations of the privilege and to waive it when its application stands to create serious public danger, or threatens the life or security of individuals. This matter raises the difficult legal question of determining whether or not the right to the privilege is personal and extra-patrimonial. In other words, when the holder of the right dies or becomes incapable, should the privilege disappear or should the holder's heirs or legal representatives be allowed to continue to claim it? Opinions are divided on this question. The solution to this problem must take into consideration the interests at stake. Thus, in the case of medical privilege the health and general well-being of the patient are involved. There should therefore be no basic objection to the disappearance of the privilege after the patient's death. However, the client-attorney relationship can involve patrimonial rights as well as material and financial interests which are likely to be transmitted to the heirs. It would seem logical in this case to maintain the privilege and to allow those who are continuing the deceased's judicial personality to benefit from it."[58]

18.51 (c) Journalists. A journalist does not enjoy any privilege, on grounds of confidentiality or otherwise, which entitles him to refuse to answer any proper questions when he is adduced as a witness before a Scottish court.[59] The law of England is the same.[60] In Scotland the court might, in the exercise of its discretion, excuse him from answering a/

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[58] Law Reform Commission of Canada, n 13 supra, pp 19-20.
[59] HMA v Airs, 1975 SLT 177, at p 179.
[60] A-G v Clough, [1963] 1 QB 773; A-G v Mulholland and Foster, [1963] 2 QB 477.

a relevant question which was judged to be unnecessary or not useful; but such circumstances would be quite exceptional.[61] In the law of defamation, there is a general rule of practice that the publisher of a newspaper will not be compelled to reveal the name of the author of a statement appearing in the newspaper's columns, but it has never been suggested that a newspaper has a legal right to refuse disclosure when that is ordered by the court, and several exceptions to the rule of practice have been recognised.[62] It seems clear that in the case of communications to journalists there is no consideration in favour of granting a privilege which could override the public interest in the ascertainment of the truth and the administration of justice in the courts. The position of the journalist may readily be contrasted with that of the lawyer, the clergyman and the doctor. Unlike them, he does not receive confidences in order to provide professional assistance to those who confide in him; and while the identity of those who communicate in confidence with lawyers, clergymen and doctors can generally be ascertained but not the content of such communications, in the case of the journalist the content of the communication is made public but not the identity of the communicator. It is therefore submitted that while it may be appropriate to consider the granting of a privilege in the case of clergymen and doctors, it is unnecessary to do so in the case of journalists.

18.52 (d) Partners. The Sheriffs Walker state that with certain exceptions, communications between husband and wife and between partners and professional communications between solicitor and client are confidential/

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[61] HMA v Airs, 1975 SLT 177, at p 180.

[62] See E M Clive, "Non-Disclosure by Newspapers in the Law of Defamation", 1963 SLT (News) 169.

confidential.[63] It appears, however, that communications between partners are not generally understood to be entitled to privilege. Neither Dickson nor Lewis discusses them in the part of his work which deals with evidence privileged on the ground of confidentiality;[64] Lord Moncrieff laid down that the privilege attached only to communications to spouses and to solicitors;[65] and it is thought that no modern Scottish textbook other than the Sheriffs Walker's work suggests that communications between partners are privileged.[66] The learned authors cite two authorities, Tannett, Walker & Co v Hannay & Sons[67] and Pearson v Anderson Brothers.[68] In the first, in conjoined actions the pursuers sued the defenders for the balance of an account incurred for machinery and the defenders sued the pursuers for damage said to have been caused by the bad working of the machinery. The defenders sought to recover documents including communications between Walker, one of the pursuers, and his partners relating to the machinery prior to April 19, 1872. Walker was believed to have had communications with his partners both as to the repairs on the machinery and the question as to who was to bear the expense of these. The significance of the date does not appear from the report. The pursuers objected to recovery on the ground of confidentiality. According to the report, no authority was cited for the proposition that privilege attached to communications between partners/

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[63] Walkers, para 391. See also the Report of the Committee on Privacy (the Younger Report), 1972, Cmnd 5012, Appendix I, para 74, where it is said that it appears that under Scots law communications between partners are privileged.

[64] Dickson, paras 1658-1689; Lewis, Manual, pp 124-128.

[65] HMA v Parker, 1944 JC 49.

[66] Walkers' proposition, and the authorities which they cite, have not been found in J Bennett Miller, Law of Partnership in Scotland (1973).

[67] (1873) 11 M 931.

[68] 1897, 5 SLT 177.

partners: the only case cited was Livingstone v Dinwoodie,[69] for the proposition that if the communications could not be made evidence they ought not to be recovered, a proposition which is no longer regarded as sound.[70] Lord President Inglis said:

> "I am not inclined to allow the fourth article [of the specification of documents, describing the communications]. I do not think that letters between partners of a firm can be allowed to be recovered unless under very exceptional circumstances, and unless specific grounds are stated for their recovery. If one partner had been sent to another country to act for the firm in a particular transaction there might be a reason for recovering the letters to him, to shew what his transactions were. But very special cause would be required, and we have none such here."[71]

Lord Deas said:

> "With regard to communications said to have passed between the partners, something very special would be requisite to authorise these being recovered."[71]

Lord Ardmillan and Lord Jerviswoode concurred. The decision may be explicable on the ground that the communications were made post litem motam in respect that they were concerned with the question of which party was to bear the expense of the repairs. It seems to have been so understood by Hamilton Grierson,[72] Lewis[73] and Guild.[74] The learned Sheriffs' second authority, Pearson v Anderson Brothers,[68] is an Outer House case in which the defenders objected to a diligence to recover letters passing between partners of their firm in their office in/

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[68] 1897, 5 SLT 177.
[69] (1860) 22D 1333.
[70] Admiralty v Aberdeen Steam Trawling and Fishing Co Ltd, 1909 SC 335, L P Dunedin at p 340; Black v Bairds & Dalmellington, 1939 SC 472, L J-C Aitchison at p 478; Young v National Coal Board, 1957 SC 99, Lord Blades at p 108.
[71] (1873) 11 M 931, at p 932.
[72] In his edition of Dickson (3rd ed), para 1374, and his article, "Confidential Communications" in Green's Encyclopaedia of Scots Law, vol iii (1896 ed), p 183.
[73] Manual, p 193.
[74] D A Guild, "Confidential Communications" in Green's Encyclopaedia, vol iv (1927 ed), p 344.

in America and their office in Scotland on the ground that, being communications between partners, they were confidential. The Lord Ordinary sustained the objection on the authority of Tannett Walker & Co, but it seems clear the he understood that decision to have been based on the consideration that the partners were litigants on the same side, and that he based his own decision on the same ground. Guild understands Pearson to have been decided on the basis that the communications were made post litem motam.[74] No other cases with a bearing on the learned Sheriffs' proposition have been traced.[75] It is thought that there are no grounds for granting a privilege to communications between partners, and that it may be desirable to make it clear that no privilege attaches to them.

18.53 (e) Other relationships. There are many other relationships in which the recipient of a communication owes to a communicator a duty of non-disclosure. Accountants, banks, insurance companies and many employees and agents owe such a duty to their clients, customers or employers.[76] They do not, however, enjoy the privilege of withholding in court the information they receive if it is relevant to an issue upon which the court is adjudicating, unless in highly exceptional circumstances they are excused by the court in the exercise of its discretion.[77] It is thought that there are insufficient grounds for creating/

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[74] D A Guild, "Confidential Communications" in Green's Encyclopaedia, vol iv (1927 ed), p 344.

[75] In Catto, Thomson and Co v Thomson and Son, (1867) 6 M 54, cit by Dickson, para 1361, diligence to recover a partner's private books was refused not on the ground of confidentiality but on the ground that they would not be the writ of the firm.

[76] Walkers, para 397(a), (b); Walker, Delict, ii, pp 712-713.

[77] HMA v Airs, 1975 SLT 177, at p 180. See ante, para 18.33.

creating any statutory privilege in respect of any of these relationships. That was the conclusion reached by the Law Reform Committee.[78]

6. Public policy

18.54 Evidence may be excluded on grounds of public policy. Various matters are inadmissible because their disclosure would obviously affect the administration of public affairs or the administration of justice. As to the latter, the rules as to the competence as witnesses of judges, jurors and arbiters have been considered in Chapter 3, paragraphs 3.08-3.15. As to the former, it is thought that it would be inappropriate to consider any reform of the rules as to the exclusion of evidence on other grounds of public policy in the context of the reform of the law of evidence in Scotland. In Conway v Rimmer Lord Reid said that in the field of public policy - the proper relation between the powers of the executive and the powers of the courts - he could see no rational justification for the law being different in Scotland and England.[79] Lord Upjohn said:

> "While the law of England and that of Scotland may differ in many respects it is really essential, in the interests of justice to Her Majesty's subjects in both parts of the United Kingdom, that the rules relating to Crown privilege should be the same."[80]

In Conway the House of Lords resolved various differences between the English courts on the one hand and the rest of the common law world and Scotland on the other. Since Conway there have been several decisions of the House of Lords in English appeals[81] and other English decisions/

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[78] LRC 16, para 54.
[79] [1968] AC 910, at p 938.
[80] [1968] AC 910, at p 990.
[81] R v Lewes Justices, exp Secretary of State for Home Department, [1973] AC 388; Norwich Pharmacal Co v Customs and Excise Commissioners, [1974] AC 133; Alfred Crompton Amusement Machines Ltd, v Customs and Excise Commissioners (No 2), [1974] AC 405; D v NSPCC, [1978] AC 171.

decisions[82] which will clearly require to be considered in appropriate cases in Scotland.[83]

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[82] In re D (Infants), [1970] 1 WLR 599; R v Cheltenham Justices, ex p Secretary of State for Trade, [1977] 1 WLR 95.

[83] For example, dicta restricting the scope of claims for non-disclosure on the ground of public interest, in MacArthur v MacArthur, (1946) 62 Sh Ct Rep 137, and Higgins v Burton, 1968 SLT (Notes) 52, are inconsistent with Conway, In re D and D v NSPCC (nn 78, 81, 80 supra). Other Scottish authorities are noted in Walkers, paras 295, 399.

Chapter 19

HEARSAY[1]

1. Introduction

19.01 This chapter is concerned with the admissibility of oral hearsay. The admissibility of hearsay statements in documents has been considered in Chapters 11 and 12. This section of the present chapter contains a discussion of the reasons for the exclusion of oral hearsay, the disadvantages which result from its exclusion, and various possible methods of reform of the law. The following sections of the chapter consider various aspects of the present law which have caused, or seem likely to cause, difficulties in practice. Secondary hearsay is discussed in relation to (1) the maker of the statement, (2) double hearsay, (3) the nature of the statement and (4) dying depositions. Next, primary hearsay is considered in relation to (1) previous consistent statements, (2) de recenti statements, and (3) previous inconsistent statements. There follows a discussion of evidence of previous identification, and of statements forming part of the res gestae. Extrajudicial admissions, and statements made by suspects and accused persons, are considered in Chapter 20.

19.02 (1) The present law. It is thought that the present law may be very briefly stated in the following terms.[2] Hearsay evidence is evidence of what another person has said. So defined it includes both secondary hearsay, which may be admissible as indirect evidence of the facts alleged in the statement, and primary hearsay, which may be admissible/

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[1] Walkers, chap 29; R & B, paras 18-82 to 18-92; Cross, chaps 17-20; Phipson, chaps 15, 21; Law Reform Commission of Ontario, Report on the Law of Evidence, chaps 1-3; Law Reform Commission of New South Wales, Working Paper on the Rule against Hearsay; H A Hammelmann, "Hearsay Evidence, a Comparison", (1951) 67 LQR 67.

[2] Adapted from Walkers, paras 370, 371, 375.

admissible as direct evidence that the statement was made, irrespective of its truth or falsehood. Evidence of the fact that a statement was made is admissible, provided that the mere fact that the statement was made, irrespective of its truth or falsehood, is relevant; but hearsay is usually inadmissible as evidence of the facts alleged in the statement.

19.03 (2) Reasons for the exclusion of hearsay evidence. The cautious attitude of the present law towards the admission of hearsay evidence appears to be based on the following considerations. (a) Hearsay is evidence of a statement made by a person when not under oath and not subject to cross-examination or the scrutiny of the court. (b) Hearsay is not "the best evidence." (c) There is a danger of inaccuracy through the repetition of the statement. (d) Juries would be unable to evaluate hearsay evidence accurately. (e) Hearsay evidence may be superfluous. (f) Hearsay evidence may be concocted. Each of these reasons may be thought to have some substance: the question is, however, whether they are so weighty as to make it impossible to contemplate any relaxation of the present law.

19.04 (a) Since the statement is not made on oath in court and the maker is not subject to cross-examination, the tribunal of fact cannot evaluate his credibility and reliability at first hand by the traditional methods. On the other hand there may be cases where the circumstances in which the hearsay statement was made indicate what opportunity the maker of the statement had to perceive the facts of which he speaks, and what likelihood there is of his reporting them correctly. And there are cases where a statement made shortly after the transaction in question is more likely to be reliable than evidence given by the maker in court months or years afterwards.

19.05/

19.05 (b) In considering the objection that hearsay is not "the best evidence" it seems necessary to distinguish between the best conceivable evidence and the best reasonably available evidence. It may obstruct the ascertainment of the truth to exclude a hearsay statement where by the time of the trial the maker can no longer accurately recollect the matters dealt with in the statement, or cannot be found or brought to court without the expenditure of an inordinate amount of time and money.

19.06 (c) As to the danger of inaccuracy through repetition, it may be observed that the danger decreases, the fewer the number of links in the chain of communication. A's evidence of what B said is less likely to be inaccurate than A's evidence of what B told him C said. It is true that even in the former case there is a risk of error, since A may have an imperfect recollection of what B said, or may have misheard or misunderstood B in the first place. But A may be cross-examined to test whether he is credible and reliable, and whether the original conditions of hearing and understanding the statement were satisfactory. The danger of inaccuracy is tolerated at present in cases where hearsay is admissible, and it may be that at least in the case of first-hand hearsay (where A gives evidence of what B said) the danger is not so great as to be an insuperable obstacle to reform.

19.07 (d) The fear that juries would be unable to weigh hearsay properly may be based on an unduly unfavourable view of the capacity of a modern jury, properly directed, to weigh accurately different kinds of evidence. It may now be appropriate for the law to correspond in this respect with Cockburn C J's dictum of more than a century ago:

> "People were formerly frightened out of their wits about admitting evidence lest juries should go wrong. In modern times we admit the evidence and discuss its weight."[3]

At/

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[3] R v Birmingham Overseers, (1861) 1 B & S 763, at p 767; 121 ER 897, at p 899.

At present, juries not only have to assess hearsay which is admissible under the law as it now stands, but are expected to appreciate the weight and purpose of different kinds of evidence, and to perform other tasks which are not entirely straightforward: they must consider a witness's prior statements, when admissible, as going to credibility only; they must not take into account a confession by one accused as evidence against his co-accused; they must not draw an inference against the accused from his silence when cautioned and charged or, usually, from his failure to give evidence in court; if they hear inadmissible evidence they must put it out of their minds. It seems arguable that a tribunal which is expected to understand and perform duties such as these would be able, with adequate direction, to evaluate a wider range of hearsay evidence than is admissible at present. There may be force in the Criminal Law Revision Committee's observation:

> "Anybody with common sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can."[4]

19.08 (e) It may be considered that there is a risk that, if hearsay were to be more widely admissible, parties would call an unnecessary amount of hearsay as well as direct evidence, and thus lengthen the proceedings and, in a jury trial, confuse the jury. But such a risk may not be great. It is thought that considerations of tactics and expense would continue to impel advocates to call only the most convincing evidence, and therefore to call direct evidence in preference to hearsay whenever direct evidence is reasonably available. A party's failure to call reasonably available direct evidence would be likely to cause a judge to infer that such evidence, if called, would have been unfavourable to that party; and in a jury trial he should be entitled/

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[4]CLRC, para 247.

entitled to comment in that sense to the jury. On the other hand, there may be cases where the most convincing evidence is hearsay, and the leading of that evidence would shorten rather than lengthen the proceedings and simplify the task of the judge or jury.

19.09 (f) The risk of the manufacture of hearsay evidence may be difficult to assess. It is possible that witnesses, particularly in criminal cases, would be prepared to give false evidence of previous statements by witnesses and accused persons, and false evidence of statements by unavailable or unidentifiable third parties in favour of the accused. Such evidence might be difficult to check or to challenge. On the other hand the risk of fabrication of such evidence would be obvious to the judge or jury as a matter of common sense, and the credibility of the witness and the strength of the excuses offered for the unavailability or unidentifiability of the maker of the statement could be tested in cross-examination. The question is whether the risk of fabrication is a sufficient reason for continuing to exclude first-hand hearsay evidence which in many cases may be more reliable than the evidence now admissible in court. If it is thought that that is a sufficient reason, it seems necessary to appreciate that the exclusion of hearsay on this ground forms an exception to the normal rule that the risk of bias or manufacture goes only to the weight of evidence, and not to its admissibility.

19.10 (3) Disadvantages of the hearsay rule. The disadvantages of the present law as to the exclusion of hearsay may be said to be these: (a) the exclusion of reliable evidence; (b) impossibility or expense of adducing admissible direct evidence; (c) disturbance of the natural flow of testimony and the adoption of evasive devices; (d) complication of the exceptions to the rule; (e) divergence between the information available to courts and to tribunals, inquiries and arbitrations.

19.11/

19.11 (a) Much reliable evidence is excluded, particularly of statements by a person who for good reason is not available to testify at the trial. There is therefore a risk of injustice through the court's inability to weigh all the available sources of information about the issue it has to decide.

19.12 (b) The need to call direct rather than hearsay evidence may make it impossible, or unduly expensive, to prove particular facts. The identification of the maker of the statement and the expense of bringing him to court may be costly, and the inconvenience to the maker may be inordinate.

19.13 (c) In court, the exclusion of hearsay prevents the witness from testifying in a natural way, by recounting hearsay in the course of his narrative. And advocates employ devices which technically do not infringe the rule but permit the trier of fact to infer the sense of the excluded information. ("Just answer 'Yes' or 'No', Constable: Did you receive a wireless message? - Yes. As a result of that where did you go? - To the house of A in B road. When you got there did you see some one? - Yes, I saw X. Do not tell us what he said but as a result of that what did you do? - I went to the house of C in D street and arrested Y.")

19.14 (d) The present law contains a number of difficulties and complexities, which are examined in detail later in this chapter. The admissibility of secondary hearsay which depends on the maker of the statement's death or permanent insanity, rather than on his unavailability for some other good reason seems unduly limited;[5] and the same may perhaps be said of the restrictions on the type of statement admissible/

[5]See paras 19.22-19.26 below.

admissible as secondary hearsay.[6] Statements in dying depositions are admissible on the ground that they are likely to be true; but in fact they may well be quite unreliable.[7] It is difficult to understand why previous inconsistent statements are generally admissible to discredit a witness, while previous consistent statements are not generally admissible to support him, and in neither case is the previous statement admissible as evidence of the facts stated in it.[8] The question of the admissibility of evidence of a witness's previous identification of the accused appears to be somewhat confused.[9] And the law as to the admissibility of statements as part of the res gestae appears to require restatement.[10]

19.15 These rules, and other rules as to extrajudicial admissions and confessions, which are discussed in the next chapter, are said to result in directions to juries which are "too subtle" or "unrealistic",[11] such as that a witness's previous statements are admissible only to support or impugn his credibility, and not as evidence of the facts stated in them; and that a confession by one accused is not evidence against another. Opinions appear to differ on the question whether directions such as these are in fact too difficult for a jury to appreciate;[11] but some of the rules nevertheless seem difficult to justify.

19.16 (e) In modern times many important issues are contested in public inquiries and before statutory tribunals with the assistance of material which would not be admissible in a court of law. Such bodies need/

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[6] See paras 19.29-19.32 below.
[7] See paras 19.33-19.37 below.
[8] See paras 19.41-19.42, 19.53 below.
[9] See paras 19.59-19.68 below.
[10] See paras 19.69-19.74 below.
[11] See paras 19.45, 19.56-19.57 below.

need not hear evidence on oath and may, within certain limits, regulate their own procedure.[12] In practice their decisions are based on information, whatever its source, of some probative value: regardless of the technical rules of evidence, information is taken into account if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant.[13] Decisions are reached in this way on issues which are comparable in importance to the parties, or to society, to those commonly litigated in the civil courts; and it seems important to observe that the fact that such issues are so decided appears to be acceptable to the public. If that is so, it may be that the courts could safely go some distance towards a relaxation of the exclusionary rules of evidence in general, and of the rules as to hearsay in particular. The following dictum of Diplock L J appears to be appropriate to the present law of Scotland:

> "For historical reasons, based on the fear that juries who might be illiterate would be incapable of differentiating between the probative values of different methods of proof, the practice of the common law courts has been to admit only what the judges then regarded as the best evidence of any disputed fact, and thereby to exclude such material which, as a matter of common sense, would assist a fact-finding tribunal to reach a correct conclusion: eg Myers v Director of Public Prosecutions, [1965] AC 1001."[13]

The divergence in this respect between the courts on the one hand and arbitrations, tribunals and inquiries on the other has come to appear more/

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[12] R v Deputy Industrial Injuries Commissioner, ex p Moore, [1964] 1 QB 456; Douglas v Provident Clothing & Supply Co, 1969 SC 32 (industrial tribunal); Compulsory Purchase by Local Authorities (Inquiries Procedure) (Scotland) Rules, 1964 (SI 1964, No 180), rule 7(5) and Town and Country Planning Appeals (Inquiries Procedure) (Scotland) Rules, 1964 (SI 1964, No 181), rule 8(5), each of which specifically excludes only evidence which would be contrary to the public interest, and otherwise provides that any evidence may be admitted at the discretion of the reporter. As to arbitrations, see D A Guild, Law of Arbitration in Scotland, pp 55-62.

[13] R v Deputy Industrial Injuries Commissioner, ex p Moore, n 12 supra, Willmer L J at p 476, Diplock L J at p 488.

more and more noticeable and difficult to justify with the growth in number and importance of these bodies and the increasingly large classes of questions which are confided to their jurisdiction. It seems difficult to resist the force of an American scholar's observation:

> "The truth ... is that hearsay evidence, ranging as it does from mere third-hand rumours to sworn affidavits of credible observers, has as wide a scale of reliability, from the highest to the lowest, as we find in testimonial or circumstantial evidence generally, depending as they all do upon the frailties of perception, memory, and veracity of men and women. Indeed, it is the failure of the courts to adjust the rules of admissibility more flexibly and realistically to these variations in the reliability of hearsay that ... constitutes one of the pressing needs for liberalization of evidence law."[14]

19.17 (4) Reform of the law. If it is accepted that there are weaknesses in some of the arguments for the exclusion of hearsay evidence under the present law, and that its exclusion has serious disadvantages, the next question which arises is how and to what extent the law should be reformed. The most radical approach would be to abolish the exclusionary rules completely, and to permit the admission of hearsay at the discretion of the judge, leaving it to the judge or jury to assess the cogency of any hearsay evidence tendered and admitted. It has, for example, been suggested that in England the rule against hearsay should be abolished in civil cases heard by a judge without a jury.[15] The formidable objection to such an approach, however, is that a rule that admissibility was a matter of judicial discretion would create difficulty not only for the judge, but also for the parties in preparing their cases, since it would be difficult for them to predict whether particular items of hearsay evidence would be admitted.

19.18/

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[14] McCormick, Handbook of the Law of Evidence (West Publishing Co, St Paul, Minn, 1954), para 224; cit LRC of NSW, n 1 supra, pp 25-26.

[15] G D Nokes, "Res Gestae and Hearsay", (1954) 70 LQR 370, at p 384.

19.18 A second method of reform would be to create further piecemeal statutory exceptions to or qualifications of the present law. That has been the conventional approach in the field of documentary hearsay, where various enactments have been designed to resolve particular difficulties, such as the Bankers' Books Evidence Act, 1879; the Criminal Evidence Act, 1965; and section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1966.[16] This method of reform is comparatively easy to adopt, but increases the complexity of the law in that it produces a growing list of special rules of limited application.

19.19 A third method is to devise a code containing either a general rule as to the inadmissibility of hearsay and a number of specific exceptions, as in chapter 1 of the Scottish Law Commission's Draft Code, or a general rule as to its admissibility with a number of qualifications. For example, oral first-hand hearsay could be made admissible as evidence of the truth of the facts stated where the maker is not reasonably available, and special provision could be made for the previous statements of witnesses (including precognitions), for extrajudicial admissions and confessions, and for the admission of double hearsay in particular circumstances.

19.20 In England, the Civil Evidence Act, 1968, represents an amalgam of the second and third methods mentioned above.[17] The effect of the Act is that in civil cases, provided certain conditions are fulfilled, the court must admit all first-hand hearsay, and documentary records containing first-hand or double hearsay; but if the conditions are not fulfilled it has a discretion to do so. All exceptions to the rule/

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[16] See chap 12 above.

[17] J D Heydon, Cases and Materials on Evidence, p 354.

rule against hearsay in civil cases are statutory. They include certain common law exceptions to the rule which have been preserved, and some broad new statutory exceptions which have been created. The Criminal Law Revision Committee, in their Eleventh Report, proposed for criminal cases in England a scheme which, they said, followed the scheme of the Civil Evidence Act, 1968, so far as the differences between civil and criminal proceedings allowed.[18] These English provisions and proposals do not, it is believed, provide convenient models for the reform of the law of Scotland. Although some of the problems with which they are designed to deal appear to be common to both jurisdictions, the rules of evidence, practice and procedure in the two countries are so different that English rules in this chapter of the law of evidence cannot appropriately be introduced into Scots law. Besides, the English legislation and proposals have been the object of some criticism and controversy.[19] The complex procedural rules for the admission of hearsay evidence under the 1968 Act have been criticised on several grounds.[20] A further difficulty is that there have not been, and it seems that there are unlikely to be, any corresponding reforms in the law of hearsay evidence relating to criminal cases, so that important and anomalous differences have been created between the rules of evidence in civil and criminal cases. But although it seems impossible to/

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[18] CLRC, para 238. The Bar Council did not accept that the CLRC's proposals followed the scheme of the 1968 Act (BC, para 214(e)).

[19] On the 1968 Act, Heydon, n 17 supra, pp 361-362, 365-368; on CLRC paras 224-265, see BC, paras 17-22, 172-214; Glanville Williams, "The Proposals for Hearsay Evidence", [1973] Crim LR 76.

[20] It appears, however, that in practice counsel in most cases seem to be willing to waive these rules and agree to such statements being "let in": Sir Roger Ormrod, "Evidence and Proof: Scientific and Legal", (1972) 12 Med Sci Law 9, at p 16.

to recommend the importation into Scotland of the English rules and proposals in their entirety, they, and the extensive discussion which they have generated, are of considerable comparative interest.[21]

19.21 In this chapter, no attempt is made to suggest the form which any new enactment on hearsay evidence might take. Instead, there now follows some discussion of various aspects of the present law which have caused, or seem likely to cause, difficulties in practice.

2. Secondary hearsay

(1) Maker of statement

19.22 Apart from the statutory exceptions relating to documentary hearsay, the only recognised exceptions to the rule that hearsay is inadmissible as evidence of the facts alleged in the statement occur, it has been said, where the maker of the statement is dead or permanently insane or, at least in a civil cause, a prisoner of war.[22] The exception of the case of permanent insanity, although said to be recognised, is apparently not supported by direct authority. Questions have arisen as to (a) the recognition of any further exceptions, and (b) the date on which the competency of the maker of the statement as a witness falls to be tested.

(a) Further exceptions

19.23 (i) Unfitness by reason of bodily or mental condition. It is submitted that the exception of permanent insanity, which is not firmly established,[23] should be replaced by an exceptional provision for the case where the maker of the statement is unfit by reason of his bodily or mental/

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[21] See, eg, D E Harding, "Modification of the Hearsay Rule", (1971) 45 ALJ 531; R Graham Murray, "The Hearsay Maze: a Glimpse at Some Possible Exits", (1972) 50 Can BR 1.

[22] Walkers, para 371; R & B, para 18-89.

[23] See Dickson, para 268; HMA v Monson, (1893) 1 Adam 114, 21 R (J) 5.

mental condition to give evidence either in court or on commission. In M'Kie v Western SMT Co[24] the judges of the First Division reserved their opinions on the question whether a statement would be admissible in evidence when the maker of the statement was permanently disabled by illness from giving evidence. Lord President Cooper was "impressed by the difficulties which might be raised by expanding the 'best evidence' rule to cover such a case as this." Permanent disability through illness does, however, "appear analogous to permanent insanity;"[25] and it may be thought that temporary bodily or mental disability should also form a recognised exception, as in the statutes relating to the admissibility of records.[26] These statutes provide for the admissibility of a statement contained in a document if, among other conditions, the person who supplied the information recorded in the statement is "unfit by reason of his bodily or mental condition to attend as a witness." It is conceived that if a provision on similar lines were to be enacted in relation to oral secondary hearsay, the court in deciding whether the maker of the statement was so unfit, should be entitled, as it is in these statutes, to act on a certificate purporting to be a certificate of a fully registered medical practitioner.[27] If it be thought that "such certificates (describing in half-legible writing and medical Latin a possibly minor ailment) are all too easy to produce,"[28] it may be preferable to require certificates from two doctors.[29] Even then, the court would not be bound to accept the certificates.

19.24/

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[24]1952 SC 206, at p 215.
[25]Walkers, para 371.
[26]1965 Act, sec 1(1)(b); 1966 Act, sec 7(1)(b); see chap 12 above.
[27]1965 Act, sec 1(2); 1966 Act, sec 7(2).
[28]BC, para 211.
[29]Certificates from two doctors were produced in M'Kie: see p 207.

19.24 It is for consideration whether hearsay of an oral statement should be permitted when the maker of the statement falls into any of the following categories provided for in the statutes relating to the admissibility of records:

> "beyond the seas, ... or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied."

If he is beyond the seas, his evidence may be taken on commission, at least in civil cases.[30] The exception that he cannot with reasonable diligence be identified or found, which is applicable with reason to statements in records, would, it is thought, be open to abuse if applied to oral statements, particularly in criminal cases.[31] On the other hand, the exception may be acceptable if accompanied by a condition that the statement will not be admissible unless the party seeking to adduce it has given notice of his intention to do so with particulars of the statement and of the reason why he cannot call the maker. The other parties would then be enabled to make inquiries as to the identity and credibility of the alleged maker, as to whether it is really impossible to call him, and as to the contents of the statement.[32]

19.25 The exception that the witness cannot reasonably be expected to recollect the matters dealt with may also be open to abuse. What appears to be an instance of an attempted abuse by a witness of a supposed exception of/

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[30] Evidence on commission in criminal cases is discussed in chapter 24 below.

[31] See H M Advocate v Monson, (1893) 1 Adam 114, 21 R (J) 5; BC, paras 181-182. On the other hand the present law prevents the Crown from using at the trial a statement made to them by a witness who has thereafter been kept out of the way by associates of the accused.

[32] Cf CLRC, paras 237, 240-242; Piermay Shipping Co SA v Chester, [1978] 1 WLR 411.

of this class occurred in Cole-Hamilton v Boyd,[33] where a witness affected to have forgotten about the details of a road accident, and it was unsuccessfully submitted that the court should consider a transcript of evidence which he had given on the subject in a previous action. But in other cases a statement made in good faith by a witness who had thereafter genuinely forgotten the matters dealt with may be a necessary part of a party's case. It may be that statements should be admitted under this exception, and the circumstances of their making and forgetting should be explored and evaluated in an assessment of their weight, rather than that they should all be excluded on the ground of possible abuse. Such statements are admissible in proof of identification in criminal cases (see para 19.61 below).

19.26 (ii) Prisoner of war. The exception that the maker of the statement is a prisoner of war could, it is thought, be applied to criminal cases on the basis that before allowing the evidence to be admitted the court would have to be satisfied that the maker was a prisoner of war. The court could be so satisfied either by oral evidence or by documentary evidence emanating from H M Government, or from the imprisoning State or from the maker of the statement himself. It would be for the court to determine whether such evidence was of sufficient weight to satisfy the court that the maker was in fact a prisoner of war.

(b) Competency of maker of statement as witness

19.27 It does not seem logical to depart from the requirement that the maker of the statement must be a person who would have been a competent witness. This requirement may, however, give rise to a question/

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[33] 1963 SLT (Notes) 77.

question as to the date on which competency falls to be tested. "There seem to be three possible dates, (1) the day when the statement is tendered in evidence, (2) the day the maker of the statement died, and (3) the day when the statement is alleged to have been made. The point can seldom arise now and seems to be unsettled."[34] Dickson[34] states that the date is the third of these, but in Dean's J F[34] Lord Dunedin reserved his opinion.

(2) Double hearsay

19.28 "Hearsay of hearsay is probably admissible, provided that each statement fulfils the necessary conditions as to the makers and the nature of the statement."[35] It would be useful to make it clear that such double hearsay, at least, is admissible. Doubt as to admissibility would thus be avoided where, for example, a witness in a murder trial is tendered to speak to a dying statement made by the victim to someome who related it to the witness and thereafter died before the trial.[36] Double hearsay has been admitted, although the makers of the statement were not proved to be or presumably dead, in actions concerned with the proof of death abroad.[37] It is questionable whether it should be admitted in other cases if the necessary conditions are not fulfilled.

(3)/

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[34] Walkers, para 371, citing Deans's J F v Deans, 1912 SC 441, L P Dunedin at p 448 and referring to Lovat Peerage Case, 1885, 10 App Cas 763; Dickson, paras 266, 267.

[35] Walkers, para 371, citing Smith v Bank of Scotland, (1826) 5 S 98 (2nd ser, 90); and Deans's J F (supra, n 34), where hearsay of hearsay was considered without comment; and referring to Lovat Peerage Case (supra, n 34) at p 774; but pointing out that Deans's J F and Lovat were pedigree cases and possibly unsafe guides in other actions.

[36] See Smith (n 35, supra), L J-C Boyle at p 92(99); Glanville Williams, "The New Proposals in Relation to Double Hearsay and Records", [1973] Crim L R 139.

[37] Fairholme v Fairholme's Trustees, (1858) 20 D 813, at p 815; Tawse, (1882) 19 SLR 829; cit by Stevenson, Presumption of Life, pp 53-54; and see Dickson, para 117.

(3) Nature of statement

19.29 (a) Statement by way of precognition.

> "Although the maker of the statement is proved to be dead, permanently insane or a prisoner of war, and would have been a competent witness on the material date, evidence of the statement is inadmissible if the circumstances raise a presumption that it does not truly reflect what was in his mind. Such a presumption arises if the statement was made on precognition, because it is not spontaneous or voluntary."[38]

This rule seems to deserve some examination. As Lord Emslie has observed:

> "Amongst the most delicate of these problems [of admissibility of evidence] is the problem of the admissibility of written statements made by a deceased witness. The solution of this type of problem invariably involves inquiry into the circumstances in which the statements came to be made and consideration of authority after full argument by counsel."[39]

19.30 The question of the admissibility of precognition and similar statements arises not only here but in relation to the admissibility of records[40] and the admissibility of previous statements by witnesses;[41] and/

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[38] Walkers, para 372. In addition to the authorities there cited, which are not all to the same effect (see nn 16, 17), see McIntosh, (1838) 2 Swin 103 (signed declaration by deceased witness held inadmissible); Stephens, (1839) 2 Swin 348 (oral evidence of statements by deceased on precognition held admissible); Lynch, (1866) 5 Irv 300 (such evidence held inadmissible); Laidlaw v Paterson's Trs, 1954 SLT (Notes) 5 (report by deceased expert held admissible); Bullett v BRB, 1964 SLT (Notes) 102 (deceased witness "had the opportunity of making a statement" - jury trial allowed); Ferrier's Exr v Glasgow Corporation, 1966 SLT (Sh Ct) 44 (statement by deceased made when being precognosced held inadmissible); Holt v Drever, 1970 SLT (Notes) 49 ("accident inquiry form" completed by deceased witness - jury trial refused); Miller v Jackson, 1972 SLT (Notes) 31 (statement by deceased akin to precognition held inadmissible); Pirie v Geddes, 1973 SLT (Sh Ct) 81 (statement to police which led to investigation of alleged crime, made by deceased who was himself involved in alleged crime, held inadmissible); Hall v Edinburgh Corporation, 1974 SLT (Notes) 14 (written statement by deceased in answer to defenders' pro forma questionnaire held admissible); Moffat v Hunter, 1974 SLT (Sh Ct) 42 (written statements given by deceased to insurance company without prompting or questioning, held admissible); HMA v Irving, 1978 SLT 58 (oral statements to police by deceased complainer held admissible).

[39] Holt, n 38 supra, Lord Emslie, at p 30.

[40] Para 12.22 above.

[41] Paras 19.40, 19.47-19.49.

and mention has been made of the question whether precognitions should be excluded from any new provisions relating to the admissibility of records.[40] It may be argued that the rule now being considered should not be altered, despite the difficulties which it causes, upon the view that hearsay of statements post litem motam made at the instigation of a party is best excluded, at any rate before juries. It may be, however, that some practitioners would favour allowing the production of the precognition and the evidence of the precognoscer if the maker of the statement has died. It may well be true that the present law excludes statements which, if admissible, a judge at least would be well able to assess. He would probably, and with reason, have more confidence in some precognoscers than in others; and the personal interest of the maker of the statement, and the absence of cross-examination, are factors capable of judicial assessment. There are dicta which support the view that the rule contained in the exception under the present law should be applied more stringently in criminal than in civil cases.[42] There may therefore be room for some such solution as that statements made on precognition by persons who have subsequently died should be admissible in civil proofs. Those in favour of some relaxation of the rule may argue that interest, having been abolished as a ground of exclusion of witnesses in the nineteenth century, should no longer be a ground for the exclusion of statements by persons deceased: interest is a factor which judges and modern juries, properly directed, may reasonably be relied on to take account in assessing the weight to be given to the statement. They may also point to the fact that statements made in evidence in prior proceedings by a person now deceased/

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[40] Para 12.22 above.

[42] Lauderdale Peerage Case (1885) 10 App Cas 692, Lord Watson at p 708, Earl of Selborne, LC, at p 711; Pirie v Geddes, 1973 SLT (Sh Ct) 81.

deceased may, at least in certain circumstances, be admissible despite his interest in the subject-matter.[43] It must be admitted that such statements may be distinguished from those made on precognition on the ground that the former are the ipsissima verba of the witness and are subject to cross-examination. On the other hand, dying depositions are admissible although they may be tendentious and unreliable.[44]

19.31 (b) Oral statement. It is thought that any new rule should apply to oral statements as well as to written statements by persons deceased. The consideration that the circumstances of an oral statement may suggest that it may not truly reflect what was in the speaker's mind, should properly be relevant, not to the admissibility of the statement, but to its weight.

19.32 (c) Evidence given in prior proceedings. There is an unresolved question whether, in civil proceedings, evidence of a witness now deceased given in prior proceedings between different parties is admissible, there having been no cross-examination on behalf of a party to the later action.[43] It is suggested that that fact should not render the statement inadmissible,[45] but should have a bearing upon its weight. There is also a question as to the admissibility of such evidence in criminal trials. The question is unlikely to arise in practice, unless in relation to a series of criminal trials arising out of the same subject-matter,[46] or unless provisions for re-trial in criminal cases are introduced, because in general a civil action arising out of any matter is/

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[43] Hogg v Frew, 1951 SLT 397; cf Coutts v Wear, 1914, 2 SLT 86; Campbell v Cook, 1948 SLT (Notes) 44. See para 19.32 below.

[44] See paras 19.33, 19.35 below.

[45] On the admissibility of transcripts of evidence see para 11.30 above.

[46] In HMA v Waddell, The Scotsman, 20th November 1976, a trial for murder, there was read to the jury a transcript of the evidence given by the victim's husband at the trial seven years before of another man for the same murder, the husband having died in the interval between the two trials. See also R v Hall, [1973] QB 496; Phipson, paras 1433-1443.

is likely to be heard after any relevant criminal proceedings have been disposed of. It appears that in England the conditions of admissibility of testimony given in former proceedings are that the evidence should have been for or against the same accused, in relation to substantially the same facts, by a witness unable to attend the trial through death or illness.[47]

(4) Dying depositions[48]

19.33 (a) Admissibility: (i) In event of deponent's recovery. The present rule is that a dying deposition is not used unless the deponent dies. If he recovers, he may or may not give evidence at the trial. If he is unable to give evidence through unfitness by reason of his bodily or mental condition, it is arguable that his dying deposition should be admissible in the same way as has been proposed above in relation to other types of secondary hearsay.[49] If he does give evidence, and his testimony differs from his dying deposition, should the deposition be admissible, and if so, for what purpose? It has been known for a witness to give a different story in the witness-box from that given in his dying deposition.[50] In such a case the discrepancy would appear to have a bearing on the reliability of the witness, and it may be contended that it should be open to either the prosecution or the defence to put his deposition to him and call upon him to explain it. If that is done, should the deposition be treated only as evidence bearing on the witness's credibility, or should it be admissible as evidence of the truth of the matters asserted in it? A similar question arises in relation to previous consistent and inconsistent statements of witnesses, which/

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[47] Cross, p 495.

[48] Dickson, paras 1754-1756; Walkers, para 410; R & B, paras 7-31 to 7-33.

[49] Para 19.23 above.

[50] Sheriff J M Lees, "Dying Depositions", (1885) 1 Sc L Rev 181, at p 189.

which are discussed below. It is submitted that the deposition should be admissible, at least as evidence going to credibility.

19.34 (ii) In other proceedings. Dying depositions appear to be admissible only in trials for the murder or culpable homicide of the deponent, and not in any other criminal or civil proceedings. It may be logical and on occasions useful to provide that they should be admissible in trials on other charges and in civil cases. The rationale that they are admissible because likely to be truthful seems to be applicable to all proceedings.

19.35 (b) Proof of deposition. In ordinary practice, when the deponent dies before the trial and his deposition is put in evidence, two witnesses, one of whom is the sheriff, prove the deposition and establish that the deponent realised what he was doing. It has been suggested that the sheriff should give evidence as to the weight to be attached to the deposition. At the end of his article,[50] Sheriff Lees wrote:

> "It seems to me it would be better if in both countries [ie Scotland and England] the magistrate was invited to state to the jury with some fulness the circumstances attending the taking of a dying deposition at which the prisoner was not represented, and the weight he himself attaches to it. Juries, I fear, hearing that the deposition was emitted while the deponent was in his sound and sober senses, and listening to its consecutive and distinct narrative, give to it an implicit credence and a weight which they might not be disposed to give so fully if they were made aware of the intermittent and hesitating form in which perhaps the information was obtained from the deceased, and the alterations and corrections to which, in the course of its emission, it was subjected by him."

Evidence of that nature would not, it is thought, be appropriate if the deponent survived and gave evidence, and his deposition was admitted in the circumstances described in paragraph 19.33 above. It may be, however/

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[50] Sheriff J M Lees, "Dying Depositions", (1885) 1 Sc L Rev 181, at p 189.

however, that in other cases such evidence would be of some value. Under the present law, in the ordinary case of an admissible oral statement by a deceased, those who heard it are subject to cross-examination as to the circumstances in which it was made.[51] There is a related question, whether it is necessary for the sheriff to ask the deponent whether he bears any ill-will towards his assailant.

19.36 (c) Privilege. It is thought that privilege attaches to statements contained in dying depositions,[52] as it does to statements in precognitions.[53] The matter could with advantage be clarified.

19.37 (d) Affirmation. It is said in the text-books[48] that the deposition is taken on oath. However, there seems no sufficient reason why the deponent should not be offered the alternatives of taking an oath or making an affirmation, and it is believed that in practice deponents have been allowed to affirm. It is thought that the rules in this respect should be the same for deponents as for witnesses in court,[54] except that the deponent may be required only to acknowledge the words of the oath or affirmation without either raising his hand or repeating them; and that he need not be required to confirm that what he has said is all truth "as he shall answer to God".

3. Primary hearsay

(1) Previous consistent statements[55]

19.38 (a) To rebut attack on credibility. There appears to be a general rule that evidence may not be led that a witness has previously made/

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[48] Dickson, paras 1754-1756; Walkers, para 410; R & B, paras 7-31 to 7-33.
[51] Gordon v Grant, (1850) 13 D 1, L J-C Hope at p 11.
[52] D M Walker, Delict, II, p 809.
[53] Watson v McEwan, (1905) 7 F (HL) 109; see para 24.24 below.
[54] See paras 8.02-8.14 above.
[55] For a review of English and American rules, see R N Gooderson, "Previous Consistent Statements", (1968) 26 CLJ 64. See also Cross, pp 207-220. The admissibility of self-serving statements by accused persons is considered in the next chapter.

made a statement which is consistent with his testimony in the witness-box. The rule has been described as one of expediency rather than of principle,[56] and no doubt exists in order to discourage the manufacture of "self-serving" testimony, and to avoid the introduction of superfluous evidence. The exceptions to the rule include statements forming part of the res gestae, statements made de recenti, statements by accused persons when cautioned and charged (which are in practice led irrespective of whether they are consistent with his defence), and statements by prosecution witnesses, who identify the accused in court, that they have identified him on some specified previous occasion, such as an identification parade.[57] It is not clear, however, whether such evidence may be led when the witness's credibility is impugned. It is submitted that in these circumstances such evidence should be admissible. The submission derives some support from the following observations of Lord Kincairney:

> "There is one kind of hearsay which I have always thought to be of true evidential value, but which we reject, - viz, when it is sought to be proved that a witness who deponed to a certain effect had said much the same thing on some previous occasion, when no question had arisen and no temptation to deceive had been suggested. Such evidence would certainly displace the doubt that the witness had given evidence for the purpose of dishonestly favouring one of the parties."[58]

19.39 The decisions on the subject are inconclusive. The accused may found on evidence led by the Crown of statements made by himself for the purpose of showing that his story has been consistent;[59] and in practice the accused's reply to caution and charge is given in evidence/

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[56] McInnes v Brown, 1963 SLT (Notes) 15.

[57] See para 19.60 below.

[58] Lord Kincairney, "The History of the Law of Evidence", (1899) 11 Jur Rev 1, at p 21.

[59] Forrest, (1837) 1 Swin 404, at pp 415, 419; Pye, (1838) 2 Swin 187; Brown v HMA, 1964 JC 10.

evidence whether or not it is consistent with his defence. In Gibson v National Cash Register Co[60] it was held that a letter and telegram, written by a witness at the time to which his evidence related, could competently be referred to for the purpose of testing his credibility. The case has been regarded as falling within the de recenti exception,[61] but it is very unlike the commonly encountered de recenti statement made by an injured witness to the first natural confidant. A dictum of Lord President Normand in Barr v Barr[62] seems wide enough to justify the admission of a witness's previous consistent statement for the purpose of supporting his credibility whether it was made de recenti or not:

> "... I am of opinion that something repeated or said by the pursuer after an interview with his wife to a brother or any other witness narrating or purporting to narrate what took place is no corroboration of the pursuer's own evidence with regard to the facts spoken to. The law on this point was laid down in the case of Oswald v Fairs[63] by Lord President Dunedin, who says that the evidence that A made a certain statement to C cannot be regarded to be proof that A made a similar statement to B. Evidence that A made a statement to C may be useful as showing that A's evidence in causa was true evidence, and may be useful to set up his credibility, but that is a quite different thing from evidence corroborating an already credible witness."

It may not be legitimate, however, to divorce the last sentence of that passage from its context. The clearest case is Burns v Colin McAndrew and Partners Ltd[64] where the pursuer's wife was asked about statements which he had made to her relating to work averred to have resulted in dermatitis. It was not argued that the statements had been made de recenti. Lord Milligan held that her evidence was admissible for the/

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[60] 1925 SC 500.
[61] Walkers, para 376.
[62] 1939 SC 696, at p 699.
[63] 1911 SC 257, at p 265.
[64] 1963 SLT (Notes) 71.

the limited purpose of showing that the pursuer, who had been charged in cross-examination with concocting his story, had told the same story almost from the beginning. His Lordship said:

> "In my opinion, the evidence of what the pursuer said to his wife on the occasion referred to was competent but for a very limited purpose only and that was to attempt to traverse the suggestion made in cross-examination that the pursuer had concocted his story. If a witness is charged with concocting a story, I think that it is competent to attempt to show that the story which he is telling is one which he had told from almost the very beginning, and is, accordingly, not one which he had made up over a period of time. This does not mean that his story is corroborated, but it may have some bearing on the reliability of the witness."

19.40 It is respectfully thought that the latter decision is correct, and that in the absence of clear Inner House authority in the same sense it would be useful to promulgate a rule to the effect that if the credit of a witness is impugned on a material fact on the ground that his account is a late invention, an earlier statement by the witness to the same effect, other than - perhaps[65] - a statement made on precognition, is admissible if made within a reasonable time of the event.[66] Indeed it may even be argued that the rule should go so far as to provide that the advocate calling the witness may anticipate the impugning of his credit by leading his previous consistent statement in chief: it is possible to envisage a situation where the cross-examining advocate could conduct his cross in such a way as to show that he does not accept the evidence-in-chief and yet does not imply fabrication and thus does not let in the previous/

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[65] Those in favour of the admissibility of precognitions would exclude this qualification. Others may think that the admission of precognitions for this purpose would make fabrication much too easy. The present law appears to be that a witness cannot be asked, in order to confirm his testimony, whether what he has deponed is what he stated when precognosced. The only reported decision on the point appears to be Robertson, (1842) 1 Broun 152, at p 190, cit by Macdonald, p 311, and R & B, para 18-74, but the rule appears to be well established in both civil and criminal practice.

[66] Cf R v Oyesiku, (1971) 56 Cr App R 240.

previous consistent statement in re-examination or in the examination of a subsequent witness. In any event it is thought that the whole statement should be admissible.[67] It may be argued against the admissibility of previous consistent statements that they could be easily fabricated, and would raise collateral issues. But on the other hand it is submitted that ease of fabrication is rather an observation on weight than a reason for exclusion; and that where a witness's credibility is impugned the question whether he has told a different story, which may at present be investigated by virtue of section 3 of the 1852 Act, is just as much a collateral issue as the question whether he told the same story.[68] It may be, however, that the previous consistent statements of accused persons should continue to be generally inadmissible in criminal cases: these are considered in the next chapter.

19.41 (b) Admissibility for other purposes. Should previous consistent statements be admissible for other purposes besides rebutting a challenge of fabrication and the various purposes mentioned in para 19.38? There may be much to be said for replacing the present fixed rule, with its limited number of exceptions, with a broadly formulated rule under which proof of prior consistent statements would be permissible whenever the fact that the statement was made is substantially relevant for some reason other than its tendency to confirm the consistency of the witness.[69] There are several arguments in favour of this proposal. (1) The present rule may be supposed to have arisen as a corollary to the old rules that parties and accused persons were incompetent as witnesses on the ground of interest. Since these rules have been abandoned, the present rule should also be reformed, since/

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[67] See Gooderson, (1968) 26 CLJ 64, at pp 86-89.
[68] Cf Lord Sands in Ovenstone v Ovenstone, 1920, 2 SLT 83.
[69] See Cross (3rd ed), pp 194-195.

since it rests on the same basis. A judge or jury may be relied on to take into account the factor of self-interest when assessing the value of a previous consistent statement. (2) The present rule is unfair: statements against interest by a party or an accused are admissible, but statements consistent with his evidence are not. The former are thought to be more likely to be true, and the latter are thought to be open to the risk of manufacture. In the cynical words of Eyre, CB:

> "... the presumption ... is, that no man would declare anything against himself, unless it were true; but that every man, if he was in difficulty, or in the view to any difficulty, would make declarations for himself."[70]

But in fact previous consistent statements are often made under the same circumstances as previous inconsistent statements. (3) In criminal cases, the present rule is inconsistent with the presumption of innocence. The accused's previous consistent statement is excluded on the assumption that he might be guilty, and his only purpose in making it would be to deceive the court. (4) The present rule is inconsistent with the principle that the essential test of the admissibility of evidence is the test of relevance. Relevance is to be judged by applying a fair-minded, common-sense approach. If statements and conduct which suggest guilt or civil liability may be proved, so should statements and conduct which suggest innocence or the absence of liability: even though there is a risk of fabrication, this should be taken into account and go to the weight of the evidence, and should not be the justification of its inadmissibility.[71] (5) The opportunities for cross-examination and for leading evidence to the contrary provide sufficient tests of the truth of the previous consistent statement.

19.42/

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[70] R v Hardy, (1794) 24 St Tr 199 at p 1093: cit Corke v Corke and Cooke, [1958] P 93, at p 101.

[71] See Corke v Corke and Cooke, n 70 supra, Morris L J (diss) at pp 106-107.

19.42 (c) Other jurisdictions. In the United States, rule 503 of the Model Code of Evidence, approved by the American Law Institute in 1942, makes provision for the admission of previous statements, both consistent and inconsistent, unless excluded on some other ground, if the maker either is unavailable or is present in court and available for cross-examination. Protection from possible abuse of the rule is afforded by a provision in rule 303 that the judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will necessitate undue consumption of time, or will create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or will unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered. Rules 45 and 63(1) of the Uniform Rules of Evidence, approved by the Commissioners for Uniform State Laws in 1953, are in substantially similar terms. Under both sets of rules the position is that there is a simple rule of the admissibility of previous statements, both consistent and inconsistent, as substantive evidence on the merits in all cases, subject only to the judge's discretion to exclude them on the grounds stated. They are also admissible as substantive evidence in the Evidence Act proposed by the Law Reform Commission of Queensland[72] and in the consolidation of the law of evidence proposed by the Civil Code Revision Office of Quebec.[73] The Californian Law Revision Committee have pointed out that the rules should not permit a written previous statement by a party to be lodged in lieu of his examination-in-chief. Other commentators have desiderated that the statement, to be admissible, should exhibit circumstantial guarantees of trustworthiness: for example, that (1) the statement/

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[72]See their Report on the Law Relating to Evidence, p 62.
[73]See their Report on Evidence, pp 13-14, 68-72.

statement is proved to have been written or signed by the maker or to have been given by him as testimony in a judicial or official hearing, or he acknowledges having made the statement in his evidence in the present proceeding, and (2) the maker is available for cross-examination. It is thought that in Scotland the statement should not be admissible until the maker has first given direct evidence in the witness-box, without reference to the statement, of the facts to which it relates; and, perhaps, that a statement which was made for the purpose of setting out the evidence which a person could be expected to give as a witness in pending or contemplative legal proceedings should not be admissible. The question whether a precognition should be admissible is further discussed below in relation to previous inconsistent statements, at paras 19.56-19.59.

19.43 The Law Reform Commission of Ontario draw a distinction between previous consistent statements and previous inconsistent statements, and between previous inconsistent statements adduced in examination-in-chief and in cross-examination. They advocate that a party producing a witness should be permitted to prove a previous consistent statement to rebut a suggestion that his evidence given at the trial has been fabricated. In such a case, the statement should be admitted not only to support the credibility of the witness, but as substantive evidence of the facts therein. But when corroboration is required, no such statement should be used to corroborate the witness's evidence. As to previous inconsistent statements, however, they say that it would not be wise to permit counsel calling a witness to adduce evidence of such a statement as proof of the facts contained in it, because to do so would permit a statement not given under oath to contradict the evidence of the maker of the statement which has been given under oath. In their view, proof of such a statement should be/

be permitted only for the purpose of discrediting a witness who has disappointed an examiner. But where on cross-examination a witness admits making a statement inconsistent with his present testimony, or where he does not admit making such a statement and proof is given that he did in fact make such a statement, the statement should be received as evidence of the facts stated therein.[74]

19.44 In England, all previous statements of witnesses, both consistent and inconsistent, are now admissible in civil cases with the leave of the court under the Civil Evidence Act, 1968. If admitted, they are evidence of the facts stated, not simply as circumstantial evidence negativing the suggestion of after-thought or fabrication. The Criminal Law Revision Committee have proposed that there should be a similar provision for criminal cases.[75]

(2) De recenti statements[76]

19.45 The principle that a de recenti statement is not corroboration, but supports the credibility of the witness, has been criticised on the ground that it creates an "unreal" distinction,[77] or "complication", which is "too subtle" and "wholly unrealistic and difficult for a jury to appreciate."[78] In England the Criminal Law Revision Committee has accordingly proposed, as has just been mentioned, to "get rid of the complication in the present law" by providing that a previous statement made by a witness will be admissible not only to support or impugn his credibility, but as evidence of the facts stated in it.[78] Many practitioners, however, reject such criticisms of the principle, and the Committee's/

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[74]Law Reform Commission of Ontario, Report on the Law of Evidence, chap 3, pp 53-55.
[75]CLRC, para 257.
[76]Walkers, para 376; R & B, paras 18-87, 18-88.
[77]Draft Code, p 11.
[78]CLRC, p 242, paras 232, 257.

Committee's proposal is opposed by the Bar Council.[79] It is submitted that the present law of Scotland on the matter is satisfactory. Further, the present law seems to be reasonable in permitting the admission of evidence of a de recenti statement in any case, civil or criminal, and whether the witness is a child or adult, or male or female. As Lord Hewart, C J, observed in R v Camelleri:[80]

> "No doubt there is force in the suggestion that probably little attention would or should be paid to a complaint by an abandoned male person of mature years, but perhaps that observation goes rather to the weight, than to the admissibility, of the complaint."

(3) Previous inconsistent statements

19.46 The Evidence (Scotland) Act, 1852, enacts by section 3:

> "It shall be competent to examine any witness who may be adduced in any action or proceeding, as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified."

Section 3 has been repealed so far as relating to criminal proceedings by Schedule 10, Part I, of the Criminal Procedure (Scotland) Act, 1975, which provides by sections 147 and 349:

> "In any trial, any witness may be examined as to whether he has on any specified occasion made a statement on any matter pertinent to the issue at the trial different from the evidence given by him in such trial; and in such trial evidence may be led to prove that such witness has made such different statement on the occasion specified."

These provisions raise questions as to (a) the nature of the previous inconsistent statement, (b) the purpose for which it may be proved, and (c) the procedure whereby it may be proved. Rules proposed and adopted in other jurisdictions have been noted in paras 19.42-19.44 above.

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[79] BC, para 185.

[80] [1922] 2 K B 122, at p 125.

(a) Nature of statement

19.47 (i) Statement by way of precognition.[81] Despite the unqualified terms of section 3, there is in modern practice a rule that a witness cannot be contradicted by what he said on precognition. The question of the validity of this rule does not appear to have been fully argued in the courts. It may be that the rule has its origin in a confusion between the question whether a precognition may be used to contradict a witness and the entirely separate question whether a precognition is admissible evidence of what a deceased person said.[82] Whatever its origin, the present law is in an unsatisfactory state because the plain words of section 3 do not accurately represent the rules which are applied in practice. It is thought that one of two courses should be adopted: either to amend section 3 so that it corresponds with modern practice, or to restore the law to the state originally intended by Parliament by making it clear that section 3 is perfectly general in its terms and does not admit of any exception for statements made on precognition. In Kerr v H M Advocate[83] Lord Justice-Clerk Thomson justified the present rule in this way:

> "The reasons for giving protection to a precognition are various. Obviously the public interest is involved and the investigation of any matter, whether civil or criminal, is thereby facilitated. But what is of importance for the present matter, and one reason why reference to precognition is frowned on, is that in a precognition you cannot be sure that you are getting what the potential witness has to say

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[81] Walkers, para 343(b); R & B, paras 5-72, 18-74. The admissibility of precognitions has been briefly mentioned in the context of new provisions as to the admissibility of documents, at para 12.22 above, and as to the admissibility of statements as secondary hearsay at paras 19.29-19.30 above.

[82] Anon, "Evidence: Contradiction by Precognition", 1959 SLT (News) 33.

[83] 1958 JC 14, at p 19.

> in a pure and undefiled form. It is filtered through the mind of another, whose job it is to put what he thinks the witness means into a form suitable for use in judicial proceedings. This process tends to colour the result. Precognoscers as a rule appear to be gifted with a measure of optimism which no amount of disillusionment can damp."

The second of these reasons has been said to be a damning indictment of the method of taking statements from witnesses where those statements are to be the justification for putting an accused person in the dock.[84] The Thomson Committee decided not to propose that it should be competent to use an unsworn precognition to test the credibility of a witness. There was

> "a strong body of opinion against an unsworn precognition being used in this way. It is argued that a precognition is not the witness's own statement; it is only the Procurator-Fiscal's record of what the witness said. Further, every witness departs from his precognition to some extent, and some go much further in their evidence than they do in their precognition. The precognition might omit much and, although factually correct, give quite a wrong picture. It is also thought that the trial should not be extended to collateral matters such as precognitions and the manner in which these are taken, since this would only delay proceedings."[85]

19.48 On the other hand, the decisions which are said to support the present rule have been subjected to cogent and destructive analysis,[82] and dissatisfaction with the rule has frequently been expressed.[86] It may be that objections to the admission of precognitions can be over-stated. It may be accepted that honest witnesses naturally to some extent/

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[82] Anon, "Evidence: Contradiction by Precognition", 1959 SLT (News) 33.

[84] James Law, QC, "The Thomson Report", 1976 SLT (News) 89, at p 93.

[85] Thomson, para 44.03.

[86] J Campbell Lorimer, "The Evidence (Scotland) Act, 1852, sec 3", (1920) 36 Sc L Rev 168; G W Wilton, "The Evidence (Scotland) Act, 1852", 1922 SLT (News) 37 (interesting on the origin and passage of the legislation); Anon, "Precognition Evidence and Recall of Witnesses in Civil and Criminal Law", (1933) 49 Sc L Rev 151, 183; Anon, "The Nature and Status of Precognitions", 1958 SLT (news) 205; Anon, "Evidence: Contradiction by Precognition", 1959 SLT (News) 33; W A Brown, "The Evidence (Scotland) Act, 1852", (1966) 11 JLS Sc 307.

extent depart from and go further than their precognitions; but it is difficult to suppose that a variation made in good faith would be founded on, or if founded would be regarded with disapproval by a judge or an appropriately instructed jury. A precognition which is factually correct but gives quite a wrong picture is, in practice, a useless precognition, and it should not be assumed that such precognitions are normally taken. Some precognoscers are more capable than others, but it should be assumed that any reasonably competent solicitor will endeavour to get the truth from every person on precognition, regardless of its effect; and while he may at times inevitably shade or colour the precognition through unconscious bias, he will not record "yes" for "no". The content and manner of taking of the precognition would go to the credibility of the witness, which might well be a crucial rather than a collateral matter. If a witness is dishonest, or is tampered with or bribed or threatened, the fact that he has gone back on an accurate precognition, competently taken, should surely be capable of proof, and if proved, lead to the rejection of his evidence. Under the corresponding English statutory provisions, previous inconsistent statements in their proofs may be put to witnesses, apparently without any of the ill effects predicted by the supporters of the present Scottish rule.[87] To the objection that the admission of evidence of a statement made on precognition would breach the confidentiality of the precognition,[88] it may be replied that any privilege conferred in relation thereto is that of the litigant, who may waive it by putting the statement to the witness. It is thought that the/

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[87] Cross, pp 222-225; commentary on Kerr, n 83 supra, in [1958] Crim LR 387.

[88] In M'Neilie v HMA, 1929 JC 50, at p 53, L J-G Clyde referred to "the confidential circumstances of precognition". See also Kerr v HMA, 1958 JC 14, L J-C Thomson at p 19; Hall v HMA, 1968 SLT 275, L J-C Grant at p 277.

the confidentiality of the precognition is a separate matter from the absolute privilege conferred on statements made on precognition, which is discussed in Chapter 24. The Sheriffs Walker proffer the suggestion

> "that section 3 ought not to be excluded by the mere fact that a precognition has been taken, and that the matter is one of credibility. If the witness and the precognoscer differ as to what was said, the evidence of the latter may be suspect, but that is not nowadays a reason for excluding it."[81]

19.49 It may be noted that it now appears to be arguable that in criminal proceedings there is no exception of previous statements made on precognition, in view of the unqualified terms of section 147 and 349 of the 1975 Act. It is possible to envisage a submission that since the actual words of the 1975 Act are clear and unambiguous in their meaning, it is not permissible to qualify them by having recourse to decisions bearing on the corresponding provisions of the Act of 1852 or to the practice of the criminal courts before the Act of 1975.[89] But in view of the consistent refusal of the courts in modern times to read section 3 as meaning what it says in relation to precognitions, it seems unlikely that such an argument would be sustained.

19.50 (ii) Precognition on oath, etc. It may be that a distinction could usefully be drawn between, on the one hand, precognitions in conventional form, which are unsworn, unsigned and recorded in writing in narrative form by the precognoscer, and, on the other hand, precognitions on oath, or signed precognitions, or precognitions recorded/

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[81] Walkers, para 343(b); R & B, paras 5-72, 18-74. The admissibility of precognitions has been briefly mentioned in the context of new provisions as to the admissibility of documents, at para 12.22 above, and as to the admissibility of statements as secondary hearsay at paras 19.29-19.30 above.

[89] Cf Inland Revenue Commissioners v Joiner, [1975] 1 WLR 1701, R v Curran, [1976] 1 WLR 87, and Farrell v Alexander, [1977] AC 59, recent decisions of the House of Lords as to the construction of consolidation Acts.

recorded on tape or recorded in writing in question and answer form. It may be that while precognitions of the former class should be inadmissible for the purpose of section 3 and its equivalents in the 1975 Act, precognitions of the latter class, or some categories of them, should be so admissible. The Thomson Committee recommend that it should be competent to use a statement made on precognition on oath to test the witness's credibility,[90] and it has recently been held that a precognition on oath will normally be competent as a basis for challenging the evidence of a witness under section 3.[91] Precognition on oath is fully discussed in Chapter 24. It may be doubted whether it should be competent to use signed precognitions for the same purpose. In England, where it appears to be the practice for witnesses to sign their statements, the experience of the Bar Council in criminal cases

> "is that, repeatedly, statements are taken by over-enthusiastic police officers and solicitors and they are signed by witnesses who pay very little attention to the actual wording of the document itself. When the witness takes the oath or affirms in the solemnity of the court, he tells his story, very often, in quite a different way."[92]

The signature of precognitions is also considered in Chapter 24. The Thomson Committee recommend that Crown precognitions should be signed,[93] but do not recommend that unsworn precognitions, whether signed or not, should be used to test a witness's credibility.[94] The recording of precognitions on tape, or in question and answer form, probably occurs in practice so rarely, if at all, that it is unnecessary to contemplate the formulation of any rule relating thereto.

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[90] Thomson, para 44.07.
[91] Coll, Petitioner, 1977 SLT 58.
[92] BC, para 144.
[93] Thomson, paras 17.07-17.08.
[94] Thomson, para 44.04.

19.51 (iii) Statements to police.[95] The exception of statements on precognition from the ambit of section 3 of the 1852 Act frequently involves the courts in examining the circumstances in which a statement was obtained from a witness by the police in order to determine whether the statement is to be regarded as a precognition or not. Some observations were made on this matter in para 12.23. The Thomson Committee felt able to draw a distinction between a precognition and a statement made by a witness to a police officer on the ground that the latter is more likely than the former to contain the actual words of the witness.[96] It may be thought, on the other hand, that the risk of inaccuracy or bias on the part of the police officer is not negligible, and not necessarily less than in the case of a procurator-fiscal; and that a statement to a police officer may have been made in haste and perhaps under the influence of shock caused by the events in question, while a subsequent statement in an interview with a procurator-fiscal is likely to be made and recorded with care. It seems curious that in Scotland, where the work of precognition is undertaken by a detached and professional procurator-fiscal service, it is to be presumed that the result is more likely to be vitiated by bias or inaccuracy than a written statement recorded by an investigating police officer. The view that a Crown precognition is in general less likely to be reliable than a police statement is one which may not command general assent. It may be that the same rule, whether of exception from or inclusion in the ambit of section 3, should apply both to precognitions and to police statements.

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[95] The false denial on oath of a previous inconsistent statement to the police warrants a charge of perjury: Aitchison v Simon, 1976 SLT (Sh Ct) 73.

[96] Thomson, para 44.05; see also para 17.06.

19.52 (iv) Evidence on commission. The Act of Sederunt regulating proceedings in jury causes, of 16th February 1841, enacts by section 17:

> "... The depositions taken on commission shall not be used, if the witnesses so examined shall afterwards be brought forward at the trial."[97]

Section 17 was held to apply to proofs as well as to jury trials,[98] and although not included in the Codifying Act of Sederunt, 1913, was said by Maclaren to be "in its main features declaratory of the present law and practice."[99] Similarly, in the sheriff court, rule 138 of the 1907 Act, Schedule I, which makes provision as to evidence on commission in jury trials, enacts:

> "... depositions shall not be read or referred to if the deponing witness attends at the trial."

In Parker v North British Railway Co[1] the pursuer examined a witness on commission and brought him to the proof but neither examined him nor used his deposition taken on commission. The defenders, however, put him in the witness-box and used the deposition taken on commission for the purpose of comparing it with what he said in the witness-box. Giving judgment after a subsequent hearing on objections to the Auditor's report, Lord Stormonth Darling observed:

> "I rather think that such a use of the deposition might have been successfully objected to."

In Forrest v Low's Trustees[2] a witness whose evidence had been taken on commission was subsequently examined in court and questioned as to whether she had not made a different statement when giving evidence before the/

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[97] Alexander's Abridgement, Supplement, p 95.
[98] M'Lean and Hope v Fleming, (1867) 5 Macph 579.
[99] Maclaren, Court of Session Practice, p 1035; see also Thomson and Middleton, Manual of Court of Session Procedure, p 384.
[1] (1900) 8 SLT 18.
[2] 1907 SC 1240.

the commissioner. These questions were held to be competent, as falling within the first part of section 3 of the Act of 1852; but it was held that since she had been examined as a witness in court, the report of the commissioner could not be admitted as evidence that she had made a different statement in terms of the second part of section 3. It is thought that it should now be made possible for the report of a commissioner to be used to contradict evidence given in court. It may be that the rules were originally enacted in order not to prolong civil jury trials or confuse the civil juries of the time.[3] It appears, however, that cases where witnesses give evidence both on commission and in court are few, and that the occasions when their evidence differs materially are probably even fewer; and on such occasions it seems important that the court should be made aware of the discrepancies in their evidence. No difficulties seem to have arisen from the fact that it is competent to contradict a witness by using his statements made in evidence at a fatal accident inquiry.[4]

(b) Admissibility as evidence of the facts stated

19.53 Should a witness's previous inconsistent statement be admissible only for the purpose of indicating that his testimony is unreliable, or should it be admissible as evidence of the facts stated in it? Where the witness is a party, his previous inconsistent statement may be admissible for the latter purpose on the ground that it is an admission. Otherwise, however, the previous inconsistent statement of a witness is admissible only for the former purpose.

19.54 The present law may be supported on the following grounds.

(1) When the previous statement was made the witness was not speaking under the/

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[3]See Forrest, n 2 supra, Lord M'Laren at p 1247.

[4]As in Mallice v Allied Ironfounders Ltd, (O H, Lord Grieve), 30th June 1972, unreported.

the sanction of an oath and in the solemnity of a judicial proceeding. (2) It is doubtful whether the witness could be adequately cross-examined as to the previous statement, since the cross-examining party may not have had sufficient opportunity to ascertain the circumstances in which it was made. (3) A jury might attach undue weight to such a statement. (4) The admission of such statements might encourage the fabrication of evidence. (5) To admit a prior inconsistent statement as evidence of the facts stated therein would permit a statement not given under oath to contradict the evidence of the maker of the statement which has been given under oath. (6) In a case where no corroboration was required, the case could be decided on the basis of the acceptance of the previous statement alone, and not on the basis of any evidence led on oath in court.

19.55 Among the arguments for changing the law are these. (1) The prior statement may very often be more likely to be true than the evidence given in court because it is nearer in time to the event described. (2) It is inconsistent for the law to recognise sufficient probative force in a previous inconsistent statement to permit a jury to disbelieve the witness's testimony in the box, but at the same time to deny that there is sufficient probative force in the statement to permit the jury to believe the statement itself. (3) The reliability of the previous statement can be tested quite adequately in cross-examination, notwithstanding that the cross-examination does not take place at the time and under or in full knowledge of the circumstances in which the statement was made. (4) In reply to arguments (5) and (6) above, reference may be made to the words of Learned Hand J:

> "If, from all the jury see of the witness, they conclude that what he says now is not the truth, but what he said before,
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> they/

they are nonetheless deciding upon what they see and hear of that person and in court."[5]

19.56 The Thomson Committee deal with the question in the context of witnesses' precognitions, observing that to make any precognition competent evidence as to fact would be a fundamental change in the law which they could not support.[6] In England, on the other hand, a witness's previous inconsistent statement may be treated as evidence of the facts stated under section 3 of the Civil Evidence Act, 1968,[7] which followed upon the Thirteenth Report of the Law Reform Committee. The Committee had observed:

> "... in none of the cases in which a previous statement of a witness who is called at the trial is admissible at common law is it treated as having any probative value as evidence of the matters to which the statement relates. Yet such a statement could not logically be used by a witness to refresh his memory unless it were more likely to be true than false, nor could it be treated as destroying the probative value of a witness's oral evidence unless it had at least as much probative value of its own as the oral evidence: that is to say, unless it was as likely to be true as the oral evidence of the same witness."[8]

The Criminal Law Revision Committee recommended a provision identical to section 3 of the 1968 Act in relation to criminal proceedings, upon the view that the distinction between evidence admissible to prove the truth of what was said in the previous statement and evidence admissible only in order to neutralise the effect of the evidence given in court by the maker of the statement, was "over-subtle".[9] Sir Rupert Cross has illustrated the advantages of the proposal with the following example:

> "W tells the police that he saw the accused near the scene

of/

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[5] Di Carlo v US, (1925), 6 F 2d 364, 368, cit Law Reform Commission of Canada, Evidence Project Study Paper no 9, "Hearsay", p 14.
[6] Thomson, para 44.04.
[7] Cross, pp 225-226.
[8] LRC 13, para 8.
[9] CLRC, paras 232, 257, and p 242.

> of the crime; at the trial he swears that he did not see the accused near the scene of the crime and, when his previous inconsistent statement is put to him in cross-examination, he admits that he made it but says that he did so because he had quarrelled with the accused. In most cases the only safe course for the tribunal of fact will be to ignore W's evidence; but what if there is other evidence to suggest that W had been 'got at'? What if it is obvious that W's testimony concerning the quarrel is false? Surely it is wrong that there should be an absolute rule that the previous inconsistent statement of a non-party witness is admissible for the sole purpose of impeaching his credit? At times it must seem absurd to the layman that the law should permit an inconsistent statement to be received for the purpose of neutralising the maker's testimony, although it may never be acted upon, even when it is the contradictory of that testimony, and even when there is every reason to suppose that the statement was true. This is yet another of those distinctions which do little credit to the law of evidence."[10]

19.57 To the Bar Council, on the other hand, the distinction between the admissibility of a previous inconsistent statement as evidence of the facts asserted and as evidence going only to credibility, was in accordance with common sense, and they did not consider it to be "over-subtle."[11] As we have noted, it may be argued that if such statements were to be admissible as evidence of the facts stated, it would be open to a person who desired to subvert the course of justice to depone that on some previous occasion a witness who gives evidence against his cause, or client, or associate, said something different from that evidence; and there would be a risk that the dishonest account of the previous statement would be accepted and acted upon by the court or jury on the basis that it truly stated the facts. There would be a similar risk that inaccurate or dishonest police statements and - if they were to be admissible - precognitions, however rarely encountered in practice, would be accepted as evidence of the facts recorded in them. The question is whether such risks are so great as to make it impossible to modify the present state of the law. To/

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[10] An Attempt to Update the Law of Evidence, pp 24-25.
[11] BC, paras 144, 188.

To hold that they are, might imply an unfavourable view of the perspicacity of judges and jurors as triers of fact, and of the competence and integrity of the police and the solicitors' branch of the legal profession.

(c) Procedure

19.58 If it is sought to discredit a witness in terms of section 3 of the Act of 1852, or sections 147 or 349 of the Act of 1975, the witness must be specifically asked whether he made the statement, and if he denies doing so, evidence of the statement may be led.[12] This rule has created doubts and difficulties. It appears that if a prosecutor, or party leading in a civil case, wishes to take advantage of the provisions, he probably must call the witness himself and put the statement to him. In M'Neilie v H M Advocate[13] it was held incompetent for a prosecutor to recall a witness to speak to a statement alleged to have been made by a defence witness and denied by him. The Thomson Committee accordingly recommend that if a witness denies that he made a previous statement which is different from his evidence, the court should have power, on a motion by the Crown at the close of the defence case and before speeches to the jury, to allow the Crown to lead additional evidence, whether from a new or a recalled witness, to prove that the witness did make a different statement. They recommend that that should apply to summary proceedings also, mutatis mutandis.[14] It is submitted that a similar rule should be enacted for civil proceedings, and that in both civil and criminal proceedings the fact that the witness whom it is sought to call had been present in court during the evidence of the witness whom it is sought/

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[12] Walkers, para 343(a); Wilson v Jacobs, 1954 SLT 215; R & B, para 18-74.
[13] 1929 JC 50.
[14] Thomson, paras 43.11, 43.13.

sought to discredit, should not render the witness incompetent.[15]

4. Evidence of previous identification[16]

19.59 It may be desirable to consider, in the context of the foregoing discussion of the admissibility of previous statements, the admissibility of evidence of the making of an identification prior to the trial. The matter is not fully disucssed in the text-books,[17] and there appear to be only two reported Scottish authorities. In the first, McGaharon v H M Advocate,[18] the precise nature of the evidence given cannot be gathered from the report,[19] and no opinions were delivered. The second, Muldoon v Herron,[20] although a Full Bench decision (Lord Wheatley dissenting), naturally dealt with only one of a number of possible situations in which evidence of previous identification may be tendered. It is proposed to discuss some of these situations in the following paragraphs.

19.60 (1) In the first, and commonest, situation, a witness identifies the accused in court as the culprit and also depones that he accurately identified the accused to a police officer on an earlier occasion, normally either at or near the locus shortly after the crime was committed, or at an identification parade. His evidence of the earlier identification is no doubt evidence of a previous/

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[15] Cf Dyet v NCB, 1957 SLT (Notes) 18. See para 3.20 above. The recall of witnesses and related matters are discussed in paras 8.53-8.61 above.

[16] Various aspects of the law and practice relating to evidence of identification are discussed at paras 17.44 et seq above; by Thomson, chaps 12, 46; and by a Working Group under the chairmanship of Sheriff Principal Sir William Bryden, QC, in their Report "Identification Procedure under Scottish Criminal Law" (1978, Cmnd 7096).

[17] Alison, ii, 522-526, 627-628; Dickson, paras 263, 1776; Macdonald, p 325; Walkers, para 383(b); R & B, para 18-60. Cf Cross, pp 50-51; Phipson, paras 628, 1255; R N Gooderson, "Previous Consistent Statements", [1968] CLJ 64, at pp 74-86; D F Libling, "Evidence of Past Identification", [1977] Crim LR 268.

[18] 1968 SLT (Notes) 99.

[19] See Muldoon v Herron, 1970 JC 30, Lord Wheatley at p 37.

[20] 1970 JC 30.

previous consistent statement, but it is admitted to add cogency to his identification in court:

> "to show that [he] was able to identify at the time and to exclude the idea that the identification of the pursuer in the dock was an afterthought or a mistake."[21]

This practice has existed without objection for many years.[22] Other witnesses may give evidence of the fact that the witness made the earlier identification. It is thought that in practice they are permitted to do so even if he fails to testify about it.

19.61 (2) It is also common for a witness to depone that he made an accurate identification on an earlier occasion, but that he cannot now remember whom he identified or identify anyone in court as the culprit. Here, those to whom the earlier identification was made are permitted to testify to the fact that the accused was the person whom the witness then identified. Once again, this has been normal practice for many years;[23] and it was sanctioned by Muldoon. It would no doubt be followed where the witness's failure to identify at the trial was due to blindness or defective eyesight supervening since the earlier identification. It may be observed, however, that if the practice is permissible for evidence of identification, it ought to be permissible in other cases where a witness at the trial is unable to recollect what he observed on the occasion in question but would be able to say that after the event he gave a truthful and accurate account of what he had seen to a police officer or other person. In such a case, if the practice in situation (2) is sound in theory, the police officer or/

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[21] R v Christie, [1914] AC 545, Viscount Haldane LC at p 551.

[22] See Wight (1836) 1 Swin 47, where the witness identified the accused in court and apparently deponed that he had identified him to an investigating police officer.

[23] Muldoon v Herron, 1970 JC 30, L J-C Grant at p 34; see also Bennett v HMA, 1976 JC 1.

or other person to whom the witness gave his account should be permitted to state what the witness told him. In practice, however, such evidence is not admitted.[24]

19.62 (3) It is possible to envisage a situation in which a witness in court no longer remembers whom he had seen committing the offence, but can say that at an identification parade he picked out the accused as the offender. It is thought that he should be entitled to give that evidence in order to prove the truth of that identification, and other witnesses may testify to the fact that the identification was made. The evidence is not evidence of a previous consistent statement. Its weight as evidence may not be great, but it is not inadmissible.

19.63 (4) In the fourth situation, the witness does not identify the accused as the offender in court, and depones that he cannot remember having made a previous identification. Here, the witness may be cross-examined as to the fact that he made that earlier identification, and evidence of the fact that he did so may be led, in order to undermine his credibility. But, it is thought,[25] evidence of the accuracy of the identification cannot be led, unless it was part of the res gestae,[26] or was made in the presence of the accused and expressly or impliedly admitted by him to be correct.[27] There is a question whether evidence of the accuracy of the previous identification should be more generally admissible.

19.64 (5) The witness does not identify the accused as the culprit in court/

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[24] See para 19.25 above.

[25] It is thought that Muldoon does not provide authority for its admissibility in this situation, because the facts of Muldoon were essentially different: see paras 19.64-19.65.

[26] See paras 19.69-19.74 below.

[27] See para 20.26 below.

court, depones that he remembers having made a previous identification, but denies that he then identified the accused. This was the stance of Mrs Miller in Muldoon. Her denial was disbelieved by the sheriff-substitute. He accepted the evidence of two police officers who deponed that the accused were among those whom she had identified on the earlier occasion. The majority of the Full Bench of the High Court held that the state of her evidence was indistinguishable from that of the only other eye-witness in the case, who did not identify the accused in court, deponed that he had made a previous identification, and did not dispute the police evidence that he had then identified the accused. There was accordingly, in the view of the majority, evidence of identification from two sources, and the sheriff-substitute had been entitled to convict. It seems important to observe that the decision of the majority as to Mrs Miller appears to constitute a significant exception to the general rule that evidence of a witness's previous statement which is inconsistent with his evidence in court is not admissible as evidence of the facts stated in it. The sheriff-substitute was held to have been entitled to proceed on the basis of the evidence of the police officers as to Mrs Miller's previous identification, which entirely contradicted the sworn testimony of Mrs Miller herself.

19.65 (6) The witness does not identify the accused as the offender in court, and denies having made any previous identification of anyone. Evidence of a previous identification would appear to be admissible for the purpose of indicating that his testimony is unreliable; but here, as in situation (4), the question arises whether such evidence is admissible as evidence of the accuracy of the identification, which the court/

court may accept as an identification of the accused as the offender? This situation, like situation (4), is not covered by Muldoon, because there Mrs Miller admitted that she had made a previous identification to the police. The answer to the question in situation (6) will be determined by the reader's answer to the general question whether previous inconsistent statements should be admissible as evidence of the facts stated, which has already been discussed.[28]

19.66 (7) Before the trial, the accused is identified as the culprit by a person who does not appear at the trial. Evidence of the identification is inadmissible, except where the person is now dead or permanently insane. The question whether further exceptions should be recognised has been considered earlier in this chapter.[29]

19.67 (8) Before the trial, the accused is exonerated by a person who does not appear at the trial. If the victim, or some other person with direct knowledge and no possible bias in favour of the accused, makes a statement to the police before the trial which exculpates the accused, but cannot or does not appear at the trial and does not come within any of the exceptions mentioned in the preceding paragraph, the statement is inadmissible. If, for example, a small child or a person of defective mental capacity, who has been the victim of an assault, tells a police officer some days afterwards that his assailant was coloured, and the accused is white; and at the trial the victim either is rejected as a witness by the judge or, more probably, is unable to testify to the same effect through the dimming of recollection; the police officer's evidence of his statement cannot be admitted.[30] It has been suggested that in cases of disputed identification, where the person who/

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[28]Paras 19.53-19.57 above.
[29]Paras 19.23-19.26 above.
[30]The example is inspired by the facts of Sparks v R, [1964] AC 964.

who is to give the hearsay testimony has no possible interest in exonerating the accused, hearsay evidence in favour of the accused should be admissible.[31] On the other hand, the view has been expressed that the principle must be maintained that any evidence admissible for the defence must be admissible for the prosecution also.[32]

19.68 (9) In each of the above situations, the previous identification has been made to a police officer. Should a distinction be drawn for any purpose between identifications made to witnesses who are officially charged or associated with the investigation of crime, and those made to other witnesses?[33] It seems important to safeguard the reliability of any admissible evidence of previous identification, and to formulate rules which will legitimately go some way to meet the difficulties of intimidation of witnesses and failures of recollection due to delays in trials, but will not be open to abuse by the unscrupulous.

5. Statements forming part of the res gestae[34]

19.69 In Ratten v R[35] Lord Wilberforce pointed out that in the context of the law of evidence the expression "res gestae" may be used in at least three different ways.

> "1. When a situation of fact (eg a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening ...
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> "2./

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[31] Libling, n 17 supra, at p 279.

[32] CLRC, para 250.

[33] See Muldoon, n 20 supra, Lord Cameron at p 48.

[34] Walkers, paras 377-379; R & B, paras 18-47, 18-86; Julius Stone, "Res Gestae Reagitata", (1939) 55 LQR 66; G D Nokes, "Res Gestae as Hearsay", (1954) 70 LQR 370; R N Gooderson, "Res Gestae in Criminal Cases", [1956] CLJ 199, [1957] CLJ 55; Law Reform Commission of Ontario, Report on the Law of Evidence, chap 2.

[35] [1972] AC 378, at pp 388-389.

"2. The evidence may be concerned with words spoken as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, ie are the relevant facts or part of them.

"3. A hearsay statement is made either by the victim of an attack or by a bystander - indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae."

In order to minimise the confusion to which the term "res gestae" gives rise it may be desirable either to eschew its use entirely or to confine its use to situations in Lord Wilberforce's third category, where a spontaneous or contemporaneous statement relating to an event in issue is made by a participant or observer. The question in his Lordship's first paragraph is one of relevance, to be decided on a common-sense basis, and the use of the expression "res gestae" is of no assistance. The words in the second paragraph are themselves the facts in issue (eg the formation of a contract, or defamation), or verbal parts of the facts in issue (eg an utterance completing or elucidating incomplete or equivocal conduct) and thus are admissible without violation of the hearsay rule, and thus without any need to classify them under a "res gestae" exception thereto. As to statements in the third category, it would be satisfactory to classify these as falling within a "spontaneous exclamation" or "contemporaneous statement" exception to the rule, and thus to avoid altogether the use of the expression "res gestae." The formulation of such an exception will be discussed below, but the term "res gestae" will continue to be used in the paragraphs immediately following, in the way indicated by Lord Wilberforce's third paragraph. In such a situation as is there described, the rule that evidence of statements may be admitted on the ground that they form part of the res gestae gives rise to three problems. The first is to determine the limits of the transaction which is the subject of the inquiry/

inquiry. The second problem is whether the statement is to be admitted as secondary hearsay (ie as evidence of the truth of what it asserts) or as primary hearsay (ie as evidence of the fact that it was made, often called "original evidence"). If it is to be admitted as secondary hearsay, a third problem arises as to the criterion of admissibility. It would be desirable to resolve these problems as far as possible. The first problem appears to be a matter of relevancy, about which no precise rules can be formulated. Confusion may, however, result from the fact that it is doubtful whether the illustrations given by Hume and quoted by Dickson would be regarded today as instances of evidence admissible under the third aspect of the res gestae rule.[36] The second and third problems are briefly considered here, and it is suggested that consideration be given to the enactment of statutory provisions, either on the lines of clause 37 of the Criminal Law Revision Committee's draft Bill, or on the lines of various North American provisions for the admission of both spontaneous and contemporaneous statements.

19.70 (1) Whether primary or secondary hearsay. It is submitted that in cases where the making of the statement is relevant, but its truth or falsehood is irrelevant, evidence that the statement was made should be admitted solely on the ground of its relevance, as evidence of state of mind, or knowledge, or the basis of expert opinion or the like.[37] It is unnecessary to justify its admission on the ground that it forms part of the res gestae. Statements which are admitted although they do not fall into any of the categories of primary hearsay appear to be properly regarded as statements forming part of the res gestae, and/

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[36] Hume, ii, 406, note (a); the first illustration is quoted by Dickson, para 254. See Draft Code, 1.6, commentary.

[37] See Walkers, para 375, for several examples of primary hearsay.

and to be admitted as evidence of the truth of the matters stated. Examples given by the Sheriffs Walker[37a] may illustrate the point. The learned authors say that evidence of protests by the alleged victim of an assault would found an inference that the interference was uninvited. They could only be so, however, if the victim's statements were assumed to be reliable.[38] A second example is based on O'Hara v Central SMT Co. A bus swerved suddenly and caused the pursuer to fall from the platform on to the road. The defenders averred that the bus driver had been compelled to swerve in order to avoid a man who had run in front of the bus. The learned authors state that in the circumstances of the case, evidence that as, or just before, the bus swerved some unknown spectator had shouted, "Watch the bus", or that the driver had shouted, "Look out, you fool", would clearly have been admissible as part of the res gestae. Such evidence, they say, would have founded an inference that there was somebody in the way. Once again, however, the inference cannot be drawn unless the truth of what the statements convey is assumed. The driver's shout of "Look out, you fool" is, if the question of truth or falsehood is regarded as irrelevant, evidence of nothing more than that bus drivers in Clydebank occasionally use uncomplimentary language. It must be said that the learned authors, following the language of Lord Normand[39] and Lord Moncrieff,[40] call such/

[37a] Walkers, paras 377-379.

[38] 1941 SC 363.

[39] In Teper v R, [1952] AC 480, at p 487.

[40] In O'Hara, n 9 supra, at p 390.

such statements "real evidence".[41] It is submitted, however, that they are admissible secondary hearsay evidence. It seems reasonable so to regard them: such statements, made in circumstances where the possibility of concoction can be disregarded, are more likely to be true than untrue. The view that statements forming part of the res gestae are admissible as evidence of the truth of the facts stated in them is supported by Ratten v R,[42] an appeal to the Privy Council in a case of murder. The Board considered the evidence of a telephonist that she had received a call from the accused's house, in which a female voice, which was hysterical and sobbing, said, "Get me the police please". Their Lordships held that the evidence was not hearsay evidence, but on the assumption that it was, it was admissible as part of the res gestae and as evidence of the truth of what was asserted, under an exception to the rule against hearsay.

19.71 (2) Criterion of admissibility. In Teper v R,[43] Lord Normand, delivering the advice of the Board of the Privy Council, considered the basis of the admissibility of words forming part of the res gestae, and said:

> "Their Lordships will not attempt to arrive at a general formula ... This, at least, may be said, that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the
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> action/

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[41] In the learned authors' example of evidence in a trial for mobbing and rioting that members of a crowd of which the accused formed part were shouting, "A la Bastille," the evidence is admissible not, it is thought, on the ground that the shouts formed part of the res gestae in the third of the three ways mentioned above in which the expression res gestae is used, but on the ground that the words themselves, being part of the conduct of the crowd, form part of the res gestae in the second sense of the expression. The words themselves can neither be true nor false, and are, it is submitted, original evidence. Cf cries of "No Popery" (Nokes, p 95).

[42] [1972] AC 378, at pp 389, 391.

[43] [1952] AC 480, at p 487.

action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not a reported statement."

In Ratten v R,[42] however, the Privy Council appeared to advance a somewhat different view. Lord Wilberforce said:

"A hearsay statement is made either by the victim of an attack or by a bystander - indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae. A classical instance of this is the much debated case of R v Bedingfield (1879) 14 Cox C C 341, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason, why this is so, is that concentration tends to be focused upon the opaque or at least imprecise Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been victims of assault or accident. The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person (as he could not at the time when earlier reported cases were decided) can give his own account if different. There is no such difference in kind or substance between evidence of what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

"The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement

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[42] [1972] AC 378, at pp 389, 391.

> in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression 'res gestae' may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings,"

After reviewing the authorities his Lordship said:

> "These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

19.72 It is submitted that it would be desirable, in order to avoid confusion as far as possible, to restate the rule as to the admissibility of statements forming part of the res gestae, and to provide that such statements will be admissible as evidence of the facts stated. Clause 37 of the Criminal Law Revision Committee's draft Bill, which covers both of these matters, may provide a suitable model.[44] The Committee's proposed test of admissibility is similar to, though somewhat narrower than, that laid down in Ratten. Clause 37, whose side-note reads, "Admissibility of statements made as immediate reaction to events in issue personally witnessed", provides:

> "(1) In any proceedings a statement made by a person otherwise than in a document shall be admissible as evidence of any fact stated therein if -
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> (a) it directly concerns an event in issue in those proceedings which took place in the presence, sight or hearing of that person; and
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> (b)/

[44] CLRC, para 261, pp 199, 246.

(b) it was made by him as an immediate reaction to that event."

The remaining subsections of clause 37 limit admissibility under the clause to first-hand hearsay, and prevent a statement admissible under the clause from counting as corroboration of any evidence given by the maker, in order to preserve the principle that a witness may not corroborate himself.

19.73 The provisions of clause 37(1) may, however, be open to the following comments. As to sub-clause 1(a), Sir Rupert Cross has observed that it is difficult, if not impossible, to apply the requirement that the statement should "directly" concern the event to cases in which it was made shortly before the occurrence of the event.[45] As to sub-clause 1(b), it may be difficult to determine whether a statement was made as a genuine and unconcocted "immediate reaction" to the event. Experiments have shown that the difference in time between an ordinary "spontaneous" reaction and a deceptive reaction to significant words is so minute that it can only be measured with the aid of instruments.[46] Further, it seems desirable to devise a test of admissibility which would not depend on the nature of the emotional state of the speaker, and would permit the admission of statements made before the occurrence of the event. For example, Lord Moncrieff's dictum in O'Hara[47] about

"an exclamation forced out of a witness by the emotion generated by an event"

is, it is thought, unacceptable as a comprehensive test because it disregards the possibility that the emotion generated might distort the perception of the speaker,[48] and it may be thought to exclude statements made/

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[45] Cross, p 509.
[46] D S Greer, "Anything but the Truth? The Reliability of Testimony in Criminal Trials", (1971) 11 Brit J Crim 131, at p 145.
[47] 1941 SC 363, at p 390.
[48] R M Hutchins and D Slesinger, "Some Observations on the Law of Evidence", (1928) 28 Col LR 432.

made before the crucial event in issue. Two American writers have indicated the value of unemotional statements made prior to the event:

> "With emotion absent, speed present, and the person who heard the declaration on hand to be cross-examined, we appear to have an ideal exception to the hearsay rule. Statements by passengers before any damage has been done about the roughness of the train ride; observations as to the speed of a train as it is going by; remarks made on hearing a fight in progress some distance away; 'Why don't the train whistle?', spoken as the declarant saw it approaching the crossing; - all these are exclamations the value of which is indicated by the opportunity to cross-examine the hearer as to the surrounding circumstances, by the speed of the reaction, and the unemotional condition of the speaker."[49]

19.74 In the United States and Canada, accordingly, various proposals have been made as to the admissibility not only of excited utterances but also of contemporaneous statements not made under the stress of nervous excitement. It is thought that a statement of the latter kind, made while the speaker is perceiving an event or immediately thereafter, should be admissible because it is likely to be reliable, there being no time for reflection or fabrication, and its value is likely to be superior to any later recollection which may be given in the witness-box by the speaker. Rule 512 of the American Law Institute's Model Code of Evidence is in these terms:

> "Contemporaneous or Spontaneous Statements. Evidence of a hearsay statement is admissible if the judge finds that the hearsay statement was made (a) while the declarant was perceiving the event or condition which the statement narrates or describes or explains, or immediately thereafter; or (b) while the declarant was under the stress of a nervous excitement caused by his perception of the event or condition which the statement narrates or describes or explains."

The provisions of the Federal Rules of Evidence, the Uniform Rules of Evidence approved in 1953 and the new Uniform Rules of Evidence approved in 1974 are in substantially similar terms.[50] In the draft Code of the Californian/

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[49] Ibid, pp 439-440.

[50] See Law Reform Commission of Ontario, Report on the Law of Evidence, chap 2.

Californian Law Revision Commission, however, it was provided that evidence of a contemporaneous statement should be admissible only if the declarant is unavailable as a witness.[50] But the Law Reform Commission of Ontario took the view that a contemporaneous statement should be admissible regardless of whether the speaker is dead, or cannot be found, or is too old to testify, and recommend a provision concerning both spontaneous and contemporaneous statements, in these terms:

> "Whether or not a person is called as a witness in a proceeding, a statement made by him is admissible in evidence if it was made in such conditions of spontaneity or contemporaneity in relation to an event perceived by the witness as to exclude the probability of concoction or distortion."[50]

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[50] See Law Reform Commission of Ontario, Report on the Law of Evidence, chap 2.