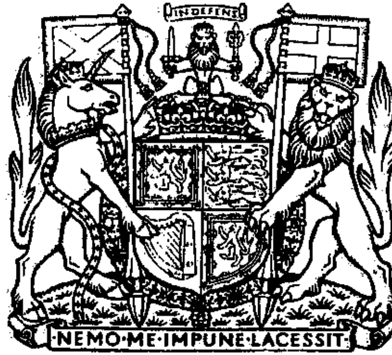

SCOTTISH LAW COMMISSION

RESEARCH PAPER

on the

LAW of EVIDENCE

of SCOTLAND

by

Sheriff I D Macphail

April 1979

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

Chapter 20

EXTRAJUDICIAL ADMISSIONS: STATEMENTS BY SUSPECTS AND ACCUSED PERSONS

1. Introduction

20.01 Extrajudicial admissions, and confessions and other statements by suspects and accused persons, may be regarded as being admissible in evidence as exceptions to the hearsay rule, and thus as appropriate for discussion in Chapter 19, but it will be convenient to deal with them in a separate chapter. The law relating to extrajudicial admissions appears to be satisfactory in most respects, but it seems desirable to draw attention to difficulties concerning certain types of admission. As to statements by suspects and accused persons, it will be necessary to consider statements made in a variety of different circumstances, and the trial-with-a-trial procedure.

2. Extrajudicial admissions

20.02 Admissions made in the course of precognition[1] or negotiation[2] are discussed elsewhere. The rules as to judicial admissions in another cause[3] and as to implied admissions[4] do not appear to cause difficulty; and the probative value of extrajudicial admissions appears to be generally understood.[5] The areas of the law selected for consideration here are (1) admissions in judicial proceedings, (2) admissions contained in writing, (3) admissions made vicariously by co-defenders and employees, and (4) admissions improperly obtained.

20.03/

---

[1]Walkers, para 29; paras 19.47-19.50 above.
[2]Walkers, para 29; paras 18.28-18.32 above.
[3]Walkers, para 32.
[4]Walkers, paras 34, 163; Campbell v Cook, 1948 SLT (Notes) 44.
[5]Walkers, para 30; McInnes v Brown, 1963 SLT (Notes) 15; Buick v Jaglar, 1973 SLT (Sh Ct) 6; Liquid Gas Tankers Ltd v Forth Ports Authority, 1974 SLT (Notes) 35.

20.03 (1) Admissions in judicial proceedings. There are conflicting decisions as to the admissibility of a judicial declaration emitted by an accused as evidence against him in a subsequent civil cause to which he is a party. The most recent decision, which is against its admissibility,[6] is criticised by Dickson;[7] and the Sheriffs Walker observe that the objection that the judicial examination is held in private could not be held to apply if the declaration had been used in evidence in a criminal trial.[8] The point may come to have some practical importance if the Thomson Committee's proposals as to judicial examination are made the subject of legislation.

20.04 It is thought that just as evidence given by a party at a previous trial is admissible against him at a subsequent trial as an admission,[9] a document which he has knowingly advanced as true in earlier judicial proceedings for the purpose of proving a particular fact should be admissible against him in subsequent proceedings to prove the same fact. There does not appear to be any Scottish authority in point.

20.05 (2) Admissions contained in writing.[10] Dickson states that a document will not be received as an admission if it has not been uttered;[11] but the cases on which his proposition is based[12] were criticised in Watson v Watson,[13] where a torn-up draft letter in the defender's writing was held to be admissible against her as evidence of adultery. The Sheriffs Walker point/

---

[6] Little v Smith, (1847) 9 D 737.
[7] Dickson, para 290. The earlier cases are referred to in para 289. See also para 1628.
[8] Walkers, para 31.
[9] Walkers, para 33.
[10] Walkers, para 35; Healey v A Massey & Son, 1961 SC 198.
[11] Dickson, para 303.
[12] Gavin v Montgomerie, (1830) 9 S 213; Livingstone v Murray, (1831) 9 S 757.
[13] 1934 SC 374. See also Creasey v Creasey, 1931 SC 9.

point out that since the document has not been uttered, it is not evidence of concluded intention, but it may be evidence of the writer's knowledge or state of mind, or it may bear on some disputed collateral issue.[14] It may be desirable to restate the law.

20.06 (3) Admissions made vicariously: (a) Co-defenders, etc. The general rule that an extrajudicial admission by one defender is not evidence against another is illustrated by Creasey v Creasey,[15] where entries made by the defender in her diary were held to be inadmissible as evidence against the co-defender, although admissible against the defender. In the result, the defender was found guilty of adultery but the co-defender was assoilzied. A similar rule would no doubt apply in respect of co-pursuers. There are two views about such a conclusion. In Rutherford v Richardson[16] Viscount Birkenhead said that the court might quite reasonably conclude that it is proved that B has committed adultery with C, but not that C has committed adultery with B: such a verdict, although sometimes "ignorantly derided" as inconsistent, was in fact "both logical and defensible." Wigmore, on the other hand, describes it as "perfectly logical, but also perfectly and absurdly artificial."[17] It is, perhaps, difficult to formulate a valid justification of the present law. Lord President Clyde said in Creasey:

> "The statements in the diary were not, of course, made in his presence, nor were they, so far as can be known, in any way communicated to him."[18]

Lord Morison said:

> "It seems to me to be obvious that it is unjust to use as evidence against/

---

[14] Walkers, para 35, n 67.

[15] 1931 SC 9. The alleged paramour, although referred to as the co-defender, was not called as a defender by the pursuer but entered the process by minute.

[16] [1923] AC 1, at p 6.

[17] Wigmore, IV, p 117, cit Cross, p 449.

[18] 1931 SC 9, at p 17.

against one man what another man writes of him behind his back."[19]

But the man against whom it is sought to use the evidence is entitled to deny or explain it, since he is a competent witness on his own behalf; and he may also cross-examine the maker of the statement if he gives evidence. As Sir Rupert Cross has observed of the equivalent English rules,

> "The trouble which besets this branch of the law is that it has never faced up to the two climacteric changes of 1851 and 1898 when, in civil cases, the parties were made competent and compellable and, in criminal cases, the accused was made competent. Much of the present law concerning hearsay, admissions and confessions is geared to the system as it existed before those changes."[20]

In England, a statement by one party in civil proceedings is admissible as evidence against another under section 2 of the Civil Evidence Act, 1968, by service of an appropriate notice. It may be that if such a statement were to be admissible in Scotland, notice of its proposed use ought to be given in the pleadings. It should be noted that although a case might be made for reform of the law as to civil proceedings, the case for reform of the law as to statements by co-accused in criminal proceedings may be more difficult: see paras 20.33-20.36 below.

20.07 (b) Employees. A statement or admission by an employee which it was part of the normal duties of his employment to make is admissible in evidence against the employer; but when an employer is sued in respect of the negligence of his employee, an extrajudicial admission by the employee regarding his alleged act of negligence is not admissible in evidence against the employer, on the ground that the employee had no implied authority to make it.[21] The latter admission may be put to the employee in cross-examination/

---

[19] Ibid, at p 18.

[20] "The Evidence Report: Sense or Nonsense", [1973] Crim LR 329, at p 334.

[21] Walkers, para 36; Livingstone v Strachan, Crerar & Jones, 1923 SC 794, L J-C Alness at p 803, Lord Ormidale at p 805, Lord Anderson at p 809; Scott v Cormack Heating Engineers Ltd, 1942 SC 159; Anderson Trawling Co Ltd v Forth Ferries Ltd, 1953 SLT (Notes) 36; cf Palestine Transport and Shipping Co Ltd v Greenock Dockyard Co Ltd, 1947 SN 162.

examination and used by virtue of section 3 of the Evidence (Scotland) Act, 1852, but it is not evidence against the employer. If the employee were called as an additional defender, it would be competent as evidence to prove the liability of the employee, but not of the employer. In Scott[22] Lord Moncrieff appeared to favour the dissenting opinion of Lord Murray in Livingstone[23] to the effect that an admission by an allegedly negligent employee was competent evidence against his employers, and indicated dissatisfaction with the present law. Wigmore observed of the corresponding American rule:

> "... it is absurd to hold that the superintendent has power to make the employer heavily liable by mismanaging the whole factory, but not to make statements about his mismanagement which can be even listened to in court; the pedantic unpracticalness of this rule as now universally administered makes a laughing stock of court methods."[24]

In England the employee's statement can now be rendered admissible against the employer under section 2 of the Civil Evidence Act, 1968. It is suggested that in Scotland the position of agents and employees should be assimilated, and that a statement made by an agent or employee should be admissible against his principal or employer if it concerns a matter within the scope of, or relating to, the agency or employment. It is thought that it should be admissible even if made after the termination of the agency or employment, since the former agent or employee will frequently be one of the few people, if not the only person, who has personal knowledge of the matter to be proved.

20.08 (4) Admissions improperly obtained. The admissibility of evidence in civil causes which has been illegally or irregularly obtained is considered in the next chapter. The question of the admissibility of an admission/

---

[22] 1942 SC 159, at p 163.
[23] 1923 SC 794, at p 815.
[24] Wigmore, IV, 166, cit Law Reform Commission of Canada, Evidence Project Study Paper no 9, "Hearsay", p 17.

RE 68917 BL(609)

admission obtained by threats, compulsion, trickery or deceit does not appear to have been decided in the Scottish courts. Dickson[25] and the Sheriffs Walker[26] suggest that the fact that an admission has been so obtained should not affect its admissibility but should go to weight. If that were so, it is possible that a confession which has been excluded as involuntary in a criminal trial could be admitted in a subsequent civil cause to which the accused was a party.[27] It may be that the civil court should have a discretion to exclude improperly obtained admissions. Reference should be made to the discussion in the following chapter, at paras 21.08-21.15.

3. Statements by suspects and accused persons

(1) Police interrogation: confessions

20.09 The present law relating to interrogation and confessions has recently been expounded in the fourth edition of Renton and Brown[28] and considered in the Second Report of the Thomson Committee.[29] In view of the comprehensive treatment of the subject in these volumes it would, it is thought/

---

[25]Dickson, para 307.

[26]Walkers, para 38.

[27]As in Bains v Yorkshire Insurance Co, (1963) 38 DLR (2d) 417, cit Ontario Law Reform Commission, Report on the Law of Evidence, p 208.

[28]R & B, paras 18-24 to 18-29; as to statutory duties to give information to the police see R & B, para 18-45. Other reviews of the modern law include Walkers, paras 42-46; A D Gibb, "Fair Play for the Criminal", (1954) 66 Jur Rev 199; Lord Kilbrandon, "Scotland: Pre-Trial Procedure", and Professor T B Smith, "Scotland: The Trial Process", both in The Accused, ed J A Coutts (Stevens & Sons Ltd, 1966), and the review by G H Gordon in 1966 Jur Rev 279; G H Gordon, "Institution of Criminal Proceedings in Scotland", (1968) 19 NILQ 249; J W R Gray, "'Chalmers and After': Police Interrogation and the Trial within a Trial", 1970 Jur Rev 1; Henry Brinton and Lord Fraser, "Trial and Pre-Trial Procedures", (1971) 135 JPJ 827; Lord Cameron, "Scottish Practice in relation to Admissions and Confessions by Persons Suspected or Accused of Crime", 1975 SLT (News) 265. The leading English authority on the admissibility of confessions now appears to be DPP v Ping Lin, [1976] AC 574. See also CLRC, paras 28-69, and Phipson, chap 19.

[29]See Thomson, chaps 7 and 8.

thought, be superfluous to do more here than add a few notes on the present law[30] and summarise and comment on the recommendations of the Committee as to interrogation and judicial examination.

20.10 The Committee begin by recommending that it should be competent for the Crown to lead evidence of statements made by a suspect before arrest in answer to police questioning. The admissibility of such evidence should be subject to the following qualifications. (a) It must have been fairly[31] obtained. (b) Before being questioned, the suspect must have been cautioned. The caution should be administered only once, and that is when the police officer has reasonable cause to suspect the person of having committed/

---

[30] In addition to R & B, paras 18-24 to 18-29, see Jones v Milne, 1975 SLT 2; Balloch v HMA, 1977 SLT (Notes) 29; and, for comment on the learned editor's concept of the "chargeable suspect", Murphy v HMA, 1975 SLT (Notes) 17. The value of the requirement of corroboration of the confession, which was commented on by L J-C Thomson in Sinclair v Clark, 1962 JC 57, at p 62, was strikingly illustrated by Boyle v HMA, 1976 SLT 126. It is probably unnecessary for the Crown to lead evidence that the accused was cautioned and charged, if they do not propose to found on any reply or subsequent statement (cf Rees v Barlow, [1974] Crim LR 713). They may found on an incriminating reply to caution and charge as a criminative circumstance (McSorley v HMA, 1975 SLT (Notes) 43; Wilson v HMA, 5th March 1976). The absence of a caution has been held not to render a statement or reply inadmissible (Laing, (1871) 2 Coup 23; Gracie v Stuart, (1884) 5 Coup 379; Smith v Lamb, (1888) 1 White 600; H H Brown, "Police Evidence", (1896) 12 Sc L Rev 203, at pp 204-205), but in view of the modern, judicially approved practice of invariably accompanying the words of the charge with a caution (see Walkers, para 45, and Mills v HMA, 1935 JC 77, L J-C Aitchison at p 81), it may be that nowadays the absence of a caution would at least imperil the admissibility of a subsequent statement or reply.

[31] The criterion of fairness, which is prominent in the present law and in the Committee's recommendations, will no doubt enable the courts to continue to exert an important influence in determining from time to time what methods of obtaining incriminating statements will be fair and what unfair. It appears that the application of that criterion might exclude, in particular circumstances, a statement made without inducement or pressure by a person who is mentally deficient or mentally ill; but there is no reported authority: cf R v Kilner, [1976] Crim LR 740. As to the admission of psychiatric evidence as to the reliability of the statement, see R S O'Reagan, "Impugning the Credit of the Accused by Psychiatric Evidence", [1975] Crim LR 563, at pp 567-569.

committed the offence.[32] (c) Interrogation of suspects in police stations must be recorded on tape.[33] (d) When a person is proceeded against on petition, the record of any interrogation should not be admissible at his subsequent trial unless he has been examined on it at a judicial examination.[34] Where a suspect makes a statement, not in response to a police question, the following procedure should apply. (a) The police should again caution him. (b) The statement should be recorded by a police officer and signed by the suspect. (c) If made in a police station, it will also be recorded on tape.[33] (d) It should normally be taken by the investigating officer/

---

[32] Thus rec 21b. But the text also appears to suggest that the caution should be administered just before questioning commences (para 7 13b). It is thought that the caution should be administered both at the time of initial detention (when the suspect may make an unguarded incriminating remark) and also just before interrogation commences in the police station. In England there has been much controversy about the need for and nature of the caution: see CLRC, paras 43-44; Lord Devlin, "Too High a Price for Conviction", Sunday Times, 2nd July 1972; Sir Robert Mark, "What I'm Fighting For", Observer, 16th March 1975. The Thomson Committee say: "We do not regard the caution as having any magical significance or effect, but it should be retained because there is no point in a man having the right to remain silent unless he is aware of it" (para 7.13).

[33] As to the need for the unchallengeable recording of statements, see CLRC, paras 48-52; C J Miller, "Silence and Confessions - What are they worth?", [1973] Crim LR 343, at pp 347-348; addresses to Justice by Lord Salmon (The Scotsman, 28th June 1974) and Lord Kilbrandon (The Times, 30th June 1976); R v Turner, (1975) 61 Cr App R 67. See also the Home Office report "The Feasibility of an Experiment in the Tape-recording of Police Interrogations", (1976, Cmnd 6630). The Home Office does not appear to favour a comprehensive scheme for the tape-recording of police questioning in England, on the grounds that the recording may not be technically satisfactory, the suspect could feign protestations and other sounds implying assault or other impropriety on the part of the interviewer, and the provision of transcripts would involve inordinate expenditure in cost and manpower. (Note to the Royal Commission on Criminal Procedure, The Times, 8th April 1978). It is thought that before any decision is taken to introduce tape-recording it will be necessary to consider whether tapes of interrogations should be available to procurators-fiscal in investigating complaints against the police, and whether tapes should be erased in the event of no proceedings being commenced against the suspect. The Royal Commission on Criminal Procedure is about to start an inquiry, with a limited experiment, into the use of tape-recorders by the police to record the interrogation of suspects (Daily Telegraph, 8th June 1978).

[34] Thomson. paras 7.13, 8.17, 8.18; rec 21. The introduction of different rules of evidence for solemn and summary cases appears to be implicit in the Committee's recommendations.

officer. (e) As in the case of interrogation, where a person is proceeded against on petition, the record of any statement made should not be admissible at his subsequent trial unless he has been examined on it at a judicial examination.[35] The suspect's solicitor should not be permitted to intervene in police investigations before charge.[36]

20.11 When an accused is charged he should be cautioned and specifically asked if he has anything to say in reply to the charge.[37] Formal post-charge statements made to police officers should continue to be admissible in evidence provided that the following conditions obtain. (a) The statement must be preceded by a caution and by an offer of an interview with a solicitor. (b) The statement must be recorded in a document, which is written either by the accused or by a police officer at his dictation. (c) The document must contain an acknowledgement by the accused of his right to silence, and a statement that he has seen a solicitor or has decided not to see one. (d) The whole proceedings must be recorded on tape if they take place in a police station or a prison. (e) The statement must be voluntary and not made in response to any invitation, threat or promise by the police. (f) The police officer taking the statement must not interrupt or ask any questions save such as are necessary for clarification. (g) Where a person is proceeded against on petition the statement should not be admissible at his subsequent trial unless he has been examined on it at a judicial examination.[38] The Committee make detailed recommendations as to the recording of statements.[39]

20.12/

---

[35] *Ibid*, para 7.14; rec 22.
[36] *Ibid*, paras 5.08, 7.16; rec 23.
[37] *Ibid*, para 7.17; rec 24.
[38] *Ibid*, para 7.19; rec 25.
[39] *Ibid*, paras 7.14, 7.21; recs 26-30. See n 33 *supra*.

20.12 As to the admissibility of statements in evidence, the Committee recommend that in solemn procedure nothing alleged to have been said to or in the hearing of the police by a suspect or an accused shall be admissible in evidence for the Crown at his trial unless it has been put to the accused at a judicial examination. Where a decision is taken to deal summarily with a case initiated by petition the same rule should apply.[40] If the proceedings at interrogation in a police station are unrecorded through the failure of the tape-recorder, the account of a police officer made from memory or notes made at the time or immediately afterwards should not be admissible in evidence; but the same restriction should not apply to a voluntary statement.[41]

20.13 The Committee recommend the revival of judicial examination of accused persons in a realistic form which, they consider, will increase the chance of conviction of the guilty and reduce the chance of the innocent being brought to trial.[42] The procurator-fiscal should be entitled to require an accused to submit to judicial examination before a sheriff (a) when he is brought before the sheriff on petition on the next lawful day after arrest, and (b) where, after his appearance on petition, he makes a statement to, or blurts out remarks to or in the hearing of, the police.[43] Further, while an accused on petition should have the right to make a declaration before the sheriff at any time before the service of the indictment, whether or not he has been previously judicially examined, he should, where he elects to make a declaration, become bound to submit to judicial examination thereafter.[44] The examination should be restricted to questions by the procurator-fiscal which are relevant to affording the accused/

---

[40] Ibid, para 7.22; recs 31-32.
[41] Ibid, para 7.23; rec 33.
[42] Ibid, para 8.10.
[43] Ibid, paras 8.11-8.13; recs 34-36.
[44] Ibid, para 8.29.

accused an opportunity to state his position, enabling the procurator-fiscal to ask him questions designed to prevent the subsequent fabrication of a false line of defence, and ensuring that anything the accused has said to the police, which is to be used as evidence at his trial, has been fairly elicited and is not distorted or out of context.[45] Detailed recommendations are made as to the procedure[46] and the recording of the proceedings.[47] The accused should be entitled to an interview with his solicitor before a judicial examination and his solicitor should be entitled to be present at the examination but he should not be allowed to ask questions. At the end of the proceedings he should be entitled to request the sheriff to put specific questions to the accused for the purpose of clarifying particular points.[48]

20.14 As to the use of the judicial examination, the Committee recommend that the transcript should be produced at the first diet unless both parties agree to dispense with it, and such part of it as is adjudged to be admissible will be available in evidence at the trial. Any incriminating answer given by the accused at the judicial examination may be used by the Crown as corroboration of other evidence. The transcript should be lodged by the Crown as a production. It should be sufficient evidence of its contents, should not require to be proved and should be available for use at the trial by either the Crown or the accused.[49] The jury should be entitled to take account of, and draw any appropriate inference from, the accused's failure to disclose at judicial examination a particular line of evidence on which he relies at his trial; but in no circumstances should failure to answer questions at judicial examination amount to corroboration.[50]

It/

---

[45] *Ibid*, paras 8.14-8.16; rec 37.
[46] *Ibid*, paras 8.17-8.18; rec 38.
[47] *Ibid*, para 8.21; recs 40-41.
[48] *Ibid*, para 8.20; rec 39.
[49] *Ibid*, para 8.22; recs 42-43.
[50] *Ibid*, paras 8.25, 8.27; rec 44.

It is suggested by the present writer that it should be made clear that there is no privilege attaching to a statement made on judicial examination which prevents it from being proved in other proceedings as a previous inconsistent statement, or otherwise.[51]

(2) Other statements by persons accused

20.15 The following paragraphs are concerned with a number of difficulties which have arisen in relation to various categories of incriminating statements by accused persons, other than statements made to the police, which have been considered in the preceding section, and statements to legal advisers and clergymen, considered in Chapter 18, paras 18.19-18.23, 18.38-18.44. The probative value of a plea of guilty which has been tendered and either rejected or withdrawn, or which has been accepted in relation to other charges in the indictment or complaint, is considered in Chapter 2.

20.16 (a) Averment of previous malice. Dickson stated that in a charge of murder, previous expressions of malice, or acts indicating that disposition, towards the deceased were relevant; but in order to prevent surprise, the proof was restricted to a fortnight before the alleged crime, unless the indictment libelled previous malice.[52] In H M Advocate v Kennedy,[53] however, Lord Salvesen said that since the passing of the Act of 1887 there had been no absolute rule limiting the evidence of facts and statements relevant to show previous malice on the part of the accused to a period of fourteen days previous to the date of the crime charged. It was, he said, no longer necessary to libel malice in the indictment, and the practice for many years had been in favour of allowing without notice evidence of any facts which had a bearing on the motive/

[51] See Dickson, para 1628.
[52] Dickson, para 20.
[53] (1907) 5 Adam 347.

motive of the accused. A different view was taken by the editors of Macdonald's Criminal Law:

> "Evidence of malice antecedent to the acts charged may be led subject to fair notice being given in the indictment. Although for purposes of relevancy malice is implied in the indictment, practice still requires an express allegation of previous malice as matter of fair notice."[54]

In H M Advocate v Flanders[55] Lord Cameron approved that statement in Macdonald and declined to follow Kennedy. It is thought, with respect, that the law stated in Macdonald and Flanders must be correct; but since the matter rests formally on two conflicting single-judge decisions it may be desirable to make that clear.

20.17 (b) Admissibility of statements in relation to one charge in trial on different charge. The learned editor of Renton and Brown raises the question whether, if A makes an admission in relation to one charge, that statement may be used in his trial on another charge arising out of the same species facti.[56] Where the first charge is more serious than the second, the statement can be used; but where the more serious charge is the second one the position is not quite so clear. The authorities are collected and discussed in paragraph 18-46 of Renton and Brown. It may be that a rule should now be enacted embodying either the familiar criterion of fairness, or the general principle enunciated by Lord Justice-General Clyde in M'Adam v H M Advocate,[57] that evidence of the reply to the less serious charge may be admitted if each of the crimes charged falls into the same category, such as dishonesty or personal violence, and substantially covers the same species facti.

20.18/

---

[54] Macdonald, p 306.
[55] 1962 JC 25.
[56] R & B, para 18-46.
[57] 1960 JC 1, at p 4; followedin HMA v McTavish, 1975 SLT (Notes) 27.

20.18 (c) Statements to prison officers. It appears that statements made to prison officers are regarded as in the same category as statements made to the police.[58] It is thought that the present law is accurately stated in Macdonald as follows:

> "... statements made to prison officials will not be received, unless it be clearly established that the accused was distinctly cautioned that his statements might be used against him, and that what he said was spontaneous, and not elicited by questions."[59]

It is, however, doubtful whether prison officers should receive confessions at all. It has been suggested that they should send for a magistrate or perhaps for the police. It may be that, if the recommendations of the Thomson Committee[60] are implemented, clear provision should be made as to the duty of prison officers to send for the police if it appears that a person in custody desires to make a statement. If it is to remain competent for prison officers to receive confessions, it is submitted that the law should be formally restated on the lines of Macdonald's proposition, for two reasons. The first is that that proposition is founded solely on the authority of a single-judge decision.[61] The second is that if the law relating to statements to the police is altered in accordance with the recommendations of the Thomson Committee,[60] judicial decisions made thereafter as to statements to the police may not be readily applicable to statements made to prison officers, and earlier judicial decisions may not continue to reflect accurately contemporary judicial attitudes to the admissibility of incriminating statements.

20.19/

---

[58] Walkers, para 40; R & B, para 18-40.
[59] Macdonald, p 314.
[60] Thomson, paras 7.14-7.23.
[61] Proudfoot, (1882) 4 Coup 590, 9 R (J) 19.

20.19 (d) Statements to investigators other than police. It is stated in Renton and Brown:

> "The rules relating to investigation by the police do not apply to the same extent to investigations made by or on behalf of employers. This is so even where, as in the case of the Post Office the investigation is carried out by means of an interrogation by officials employed as security officers. Such officials appear not to be in any way inhibited by the law in interrogating suspects, provided they act without duress, persuasion, or inducement, and provided the proffered statements were voluntarily made."[62]

The first sentence is founded on two authorities, Waddell v Kinnaird[63] and Morrison v Burrell.[64] It is submitted that the evidence which was held to be admissible in Waddell would be held inadmissible today. The accused was a railway employee. After he had been charged and cautioned by a railway constable, he was taken before a stationmaster and questioned by him in the presence of the railway constable and a burgh constable. Evidence of his answers was held to be competent; but Lord Ormidale, in a dissenting opinion, took the view that the stationmaster's examination of the accused was in effect an inquiry at the instance, or, at any rate, with the connivance and assistance, of the police into the probable guilt of the prisoner, and the statements made by the prisoner were not in any legitimate sense of the term voluntary statements.[65] The Sheriffs Walker express the view that the opinion of Lord Ormidale would now be followed.[66] It is thought that the decision should be over-ruled, and that the correct view of the admissibility of statements to investigators other than the police is to be found in the opinion of Lord Justice-General Cooper in Morrison.[64] There, statements made by a/

---

[62] R & B, para 18-41. See also Walkers, para 40.
[63] 1922 JC 40.
[64] 1947 JC 43. Cf Philip Turner and Peter Rennie, (1853) 1 Irv 234.
[65] 1922 JC 40, at p 52.
[66] Walkers, para 40, n 1.

a sub-postmaster to Post Office investigators were admitted in evidence against him. Lord Cooper distinguished between an investigation by the police addressed to a citizen charged with, or detained under suspicion of having committed, a crime, and

> "a domestic investigation by the proper officials of a public department into an apparent irregularity in the conduct of a public service of vital consequence to the community."[67]

The investigators had strongly suspected the accused of having committed a breach of Post Office regulations, and had had in their minds the possibility, not amounting to suspicion, that he had transmitted fraudulent bets. They had cautioned the accused, and the interview had been quietly and reasonably conducted. Lord Cooper held that the evidence of the accused's voluntary replies were admissible,

> "having regard in particular to the specific findings which I have rehearsed as to the circumstances under which the investigation was conducted and to the absence of any hint or trace of impropriety, unfairness or mis-use by the investigators of their position - a factor of vital importance in all cases of this kind."[68]

It is thought that the test of fairness should be applicable to all statements made to investigators other than the police, and that a provision to that effect could with advantage be enacted, which would cover statements to employers, press reporters[69] and private investigators.[70] In H M Advocate v Friel[71] Lord Ross applied the test of fairness to statements made to investigating Customs and Excise officers.

20.20/

---

[67] 1947 JC 43, at p 48.
[68] 1947 JC 43, at p 49.
[69] In HMA v Campbell, 1964 JC 80, L J-C Grant sustained an objection to the admission of a statement made without caution by the accused to a newspaper reporter accompanied by a policeman in disguise.
[70] There appears to be no reported decision as to statements to private investigators.
[71] 1978 SLT (Notes) 21. Cf Commissioners of Customs and Excise v Harz, [1967] 1 AC 760.

20.20 (e) Statements to private persons. It is thought that the same test should be applicable here. Statements by Alison[72] and Dickson[73] indicate that confessions to private persons are admissible even if made as a result of threats, undue influence or inducements. As the Sheriffs Walker observe,

> "The decisions, however, do not uniformly support this view. It is thought that fundamentally the matter is one of fairness to the accused and the likelihood or otherwise that the inducement or threat resulted in the making of a false confession."[74]

It is stated in Macdonald that where statements are made to officials not concerned with criminal matters, their admissibility depends on circumstances, and that it does not seem to be a matter of competency so much as of fairness.[75] It may be useful to make it clear that the views expressed by Alison and Dickson are no longer sound. Lord Cameron said recently:

> "Perhaps the better and sounder view is this:- that confession to a private party will be admissible unless the circumstances in which it has been made or extracted are such as to raise doubt as to whether it has been falsely made in order to escape from further pressures or in response to inducements offered, and that this is an issue which is essentially for the jury to determine upon the evidence laid before them. A case could also be figured when, by arrangement with police officers, a private person could be used to exercise upon a suspect pressures which would be fatal to the admissibility in evidence of a confession extracted by them by the use of such pressures: in such a case it cannot be doubted that any confession so obtained would be inadmissible."[76]

20.21 (f) Expressions uttered during sleep. In Emond[77] it was deponed to, without objection, that the accused, when in prison, "had started up/

---

[72] Alison, ii, 581.
[73] Dickson, para 345.
[74] Walkers, para 40.
[75] Macdonald, p 314.
[76] Lord Cameron, "Scottish Practice in relation to Admissions and Confessions by Persons Suspected or Accused of Crime", 1975 SLT (News) 265.
[77] (1830) Bell's Notes 243.

up and made a certain exclamation in his sleep." Dickson observes that expressions uttered during sleep would be admitted as evidence of knowledge if property or a weapon were recovered in consequence of them or if they indicated "an intimate acquaintance with details connected with the crime."[78] In Macdonald and in Renton and Brown, on the other hand, it is said that the propriety of admitting expressions uttered during sleep "is open to very serious question."[79] Macdonald adds that if, however, real or circumstantial evidence is obtained in consequence of what has been so said, it might be admissible to prove them as explaining and leading up to its discovery. It would appear to be wrong in principle to admit, as evidence of its truth, a statement uttered when the maker was not exercising his conscious mind.[80] One illustration of the principle is the rule that a judicial declaration must not be taken unless the accused is in his sound mind and sober senses.[81] It may be that words uttered in sleep should be admissible only for the purpose stated by Macdonald. There is, however, a danger that a jury would not be prepared to decline to act on them.

20.22 (g) Statements overheard. There may be a doubt whether a police or prison officer may give evidence of a statement made by a person in custody which he has overheard. The doubt arises from H M Advocate v Keen,[82] where Lord Ormidale sustained an objection to the admission of the evidence of a police officer as to what he had heard when two of the accused were shouting to each other in the cells of the police office shortly after they had been placed there. The report gives no account of the/

---

[78] Dickson, para 351.
[79] Macdonald, p 315; R & B, para 18-43.
[80] See the argument for the Crown in Meehan v HMA, 1970 JC 11, at pp 12-13, and para 13.01, n 1, above.
[81] See R & B, para 5-45.
[82] 1926 JC 1.

the argument or the reasons for the decision. The consideration that the accused were charged with the then capital crime of murder and other crimes, may have had a bearing on the decision.[83] It was, however, criticised by Professor Dewar Gibb as "surely most obviously wrong" and "carrying the idea of fair play beyond all reason." He observed, "Men in a police station who shout their observations must surely be taken to know that policemen will hear them."[84] It seems difficult to reconcile Keen with the decision of the High Court in Welsh and Breen v H M Advocate,[85] where the Court refused applications for leave to appeal against conviction on the ground of the wrongful admission of evidence of police officers as to statements which, purely by accident, they had overheard the accused making to each other while they were in police cells after being cautioned and charged. The Court did not refer to the earlier authorities or express any disapproval of Keen, and explicitly refrained from laying down "just exactly how far the limits of permissible evidence of this nature will go." The Court did, however, place some emphasis on the voluntary and spontaneous nature of the statements and the absence of inducement in the case before them, and the test of fairness. The Thomson Committee believe that the Welsh and Breen approach is the correct one, and that in such circumstances, provided the police role is passive, the evidence of anything said by an accused person to or in the hearing of the police should be admitted: whether or not the accused person is aware that a police officer is listening to him is immaterial.[86] They/

[83] Cf Waddell v Kinnaird, 1922 JC 40, where Lord Salvesen said at p 48 that where the charge is one of murder "it is in accordance with the tradition of the High Court never to allow evidence to which any plausible objection can be taken."

[84] (1954) 66 Jur Rev 199, at p 219.

[85] 15th November 1973, unreported except in (1974) 38 JCL 151. Passages from the judgment are printed in the sheriff's opinion in HMA v O'Donnell, 1975 SLT (Sh Ct) 22, at p 24.

[86] Thomson, para 7.20.

RE 68917 BL(623)

They recommend that remarks blurted out to third parties in the presence of the police should be put to the accused at his judicial examination.[87] In H M Advocate v O'Donnell,[88] where objection was taken to the evidence of a police officer as to remarks he had overheard which were being shouted by accused persons in the police cells, the sheriff declined to follow Keen and observed that the earlier cases[89] seemed to establish that evidence of an overheard remark, made by an accused person in custody and relating to matters relative to the charge on which he is being tried, is admissible, provided that the remark was made voluntarily and not as the result of an inducement or trap.

20.23 Welsh and Breen appears to be consistent with these earlier cases, but since the Court expressly refrained from laying down any principle and did not overrule Keen, it may be desirable to enact a provision which restates the earlier law. It may be that such a provision should be so phrased as not to render admissible evidence of statements obtained by setting up microphones or making other special arrangements for the purpose of recording conversations after an accused has been cautioned and charged.[90] But the nature and extent of any such qualification would depend on an assessment of how far the police may go before they transgress the standards of investigation which are required in a civilised society. If it is said that the making of special arrangements is "not playing/

---

[87] Thomson, para 8.18b.

[88] 1975 SLT (Sh Ct) 22.

[89] Brown, (1833) Bell's Notes 244; Miller, (1837) Bell's Notes 244; Johnston, (1845) 2 Broun 401.

[90] Cf R v Mills, [1962] 1 WLR 1152, and R v Stewart, [1970] 1 WLR 907, where evidence was admitted of conversations recorded after the accused had been charged; and R v Buchan, [1964] 1 WLR 365, and R v Maqsud Ali, [1966] 1 QB 688, where evidence was admitted of conversations recorded before they had been charged with the offences for which they were subsequently tried.

playing the game", the policeman might well reply that the detection of criminals is not a game at all, and that there should be no hesitation in admitting evidence obtained by such arrangements. He might add that such evidence would be even more trustworthy than a formal confession, since the accused could not be influenced by the hope of receiving any special favour by making the statement, as may sometimes be thought to happen in the case of a confession.

20.24 (h) Statements in intercepted letters. In H M Advocate v Fawcett[91] a prisoner committed for trial wrote a letter to his brother containing suggestions for his defence and, in contravention of the prison rules, entrusted it for delivery to another prisoner whose sentence was on the point of expiry. The letter fell into the hands of the prison authorities, and it was held that it was admissible as evidence against the writer. In H M Advocate v Walsh[92] objection was taken to the admissibility of a letter written in prison by an accused awaiting his trial, which had been retained by the governor as being in contravention of the rules regulating the correspondence of prisoners. The Crown stated that the letter was only to be used for a comparison of handwriting, not for any statements which it might contain. Lord Justice-Clerk Scott Dickson, having regard to the limited purpose for which it was proposed to use the letter, repelled the objection. He observed:

> "I do not ... need to decide, nor do I express any opinion on, the wider question of the competency of using a letter, written and obtained in such circumstances as these with which we are here concerned, as evidence of statements contained in it."

It may be that these observations have raised a doubt as to the admissibility, as evidence against a prisoner, of letters written by him to/

---

[91](1869) 1 Coup 183.
[92]1922 JC 82, at p 84.

to unofficial persons outside the prison and intercepted by the prison authorities.[93] It may therefore be useful to make it clear that such letters are admissible for that purpose. Fawcett was not cited in Walsh; and it would seem illogical to admit voluntary oral statements made by the accused while in custody,[94] but to exclude letters which he has written and attempted to despatch, provided that they were written voluntarily and not as the result of any inducement or trap, and were not privileged letters to his agent. It may be desirable to affirm the opinion of Hume,[95] which was cited in Walsh:

> "... credit cannot well be refused to a letter from the pannel, which implies a confession of his guilt, or relates or alludes to the circumstances of the fact, though the letter be found even in his own pocket, and much more if it is intercepted on the way,[96] or have once passed out of his hands, for delivery according to the address."

20.25 (i) Implied confessions. The present law is that no inference of guilt may legitimately be inferred from the fact that the accused, when charged with the crime, either says nothing or says that he has nothing to say, since he is entitled to reserve his defence.[97] The Thomson Committee do not suggest that it should be permissible to draw any adverse inference from the silence of a suspect in answer to police questioning;[98] but they recommend that the failure of an accused person to answer questions at judicial examination should be a matter for comment relevant in weighing evidence,[99] and his failure to disclose at judicial examination a particular line/

---

[93] See Walkers, para 40. Cf Macdonald, p 331.

[94] As in Brown, Miller, Johnston, Welsh and Breen, and O'Donnell, nn 85 and 89 supra.

[95] Hume, ii, 396.

[96] Hume's note: "In the trial of Main and Aitchieson for house-breaking, 25th March 1818, such a letter, addressed and sent to a companion of one of these pannels, was produced and admitted as an article of evidence against the writer."

[97] Walkers, para 34; Robertson v Maxwell, 1951 JC 11; Wightman v HMA, 1959 JC 44 (but see McSorley v HMA, 1975 SLT (Notes) 43).

[98] Thomson, para 7.12.

[99] Thomson, para 8.27.

line of defence on which he relies at his trial should be a matter which the jury may take into account, and from which they may draw any appropriate inference.[1]

20.26 The present law as to the inferences which may be drawn from silence on other occasions appears to be well understood, despite an apparent dearth of modern reported authority:[2] it is a question of fact in each case whether an inference of guilt may legitimately be drawn. As to whether an inference of guilt may be drawn from behaviour other than silence, it is clear from Lord Justice-General Cooper's opinion in Chalmers v H M Advocate[3] that the law relating to confessions is fully applicable to non-verbal assertive actions.[4]

20.27 Where an accused who is charged on indictment has failed to appear at an earlier diet of trial, it is sometimes averred in the indictment for the later diet that "you, being conscious of your guilt, did abscond and flee from justice and fail to appear for trial at" a specified court, time and place, eg "a sitting of the High Court of Justiciary in Glasgow commencing 1st May 1967."[5] The Crown then leads evidence to that effect, and the jury is invited to draw an inference of guilt from the accused's failure to appear. The accused is entitled to deny or explain his absence, and to invite the jury not to draw that inference. This procedure is not unknown both in the High Court and in cases on indictment in certain sheriff courts/

---

[1] Thomson, para 8.25.

[2] Walkers, para 34; Winchcole v Adair, 1947 SLT (Notes) 64. For the modern English law see Phipson, paras 764-767; Parkes v R, [1976] 1 WLR 1251.

[3] 1954 JC 66, at p 76: "a passage which one might venture to hope is destined to become a classic statement of the law relating to confessions by acts" (Cowen and Carter, Essays on the Law of Evidence, p 61).

[4] See Douglas v Pirie, 1975 SLT 206, where the compliance of an accused charged under section 6(1) of the Road Traffic Act, 1972, with the statutory requirements to provide specimens of breath and blood or urine was held not to constitute an admission that he was the driver of the car.

[5] HMA v Mulholland, 1968 SLT 18; R & B, para 6-29.

courts, but its competency in modern times has not been fully examined. It seems that its origin may be found in the practice in the High Court prior to the abolition of the sentence of outlawry or fugitation by section 15(2) of the Criminal Justice (Scotland) Act, 1949.[6] Before 1949, where the accused failed to appear in the High Court after being duly cited, the Crown moved that letters of fugitation should be granted, and the Court pronounced sentence of outlawry, or fugitation.[7] It seems clear that absence gave rise to a strong presumption of guilt, and that outlawry was in effect a declaration of guilt in absence.[8] It appears that if the accused was subsequently indicted, it was competent for the Crown to add to the charge words to the effect that he, being conscious of his guilt, had absconded and fled from justice. No inferior court could pronounce sentence of outlawry.[9] According to the earlier editions of Macdonald, the words mentioned could competently be added where sentence of outlawry had not been pronounced:

> "Where the trial has been delayed by the flight of the accused, it is usual to say: "And you, being conscious of your guilt in the premises, did abscond and flee from justice." And where the accused has been previously indicted and outlawed for non-appearance, this fact is also sometimes stated."[10]

No examples have been found of any pre-1949 sheriff court indictments containing an allegation of failure to appear at an earlier diet of trial.

20.28 An objection to such an averment in a High Court indictment was repelled/

---

[6] 12, 13 & 14 Geo VI, cap 94.

[7] See Green's Encyclopaedia, vol v (1928 ed), paras 740-741; Macdonald (5th ed), p 269. For an example, see HMA v Monson, (1893) 1 Adam 114.

[8] See Selected Justiciary Cases 1624-1650, vol ii (Stair Society vol 27), ed Sheriff J Irvine Smith, Introduction, pp liii-liv.

[9] Hume, ii, 69; Summary Jurisdiction (Scotland) Act, 1908 (8 Ed VII, cap 65), sec 33.

[10] Macdonald (4th ed), p 445: see also 1st ed p 478, 2nd ed p 431, 3rd ed p 464.

repelled by Lord Milligan in H M Advocate v Mulholland[11] upon the view that

> "reference in a charge against a panel that he had previously absconded has always been treated as competent."

There, however, the defence did not submit that the discontinuance of outlawry by the Act of 1949 had any bearing on the issue. It seems, accordingly, that the question whether it is competent to make such an averment in the absence of a previous sentence of outlawry remains open to argument.

20.29 Whatever the correct answer to that question may be, it now seems appropriate to resolve any doubt and formulate a rule for the future as to the inference of guilt from failure to appear at trial. It is thought that the rule should be applicable in all courts, and in both solemn and summary procedure. The inference, if permissible - and it was frequently drawn by the Supreme Courts for over 300 years before 1949 - , should be capable of being drawn under both forms of procedure, and without any preceding action or determination by a competent court. It is for consideration whether notice should be given in the indictment or complaint. It may be that it would be fair to give the defence notice of the fact that the prosecutor intends to found on the accused's absence as a matter inferring guilt. It may be also that the rule should be so drawn as to include any flight by the accused which has caused the trial to be delayed.

20.30 (j) Statements in judicial proceedings.[12] It is thought that the law as to these is settled, except for a doubt as to the admissibility of statements made on declaration.[13] The matter could with advantage be clarified/

---

[11] 1968 SLT 18.

[12] See R & B, para 18-83.

[13] See Wilson (1860) 3 Irv 623 (competent to refer to the statement in cross-examination); George Milne (1866) 5 Irv 229 (incompetent to prove the statement, on the ground that a declaration was privileged in respect of its purpose and the circumstances under which it was taken); Dickson, para 1628.

clarified in the context of any reform of the judicial examination procedure, as suggested above.[14] The law as to the inadmissibility of a deposition made by an accused in another's sequestration rests on a decision of Lord M'Laren excluding such a deposition in a case where the accused was charged with embezzlement of the fund referred to in it. Objection was taken on the ground that the deposition not being voluntary on the part of the panel, and being in that respect unlike a declaration, it could not be used against him. Lord M'Laren observed that, unless in a very exceptional case, the proceedings in one court in a different case could not be used as evidence against a prisoner in the criminal courts.[15] It is thought that the question of the admissibility of such a statement would now be considered to depend on the proper construction of the statute by virtue of which the statement was elicited.[16]

20.31 (k) Self-serving statements.[17] The general law as to the admissibility of previous consistent statements was considered in Chapter 19. In criminal cases, the general rule is that statements by the accused are not evidence in his favour. But statements made by him may be admissible as part of the res gestae, in the second sense in which that expression is used.[18] And statements made by himself in his own favour, in a judicial declaration or in a statement made under caution[19] to the police may, if led by the Crown, be founded on by the accused, not as tending to show the truth of the contents of the statement, but in order to show that he has told a consistent story throughout.[20] The accused's reply to the police when cautioned/

---

[14]See paras 20.03, 20.14 above.
[15]Fleming, (1885) 5 Coup 552, at p 581.
[16]See Commissioners of Customs and Excise v Harz, [1967] 1 AC 760, Lord Reid at p 816; Phipson, para 813; para 18.08 above.
[17]See R & B, para 18-47.
[18]See para 19.69 above; Hume, ii, 401, note a.
[19]As to the caution, see nn 30, 32 above.
[20]Brown v HMA, 1964 JC 100.

cautioned and charged is normally led in evidence[21] and, if in his favour, may be founded on by him for the same purpose. If the recommendations of the Thomson Committee are implemented, the transcript of the accused's judicial examination will be available for use at the trial by either the Crown or the accused.[22] It may be suggested that while the Crown may found on the transcript as evidence of the truth of the facts stated in it, the accused should be entitled to found on it only for the purpose of demonstrating that his story has always been the same.

20.32 It may be thought that, the latter reform apart, the accused should not be accorded any further opportunities to found on statements made by himself in his own favour. On the other hand, the present law may sometimes operate unfairly when it excludes exculpatory statements made by the accused before the crime was committed. In H M Advocate v Macleod[23] an accused charged with mobbing and rioting was not allowed to lead evidence that prior to the riotous assembly he had advised certain individuals to have nothing to do with it; and in H M Advocate v Scott[24] a girl charged with child murder was not permitted to put in evidence two letters written by herself, one prior to and the other during her pregnancy, in order to show that she had suffered from irregularities of menstruation and to assist in proving that she was ignorant of the probable date of conception, and that her labour had come upon her unexpectedly. It is no doubt true that written and oral statements could be manufactured by the accused prior to the crime, but it may be that that should be a consideration going to their weight, and not against their admissibility, and that they should be admissible if only for the purpose of showing that the statements were made.

(3)/

---

[21] See n 30 above.
[22] Thomson, para 8.22. See para 20.14 above.
[23] (1888) 1 White 554.
[24] (1892) 19 R (J) 63.

(3) Statements by co-accused

20.33 (a) Statement incriminating the accused. The present law is that a statement made by one accused incriminatory of a co-accused is not admissible against the latter unless made in his presence and hearing, and only if his attendance at the time of the making of the statement has not been improperly arranged for the purpose of making the statement evidence against him. Otherwise, apart from cases of concert, a confession of, or inferring, guilt by one accused is not evidence against another. If evidence of a confession by one accused is led as admissible against him, and its terms implicate another accused, the jury must be directed to disregard it as evidence against the other accused. However, the silence of an accused person after a statement made by a co-accused in his presence may be founded on as an implied admission, and evidence of the co-accused's statement may be admissible for that purpose.[25] A declaration by one accused is not admissible as evidence against another.[26]

20.34 The Criminal Law Revision Committee, by a majority, recommended the enactment of a provision enabling the prosecution to adduce evidence of a statement made by one accused, A, implicating another, B, who is being tried jointly with him.[27] The recommendation was made on the ground that there are many cases where the interests of justice require that what any of the accused have said out of court about the part played by the others in the events in question should be before the court. A further argument in favour of the provision was that it would get rid of the "absurd" situation which occurs under the present law that, when A has made/

---

[25] Walkers, para 37; Lewis, Manual, pp 323-324; HMA v Davidson, 1968 SLT 17.
[26] Walkers, para 31.
[27] CLRC paras 251-252, pp 190, 237.

made a statement incriminating himself and B, it is necessary to direct the jury that the statement is admissible against A but not against B. This, it was said, is a subtlety which must be confusing to juries, and in reality they will inevitably take the statement into account against both accused. It has also been pointed out that the American Model Code, Uniform Rules and Federal Rules, and the proposed Ghana Rules of Evidence are to the same effect as the Committee's proposed provision.[28] The proposal was not well received, however,[29] and it seems doubtful whether a proposal on similar lines would be supported in Scotland. Hume appears to take it for granted that an accused's declaration "cannot weigh at all against any other pannel;[30] and Dickson observes that "nothing is more frequent than culprits attempting to shift the guilt from themselves to the shoulders of their fellow-prisoners."[31] It may be admitted that a burden is cast upon the jury by the direction which must be given, but it may be difficult to devise a system which would permit A's statement to be evidence against B but which would also provide adequate and workable safeguards for B. In England the Bar Council found it impossible to do so.[29]

20.35 (b) Statement exculpating the accused. If one accused, A, makes a statement in favour of his co-accused, B, should B be entitled to found on it? The present law is unclear. Macdonald points out that although it was held in Lyall and Ramsay[32] that one accused might not lead evidence of a statement made by his co-accused, tending to exculpate him and to inculpate the co-accused, that decision seems to depend on the analogy of/

---

[28] Cross, An Attempt to Update the Law of Evidence, p 26.
[29] See eg, BC paras 84, 189-195; but defended by Cross, p 501.
[30] Hume, ii, 327.
[31] Dickson, para 337.
[32] (1853) 1 Irv 189.

RE 68917 BL(633)

of the use of judicial declarations when persons accused were incompetent witnesses.[33] Dickson discusses the problem in these terms:

> "It is a nicer question whether, if a prisoner in his declaration confesses his own guilt and absolves his correus, the latter can refer to the declaration as evidence in his favour. No doubt he will not be allowed to do so, unless the prosecutor produces the declaration. If, however, the admissions in a declaration on which the prosecutor founds are inconsistent with the guilt of the declarant's correus, it seems anomalous to receive them against the one panel, but to disregard them entirely as evidence for the other; for they ought only to receive effect on the supposition that they are true; and if they are, there seems to be no just ground for refusing to the correus the benefit of them. The confession also gives a truthful character to the exculpatory statements, which will usually be prejudicial rather than favourable to the party who makes them. On the other hand, it is not unlikely that a prisoner, finding his own case desperate, may try to clear his associate; while the general rule against admitting statements not made on oath is against receiving the declaration of one prisoner in favour of another."[34]

20.36 At present, an accused person may found on his own judicial declaration or statements made by himself in his own favour, only if these are led by the Crown and only in order to show that he has consistently told the same story.[35] He may found on his reply to caution and charge for the same purpose. Under the Thomson Committee's proposals he would be entitled to use the transcript of his own judicial examination, whether it had been led by the Crown or not.[36] It has been suggested above that although the Crown may found on the transcript as evidence of the truth of the facts stated in it, the accused should be entitled to found on it only for the purpose of demonstrating that his story has always been the same.[37] As to statements made by a co-accused, it is submitted that the accused should not be entitled to found for any purpose on any statement made in his favour by a co-accused, whether in the context of a declaration/

---

[33] Macdonald, p 316.
[34] Dickson, para 338.
[35] Brown v HMA, 1964 JC 10.
[36] Thomson, para 8.22.
[37] See para 20.31 above.

declaration, confession or otherwise, and whether the statement is adduced by the Crown or any other party. If the co-accused wishes to assist the accused, he may go into the witness-box and give evidence in his favour.

4. The trial within a trial

20.37 There is a question whether the trial within a trial procedure laid down in Chalmers v H M Advocate[38] should be retained in any form. In Chalmers,[38] Lord Justice-General Cooper laid down the procedure in these terms:

> "When objection is taken to a line of evidence based upon the alleged unfairness of the methods used in eliciting it, the jury ought to be excluded, and the evidence bearing upon the attendant circumstances should be heard by the judge in the absence of the jury, including, if so advised, the evidence of the accused himself. If, in the light of such evidence and argument, the judge sustains the objection, the jury should be told nothing about the matter. If on the other hand the judge repels the objection, the case will proceed in the presence and hearing of the jury, and, if either prosecution or defence choose to do so, the evidence bearing upon the attendant circumstances can be made the subject of examination and cross-examination a second time. In the end of the day it will be for the judge to direct the jury that, in considering the weight and value of the evidence to which objection has been taken and repelled, it is for the jury to have regard to the attendant circumstances as proved before them, and, in so far as they may consider that the evidence objected to is not to be relied upon by reason of the circumstances in which it arose, to discount it or exclude it from their deliberations."

20.38 The procedure appears to have been an innovation in Scottish practice.[39] It somewhat resembles the English practice which recognises that/

[38] 1954 JC 66, at p 80.

[39] In Thompson v HMA, 1968 JC 61, L J-G Clyde described it as "an innovation in the law of Scotland in 1954." Two examples of earlier practice may be noted. In HMA v Proudfoot, (1882) 4 Coup 590, 9 R (J) 19, counsel for the accused questioned the witnesses after objecting to the line of examination, and then presented argument. In HMA v Aitken, 1926 JC 83, 1926 SLT 310, 1926 SN 39, when a Crown witness was about to be examined in chief as to a statement made by the accused, the presiding judge, the advocate-depute consenting, allowed counsel for the accused to question the witness "so as sharply to bring out the circumstances in which the statement was taken, and thus to raise a point at issue" (minutes). Thereafter, on the advocate-depute pursuing the line of examination for the accused submitted that evidence as to the statement was inadmissible. Neither the reports nor the minutes indicate that the jury retired before the questions were put.

that there are conditions precedent which are required to be fulfilled before evidence is admissible for the jury: in the event of objection, the judge alone has to decide whether the conditions have been fulfilled, and to determine any disputed facts; and in the event of objection to evidence of an alleged confession, the judge may hear evidence outwith the presence of the jury in a trial within a trial.[40] The procedure laid down in Chalmers may have been suggested by a consideration of English practice; but it may also be seen as a development of a Scottish practice whereby argument on objections to the admissibility of confessions was heard in the absence of the jury before the critical evidence had been led.[41] In the absence of certainty or agreement as to what the substance of the evidence would be, such argument was unsatisfactorily based on hypotheses, sometimes disputed, as to the testimony which the witness would be likely to give. Thus, in H M Advocate v Short,[42] after Lord Justice-Clerk Thomson had heard some argument in the absence of the jury, further evidence was elicited from the witness in the presence of the jury, then the objection was renewed, the jury retired again and further argument was heard.[43]

20.39 In Chalmers,[38] Lord Cooper explained his reasons for the introduction of the new procedure in these terms:

> "In this case, following certain precedents (such as Cunningham[41]), the presiding judge excluded the jury during the argument as to the admissibility of the evidence as regards the corn field, but took the evidence as to the circumstances attending the interrogation in the police station and its sequel in the corn

field/

---

[38] 1954 JC 66, at p 80.
[40] Cross, pp 58-65.
[41] As in H M Advocate v Cunningham, 1939 JC 61.
[42] High Court, Edinburgh, 30th May 1950, unreported.
[43] In HMA v Rigg, 1946 JC 37, L J-C Cooper, the presiding judge at the trial, both heard argument and examined the statement objected to, and sustained the objection in the light not only of the surrounding circumstances but of the inherent characteristics of the statement.

field in the presence and hearing of the jury. In my view, this course is open to objection and should no longer be followed. In some cases (of which the present is an instance) such a course not only unduly ties the hands of counsel in examining and cross-examining witnesses, but almost inevitably leads to the disclosure to the jury, directly or by inference, of matters which ought to be withheld from their knowledge."

Having laid down the new procedure in the terms already quoted, he continued:

"I recognise that this procedure may give rise to difficulty and may not always achieve the desired ideal of avoiding prejudice to the accused. But it will at least minimise the risk of such prejudice to an extent unattainable by our past practice. In a murder trial the jury, being enclosed, will hear nothing of evidence which the presiding judge has ruled to be inadmissible. In other types of cases the jury may acquire information through the medium of the Press; and all that can be done in such cases is to request the Press not to report the matter pending the conclusion of the trial, and to warn the jury to refrain from discussing the case with others, and from reading newspaper reports, during any overnight adjournment."

20.40 The trial-within-a-trial procedure has been much criticised. In Thompson,[43a] Lord Justice-General Clyde, delivering the opinion of the Court, said:

"Experience has shown that it has several undesirable features. Apart from the repetition of evidence (first before the judge alone, and then before the jury) with the consequent addition to the length of time occupied by the trial, it affords an opportunity for the reconstruction of evidence for the second trial after the witnesses have seen how they are cross-examined in the first one. Moreover the jury in the second trial have no opportunity of

testing/

[43a] 1968 JC 61.

testing the consistency of the evidence in the two trials, because they are not present at the first one, whereas the judge is, although he cannot properly disclose the inconsistencies to the jury. It seems unfair to both sides that the judge should be put in a stronger position than the jury to decide on a matter where the ultimate responsibility for deciding rests exclusively with the jury.

"It appears that the procedure laid down in Chalmers' case may have to be reconsidered, particularly as these trials within trials are increasing in number. It would be unfortunate if the law of Scotland in regard to confessions were to reach the stage it reached in England, which induced Parke B in Reg v Baldry[44] to say (at p 445): 'I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence ... justice and common sense have, too frequently, been sacrificed at the shrine of mercy.' If the question is whether the confession has been freely and voluntarily given - and that is usually the question - and if, as seems clear, the jury must have an opportunity of determining whether the confession was fairly obtained, in cases where the confession is part of the Crown evidence in the trial, it seems difficult to justify a separate trial on this matter before the judge alone as well. It would seem that there is much to be said for leading the evidence once and for all before the jury. If the judge takes the view that the Crown has not led evidence that the confession was freely and voluntarily given, he can at the end of the day direct the jury to disregard the evidence on the confession, or, if the Crown case is otherwise insufficient, he may direct them to return a verdict of not guilty. But if he considers that the confession was freely and voluntarily given, then he leaves the matter to the jury. Time would be saved and the interests of the accused would be quite adequately safeguarded in this way. Until the decision in Chalmers is to be reconsidered, however, the present trial within a trial procedure would appear to have to go on."

20.41 To the foregoing criticism (i) that the procedure leads to the repetition and unchallengeable reconstruction of evidence, there may be added the following considerations. (ii) The procedure appears to contravene the ancient rule that the whole evidence must be taken in the presence of the jury. The Criminal Justice Act, 1587, cap 57, provided by Section 10:

"in all tyme cuming the haill accusatioun ressoning writtis witnesses and utheris probatioun and instructioun quhatsumeuer

of/

[44](1852) 2 Den CC 430.

of the cryme salbe allegit ressonit and deducit <u>to the assyse</u> in presence of the partie accusit in face of iudgement and na utheris ways."[45]

20.42 (iii) The procedure does not accurately reflect any principle that all questions of admissibility must be determined by the judge alone. If the judge holds, after a trial within a trial, that a confession is, or may be, admissible, he must direct the jury to disregard it unless they are satisfied that it was made voluntarily.[46] Thus, the jury have to decide the question of admissibility for themselves: they cannot be concerned solely with the probative value or effect of the statement.

20.43 (iv) If a relevant consideration is that a confession which was not made voluntarily is likely to be unreliable, the procedure appears to contravene the principle that the reliability of evidence is essentially a matter for the tribunal of fact. It is difficult to see why there should be this double check on the nature of the confession. It was no doubt justifiable in England in the days when it was not possible for the accused to testify concerning the circumstances in which the confession was made; but now that the accused can give evidence, it may be difficult to justify treating the question of the reliability of confessions differently from the question of the reliability of any other hearsay statement such as an informal admission,[47] other than in terms of the somewhat unsatisfactory disciplinary principle according to which one/

---

[45]Emphasis supplied. It must be noted, however, that sec 10 of the 1587 Act has been repealed by Sched 10, Part I, of the 1975 Act, which enacts by sec 145(1): "Without prejudice to section 174 of this Act [which deals with insanity in bar of trial or as the ground of acquittal], no part of a trial shall take place outwith the presence of the accused."

[46]<u>Chalmers</u>, <u>supra</u>, L J-C Thomson at p 83; cf <u>Chan Wei Keung</u> v <u>R</u>, [1967] 2 AC 160; followed in <u>R</u> v <u>Burgess</u>, [1968] 2 QB 112, and <u>R</u> v <u>Ovenell</u>, [1969] 1 QB 17, holding that the judge should <u>not</u> give such a direction, since admissibility was a matter for him.

[47]Cross, <u>An Attempt to Update the Law of Evidence</u>, p 16.

one of the objects of the criterion of voluntariness is the discouragement of improper police methods.

20.44 (v) The procedure seems to be anomalous because it is not generally applied in situations where an objection to admissibility of evidence other than a confession is taken and there is dispute as to the "preliminary facts."[48] Examples of such situations are disputes as to whether tape-recordings were original or fabricated, whether a communication was privileged, whether a specimen of blood or urine was duly taken and supplied in terms of the Road Traffic Act, 1972,[49] and whether a dying deposition was emitted voluntarily when the witness was in his sound and sober senses. On the other hand it is not inconceivable that provision could be made for a special procedure for objections to the admissibility of confessions. Rule 104(c) of the Federal Rules provides:

> "Hearings on the admissibility of confessions should in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require."

20.45 (vi) On a practical level, there is a danger that the jury will think that they have been asked to withdraw because statements prejudicial to the accused are about to be made. The judge has the comparatively minor embarrassment of directing the jury on an issue which he has already decided for himself. He would suffer greater embarrassment if, as is not inconceivable, the evidence led before the jury were to cause him to reach the view that his decision that the confession was admissible was wrong. It would appear that/

---

[48] The Thomson Committee say that the item of evidence is "almost invariably" an incriminating statement made by the accused person to police officers (Thomson, para 47-07).

[49] See I R Scott, "Admissibility of Evidence: Preliminary Disputed Facts," (1974) 90 LQR 319.

that if the evidence adduced before the jury is more favourable to the accused than that led before the judge, it is open to the defence to submit that on the basis of the evidence heard by the jury the confession is inadmissible and they should be directed accordingly. But it would then be difficult for the jury, however strongly directed, to exclude the confession from their minds.

20.46 (vii) There are apparently unresolved questions as to the burden and standard of proof at a trial within a trial. If the facts and circumstances relating to the making of the statement are disputed, these questions do not arise, because where two possible interpretations can properly be put on the situation, one of which falls into the category of unfairness and the other into the category of fairness, the judge should leave the determination of that issue to the jury.[50] But if the facts and circumstances are undisputed, the judge himself has to make the decision. Authoritative guidance has been given in these terms:

> "... a judge who has heard the evidence regarding the manner in which a challenged statement was made will normally only be justified in withholding the evidence from the jury if he is satisfied on the undisputed relevant evidence that no reasonable jury could hold that the statement had been voluntarily made and had not been extracted by unfair or improper means."[51]

The cases do not, however, make explicit the rules as to the incidence of the burden of proof, and as to the standard of proof. It may be thought that if the trial-within-a-trial procedure is to be retained to any extent, not only should the burden of proof be on the Crown, but the judge should be so satisfied according to the criminal standard of proof. In England the standard appears to be proof beyond reasonable doubt,[52] but in Australia and Canada/

---

[50] <u>Murphy</u> v <u>HMA</u>, 1975 SLT (Notes) 17.

[51] <u>Balloch</u> v <u>HMA</u>, 1977 SLT (Notes) 29.

[52] Phipson, para 797.

Canada it has been held that the prosecution need only establish facts justifying admissibility on the balance of probabilities.[53]

20.47 (viii) It seems likely that as a result of the guidance afforded by Murphy[50] and Balloch,[51] to which reference has just been made, the occasions when a judge will exclude evidence after hearing a trial-within-a-trial will in future be few. It appears that in many cases where objection is taken the procedure will lengthen the trial without any advantage to the administration of justice.

20.48 Lord Cameron has made the following observations on the procedure:

> "It is no secret that this device, laudable though its purpose may be, is being viewed with increasing disfavour. There is increasing support for the view that this is a matter which should be investigated once and for all in presence of the jury. If at the end of the day the judge reaches the conclusion that there is evidence which, if accepted, demonstrates that the voluntary statement was not truly voluntary, then he can and should direct the jury that if they accept that evidence they must exclude the statement from their consideration. It may also be that the evidence is such that the judge will be entitled to give a direction in law that any statement or admission made must be excluded from the jury's consideration. If it is urged that a jury cannot readily do so and that the fact of 'confession' cannot be so easily expunged from their minds, it can with equal force be replied that the 'trial within a trial' method leaves the jury with the certainty that something bearing directly and heavily on the issue of guilt has been kept from them and they are free to speculate how damning it would have been. In such circumstances (it can be argued) the better course in the interest of accused and public alike may well be to let the whole evidence be presented. Admittedly the problem is a difficult one to solve upon any view which may be taken as to which course of action is to be preferred in the interest of 'fairness', but if the voluntary character of a statement made or alleged to have been made is
>
> to/

---

[50] Murphy v HMA, 1975 SLT (Notes) 17.

[51] Balloch v HMA, 1977 SLT (Notes) 29.

[53] Cross, p 65. It has been assumed above that in a trial within a trial in Scotland the normal rules of evidence should continue to apply. Cf however Cross, p 58, as to the English law: "It is probably true to say that the judge is not bound by all the exclusionary rules in determining what material to receive as proof of facts constituting a condition precedent to certain items of evidence;" and rule 104(a) of the Federal Rules, whereby the judge is not bound by the rules of evidence, except those concerning privileges, in determining preliminary questions with regard to the qualifications of a witness, matters of privilege or the admissibility of evidence.

to be determined, as it almost inevitably must, upon consideration of the relative credibility of witnesses then it would seem both logical and just that this critical matter should be kept in the hands of those who are judges of fact and credibility, namely the jury, and not the presiding judge. And the nearer the matter is to the heart of the case the greater would appear to be the force of the argument that its decision should remain and rest with the jury."[54]

20.49 In view of these criticisms and difficulties, it may be thought that the course proposed in Thompson[55] by Lord Justice-General Clyde should now be adopted. It must be admitted that such a course could involve the disclosure to the jury of a confession which the judge might ultimately hold to be inadmissible; and that in such circumstances it might be difficult for the jury to disregard the confession, notwithstanding a direction from the judge that they should do so. But this difficulty would not arise if the Crown sought to adduce challengeable confessions only in cases where the confession was essential for conviction: in such cases, if the judge were to conclude that the confession was not voluntary, there would be insufficient evidence for conviction and he would direct the jury to return a verdict of not guilty. If the Crown were to adduce such confessions in other cases, where the Crown evidence was otherwise sufficient, and if the confession were held inadmissible but the jury nevertheless convicted, the conviction might be quashed on appeal. It is thought, however, that the traditional fairness of the Crown Office, in refraining from adducing evidence likely to be held inadmissible, would go far to mitigate any risks in the procedure adumbrated in Thompson. The procedure has been in existence for/

---

[54]Lord Cameron "Scottish Practice in relation to Admissions and Confessions by Persons Suspected or Accused of Crime", 1975 SLT (News) 265, at p 267.
[55]1968 JC 61.

for over 20 years, and the number of cases in which it has resulted in evidence being excluded is very few indeed.[56]

20.50 The Thomson Committee considered the trial-within-a-trial procedure in the light of their recommendations as to the admissibility in evidence of statements made by a suspect before arrest in answer to police questioning and statements made by an accused person to the police after he has been charged, and their recommendations as to the use of judicial examination. Their recommendations as to the trial-within-a-trial procedure may be very briefly summarised as follows. If, at the judicial examination or the first diet, the accused challenges a statement allegedly made by him to police officers, and the judge at the first diet holds that he cannot determine the question of admissibility except upon a consideration of the issue of credibility, he will defer further consideration of the matter until the trial and, at the trial, he will have a discretion either to hold a trial within a trial or to allow the jury to hear the evidence of both versions under appropriate directions in the course of his charge. If the statement is challenged for the first time at the trial, a trial within a trial will not be held, but the judge will have a transcript of the statement and may rule it to be inadmissible if satisfied by the police evidence that it had not been fairly obtained. In relation to statements allegedly made by the accused to an investigating officer or official other than a police officer, and challenged by the accused at his trial, the judge will have a discretion either to hold a trial within a trial or to allow the jury to hear the evidence of the conflicting versions and to direct the jury suitably in the course of his charge.[57]

20.51/

---

[56] Thomson, para 47.08.
[57] Thomson, paras 47.07-47.15.

RE 68917 BL(644)

20.51 There is no doubt that the trial-within-a-trial procedure would rarely be invoked if, as the Thomson Committee recommend, it were to be retained for use, at the discretion of the trial judge, only in the exceptional cases which have been referred to above. These recommendations do not, however, meet the criticisms and difficulties which have been enumerated, and of course were not designed to do so. The recommendations have been criticised on the ground that they are "unnecessarily complicated and even perhaps too obviously smacking of compromise."[58] On the other hand, the retention of a judicial discretion to hold a trial within a trial has the merit of being able to cater for the unforseen case.

20.52 The Working Group on identification procedure envisaged that a trial within a trial should be held where the defence objects to the admission of evidence on the ground that it was obtained as a result of the Scottish Home and Health Department Parole Rules.[59] It is submitted that, for the reasons already given, the use of the trial-within-a-trial procedure should not be extended to such a case.

---

[58] J E Adams, "An Englishman Looks at Thomson", [1976] Crim LR 609, at p 619.

[59] Identification Procedure under Scottish Criminal Law (1978, Cmnd 7096), para 4.01. See paras 17.48-17.49 above.

Chapter 21

THE ADMISSIBILITY OF EVIDENCE ILLEGALLY OR IRREGULARLY OBTAINED

1. Introduction

21.01 This chapter is concerned with the admissibility of relevant evidence which has been obtained by illegal or irregular means. The major problem in this field is that the present law of Scotland seems to recognise a distinction between civil and criminal cases. It appears that in civil cases the sole test of admissibility is relevancy: if the evidence is relevant it is admissible, and the court is not concerned with how it was obtained. In criminal cases, on the other hand, evidence illegally or irregularly obtained is inadmissible unless the illegality or irregularity associated with its procurement can be excused by the court.[1] It will be submitted that in this respect there should be no difference in principle between civil and criminal cases, and that a test of admissibility similar to that now employed in criminal cases should be applied in civil litigation. A second problem is that in criminal cases there is some uncertainty about the admissibility of evidence discovered as a result of a confession which is itself inadmissible. It will be convenient to examine the latter problem first, then to review briefly the present law as to the admissibility in criminal cases of evidence illegally or irregularly obtained other than as a result of an inadmissible confession, and finally to consider the law as to the admissibility of illegally or irregularly obtained evidence in civil proceedings. It seems desirable to attempt to devise a unified approach to the general area of the admissibility of illegally/

[1]Walkers, para 2; Report of the Committee on Privacy (1972, Cmnd 5012), Appendix I, para 74.

RE 68917 BL(647)

illegally obtained evidence which would encompass both civil and criminal cases and, in the criminal field, both evidence obtained as a result of an inadmissible confession and evidence obtained by other irregular means. The appropriate basis of such an approach, it is suggested, would be the criteria set out in the line of cases beginning with Lawrie v Muir, 1950 JC 19, discussed at paras 21.05-21.06 below.

2. Criminal causes

(1) Evidence obtained as result of inadmissible confession[2]

21.02 If an accused person makes a confession which is inadmissible, but contains information as a result of which relevant facts are discovered, two questions arise. First, to what extent is evidence of these facts admissible? Second, if the consequently discovered facts confirm the truth of the confession, or part of it, is the confession itself to any extent admissible? Prima facie it appears that if these questions were free from authority any one of five possible positions could be adopted: (1) to admit the fact discovered, but nothing more; (2) to admit the fact discovered, and that its discovery was a consequence of something the accused said; (3) to admit the fact discovered together with as much of the confession as relates strictly to it; (4) to admit the fact discovered and the entire confession; and (5) to exclude the whole confession and all facts discovered in consequence of it. The only guide to the position adopted by the law of Scotland is Chalmers v H M Advocate,[3] which makes it clear that the discovery of the fact does not render any part of the confession admissible. In Chalmers, as is well/

---

[2]See R & B, para 18-28. A Gotlieb, "Confirmation by Subsequent Facts", (1956) 72 LQR 209; Z Cowen and P B Carter, Essays on the Law of Evidence, chap 2; Cross, pp 278-281; Phipson, paras 830-831; J D Heydon, Cases and Materials on Evidence, pp 223-230.

[3]1954 JC 66.

well known, the accused made a statement, presumably self-incriminating, which was not tendered in evidence, and then took police officers to a cornfield where he pointed out the whereabouts of the purse of the murder victim. It was not argued that the finding of the purse rendered the accused's earlier statement admissible, but the terms of Lord Justice-General Cooper's opinion as to the inadmissibility of the evidence of the pointing out do not leave the matter in any doubt. In other words, to the second question posed above the law of Scotland returns an authoritative answer in the negative. That aspect of the matter was accepted by the Thomson Committee,[4] and is also accepted here.

21.03 The first question, however - whether facts discovered in consequence of an inadmissible confession are admissible - was not squarely raised in Chalmers.[3] Evidence of the finding of the purse would not have been relevant without evidence linking the accused with the finding. It appears that Lord Cooper would not have treated evidence of the finding of the purse by the police as inadmissible; but the answer of Scots law to the first question is not free from doubt. It is arguable that both logic and the need to discourage improper police practices must lead to the conclusion that where a confession is inadmissible, evidence of facts consequently discovered should also be inadmissible. The exclusion of an improperly obtained confession in order to discourage such practices is hardly consistent with the admission of property found in consequence of the confession. On the other hand it may be contended that the confession and the facts are distinguishable on the ground that while there may be a risk that the confession is unreliable or open to more than/

---

[3] 1954 JC 66.
[4] Thomson, para 7.26.

than one interpretation, no such risk is involved in the admission of the facts. The answers to that contention may be that unreliability is not the ground of exclusion of improperly obtained confessions in Scots law; and that if there is no risk involved in admitting evidence of the facts, logic demands that as much of the confession as is verified by the facts should also be admitted. It may be further argued that it would be wrong to exclude evidence of the facts where the facts themselves incriminate the accused - as where the property is found in a place of concealment on his premises.

21.04 It is thought that in order to obtain a satisfactory answer logic must yield and a rule should be adopted which has the merits of being more flexible than any of the five propositions mentioned above and of being consistent with the modern Scottish decisions on illegal searches and seizures in criminal cases. It is submitted that the appropriate solution is to make the admissibility of the evidence a matter for the discretion of the court. If the facts were discovered as a result of circumstances particularly unfair to the accused or an exceptionally serious illegality, such as a confession extracted by brutality, the judge would be entitled to exclude the evidence. That would then be a particular application of the general discretion of the court to admit or exclude evidence illegally or irregularly obtained. Indeed, it may be that such a solution is already implicit in the present law.[5] A solution on these lines commended itself to the Thomson Committee, who said:

> "We take the view that there is nothing improper in the police asking questions of an accused person after charge, for example, regarding the whereabouts of a missing child or
>
> stolen/

---

[5] See Gotlieb, n 2 _ante_, p 235.

stolen property. Indeed, the police have a duty to ask such questions and the public expect them to do so. Although the answers which they receive will not be admissible in evidence, the court may allow evidence of recovery, provided: (a) the prosecution does not disclose in evidence the source of the information; and (b) the information was not obtained by methods which the court decides are unfair in the circumstances."[6]

The Committee made these observations in the context of their proposals as to interrogation, but they did not mention the subject in their summary of recommendations. It is thought that the Committee's view could with advantage be declared to be the law whether their proposals as to interrogation are enacted or not.

(2) Evidence obtained by other illegal or irregular means[7]

21.05 (a) General. The modern law of Scotland is expounded by the Sheriffs Walker and the learned editor of the fourth edition of Renton and Brown.[8] The principal authority is the Full Bench case of Lawrie v Muir, in which Lord Justice-General Cooper said:

"From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or

technical/

---

[6] Thomson, para 7.27.

[7] Walkers, para 2(c); R & B, paras 5-24, 5-26, 5-28, 5-31, 18-94; Z Cowen and P B Carter, Essays on the Law of Evidence, chap 3; Glanville Williams, "Evidence Obtained by Illegal Means", [1955] Crim LR 339; L G Murray, "Admissibility of Evidence Illegally Obtained", (1958) 74 Sc L Rev 73; J W R Gray, "The Admissibility of Evidence Illegally Obtained in Scotland", 1966 Jur Rev 89; J T C[raig], "Evidence Obtained by Means Considered Irregular", 1969 Jur Rev 55; J D Heydon, "Illegally Obtained Evidence", [1973] Crim LR 603, 690; Cross, pp 276-285; Phipson, paras 828-829; Jeffrey v Black, [1977] 3 WLR 895; J D Heydon, Cases and Materials on Evidence, pp 230-254.

[8] See n 7 supra. In addition to the cases cited by the learned writers see Marsh v Johnston, 1959 SLT (Notes) 28, Hopes v HMA, 1960 JC 104; McPherson v HMA, 1972 SLT (Notes) 71; Cook v Skinner, 1977 SLT (Notes) 11; Skinner v John G McGregor (Contractors) Ltd, 1977 SLT (Sh Ct) 83; Walsh v MacPhail, 1978 SLT (Notes) 29; Nocher v Smith, 1978 SLT (Notes) 32.

technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods."[9]

His Lordship went on to adopt "as a first approximation to the true rule" the statement of Lord Justice-Clerk Aitchison in H M Advocate v McGuigan[10] that "an irregularity in the obtaining of evidence does not necessarily render that evidence inadmissible". He observed that there was no absolute rule, and the question was one of circumstances. He continued:

"Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick. Again, there are many statutory offences in relation to which Parliament has prescribed in detail in the interests of fairness a special procedure to be followed in obtaining evidence; and in such cases (of which the Sale of Food and Drugs Acts provide one example) it is very easy to see why a departure from the strict rules has often been held to be fatal to the prosecution's case. On the other hand, to take an extreme instance figured in argument, it would usually be wrong to exclude some highly incriminating production in a murder trial merely because it was found by a police officer in the course of a search authorised for a different purpose or before a proper warrant had been obtained."[9]

21.06/

---

[9] 1950 JC 19, at pp 26-27.
[10] 1936 JC 16, at p 18.

21.06 Lawrie[9] and the Scottish decisions which followed it[11] have been very influential in other jurisdictions[12] and are widely regarded as providing a satisfactory compromise between a general rule of exclusion of improperly obtained evidence, and a general rule that the impropriety of the method of obtaining the evidence is irrelevant to its admissibility. Here, as in the case of evidence obtained as a result of an inadmissible confession, the law is open to a charge of logical inconsistency: the comment may be made that it seems inconsistent to exclude a confession obtained by illegal means but to countenance the admission of real evidence obtained by illegal means. But many critical and comparative studies have concluded that a balancing of conflicting interests is the only rational way of resolving the problems involved, and the express recognition of this in Scots law is the method most likely to achieve rational results.[13]

21.07 (b) Warrant to search. It may be convenient to summarise here the conclusions of the Thomson Committee as to warrants to search. The Committee were satisfied with the present law as to the power of the police to seize articles which are not specified in a warrant to search and which/

---

[9] 1950 JC 19, at pp 26-27.

[11] M'Govern v HMA, 1950 JC 33; Fairley v Fishmongers of London, 1951 JC 14; HMA v Turnbull, 1951 JC 96; HMA v Hepper, 1958 JC 39; Marsh v Johnston, 1959 SLT (Notes) 28; HMA v M'Kay, 1961 JC 47; Laverie v Murray, 1964 SLT (Notes) 3; Bell v Hogg, 1967 JC 49; Hay v HMA, 1968 JC 40; McPherson v HMA, 1972 SLT (Notes) 71; and other cases cited in n 8 supra.

[12] J D Heydon, Cases and Materials on Evidence, p 230.

[13] P Stein and J Shand, Legal Values in Western Society, p 195; Cowen and Carter, n 7 ante, pp 83-92, 103; Williams, n 7 ante, p 349; Gotlieb, n 2 ante, p 233; Heydon, [1973] Crim LR (n 7 ante) at p 697, n 12 ante at p 225; Ontario Law Reform Commission, Report on Evidence, pp 65-67, 70-72; Law Reform Commission of Canada, Evidence Project Study Paper no 10: "The Exclusion of Illegally Obtained Evidence", pp 16, 24. Aliter Gray, n 7 ante. The Scottish decisions were misunderstood by the Privy Council in Kuruma v R, [1955] AC 197, and King v R, [1969] 1 AC 304.

which relate to crime other than that for which the warrant was granted. They considered, however, that the law should be clarified as to the rights of the police to search for evidence in premises of parties who are not accused. They recommended that a sheriff should have power to grant a warrant to search the premises of a third party, but unless the sheriff is satisfied that there is a real risk of the evidence being destroyed or tampered with, the third party should be given an opportunity of being heard before the warrant is granted.[14]

3. Civil causes[15]

21.08 There has been no authoritative statement of the law as to the admissibility of evidence illegally or irregularly obtained in civil cases, such as Lawrie[9] has provided for criminal cases. The decision which has been understood, perhaps not quite accurately, as the binding authority for civil proceedings is Rattray v Rattray.[16] There, a letter sent by the defender to the co-defender was stolen from the Post Office by the pursuer and produced and founded on by him. The Lord Ordinary granted decree of divorce. On a reclaiming motion by the defender and co-defender before the Second Division Lord Trayner, Lord Young and Lord Justice-Clerk Macdonald held that adultery had not been proved, but Lord Moncrieff held that it had. Lord Trayner and Lord Moncrieff were of opinion that the letter was admissible, but Lord Young was of opinion that it was not. In the Outer House no objection had been stated on the ground that the letter had been illegally obtained, but Lord Young questioned its admissibility during the hearing before the Inner House. Lord Trayner expressly refrained from deciding the general question whether a document obtained through the commission of a crime could/

---

[9] 1950 JC 19, at pp 26-27.
[14] Thomson, paras 4.19-4.24.
[15] Walkers, para 2(b).
[16] (1897) 25 R 315.

could be used in evidence to his own advantage by the committer of the crime. He held that the letter was admissible as evidence against the defender partly upon the view that

> "the policy of the law in later years (and I think a good policy) has been to admit almost all evidence which will throw light on disputed facts and enable justice to be done",

and partly upon the view that the pursuer's act was a statutory offence which could scarcely be regarded as a crime.[17] The latter distinction was subsequently described as "subtle rather than convincing" by the later Lord Moncrieff in MacColl v MacColl[18] and "unconvincing" by Lord Justice-General Cooper in Lawrie v Muir.[19] In Rattray the earlier Lord Moncrieff reached the conclusion that adultery had been proved without considering the letter, but he added obiter that he agreed generally with Lord Trayner as to its admissibility. His Lordship founded on the fact that the objection had not been taken by the parties, and also said:

> "But I know of no case, and we have been referred to none, where the Court have refused to look at a document which instructed crime simply because it has been obtained without legal warrant."[20]

Lord Young concurred with Lord Trayner in holding that adultery had not been proved, but dissented from Lord Trayner's view of the admissibility of the letter on the ground that evidence obtained through a criminal act was inadmissible:

> "I think that the Court is bound to take notice of the statute law enacting that the pursuer's conduct was a crime (though with a discretion to the Judge as to the sentence), and to reject as evidence anything obtained by a violation of the law, and still held by the person who did that act."[20]

Lord Young's/

---

[17] Ibid, at pp 318-319.
[18] 1946 SLT 312.
[19] 1950 JC 19, at p 24.
[20] (1897) 25 R at p 320.

RE 68917 BL(655)

Lord Young's observations, like Lord Moncrieff's, were obiter because he stated that even with the contents of the letter he would have reached the same conclusion on the merits. Lord Justice-Clerk Macdonald agreed with Lord Trayner and Lord Young that the Lord Ordinary's interlocutor should be recalled, but he indicated no view as to the admissibility of the letter.[21]

21.09 It is sometimes said that the court held the letter to be admissible by a majority,[22] but while it is true that two of the three judges who expressed a view were of that opinion, four judges sat. The reasoning of the two who favoured admissibility appears to be open to comment. Lord Trayner declined to state a general rule. His statement of the policy of the law has been rendered obsolete as regards criminal proceedings by Lawrie v Muir;[19] and the only other ground of his opinion - his distinction between a crime and a statutory offence - has been disapproved by the Full Bench in Lawrie.[19] Lord Moncrieff's views were obiter; and on the substantive question the passage quoted above is now inconsistent with Lawrie[19] and H M Advocate v Turnbull[23] if not also with M'Govern v H M Advocate.[24]

21.10 Reference was made to Rattray[16] in two Full Bench decisions of the High Court. In Adair v M'Garry[25] the Court were concerned with the right of the police to take the finger-prints of a person apprehended but not committed to prison. The Lord Advocate (Mr Aitchison) observed under reference to Rattray[16] that even if the finger-prints had/

---

[16](1897) 25 R 315.
[19]1950 JC 19, at p 24.
[21]Ibid, at p 321.
[22]Eg Cowen and Carter, n 7 ante, p 84.
[23]1951 JC 96.
[24]1950 JC 33 (evidence derived from nail-scrapings - taken by the police without consent before apprehension - held inadmissible).
[25]1933 JC 72.

had been unlawfully taken they might still be received in evidence, but stated that the Crown did not propose to stand upon that contention.[26] Lord Justice-General Clyde said:

> "There is authority in both civil and criminal cases which points to the view that evidence, otherwise competent, is not to be rejected because it has been obtained by illegal means - Rattray v Rattray;[16] Crook v Duncan.[27] But the Lord Advocate very properly declined to stand upon this; and conceded that, if the finger impressions taken in the cells were illegally taken, they should not be regarded as evidence in the present case."[28]

In Lawrie Lord Cooper pointed out that the Lord Advocate had waived the rule derivable from Rattray and Crook in order to obtain a decision on the question of police practice, and stated that he was unable to read Lord Clyde's statement that the Lord Advocate had acted "very properly" as indicating any view on the part of Lord Clyde as to the validity or otherwise of that rule.[29] On the other hand, in Adair Lord Morison, after quoting from Rattray and Crook, concluded that it was immaterial whether the finger-prints were obtained by the regular procedure or not.[30] In Lawrie[31] Lord Cooper analysed the opinions in Rattray and commented that he found unconvincing Lord Trayner's distinction between a statutory offence and a crime. His Lordship noted that in MacColl[18] Lord Moncrieff "followed the majority view in Rattray with visible reluctance."

21.11 Since Rattray,[16] evidence illegally or irregularly obtained has been admitted in a number of civil cases, but the general question of/

---

[16](1897) 25 R 315.
[18]1946 SLT 312.
[26]Ibid, at p 76.
[27](1899) 2 Adam 658; 1 F (J) 50.
[28]1933 JC 72, at p 77.
[29]1950 JC 19, at p 25.
[30]1933 JC 72, at pp 90-91.
[31]1950 JC 19, at pp 25-26.

of the admissibility of such evidence has never been discussed in the Inner House. In _MacNeill_ v _MacNeill_[32] the pursuer discovered by chance and intercepted a letter from the co-defender addressed to the defender under an assumed name which had arrived by post through the letter-box of the family home. It appears that no objection was taken to the admissibility of the letter on the ground of the manner in which it had been obtained. Again, no such objection was apparently taken in _Turner_ v _Turner_,[33] also a husband's action of divorce for adultery, where the pursuer by means not disclosed in the report intercepted two letters from a third party to the defender. In _Watson_ v _Watson_,[34] another such action, the pursuer was held to be entitled to found on a document which was averred to be a torn-up draft letter written by the defender to the co-defender which he had found in an open bureau in the drawing-room of the house in which the pursuer and the defender were then residing; but it does not seem to have been argued that the document was inadmissible because of the manner of its procurement. In _MacColl_ v _MacColl_[35] Lord Moncrieff, who had been the Lord Ordinary in _MacNeill_,[32] repelled an objection to the admissibility of a letter from the defender to the paramour which the pursuer had intercepted by criminal means. He did so because he felt constrained to follow what he understood to be the opinion of the majority in _Rattray_.[16] He observed that in _MacNeill_,[32] _Turner_[33] and _Watson_[34] it had not been suggested that the letters had been criminally obtained, and the conjugal relation might have been regarded as having introduced special considerations.

As/

---

[16] (1897) 25 R 315.
[32] 1929 SLT 251.
[33] 1930 SLT 393.
[34] 1934 SC 374.
[35] 1946 SLT 312.

As to Rattray[16] he said:

> "... while I am very strongly of opinion that had I been a party to the decision of that case I should have agreed with Lord Young, I do not feel that it is now open to me to act on an independent opinion."

21.12 In Duke of Argyll v Duchess of Argyll Lord Wheatley said of Rattray in the course of an interlocutory judgment in the Outer House:

> "I must confess that I find the reasoning of Lord Trayner and Lord Moncrieff in that case difficult to follow, as did the later Lord Moncrieff in the case of MacColl, 1946 SLT 312, but like the later Lord Moncrieff I feel bound by the decision, if unconvinced by the reasoning in that case."[36]

In the Argyll case the pursuer averred that the defender had recorded in her diary a number of meetings with the party minuter. Before the Inner House, prior to the proof, the defender admitted that she had recorded certain meetings with the party minuter in her diary, but later lodged a minute of proposed amendment withdrawing that admission and averring that the diary had always been in her possession.[37] The First Division, by a majority, refused her motion to allow the minute to be received. Lord Guthrie, who dissented, seemed to indicate that the question of the admissibility of illegally obtained evidence was not foreclosed by Rattray,[16] which had been cited in argument. His Lordship said:

> "If we had before us the pursuer's answers to the minute, we should know whether he admits or denies that the diary has always been in her custody, and, if he denies that it has, the circumstances in which he, or others, obtained access to it. On a consideration of the averments of parties on these topics, the Court might have to decide such an important question as whether, if access has been unlawfully obtained, the contents of the diary can be placed before the Judge at the proof."[38]

At/

---

[16] (1897) 25 R 315.
[36] 1962 SC 140, at pp 141-142.
[37] See 1962 SC (HL) 88, at p 90.
[38] 1962 SC 140, at p 152. The decision of the Court as to the minute of amendment was reversed by the House of Lords: see n 37 supra.

At the subsequent proof certain diaries belonging to the defender were put in evidence by the pursuer, and it was establised that he had acquired them by breaking into the house occupied by the defender while the parties were living apart and taking them from her bedroom. The Lord Ordinary, Lord Wheatley, held that notwithstanding that they had been deliberately stolen, they were admissible in evidence. His Lordship referred to Rattray,[16] Watson[34] and Lawrie,[35] and observed:

> "In so far as historically adultery was regarded as a quasi-criminal offence, and its historical background is reflected in our present law at least to the extent of making proof of adultery dependent upon the criminal standard of proof beyond reasonable doubt (cf Lord Guthrie in Currie v Currie, 1950 SC 10 and Lord President Clyde in Burnett v Burnett, 1955 SC 183 at p 186), it may not be inapposite to consider the question of admissibility in a criminal trial of evidence illegally obtained. This question was canvassed by a Full Bench in the case of Lawrie v Muir.[35] [His Lordship summarised the facts of Lawrie, quoted the rubric and continued] - It would seem from the judgment that greater latitude may be given to police officers who obtain evidence by irregular methods than to offenders who are not the guardians of public order and safety but are private individuals. It would, accordingly, appear to follow that the narrower rather than the broader approach would be taken in the case of a person who obtains evidence by illegal means to further his own ends in a civil process.
>
> "Nevertheless, I am of opinion that the above statement of the law made by Lord Justice-General Cooper in Lawrie v Muir can properly be applied to a case like the present one. There is no absolute rule, it being a question of the particular circumstances of each case determining whether a particular piece of evidence should be admitted or not. Among the circumstances which may have to be taken into account are the nature of the evidence concerned, the purpose for which it is used in evidence, the manner in which it is obtained, whether its introduction is fair to the party from whom it has been illegally obtained and whether its admission will in fairness throw light on disputed facts and enable justice to be done. It may well be that in a particular case something will turn on whether the proposed evidence relates to an admission of

adultery/

---

[16] (1897) 25 R 315.
[34] 1934 SC 374.
[35] 1946 SLT 312.

adultery or to collateral matters used in an empirical process of establishing facts, circumstances, and qualifications from which proof of adultery can properly be inferred."[39]

It may be observed that in so far as his Lordship's decision to apply Lawrie proceeded on the basis that adultery used to be a quasi-criminal offence and still had to be proved on the criminal standard, it has been superseded by section 1(6) of the Divorce (Scotland) Act, 1976,[40] which makes the standard proof on balance of probability.

21.13 In McLeish v Glasgow Bonding Co Ltd[41] the defenders were permitted to use for the purposes of cross-examination a letter from the pursuer's solicitors to a medical witness for the pursuer which the defenders had recovered through inadvertence on the part of the witness. The Lord Ordinary referred to Rattray[16] and MacColl,[35] but the case is not an authority on the admissibility of evidence illegally or improperly obtained, since there was no suggestion that the defenders had used any illegal or improper means to obtain possession of the letter.

21.14 It is thought that it would be difficult to justify any difference in principle between civil and criminal proceedings as regards the admissibility of illegally or improperly obtained evidence.[42] The criterion of fairness seems applicable to both. Indeed, as Lord Wheatley observed in the Argyll[39] case, the application of Lawrie[35] to civil litigation would mean that a person who obtains evidence by illegal means to further his own ends in a civil process would be less likely to succeed in having that evidence admitted than police officers who/

---

[16](1897) 25 R 315.
[35]1946 SLT 312.
[39]1963 SLT (Notes) 42.
[40]1976, cap 39.
[41]1965 SLT 39. See paras 18.22, 18.24 above.
[42]Cf Kuruma v R, [1955] AC 197, at p 204: "There can be no difference in principle for this purpose between a civil and a criminal case."

who had obtained evidence by irregular methods in a criminal case. It certainly seems undesirable that a party to a civil litigation should be enabled to gain an advantage as the result of his own or a third person's wilful misconduct.[43] In the words of one commentator:

> "Ordered legal procedure seeks to overcome the ill-effects of self-help; to permit one litigant to win his case by stealing documents is regressive."[44]

It is therefore submitted that in civil cases, as in criminal cases, the court should be entitled to exclude evidence obtained by illegal or irregular means. Careful consideration would obviously have to be given to the definition of these means in any new provision.[45] In King v R the Privy Council used the expression "conduct of which the Crown ought not to take advantage,"[46] and the Law Reform Commission of Canada employ in their Evidence Code the criterion of whether the administration of justice would tend to be brought into disrepute.[47] It would also be necessary in any new provision to provide guidelines to assist courts in exercising their discretion. Some of these were mentioned in Lord Wheatley's judgment in the Argyll case.[48]

21.15 In formulating any new provisions it would be necessary to keep in view the questions of the admissibility of improperly obtained evidence of privileged communications,[49] and the admissibility of the evidence of third parties as to communications between spouses.[50] It may also be noted that provisions as to the inadmissibility of evidence obtained by various/

---

[43] Cf LRC 16, para 32.
[44] J D Heydon, Cases and Materials on Evidence, p 405.
[45] See J T Craig, 1969 Jur Rev 55 at pp 62-63.
[46] [1969] 1 AC 304 at p 319.
[47] Law Reform Commission of Canada, Report on Evidence, Evidence Code, sec 15.
[48] See para 21.12 above.
[49] See paras 18.22-18.23 above.
[50] See paras 4.09, 6.26 above.

various means may be appropriate in any new legislation on breach of confidence or privacy.[51]

[51]See the Bills considered by the Younger Committee: Report of the Committee on Privacy (1972 Cmnd 5012), Appendix F, pp 277, 279, 282.

PART V

THE EFFECT OF EVIDENCE

Chapter 22

THE BURDEN AND STANDARD OF PROOF

1. The burden of proof[1]

(1) Terminology

22.01 Towards the end of the nineteenth century, the American scholar J B Thayer maintained that the words "burden of proof" were used in two senses. Wigmore also wrote of two meanings of the burden of proof, and the idea of two burdens was adopted by other authors, who employed a variety of adjectives and descriptive phrases to distinguish them and indicated other senses in which a litigant might be said to bear a burden of proof.[2] In Scottish authority there is no explicit statement of the difference between the two principal burdens apart from the speech of Lord Denning in Brown v Rolls Royce Ltd.[3] Repeating the views stated in his well-known article,[4] Lord Denning emphasised the importance of distinguishing between

> "a legal burden, properly so called, which is imposed by the law itself, and a provisional burden which is raised by the state of the evidence."

The first is the burden on the party who will lose the issue unless he establishes a proposition to the satisfaction of the trier of fact on the appropriate standard of proof, while the second is the burden of adducing sufficient evidence to require an issue to be considered by the trier of fact when he comes to decide whether the legal burden had been discharged.

22.02/

---

[1]See Walkers, chap 7.
[2]See Cross, pp 67-77, esp p 67 nn 1 and 2; Nokes, chap 19.
[3]1960 SC (HL) 22, at pp 27-29.
[4]"Presumptions and Burdens," (1945) 61 LQR 379.

22.02 For example, in a civil jury trial in an action of damages for personal injuries the pursuer must firstly discharge the burden of adducing sufficient evidence to prevent the judge from withdrawing the case from the jury at the close of the pursuer's case, and secondly, after all the evidence is led, must discharge the burden of satisfying the jury on the balance of probabilities that the accident was caused by the fault of the defender. In Henderson v Henry E Jenkins & Sons[5] Lord Pearson illustrated the distinction between the two burdens in this way:

> "In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants. I have some doubts whether it is strictly correct to use the expression 'burden of proof' with this meaning, as there is a risk of it being confused with the formal burden of proof, but it is a familiar and convenient usage."

In a criminal trial, it is thought,[6] if the accused wishes the jury to consider any specific defence he must discharge the burden of pointing to evidence in support of it (either in the Crown evidence or in the evidence for the defence), or else the judge will not leave that defence to the jury;[7] but it is then for the Crown to discharge the legal burden of destroying the defence beyond reasonable doubt.

22.03/

---

[5] [1970] AC 282, at p 301.
[6] See R & B, para 18-02.
[7] See Kennedy v HMA, 1944 JC 171, L J-G Normand at p 177. (The decision quoad self-induced intoxication as a defence has been overruled by Brennan v HMA, 1977 SLT 151).

22.03 It is unfortunate that Scots law lacks any explicit and generally accepted statement of the difference between the two burdens, particularly in the field of criminal law.[8] There is room for differences of view about the terminology which might be employed. Sir Rupert Cross calls the first burden "the legal or persuasive burden", pointing out that the "risk of non-persuasion", in Wigmore's phrase, is run by the party who bears it. To describe the second burden the phrase "evidential burden" is employed by a number of writers, although it may seem a somewhat confusing term to use in contrast to some other burden since any burden of proof normally involves the adduction of evidence. The phrase "evidential burden of proof", employed by Lord Pearson in the passage quoted above, was criticised in Jayasena v R[9] on the ground that it is misleading to call the requirement a burden of proof when it can be discharged by the production of evidence that falls short of proof. In this memorandum the requirement will be referred to simply as "the evidential burden", and the first burden will be called "the persuasive burden." Before departing from the matter of terminology it may be noted that in Scottish practice it is frequently said that the burden of proof "shifts" in the course of a proof or trial.[10] The expression has been criticised,[11] and is not employed in this memorandum.

(2) Criminal trials[12]

22.04 The law could with advantage be clarified in several respects.

(a)/

---

[8] See G H Gordon, "The Burden of Proof on the Accused", 1968 SLT (News) 29, 37. See also R & B, 18-02.
[9] [1970] AC 618, at p 624.
[10] Walkers, paras 77-79.
[11] See Heydon, pp 29-31; Glanville Williams, "The Evidential Burden: Some Common Misapprehensions", (1977) 127 New LJ 156, 182, at p 156.
[12] R & B, 18-02.

(a) Burden on the Crown

22.05 (i) To exclude defence. Sheriff Gordon writes:

> "... the burden of proving that the accused committed the crime libelled against him rests upon the prosecutor throughout the trial. The standard required is proof beyond reasonable doubt. This onus is not transferred or affected by any common law defence pleas other than insanity and diminished responsibility. Although the matter is not altogether clear, partly because of a failure to distinguish between the evidential and the persuasive burden of proof, the position probably is that there is no duty on the Crown to refute any specific defence until it is raised in evidence by the accused or arises out of the evidence led for the Crown, but that once a specific defence, whether or not technically 'special', has been raised, it is for the Crown to exclude it beyond reasonable doubt. Although it will normally be difficult to establish a defence like self-defence or alibi unless the accused gives evidence there is no reason in principle why this should not be done."[13]

It is suggested that this assessment of the duty on the Crown is correct, and that it would be useful to make it clear that that is so.

22.06 (ii) Insanity. It would also be desirable to clarify the position where the issue of insanity is raised by the Crown. It has been suggested that where the Crown assert insanity against the defence assertion of diminished responsibility, so that there is no question of normality, the jury should be directed that they cannot find for the Crown unless they are satisfied beyond reasonable doubt that the accused was insane rather than of diminished responsibility.[14]

(b) Burden on the accused

22.07 In the undernoted article[15] Sheriff Gordon discusses the law of of Scotland relating to the persuasive burden of proof, if any, which may fall on an accused in relation to (i) the special defences, (ii) the proof or disproof of criminal intent, and (iii) the special case of the so-called doctrine of recent possession. The following paragraphs include a summary of/

---

[13] R & B, 18-02; and see Lambie v HMA, 1973 JC 53.
[14] HMA v Harrison, (1968) 32 JCL 119, commentary.
[15] "The Burden of Proof on the Accused", 1968 SLT (News) 29, 37.

of Sheriff Gordon's views on these three matters, and notice (iv) cases where a persuasive burden is said to fall on the accused in respect that certain facts are peculiarly within his knowledge, and (v) cases where a persuasive burden is placed upon him by statute; and it will be submitted that as a general rule it is wrong and unnecessary to impose a persuasive burden on the defence, and burdens on the defence should be evidential only.

(i) Special defences

22.08 (A) General. Certain dicta in the widely criticised case of Cunningham[16] have created undesirable confusion about the general law relating to special defences which it would be desirable to remove in the context of reform of areas of law other than the law of evidence.[17] As to the law relating to the burden of proof, however, it is clear that in relation to the special defences of alibi, self-defence and incrimination the persuasive burden of proof remains on the Crown and the only duty on the defence is to discharge the evidential burden of raising the issue in such a way that it has to be left to the jury.[18] In the judge's charge, no reference is - or need be - made to the evidential burden, since it is not the jury's concern. It is for the judge to consider whether the evidential burden has been satisfied, ie whether there is evidence before the jury which could leave them in reasonable doubt on the matter in question. If he decides that that burden/

---

[16] 1963 JC 80.

[17] "... the suggestion in Cunningham that there is a fixed list of special defences, co-extensive with the list of exculpatory circumstances in the substantive law, is as unhistorical as the suggestion in the same case that the plea of diminished responsibility is limited to murder" (Gordon, loc cit, p 30).

[18] Lambie v HMA, 1973 JC 53. The Court does not mention or differentiate between the two burdens, but it is thought that the effect of the decision may be expressed as above.

burden has been satisfied, then the only burden remaining in issue is the burden of proof lying on the prosecution, which includes the burden of proving to the jury beyond reasonable doubt that the plea of alibi, self-defence or incrimination is unfounded.[19] It seems clear that in cases where the defence is able to elicit from the Crown witnesses sufficient evidence to raise the issue, the accused need not go into the witness-box. It is thought that the courts would not now adhere to what has been said to be the "principle"[20] that a defence of self-defence can succeed only where the accused himself gives evidence.

22.09 (B) Insanity. As to the special defence of insanity, the Court said in Lambie:

> "... the passage in Walkers' Law of Evidence, Section 83(b), to the effect that 'when a special defence is stated by the accused, the onus of proving it is upon him' can now be regarded as an accurate statement of the law only in the case of the plea of insanity at the time."[21]

Sheriff Gordon formulates the rule as follows:

> "The rule relating to insanity, with which diminished responsibility may be joined, is simple. The Crown must prove the facts alleged beyond reasonable doubt, and the accused must satisfy the jury on a balance of probabilities that he is insane or of diminished responsibility. The persuasive burden of proving insanity or diminished responsibility is on the accused."[22]

It is submitted that the burden on the defence of proving insanity or diminished responsibility should be made an evidential one. The present law appears to be based on the presumption of sanity[23] and perhaps also on the considerations that the accused's state of mind is a matter peculiarly within his knowledge, that it would be difficult for the Crown to/

---

[19] Cf R v Abraham, [1974] Crim LR 246.
[20] Blair v HMA, (1968) 32 JCL 48, per L J-C Grant.
[21] Lambie, n 18 supra, at p 58.
[22] Gordon, loc cit, p 30, citing Hume, i, 43; HMA v Braithwaite, 1945 JC 55; HMA v Mitchell, 1951 JC 53.
[23] HMA v Mitchell, 1951 JC 53.

RE 68917 BL(670)

to disprove insanity or diminished responsibility without some evidence of it to be refuted, and that it is desirable to prevent these defences from being frivolously raised. But in practice an evidential burden would almost invariably require the defence to lead medical evidence: the accused would have to produce some evidence that would impair or weaken the force of the legal presumption in favour of sanity. The imposition of a legal burden is objectionable because it requires the jury to convict even if they entertain a reasonable doubt as to the sanity of the accused. The judge must direct the jury that, if they cannot decide on the evidence whether the defence allegation of insanity or diminished responsibility is more probable than not, they should convict. It is thought that this is an undesirable anomaly in the common law of Scotland, which otherwise requires the Crown to prove guilt beyond reasonable doubt and does not impose any legal burden on the defence. It is suggested that there is considerable force in the following passage of the judgment of the Supreme Court of the United States in Davis v US,[24] which was delivered by Harlin J:

> "[The accused's] guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.
>
> "... In a certain sense it may be true that where the defence is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favour of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury is in effect to require him to establish his innocence ....
>
> "Strictly speaking, the burden of proof, as those words are

understood/

[24](1895) 160 US 469, cit Heydon, p 28.

understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favour of sanity, the vital question, from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged."

In Australia Windeyer J observed:

> "The 'golden thread that runs thoughout the web of English criminal law' is broken by the defence of insanity. It is better to recognize this than to rationalise it. For there is really no logical answer to the rhetorical question of Harlan, J, asked in the course of delivering the impressive judgment of the Supreme Court of the United States in Davis v United States, 'How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?'"[25]

22.10 It should be said that cases where insanity or diminished responsibility is in issue are rare in Scottish practice,[26] and it is not suggested that a situation where a jury convicts notwithstanding a reasonable doubt as to the sanity of the accused could be anything other than highly exceptional. Nevertheless it seems undesirable that the possibility should exist.

(ii) Proof or disproof of criminal intent

22.11 Sheriff Gordon argues that while there are dicta of considerable authority[27] to the effect that the Crown need prove only the objective facts/

---

[25] Thomas v R, (1960) 102 CLR 584, cit Heydon, p 29.

[26] A special defence of insanity at the time "is rare - one in a hundred murder trials - and usually in cases of transient toxic psychosis such as occur in association with alcohol, amphetamine and lysergic acid diethylamide" (Hunter Gillies, "The Psychiatrist and the Scottish Criminal Courts", (1972) 30 Health Bulletin 12, at p 13).

[27] Hume, i, 254; Alison, i, 49; Dickson, para 37; Macdonald (3rd ed), p 464.

RE 68917 BL(672)

facts and that it is then for the defence to displace a legal presumption of mens rea, these dicta - coming as they did before modern terminological refinements - can be read as referring only to inferences of fact, and that any burden they suggest may lie on the defence is at most an evidential one. He submits that in cases of murder, the persuasive burden remains on the Crown throughout to prove mens rea beyond reasonable doubt; and that in cases of theft, dicta to the effect that the act of taking someone else's property raises a presumption of theftuous intent mean no more than that in normal circumstances a jury would be entitled to infer an intention to steal from evidence that the accused had taken property away.[28] As to cases of mistake, because of the nature of the circumstances there will normally be an evidential burden on the accused to raise the issue but, the learned author submits, since the Crown must prove both actus reus and mens rea the presence of a defence of mistake does not affect the persuasive burden of proof, and it is for the Crown to exclude mistake beyond reasonable doubt in any case where it is put in issue by the defence. It is further submitted that statements of text-writers as to the burden of proof on the accused of knowledge of the relationship in incest apply only to the evidential burden; and that the position regarding mistake in bigamy in Scotland is the same as the position regarding mistake in any other circumstances - there is an evidential burden on the accused, but the persuasive burden remains on the Crown.

22.12 It may be doubted whether there is even an evidential burden on the accused where his defence is mistake, upon the view that he has no burden of denying the mental element. The prosecution has both the persuasive and the evidential burdens in respect of the mental element, and/

[28] See Herron v Best, 1976 SLT (Sh Ct) 80.

and it is logically impossible that both sides should carry an evidential burden on the same issue. Considerations of prudence may require the accused to give evidence in support of his defence, but if he fails to do so the judge cannot withdraw the defence from the jury's consideration, as he would be entitled to do if an evidential burden rested on the accused.[29]

(iii) The "doctrine" of recent possession

22.13 Sheriff Gordon points out that the clearest example of the tendency to discuss an evidential burden in terms which suggest that it is a persuasive burden can be seen in the so-called doctrine of recent possession, which endeavours to make a rule of law out of the fact that a certain circumstance - the possession of recently stolen property - frequently constitutes convincing evidence of guilt of theft or reset of the property. The modern law appears to accept that there is a doctrine of recent possession which transfers the burden of proof to the accused;[30] but/

---

[29] See Glanville Williams, "The Evidential Burden: Some Common Misapprehensions", (1977) 127 New L J 156, at p 158. See, however, HMA v McGregor, (1974) 38 JCL 146, where the accused was charged with a series of assaults upon police officers and of certain statutory offences, all committed while he was driving a motor car. The defence was that he had been incapable of forming the intention of doing the acts alleged for a reason which was not proved but which it was suggested might have been due to drugs administered to him in drink without his knowledge. The accused gave uncorroborated evidence that he had taken some drink, but there was neither objective evidence nor opinion evidence from the doctors called by the accused which showed or tended to show that any drug had been administered to him or that he had been involuntarily intoxicated by the administration of drugs. Lord Fraser directed the jury that the onus was on the Crown to prove the case beyond reasonable doubt and that it was enough for the accused if his own evidence and that of the doctors raised a reasonable doubt. An application for leave to appeal against conviction on the ground of misdirection was refused for the reason that the misdirection tabled in the application had not been established, but the Court added that they must not be taken to endorse the correctness of the charge. It may be that the Court took the view that the accused had not discharged the evidential burden because he had not elicited any evidence at all which could have raised the issue of involuntary intoxication by the administration of drugs without his knowledge. The case is interesting, but inconclusive.

[30] Fox v Patterson, 1948 JC 104; Simpson v HMA, 1952 JC 1; Brannan v HMA, 1954 JC 87; Cryans v Nixon, 1955 JC 1; Wightman v HMA, 1959 JC 44; Cameron v HMA, 1959 JC 59.

RE 68917 BL(674)

but there is no need for a "doctrine" of recent possession, or for any rule that places the burden of proving innocence on the accused. All that is needed is a rule that guilt can be proved by circumstantial evidence, and that in cases of theft or reset the nature and circumstances of the accused's possession of the stolen property may be sufficient evidence of guilt. The learned author submits that Scots law could well adopt the statement of Watermayer, J A, in R v Nxumalo[31] where he said:

> "If [the prosecution's] line of argument is analysed it will be seen that underlying it is an assumption that there are rules of law defining what is meant by 'recent possession', and that a court is not entitled to convict unless the circumstances bring the case within the definition and is 'entitled' to convict if it does. In other words, that the law does not leave the question of the guilt of the accused free to be decided by the court in accordance with its inferences from the proved facts but imposes artificial restraints on the inferences which may be drawn, or supplies artificial aids which relieve the court from the duty of drawing its own conclusions. Save for certain statutory provisions as to onus of proof which are not material to this case and subject to the condition that the inferences drawn must be reasonably possible inferences from the evidence, there are no such restraints or aids. When the court (as a judge of fact) draws the inference that an accused person stole something from certain proved facts, it is using its powers of reasoning and deduction and is deciding a question of fact. Proof that an accused person has been found in possession of stolen property soon after it has been stolen is admissible evidence against him on a charge of theft of that property, but such proof does not, apart from certain specific statutory provisions inapplicable to this case, raise the presumption of law that the accused stole the property and does not throw any onus on him to give an explanation of his possession. In other words the court (as a judge of fact) is not bound to draw any inference adverse to the accused from proof of the possession of stolen property or from the absence of any explanation of such possession by the accused, but it may draw an inference of theft if in its opinion such an inference is justified."

(iv) Facts peculiarly within the knowledge of the accused

22.14 There may be added to the foregoing summary of Sheriff Gordon's views/

---

[31] 1939 AD 580, at p 587.

views notes on the onus of proof where a fact in issue is peculiarly within the knowledge of the accused, and where a burden is placed on the accused by statute. As to the first of these, Dickson states:

> "Another exception to the general rule [that the burden of proof lies upon the party who alleges the affirmative] is, that a party must prove his averment either affirmative or negative of a fact peculiarly within his own knowledge ...[32] The exception last noticed holds against the accused in certain criminal cases, notwithstanding the presumption of innocence."[33]

The phrase "a fact peculiarly within his own knowledge" appears to have been derived from the judgment of Bayley J in R v Turner.[34] The only Scottish authority for this statement of the common law in criminal cases cited by Dickson is Hume's statement of the onus on the accused in cases of concealment of pregnancy of proving that she had disclosed her condition.[35] But Hume and Dickson wrote before the distinction between the persuasive and evidential burdens was expressly acknowledged. The Sheriffs Walker state the law thus:

> "When the facts proved by the Crown raise a presumption of the guilt of the accused person, unless other facts or another explanation of the facts are put forward, the onus of establishing these other matters rests upon the accused. This is especially the case where the facts are peculiarly within the accused's own knowledge."[36]

In the authorities cited by the learned authors, only Lord Jamieson in Cruickshank v Smith discusses the matter, and his Lordship appears to approve of the view stated in Taylor on Evidence that

> "the principle may be more correctly stated as 'where facts lie peculiarly within the knowledge of one of the parties, very
>
> slight/

---

[32] Dickson, para 31.
[33] Dickson, para 32.
[34] (1816) 5 M & S 206, at p 211.
[35] Hume, i, 294-295.
[36] Para 83(c), citing Dickson, para 32; HMA v Hardy, 1938 JC 144, L J-C Aitchison at p 147; Cruickshank v Smith, 1949 JC 134, Lord Jamieson at pp 151 et seq.

> slight evidence may be sufficient to discharge the burden of proof resting on the opposite party.'"[37]

In Mochan v Herron[38] the High Court, without delivering opinions, dismissed an appeal against conviction by a sheriff which was founded on his application of the Sheriff Walkers' statement of the law. In Milne v Whalley,[39] where the accused was held to have been wrongly acquitted of statutory offences of driving without a licence and without insurance, the Court said:

> "It is perfectly plain when one is dealing with charges under sections 84(1) and 143(1) of the Road Traffic Act, 1972, that all the Crown has to do is to demonstrate prima facie the absence of entitlement to drive, and the Crown has amply done that in this case by proving the circumstances in which the charge was brought. Thereafter, if an accused person wishes to displace the prima facie inference, which is all the Crown has to show, it is for him to do so. After all, the possession of a licence and insurance cover are facts peculiarly within the knowledge of an accused person, and it would be absurd and quite unworkable if one were to expect or require the Crown to prove the negative, particularly in the matter of insurance."

22.15 It is thought that these decisions, and Lord Justice-Clerk Aitchison's charge to the jury in H M Advocate v Hardy,[39a] may be properly regarded as having been based upon the principle stated by Lord Jamieson in Cruickshank, and that it would be erroneous to suppose that the law of Scotland imposes a legal burden of proof upon an accused person where a fact constituting exculpation is peculiarly within his own knowledge. If that were so, an accused person would always bear the burden of disproving guilty knowledge or criminal intent, since his state of mind is a fact peculiarly/

---

[37] 1949 JC 134, at p 152: see also p 154.
[38] 1972 SLT 218.
[39] 1975 SLT (Notes) 95.
[39a] 1938 JC 144 at p 147.

peculiarly within his knowledge.[40] But as Sheriff S O Kermack said in McNeill v Ritchie:[41]

> "I interpret the effect in Scots law of a fact being peculiarly within the knowledge of the accused as requiring him to produce evidence of that fact and not as requiring him to substantiate it by full legal proof."

In other words the burden on the accused is only evidential, not persuasive. The factor of peculiar knowledge may no doubt, as a matter of common sense, be relevant in determining how much evidence discharges the evidential burden on the defence and the legal burden on the Crown. In that connection Lord Mansfield observed:

> "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."[42]

22.16 It seems important to define for the future the position in the law of Scotland, because the trend of English authority (including cases on United Kingdom legislation) is in the direction of imposing a persuasive burden on the accused. As a result of the citation of English authority on the Road Traffic Acts, and references therein to proof of facts peculiarly within the knowledge of the accused, the question whether there is any onus on, or shift of onus to, the accused has arisen from time to time in summary criminal trials for road traffic offences in the Sheriff Court. In a charge of driving without a licence, should the Crown lead some evidence that there is no trace of the accused holding a licence (as is the practice in at least some parts of Scotland); or may they rely solely on his failure to prove at the trial that he had one, upon the view that there is a persuasive burden upon him so to prove (as in England[43])? A similar question/

---

[40] See R v Spurge, [1961] QB 205, Salmon J at pp 212-213.
[41] 1967 SLT (Sh Ct) 68.
[42] Blatch v Archer, (1774) 1 Cowp 63, at p 65.
[43] John v Humphreys [1955] 1 WLR 325. See (1968) 32 JCL 53, and Milne v Whalley, 1975 SLT (Notes) 95.

question arises in relation to a charge of failing to report an accident. The position in England may be illustrated by reference to Leathley v Drummond,[44] where the defendants were charged with using, and permitting the use of, motor vehicles without insurance, and the Divisional Court held that the onus of proof that a policy was in force covering the vehicles was on the defendants: the onus was on each defendant to satisfy the court that the driving by the defendant Drummond was covered by a valid policy of insurance. Professor J C Smith's valuable commentary[45] on the case may be quoted in full:

> "It is said to be an established rule of evidence that 'where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter' (Halsbury's Laws of England (3rd ed), Vol 15, p 270). In the criminal law this principle has at most a limited application. In Spurge [1961] 2 QB at p 212 the existence of such a rule of law was denied, Salmon J adding: 'No doubt there is a number of statutes where the onus of establishing a statutory defence is placed on the accused because the facts relating to it are peculiarly within his knowledge.' The principle has been held to be applicable to a number of statutes which make it an offence to do something unless some condition is satisfied; once the prosecution has proved that that thing has been done, there is an onus on the accused with respect to the condition. In the classic illustration of Turner (1816) 5 M & S 511 it was being in possession of game without possessing one of the ten qualifications specified in the Act; in Scott (1921) 86 J P 69 it was supplying drugs without a licence; in Oliver [1943] 2 All E R 800, selling sugar without a licence; in John v Humphreys (above), driving a motor-vehicle without a licence; and in Ewens [1966] 2 All E R 470, being in possession of drugs without a prescription or other valid reason. The reason invariably given for this rule is 'that there must be many statutory prohibitions which would become incapable of enforcement if the prosecution had to embark on inquiries necessary to exclude the possibility of a defendant falling within a class of persons excepted by the section when the defendant himself knows perfectly well whether he falls within that class and has, or should have readily available to him, the means by which he could establish whether or not he is within the excepted class.' The rule is then reconciled with
>
> the/

---

[44] [1972] Crim LR 227.

[45] [1972] Crim LR 227, at pp 228-229.

the principle laid down by the House of Lords in Woolmington [1935] AC 462 (that the onus of proof is always on the Crown except for the defence of insanity and statutory exceptions) by saying that Parliament must have intended the onus of proof to be on the accused since, otherwise, the statute would be unenforceable. The line of reasoning is similar to that which is said to justify the judicial invention of vicarious liability in statutory offences through the 'delegation principle.'

"This is a convincing argument for imposing an evidential burden on the accused, but not for putting an onus of proof on him. The cases, however, generally speak in terms of onus of proof. Those which were decided before Woolmington might have been regarded as overruled by that decision and those decided shortly afterwards might have been regarded as ambiguous since the concept of the evidential burden was not expressly recognised in judicial pronouncements. It becomes increasingly difficult with each case, however, to argue that the accused in this situation bears no more than an evidential burden. The courts clearly intend to put an onus of proof on him. Thus, in the present case, '... the onus was on each defendant to satisfy the court ...' This view, however, is only doubtfully reconcilable with Woolmington because, when Parliament intends to put the onus of proof on the accused, it generally says so in express terms. It is a question which, like the 'delegation principle' referred to above, deserves the attention of the House of Lords; though the dislike shown by some of their Lordships for the Woolmington principle does rather suggest that cases like the present would be affirmed.

"For an excellent discussion of the problem, see M Dean, 'Negative Averments and the Burden of Proof' [1966] Crim LR 594; and Sir Francis Adams, Criminal Onus and Exculpations (1968, Sweet & Maxwell (New Zealand))."

22.17 The position in England has now been complicated by the fact that the Court of Appeal have affirmed, in R v Edwards,[46] that there is not, and never has been, a general rule of law that the mere fact that a matter lies peculiarly within the knowledge of the accused is sufficient to "cast the onus on him."[47] They have held that the true principle underlying the "peculiar knowledge" cases is that there is an exception to the rule that the prosecution must prove every element of the offence charged, which is limited to offences arising under enactments which prohibit the doing/

[46] [1975] QB 27.
[47] See also R v Spurge, [1961] 2 QB 205.

doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exceptions and the like, then the prosecution can rely on the exception. There is then no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like: it is for the accused to prove that he was entitled to do the prohibited act, and what rests on him is the persuasive burden of proof - not the evidential burden.

22.18 The decision in R v Edwards[46] is not, it is thought with respect, a reliable guide to the rules as to burden of proof in the criminal law of Scotland, because it was based on a consideration of English rules of pleading, and it seems to be a somewhat controversial decision. In particular, the conclusion that the burden cast on the accused by the common law principle enunciated in the decision is the persuasive burden of proof and not merely an evidential burden has been strongly criticised.[48] The writer is not qualified to comment on the decision, and would only observe that its existence serves to draw attention to the desirability of affirming and maintaining distinctive rules in the law of Scotland as to the burden of proof on the accused.

(v) The effect of statutory provisions on the burden of proof

22.19 (A) Provisions expressly casting burden on accused. Many statutes provide that the burden of proving certain matters shall be on the defence. Such/

---

[46] [1975] QB 27.
[48] See J C Smith, [1974] Crim LR 540; Cross, The Golden Thread of the English Criminal Law (Cambridge UP, 1976), pp 17-18; A A S Zuckerman, "The Third Exception to the Woolmington Rule", (1976) 92 LQR 402.

Such matters include lawful authority or reasonable excuse,[49] a lawful object,[50] lack of knowledge,[51] and no likelihood of driving under the influence of drink.[52] There are decisions which support the rule that in such cases the accused bears a persuasive burden of proof which will be discharged if the defence is established on a balance of probabilities.[53] It is submitted, however, that this rule is open to the same objection as that which was made above in relation to insanity and diminished responsibility: it is wrong in principle that an accused should be convicted if the court is left in reasonable doubt whether or not he acted with blameworthy intent. Under these statutes the sheriff, or jury, is required to decide that the accused is guilty although they are not sure that this is the case - even, indeed, although they think that there is an even chance that he had a reasonable excuse, or that there was no likelihood of his driving, or the like. A juror who believes that the chances are 60% that the accused did not have lawful authority may be said to be satisfied on a balance of probabilities, but not beyond reasonable doubt: yet in that situation, and even in a situation where he regards the probabilities as equal, the law requires him to vote for conviction. It may well be that this requirement of the law is not always scrupulously attended to in practice, and courts in fact often convict only where they have reasonable doubt; but if that is so, the fact that the requirement is disregarded is perhaps a further reason for altering the rule.

22.20/

---

[49] Prevention of Crime Act, 1953 (1 and 2 Eliz II, cap 14), sec 1(1); Road Traffic Act, 1972 (cap 20), secs 8(3), 9(3), (but compare Kennedy v Clark, 1970 JC 55, L J-C Grant at p 58, with R v Clarke, [1969] 1 WLR 1109, at p 1113).

[50] Explosive Substances Act, 1883 (46 and 47 Vict cap 3), sec 4(1); Firearms Act, 1968 (cap 27), sec 17(2).

[51] Misuse of Drugs Act, 1971 (cap 38), sec 28(2).

[52] Road Traffic Act, 1972 (cap 20), secs 5(3), 6(3).

[53] Eg Neish v Stevenson, 1969 SLT 229.

22.20 But may the rule be justified on the ground of necessity? These statutory provisions may be said to have two objectives. One is to prevent the accused, in a case where his proved conduct calls, as a matter of common sense, for an explanation, from submitting that he should be acquitted because the Crown have not adduced evidence to negative the possibility of an innocent explanation. It may be admitted that this objective is entirely justifiable, since it would obviously be wrong to require the Crown to negative all possible excuses in the absence of evidence adduced in support of them; but the objective could be met by providing that the absence of lawful authority, or the existence of knowledge, or the like will be presumed unless there is sufficient evidence to the contrary to raise a reasonable doubt. A second objective may be to prevent the accused from securing his acquittal by putting forward a defence which is specious, but nevertheless raises a reasonable doubt in the minds of the jury. It is not clear that this objective is secured in practice: it has been suggested above that it may be that in any event verdicts of acquittal are returned only where a reasonable doubt exists. It may also be suggested that juries do not always find satisfactory or intelligible the directions which they are given on the difference between the burden on the Crown of proof beyond reasonable doubt and that on the defence of proof of the statutory defence on a balance of proababilities. In any event, in considering a possible justification of necessity it is necessary to keep in view the consideration, which some may regard as the overriding consideration, that the effect of casting upon the accused the persuasive burden of proving the issue which is decisive of guilt or innocence is that if the minds of the jury are evenly balanced as to whether or not the accused is guilty, it is their duty to convict.

22.21/

22.21 (B) Criminal Procedure (Scotland) Act, 1975, secs 66, 312(v).[54]

Section 66 of the Criminal Procedure (Scotland) Act, 1975, provides:

> "Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the statute or order creating the offence, may be proved by the accused, but need not be specified or negatived in the indictment, and no proof in relation to such exception, exemption, proviso, excuse or qualification shall be required on behalf of the prosecution."

Section 312(v) of the Act lays down the same rule for summary procedure. These provisions are derived from section 19(3) of the Summary Jurisdiction (Scotland) Act, 1908,[55] which was made applicable to procedure on indictment by section 34 of the Criminal Justice (Scotland) Act, 1949.[56] Section 19(3) of the 1908 Act, and sections 66 and 312(v) of the 1975 Act, are in substantially the same terms as section 39(2) of the Summary Jurisdiction Act, 1879,[57] which replaced section 14 of the Summary Jurisdiction Act, 1848.[58] The Act of 1848 was designed to reform summary criminal proceedings in England, and it was said by the Court of Appeal in R v Edwards[59] that the object of the proviso to section 14, which was modified by section 39(2) of the Act of 1879 and adopted into Scotland by the Act of 1908, was to apply to the new English courts of summary jurisdiction the English common law relating to exceptions and provisos; and that section 81 of the Magistrates' Courts Act, 1952,[60] which replaced section 39(2) of the Act of 1879, sets out the common law rule in statutory form. Rule 6(c) of the Indictments Rules, 1971, contains a similar provision. The Court observed that/

[54] See R & B, paras 13-50 - 13.51. Note the proposals of the Thomson Committee regarding secs 67 and 312(x) of the 1975 Act: Thomson, chap 32.
[55] 8 Edw VII, cap 65.
[56] 12, 13 and 14 Geo VI, cap 94.
[57] 42 and 43 Vict cap 49.
[58] 11 and 12 Vict cap 43.
[59] [1975] QB 27. See paras 22.17-22.18 above.
[60] 15 and 16 Geo VI and 1 Eliz II, cap 55.

that if it was not necessary to specify or negative exceptions and the like in a count, it was difficult to see on principle why it whould be necessary to prove an element in the offence charged which was not set out in the count.

22.22 In Nimmo v Alexander Cowan & Sons Lord Pearson said of section 16(d) of the Summary Jurisdiction (Scotland) Act, 1954,[61] which is the predecessor of section 312(v) of the 1975 Act:

> "If some enactment prima facie requires a stated result to be achieved but provides the defenders with a possible excuse, then it is for the defenders to prove the facts by which they contend that they are excused."[62]

Similarly, in Gatland v Metropolitan Police Commissioner[63] Lord Parker C J made it clear that in summary proceedings in England under section 81 of the Act of 1952 the accused bears a persuasive burden of proving that he comes within the exception, exemption, proviso, excuse or qualification on which he relies upon the balance of probabilities, and does not bear merely the evidential burden of adducing evidence to that effect.

(vi) Reform of the law

22.23 It is submitted that, for the reasons stated in the foregoing paragraphs, and for the sake of clarity and convenience in practice, any burdens on the defence should be made evidential only, subject to one major exception which will be discussed in the next paragraph. The burden on the defence in relation to the defences of insanity and diminished responsibility would become an evidential one: it would be made clear that there is no persuasive or evidential burden on the accused of disproof of criminal intent, and no persuasive burden in cases of recent/

---

[61] 2 and 3 Eliz II, cap 48.
[62] 1967 SC (HL) 79, at p 114.
[63] [1968] 2 QB 279. See Phipson, para 107.

recent possession, on in cases where a matter is peculiarly within his knowledge; and statutes imposing a burden of proof on the defence would be understood as requiring the defence to adduce or elicit evidence sufficient to raise the issue if the matter is not to be taken as proved against the accused.

22.24 The major exception to the new rule would arise in the event of the acceptance of the proposal in this memorandum as to the admissibility of convictions as evidence in criminal proceedings. It is proposed in Chapter 11 that when the fact that a person other than the accused has committed an offence is relevant, the fact that the person has been convicted of it shall be admissible in order to prove that he committed it, and he shall be taken to have done so unless the contrary is proved.[64] It is now proposed that there should be a persuasive burden on the defence of disproving the guilt of the other person: in other words, the defence would have to prove on a balance of probabilities that the conviction was wrong. The imposition of the persuasive burden seems to be justified by the consideration that, the guilt of the other person having been established by the decision of a court, it would be inappropriate that the accused, merely by adducing some evidence tending to show that the conviction was wrong, should cast on the Crown the burden of proving beyond reasonable doubt that the conviction was right.

22.25 The corresponding proposal of the Criminal Law Revision Committee, which is about to be discussed, makes provision for a further exception to the proposed rule, in cases in which the accused may by special statutory procedure bring in a third party and is entitled to an acquittal on proof that his default was due to that of the third party. Such proof results in/

---

[64] Paras 11.22 - 11.23 above.

in the conviction of the third party; and that could not be allowed to follow from the discharge by the accused of an evidential burden. The Committee observe that to apply the principle underlying their proposal to these enactments would require an alteration of the scheme of the enactments - for example, by making the matter to be proved in order that the third party should be convicted different from the matter to be proved in order that the accused should be acquitted. That, they say, would involve a substantial reconsideration of the special procedure involved, which could not be undertaken as part of a review of the law of evidence or without consultation with the authorities concerned with the subject-matter of the enactments.[65] It is thought that there are very few such enactments which apply to Scotland.[66] It is not proposed to alter the present rules as to the burden of proof[67] and procedure[68] where a person convicted of a road traffic offence contends that there are "special reasons" for refraining from disqualification or endorsement, since that is not an issue relating to proof of guilt.

22.26 The reform of the law as to burdens on the defence has recently been discussed in other jurisdictions. In England, the Criminal Law Revision Committee proposed in their Eleventh Report that the burdens on the defence should be evidential only.[69] It would be inappropriate to discuss details of drafting here, but the leading provision of their proposed clause may be quoted:

> "8 -(1) Where by virtue of any rule of law or existing enactment there falls on the accused in any proceedings any burden of proof with respect to a matter relevant to his guilt
>
> or/

---

[65] CLRC, para 141(i).
[66] One such is the Shops Act, 1950 (14 Geo VI, cap 28), sec 71(6).
[67] Farrell v Moir, 1974 SLT (Sh Ct) 89.
[68] McLeod v Scoular, 1974 SLT (Notes) 44.
[69] CLRC paras 137-142, pp 179-180, 221-223.

or innocence, then, subject to subsection (4) below [which deals with the matters discussed in paras 22.24 and 22.25 supra] -

(a) unless there is sufficient evidence to raise an issue with respect to that matter, that matter shall be taken as proved against him; but

(b) if there is sufficient evidence to raise an issue with respect to that matter, the court or jury, in determining whether he is guilty of the offence charged, shall decide by reference to the whole of the evidence whether the prosecution has proved that matter against the accused, drawing such inferences from the evidence as appear proper in the circumstances."

The Committee's proposal was generally welcomed. The Bar Council observed:

> "We agree with this clause and with the reasoning behind it ... We agree that it is desirable to simplify and codify all burdens of proof and that the clause represents a fair way of achieving that object."[70]

The clause, if enacted, could of course be expressly excluded by subsequent legislation on particular matters. The clause is consistent with section 25(3) of the Theft Act, 1968,[71] which replaces section 28(2) of the Larceny Act, 1916,[72] whereby the possessor of implements of housebreaking had a defence of lawful excuse, "the proof whereof shall lie on such person."[73] Section 25(3) imposes an evidential burden only:

> "Where a person is charged with an offence under this section, proof that he had with him any article made or adapted for use in committing burglary, theft or cheat shall be evidence that he had it with him for such use."

As to liability for carrying offensive weapons, which is at present regulated by the Prevention of Crime Act, 1953,[74] which places on the defence the persuasive burden of proof of lawful authority or reasonable excuse, the Law Commission have proposed the offence of trespassing with an offensive weapon/

---

[70] BC, para 140.
[71] 1968, cap 60.
[72] 6 and 7 Geo V, cap 50.
[73] See R v Patterson, [1962] 2 QB 429.
[74] 1 and 2 Eliz II, cap 14, sec 1(1).

RE 68917 BL(688)

weapon, where the defence would bear only the evidential burden of adducing sufficient evidence to lay a foundation for the defence, leaving the prosecution to disprove the defence beyond reasonable doubt.[75]

22.27 In Canada, the Law Reform Commission reached the view that any purpose achieved by casting a persuasive burden on the accused could be equally accomplished by casting on him an evidential burden. They were impressed by the consideration that the effect of imposing a persuasive burden upon him could lead to his being convicted although the trier of fact was not satisfied beyond reasonable doubt as to his guilt. They recommended that as a rule the burden should be evidential, and in the rare cases where it may be thought proper to impose a persuasive burden, it should be done clearly and expressly in the legislation.[76]

(3) Civil cases

22.28 Onus of proof of statutory exception. The Sheriffs Walker[77] write:

> "When a right is given by statute subject to a qualification or to an exception, the question arises as to whether the onus of showing that the qualification or exception does not apply rests upon the party seeking the right, or whether his opponent must prove that it is applicable. No clear principle of construction is provided by the reported decisions which leave the position in some doubt,[78] but the judicial pronouncements on the analogous problem in criminal causes may provide some guide."

In Nimmo[79] Lord Wilberforce referred to

> "the orthodox principle (common to both the criminal and the civil law) that exceptions, etc, are to be set up by those who rely on them."

It/

---

[75] Law Com no 76, "Conspiracy and Criminal Law Reform", pp 172-173.
[76] Law Reform Commission of Canada, Evidence Project Study Paper no 8, "Burdens of Proof and Presumptions", pp 62-63; Report on Evidence, pp 20-22, 57-61.
[77] Para 75(d).
[78] Coul v Ayr County Council, 1909 SC 422, L P Dunedin at p 424; cf Brydon v Railway Executive, 1957 SC 282, Lord Patrick at pp 290-291.
[79] 1967 SC (HL) 79, at p 109.

It may be that the question of where the onus of proof lies in civil cases could usefully be regulated by a new statutory rule embodying that principle.

2. The standard of proof[80]

(1) The standards of proof

22.29 It is now clear that there are only two standards of proof known to the law of Scotland: proof beyond reasonable doubt, and proof upon the balance of the probabilities on the evidence.[81] There is no higher standard than proof beyond reasonable doubt - "it is difficult to conceive of a higher one which would ever be applied in practice"[82] - and there is no intermediate standard between the two.[83] It therefore seems incorrect to require[84] a higher standard of proof than proof on the balance of probabilities where, for example, a pursuer has unreasonably delayed in raising his action to the prejudice of the defender. In such a case it is the burden of proof, not the standard of proof, required of the pursuer which may properly be said to be increased.[85] It may be that the following words of Lord Denning represent the approach of the Scottish courts, although they have not been adopted in any reported Scottish decision:

> "It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases.
>
> But/

---

[80] See Walkers, chap 8.

[81] Dingwall v J Wharton (Shipping) Ltd, (HL (Sc)) [1961] 2 Lloyd's Rep 213; Brown v Brown, 1972 SC 123; Lamb v LA, 1976 SLT 151.

[82] Brown, supra, n 81, Lord Emslie at p 145.

[83] Lamb, supra, n 81, Lord Kissen at p 156.

[84] As in Barr v British Transport Commission, 1963 SLT (Notes) 59.

[85] CB v AB, (1885) 12 R (HL) 36, Lord Selborne, LC, at p 40; M'Lellan v Western SMT Co, 1950 SC 112, L P Cooper at p 115; Rutherford v Harvey & M'Millan, 1954 SLT (Notes) 28, per L J-C Thomson; Allardyce v Allardyce, 1954 SC 419, at p 422; Barty v Caledon Shipbuilding Co, unreported, cit 1955 SLT (News) 169.

But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. ... So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion."[86]

Sir Rupert Cross comments:

"These words must not be taken to mean that there is an infinite variety of standards of proof according to the subject-matter with which the court is concerned, but rather that this latter factor may cause variations in the amount of evidence required to tilt the balance of probability or to establish a condition of satisfaction beyond reasonable doubt. As certain things are inherently improbable, prosecutors on the more serious criminal charges and plaintiffs in certain civil cases have more hurdles to surmount than those concerned with other allegations."[87]

As Morris L J, said in Hornal v Neuberger Products Ltd,[88]

"Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities."

(2) Terminology

22.30 In Scotland, there does not appear to be any necessity for alternatives to the expressions "proof beyond reasonable doubt" and "proof on the balance of probabilities." As to the first, Lord Justice-Clerk Thomson said:

"... it is desirable to adhere so far as possible to the traditional formula and to avoid experiments in reformulation."[89]

Similarly/

[86] Bater v Bater, [1951] P 35, at pp 36-37.

[87] Cross, pp 98-99.

[88] [1957] 1 QB 247, at p 266. See Post Office v Estuary Radio Ltd, [1967] 1 WLR 1396 at p 1408, where Diplock L J applied a somewhat different version of Morris L J's words.

[89] M'Kenzie v HMA, 1959 JC 32, at p 37.

Similarly, in Australia Dixon, C J, said:

> "In my view it is a mistake to depart from the time-honoured formula. It is I think used by ordinary people and is understood well enough by the average man in the community. The attempts to substitute other expressions of which there have been many examples not only here but in England have never prospered. It is wise as well as proper to avoid such expressions."[90]

The traditional formula does not seem to create difficulties in Scottish practice. The same comments appear to be applicable to the expression "proof on the balance of probabilities." The expression "the balance of probabilities", although employed by Viscount Dunedin in Simpson v L M S Railway Co,[91] was not expressly approved as an appropriate formulation for a civil jury in Hendry v Clan Line Steamers Ltd,[92] but it is now commonly used in practice.[93] The expression is no doubt open to the comment that it may suggest that to satisfy the standard one need only introduce enough evidence to disturb a balanced pair of scales; but in practice that is not so. If one party gives a little evidence and the other none, the former will not necessarily succeed, because his assertion may be inherently improbable and failure to contradict an assertion does not necessarily make it credible. What is being weighed in the "balance" is not quantities of evidence but the probabilities arising from the acceptable evidence and all the circumstances of the case.[94]

(3) The standard in civil causes

22.31 It is assumed that it is unnecessary to contemplate any alteration of the rule in criminal cases that the standard of proof required of the Crown/

---

[90] Dawson v R, (1961) 106 CLR 1, at p 18: cit Cross, p 95.
[91] 1931 SC (HL) 15, at p 20.
[92] 1949 SC 320, L J-C Thomson at p 324, Lord Mackay at p 326.
[93] On its inapplicability to the assessment of future contingencies see Fernandez v Government of Singapore, [1971] 1 WLR 987, Lord Diplock at pp 993-994.
[94] See Heydon, pp 35-36.

Crown is proof beyond reasonable doubt, while the standard required of the accused, in cases where a persuasive burden of proof is imposed upon him, is proof on a balance of probabilities.[95] The nature of the burdens on the accused have already been considered.[96] It is thought, however, that consideration should be given to the question of what exceptions should be made to the general rule in civil cases that the standard of proof needed to discharge an onus or to rebut a presumption is proof upon a balance of probabilities. The writer adopts the language of Sir Rupert Cross:

> "Granted that there are two clearly distinguishable standards of proof, the higher standard is applicable to criminal cases because, so long as the proportions do not become excessive, it is better that people who are probably guilty should go free than that those with regard to whom there is a reasonable possibility of innocence should be convicted. It is, however, by no means so clear why a plaintiff or petitioner in any civil case who establishes the probability of his contention should not be granted the appropriate relief. Very strong reason is required to justify the imposition of the standard of proof appropriate to a criminal charge in a civil case, and it is open to question whether that reason has ever been convincingly stated ..."[97]

Various problems as to the standard of proof have been resolved in recent years. Parliament has enacted that in actions of divorce and actions of separation the standard required to establish adultery is proof "on balance of probability":[98] the same standard is applicable in inquiries under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1976,[99] and in actions for declarator of death under the Presumption of Death (Scotland) Act, 1977;[1] and it has been made/

---

[95]Robertson v Watson, 1949 JC 73, L J-G Cooper at p 88; H M Advocate v Mitchell, 1951 JC 53, L J-C Thomson at p 54.

[96]Paras 22.07-22.27 above.

[97]Cross, p 99.

[98]Divorce (Scotland) Act, 1976 (cap 39), secs 1(6) and 4(1).

[99]1976 (cap 14), sec 4(7).

[1]1977 (cap 27), sec 2(1). Cf M'Geachy v Standard Life Assurance Co, 1972 SC 145.

made clear that in proceedings for breach of interdict the standard is proof beyond reasonable doubt.[2] There seem to remain only four categories of proceedings as to which it is necessary to discuss the applicability of the standard of proof beyond reasonable doubt: (a) civil cases where the commission of a crime is a matter in issue; (b) civil cases where a party seeks to prove illegitimacy; (c) proceedings for contempt of court; and (d) actions for contravention of lawburrows.

22.32 (a) Allegation of crime. The Sheriffs Walker observe that the question whether in a civil cause the commission of a crime, such as fraud, must be proved by the standard of proof appropriate to criminal proceedings, or whether proof on a balance of probabilities is sufficient, has not received much consideration in Scotland, although it has been said that the criminal standard applies.[3] In Cullen's Trustee v Johnston,[4] an action of damages for fraud, Lord President M'Neill, when charging the jury, said:

> "... the law in no case presumes fraud, - in no doubtful matter does the law lean to the conclusion of fraud. Fraud is a thing that must be clearly and conclusively established."

In Wink v Speirs,[5] where fraud was alleged, Lord Justice-Clerk Patton observed:

> "... the case will require to be made out by very clear evidence."

Neither judge, however, referred in terms to the criminal standard of proof. The only Scottish judge to have done so appears to be Lord Neaves/

---

[2]Gribben v Gribben, 1976 SLT 266.
[3]Walkers, para 85. See also Buick v Jaglar, 1973 SLT (Sh Ct) 6.
[4](1865) 3 Macph 935, at pp 937-938.
[5](1867) 6 Macph 77, at p 80.

Lord Neaves in Arnott v Burt,[6] an action of reduction on the ground of forgery, when he observed:

> "... when once you come to the charge of crime in the way that is done here, I am not at all satisfied that you must not prove that charge with as complete and convincing evidence in the civil court as in the criminal court. That has often been held in cases where crime has come into consideration as a defence, - for instance, in regard to policies of insurance for fire; if the defence is wilful fire-raising, I think it must be proved by as good evidence as would be required to support a criminal charge. That has been repeatedly laid down. So in regard to scuttling ships, - that must be proved in the same way as it would require to be in the criminal court. I do not know that it is different in the case of forgery."

In Buick v Jaglar,[6a] an action of payment in which the defender admitted a course of embezzlement from the pursuer but disputed the amount for which she was responsible, the foregoing dicta were cited to Sheriff Wilkinson, who said:

> "Those dicta seem to me to be more apt in application to cases where fraud or similar crime is altogether disputed and where, therefore, one is dealing with a grave accusation against someone who, so far as the knowledge of the court goes, may be of unblemished character, than to cases such as the present where a course of criminal conduct is admitted and one is concerned merely with quantifying the extent of the defender's depredations. Even in the former class of case the law of England appears now to put the standard of proof on the ordinary civil standard (Hornal v Neuberger Products Ltd, [1957] 1 QB 247) and if a higher standard of proof applies in Scotland it is clear that that standard is restricted in its application and it does not apply to all civil allegations of crime, eg of statutory offences under the Factories Act and Road Traffic Act. Among the Scottish authorities it is only Lord Neaves, in Arnott v Burt (supra), who refers in terms to the criminal standard. The view taken in Hornal (supra) that the gravity of an allegation may affect the degree of probability required for proof, without necessarily raising the standard to that of the criminal law (per Denning, L J, at p 258, and Morris, L J, at p 266) is consistent with what is said in the Scottish authorities other than Arnott v Burt. If one views the question in that light it is clearly a less grave matter to allege in relation to an admitted course

of/

---

[6] (1872) 11 Macph 62, at p 74.
[6a] 1973 SLT (Sh Ct) 6.

of embezzlement that the extent of the depredations of the self-confessed embezzler have been greater than she admits than to allege embezzlement, even of a small amount, against someone who has made no such admission."

22.33 In civil cases where criminal conduct is in issue of types other than those referred to by Lord Neaves, it seems to be accepted in practice that the normal civil standard of proof on the balance of probabilities is applicable. Pursuers in actions of damages for personal injuries or death regularly succeed by averring and proving on that standard facts essential to establish the commission of offences under the Road Traffic Acts, the Factories Acts and other safety legislation. In cases where a conviction is founded on in terms of section 10 of the Law Reform (Miscellaneous Provisions)(Scotland) Act, 1968, the standard of proof required of the party seeking to prove that the offence was not committed has been said to be proof on the balance of probabilities.[7] On the other hand, the following view has been expressed in relation to actions of divorce for adultery in which rape is averred by a wife defender or female minuter:[8]

> "As rape is a serious crime, it is the author's[9] view that the onus on the party alleging rape will be the same as that on the Crown in a criminal case, and certainly no less than the onus on the pursuer in proving adultery."[10]

It has also been suggested that guilt of sodomy or bestiality in an action of divorce, when an extract of a conviction is not produced, must be proved beyond reasonable doubt;[11] but section 1(6) of the Divorce (Scotland) Act, 1976, now provides that in an action of divorce the standard of proof required to establish the ground of action shall be on balance of probability.[10] It would appear to be anomalous if the standard/

---

[7] King v Patterson, 1971 SLT (Notes) 40; see para 11.08 above.
[8] Clive and Wilson, p 446.
[9] Apparently Sheriff J G Wilson, QC: see Preface, p vii.
[10] The standard required to establish adultery in actions of divorce and actions of separation is now proof "on balance of probability": Divorce (Scotland) Act, 1976 (cap 39), secs 1(6), 4(1).
[11] Walkers, paras 86, 160.

standard of proof of crime required of a wife defender or female minuter were to be higher than the standard of proof of crime required of a pursuer.

22.34 It is thought that it would be useful to remove such doubts by making it clear that where any criminal conduct is in issue in a civil case, the standard of proof nevertheless remains proof on a balance of probabilities. Such a rule would be consistent with what is said in the older Scottish cases other than Arnott, and with current practice. The nature of the offence with which the court was concerned would cause variations in the amount of evidence required to tilt the balance of probability, but would not alter the standard of proof, as already discussed.[12]

22.35 It may be noted that there is a special provision as to the standard of proof in applications to the sheriff for findings under section 42(2)(c) of the Social Work (Scotland) Act, 1968.[13] Section 42(6) provides that where a ground for referral of the case is that the child has committed an offence, the sheriff shall apply to the evidence relating to that ground the standard of proof required in criminal procedure. No provision is made as to the standard of proof of other grounds, although these include the commission of incest and the various offences mentioned in the First Schedule to the Children and Young Persons (Scotland) Act, 1937.[14] The civil standard of proof would appear to be applicable to the evidence relating to these grounds.

22.36 (b) Illegitimacy. The rebuttal of the presumption against illegitimacy, when it arises, may be achieved only by proof beyond reasonable/

---

[12] Para 22.29 above.
[13] 1968, cap 49.
[14] 1968 Act, sec 32(2)(d) and (e).

reasonable doubt.[15] It is submitted that questions of legitimacy should now be determined by proof on a balance of probabilities. It has already been suggested that there should be introduced a provision on the lines of section 26 of the Family Law Reform Act, 1969, whereby the presumption of legitimacy is preserved but may be rebutted on a balance of probabilities.[16] Lord Reid's observations on section 26 have already been quoted.[16]

22.37 (c) Contempt of court. The question of the appropriate standard of proof in applications in respect of breach of interdict was raised by Lord Avonside in Eutectic Welding Alloys Co Ltd v Whitting,[17] where his Lordship expressed the view that proof should be beyond reasonable doubt. That view was approved by the First Division in Gribben vGribben.[18] It is thought that the standard of proof beyond reasonable doubt should be applicable in all cases of contempt of court, of which breach of interdict is an example. As the High Court of Justiciary explained in H M Advocate v Airs,[19] the offence of contempt of court is an offence sui generis; and lest there be any doubt as to the standard of proof applicable by the court, civil or criminal, when considering evidence led in respect of an alleged contempt of court which is denied by the alleged contemnor, it may be desirable to enact that the standard is proof beyond reasonable doubt. It is thought that that should be the appropriate standard since, if the contempt is proved, the contemnor is liable to punishment by fine and imprisonment; and he should not be liable to such penalties unless his offence has been proved on the criminal standard.[20]

22.38/

---

[15] Walkers, paras 70, 86; Clive and Wilson, pp 464-467; Brown v Brown, 1972 SC 123; see also S v S, 1977 SLT (Notes) 65.

[16] Paras 13.04-13.05 above.

[17] 1969 SLT (Notes) 79.

[18] 1976 SLT 266.

[19] 1975 SLT 177.

[20] Report of the Committee on Contempt of Court (1974, Cmnd 5794), para 175, rec 22(f); In re Bramblevale Ltd, [1970] Ch 128; Kent C C v Batchelor, (1977) 75 LGR 151.

22.38 (d) Actions for contravention of lawburrows. It has been suggested that in an action for contravention of lawburrows the standard of proof should be proof beyond reasonable doubt because, if it succeeds, a penalty is exigible from the defender, and he may be imprisoned.[21]

[21] Morrow v Neil, 1975 SLT (Sh Ct) 65, at p 69.

Chapter 23

CORROBORATION

1. Introduction

23.01 In their chapter on Sufficiency of Evidence the Sheriffs Walker point out that the law of evidence is concerned with proof of facts, and from the point of view of considering the sufficiency of evidence, facts fall into three classes, (1) crucial facts, (2) evidential facts and (3) procedural facts.[1] (1) Crucial facts are those which in a criminal cause establish the accused's guilt of the crime charged and must be libelled in an indictment or complaint, expressly or by statutory implication, in order that the libel may be relevant. In a civil cause they are the facts which a party must, or ought to, aver in order to make a case relevant to be sent to proof. Unless by statute a single witness is sufficient, such facts require "legal proof" or "full proof", which consists of either the direct evidence of two witnesses, or two or more evidential facts spoken to by separate witnesses from which the crucial fact may be inferred, or of a combination of the direct evidence of one witness and of one or more evidential facts spoken to by other witnesses which support it. There are various statutory exceptions to the rule that corroboration of crucial facts is required,[2] of which the most important from the point of view of this memorandum is section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968,[3] which will be considered below. (2) Evidential facts are facts which individually establish nothing, but from which, in conjunction with other/

---

[1]Walkers, chap 30. See also MacLeod v Nicol, 1970 JC 58.
[2]Walkers, para 384; Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1976 (cap 14), sec 6(2); Douglas v Provident Clothing & Supply Co, 1969 SC 32 (industrial tribunal); Morrow v Neil, 1975 SLT (Sh Ct) 65 (action of lawburrows).
[3]1968, cap 70.

other such facts, a crucial fact may be inferred. The evidence of a single witness is sufficient proof of each fact which is used in this way. (3) The phrase "procedural facts" is used to mean what have been described as incidental facts or matters of procedure in a criminal trial. They are not crucial because they are neither the commission of the crime nor the accused's implication in it: nor are they evidential because they do not yield any inference in support of a crucial fact. Although proof of them may be essential, the evidence of a single witness is sufficient.

23.02 The objective of the requirement of corroboration is to reduce the risk of the acceptance by the tribunal of untrue or unreliable testimony. Hume describes the requirement as

> "grounded in the universal opinion, and confirmed with numerous examples in every period of our practice ... No matter how trivial the offence, and how high soever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty, or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape."[4]

It has been cogently observed:

> "It is vital to ask why Hume said, when referring to direct evidence, '... our law is averse to rely on [a witness's] single word.' There can only be one answer to that question - namely, human fallibility. It may be noted that the risk of fallibility is double - that of the witness, and that of the tribunal which holds the witness to be credible. If that answer is correct, it provides the key to the whole subject of corroboration."[5]

The risk of error is a consideration which is relevant in civil as well as in criminal cases, and remains as important today as it was in the past. Lord Cameron has spoken of

> "the value of that requirement of our native law of evidence

which/

---

[4]Hume, ii, 383.

[5]Anon, "Corroboration of Evidence in Scottish Criminal Law", 1958 SLT (News) 137.

which refuses to peril an issue of fact, be it concerned with liberty, status, reputation or property, on the unsupported testimony of a single witness. Nothing is more easy than to err in the assessment of the credibility or accuracy of witnesses, even after subjection to skilled cross-examination, and the experience of years confirms that view."[6]

23.03 The primary questions for the reformer of the law are whether the rules of the common law give rise to any difficulty or hardship, and if so, whether the function of the requirement of corroboration as a safeguard against the acceptance of untrue or unreliable testimony is of sufficient value to offset any such difficulty or hardship. It seems possible to identify two major problems which have arisen in recent years: as to the nature of the facts which have to be corroborated, and as to what evidence of facts and circumstances will be sufficient to amount to corroboration of the direct evidence of a single witness. The latter problem was said to cause particular difficulty in actions of damages for personal injuries, and the abolition of the legal requirement of corroboration in such cases was effected by section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968.[7] The following paragraphs are devoted to a discussion of these problems, and of the question whether any further reform of the law should be contemplated.

2. General problems

(1) The facts to be corroborated

23.04 Reference has already been made to the classification of the facts to be proved as crucial, evidential or procedural.[8] The decisions in Scott v Jameson[9] and Gillespie v Macmillan[10] seem inconsistent with the proposition, which otherwise appears to be generally accepted, that each crucial/

[6]Hammond v Western SMT Co Ltd, First Division, 8th May 1968, unreported. The proceedings in the House of Lords are reported sub nom. Ferguson v Western SMT Co Ltd, 1969 SLT 213.

[7]1968, cap 70.

[8]Para 23.01 above.

[9](1914) 7 Adam 529.

[10]1957 JC 31.

crucial fact (sometimes described as an essential fact or factum probandum) requires to be proved by corroborated testimony, while evidential facts (ie facts from which a crucial fact may be inferred) may each be proved by the evidence of a single witness. Confusion appears to have arisen from dicta of Lord Justice-Clerk Macdonald and Lord M'Laren in Lees v Macdonald.[11] Lord Justice-Clerk Macdonald said:

> "... I am of opinion that in any case any fact can be proved by one witness although the whole case cannot be so proved."

Lord M'Laren said:

> "All that the law demands is that there should be two witnesses to prove a case, and provided that is so, any fact in the case may be proved by the testimony of one credible witness."

If these dicta were to be applied to proof of facta probanda, they would be destructive of the principle of corroboration, but it seems clear that they were not intended to be so applied: Lees was concerned with proof of the procedural fact of title to prosecute. Lees was nevertheless cited by Lord Justice-General Clyde to support the decision in Gillespie, which followed Scott v Jameson. In both Scott and Gillespie the accused was convicted of driving through a speed trap over the speed limit. The factum probandum, which was the speed of the vehicle, was made up of three ingredients, each of which had to be proved: the distance between the two points, the exact time when the vehicle passed the first point, and the exact time when it passed the second point. It was held, however, in each case that each of these three ingredients could be proved by the evidence of a single witness. These two decisions might have been expedient, but they seem to propound a doctrine that so long as the facts proving a criminal charge emanate from two separate and independent sources, not every fact needs to/

---

[11](1893) 3 White 468; 20 R (J) 55.

to be proved by two witnesses. Such a doctrine is not in accordance with principle, and it is submitted with respect that Scott and Gillespie were wrongly decided.[12]

23.05 It may be unnecessary, however, to eliminate the doctrine of Scott and Gillespie by means of legislation. It is believed that a substantial number of experienced practitioners are of the view that these decisions are unsound, and that if they were to be relied on by the Crown it is not impossible that they might be reconsidered by a Full Bench. It is thought that Gillespie has been followed only in cases where the facts were virtually identical to those with which it dealt; and it seems that that method of calculating speed is now seldom employed by the police.

(2) Evidence sufficient to amount to corroboration

23.06 Before the enactment of section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968,[13] it was maintained that difficulty in applying the law relating to corroboration arose from time to time in a limited class of cases. These were actions of damages for personal injuries in which it was contended that the direct evidence of a single witness (normally the pursuer) was corroborated by facts and circumstances spoken to by one or more other witnesses. It is noteworthy that the principle to be applied in such cases was well established, and that differences of judicial opinion were confined to the application of the principle to the evidence in a comparatively small number of cases within the class which arose over a short period of years.

23.07 It will be useful to quote here the familiar terms of the classical statement/

---

[12]The submission is fully and, in the writer's view, convincingly argued in "Corroboration of Evidence in Scottish Criminal Law", 1958 SLT (News) 137, and "The Logic of Corroboration" by Professor W A Wilson, (1960) 76 Sc L Rev 101. See also Walkers paras 382, 387(b).

[13]1968, cap 70.

statement of the principle by Lord President Normand in O'Hara v Glasgow Corporation:[14]

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

It has been thought that there is some conflict between this statement of the law and Maitland v Glasgow Corporation,[15] where Lord President Normand said:

> "The fact that the story told by the pursuer is probable may render it more easy to accept her evidence as truthful, but it is not corroboration of the pursuer."

It seems clear, however, that this dictum is not inconsistent with the statement in O'Hara, and that the law is that the pursuer is not sufficiently corroborated by the fact that his story is more probable than any other account: he can secure corroboration only if he leads other evidence than his own of facts more consistent with his account of the matter in issue than any other account of it.[16]

23.08 It is thought that the source of the supposed difficulty in applying the law, and of the differences of judicial opinion to which reference has been made, is that the question whether such other evidence fulfils that test is determined by the drawing of inferences, and not as a matter of logical necessity. If the circumstantial facts are established, it is possible to argue that the inference sought to be drawn/

---

[14] 1941 SC 363, at p 379.
[15] 1947 SC 20, at p 25.
[16] Hughes v Stewart, 1964 SC 155, L P Clyde at p 159.

drawn from them is not justified. This ambiguity is inherent in the nature of circumstantial evidence. It is perhaps not altogether surprising, therefore, that in a small number of borderline cases[17] different views have been expressed on the question whether a particular inference may be drawn from particular circumstantial facts.

23.09 In order to place the supposed problem in perspective, these cases should be balanced against the cases in which the question of the sufficiency of circumstantial evidence as corroboration of a single eye-witness is resolved without difficulty. It is thought that such cases may be conservatively estimated in hundreds every year. Time and again the question arises, and is resolved beyond dispute, in civil litigation other than personal injury cases, most notably in actions of divorce, and in criminal trials. It is resolved by sheriffs and justices in summary criminal trials; and in trials under solemn procedure the jury have the rule explained to them by the presiding judge, and presumably apply it in their deliberations. It does not appear to have been suggested that the rule is difficult to apply, or is an obstruction to the ascertainment of truth and the doing of justice in any of these fields.

23.10 It was maintained, however, that the rule caused other special difficulties in actions of damages for personal injuries. In the Scottish Law Commission's paper entitled "Proposal for Reform of the Law of Evidence Relating to Corroboration", which preceded the enactment of section 9 of the Act of 1968, it was said:

"From enquiries which we have made, it is evident that there

are/

---

[17] Cleisham v British Transport Commission, 1962 SC 429, 1964 SC (HL) 8; Robertson v John White & Son, 1962 SC 479, 1963 SC (HL) 22; Ferguson v Western SMT Co Ltd, 1969 SLT 213.

are many cases where pursuers, having sustained injuries when working alone or in darkness, are unable to pursue a claim through absence of corroboration."[18]

It is not clear that this statement would have been supported by the experience of most of the judiciary and of those members of the legal profession who were experienced in personal injuries litigation. If indeed there were many cases where pursuers were advised that due to lack of corroboration their claims could not succeed, it is doubtful whether their advisers correctly appreciated the requirements of the law. It may well be that the extent to which corroboration could be obtained from facts and circumstances was not widely appreciated by those who were not in practice before the Court of Session, perhaps becuase the many uncontroversial cases in which such corroboration was found were thought unworthy of the law reports.[19] But in any event the Commission recommended, in paragraph 9 of their paper, that legislation should be enacted

> "to the effect that in any civil cause, not being a consistorial cause or an action of affiliation, the Court may treat the evidence of a single credible witness as sufficient proof of any averment which requires to be established by evidence given by a witness in person."

Parliament did not accept that recommendation in its entirety, but restricted the modification of the law to personal injury cases only.[20]

It/

---

[18] Para 5.

[19] Reported uncontroversial cases of the corroboration of a single witness by facts and circumstances include Winchester v David Lawson Ltd, 1947 SLT (Notes) 17, 58; Reid v Scottish Gas Board, [1950] CLY para 4793; Ritchie v James McCaig & Sons, 1963 SC 527; Hughes v Stewart, 1964 SC 155 (all personal injuries cases); Schlichting-Werft, A G, v Tait & Sons, 1963 SC 624 (breach of contract); Bell v Glasgow Corporation, 1965 SLT 57 (damage to property). There is, also, little reported authority for the proposition that a divergence between the evidence of a pursuer and his sole supporting witness is not necessarily fatal to the pursuer's case: McCormack v Scott's Shipbuilding & Engineering Co Ltd, 1962 SLT (Notes) 46.

[20] For Parliamentary debates, see HC vol 764, col 545; vol 770, col 1375; HL vol 292, col 823; vol 293, cols 216, 228, 235 and 243; vol 295, col 197; vol 296, cols 351 and 1559. See especially Lord Reid at HL vol 292, cols 836-841, vol 293, cols 266-270.

It seems to have been accepted that section 9 was an interim measure which would require to be reconsidered when the law relating to corroboration was reviewed by the Scottish Law Commission in the course of its examination of the law of evidence.

3. Civil causes

(1) The Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968, sec 9

23.11 The foregoing review of recent problems in the law relating to corroboration suggests that attention should be focused on the operation of the law in civil cases, where the enactment of section 9 of the Act of 1968 has created a major anomaly. It will be necessary to ascertain how section 9 has worked in practice, and then to consider to what extent it has alleviated the difficulties and hardship which were referred to as justifying its enactment, and whether experience has shown that a legal - as distinct from a practical - requirement of corroboration is an essential safeguard against the acceptance of untrue or unreliable testimony in civil cases. Various schemes of reform of the law will then be discussed.

23.12 Section 9, which came into operation on 25th November 1968, provides:

> "(1) This section applies to any action of damages where the damages claimed consist of, or include, damages or solatium in respect of personal injuries (including any disease, and any impairment of physical or mental condition) sustained by the pursuer or any other person.
>
> (2) Subject to subsection (4) of this section, any rule of law whereby in any proceedings evidence tending to establish any fact, unless it is corroborated by other evidence, is not to be taken as sufficient proof of that fact shall cease to have effect in relation to any action to which this section applies, and accordingly, subject as aforesaid, in any such action the court shall be entitled, if they are satisfied that any fact has been established by evidence which has been given in that action, to find that fact proved by that evidence, notwithstanding that the evidence is not corroborated.

(3)/

(3) In relation to an action tried by the jury, the reference in subsection (2) of this section to the court shall be construed as a reference to the jury.

(4) This section shall not -

(a) affect the operation of any enactment passed or made before the commencement of this Act, or

(b) apply for the purposes of any appeal or other proceedings arising out of any proceedings in which the proof or trial has taken place, or the evidence has otherwise been given, before such commencement.

(5) The references in this section to the giving of evidence are references to the giving of evidence in any manner, whether orally or by the production of documents or otherwise."

23.13 Section 9 was first considered by the Inner House in Morrison v J Kelly and Sons Ltd,[21] in which it was held that it did not in any way alter or lessen the power of a court of appeal to review in appropriate circumstances the decision of a judge of first instance on an issue of fact, or the necessity for that judge to state adequate and sufficient reasons for reaching a decision based on his assessment of the evidence of the witnesses; and that the presence or absence of corroboration remained an important consideration for the court in deciding whether or not a fact had been proved. Morrison was followed in M'Gowan v Lord Advocate,[22] where the Court observed that section 9 was primarily intended to deal with cases where an accident occurred in the absence of any eye-witness other than the pursuer himself. In McLaren v Caldwell's Paper Mill Co Ltd,[23] Lord Kissen said (at p 165):

"My opinion is that in a case where section 9(2) has to be applied, that is, in a case where a pursuer is not corroborated on crucial facts, the evaluation and assessemnt of a pursuer's evidence requires special care and attention because of the absence of corroborative evidence."

Lord Milligan/

[21] 1970 SC 65.
[22] 1972 SC 68.
[23] 1973 SLT 158.

Lord Milligan (at p 164) expressed his agreement with Lord Kissen on this point. Lord Kissen continued:

> "A trial judge should, I think, be more hesitant in accepting such evidence as credible and reliable in the absence of supporting evidence from other sources. The difficulty of accepting such uncorroborated evidence will, in my opinion, be increased where there has been mora and therefore a heavier onus. (See, for example, Rutherford v Harvey & McMillan, 1954 SLT (Notes) 28, per Lord Justice-Clerk Thomson.) Likewise the difficulty of assessment and evaluation of uncorroborated evidence may be increased where the trial judge has to weigh and assess the importance of contrary evidence or the absence of other evidence which might have been led and which might have corroborated the uncorroborated evidence."

Lord Stott appeared to be somewhat dissatisfied with the interpretation of section 9 in Morrison. As to the first point decided in Morrison, he said (at p 168):

> "It is plain from the terms of section 9 that 'the court' who have to be satisfied that a fact has been established by the evidence of a single witness must be, in the first instance at least, the judge who hears the proof, or if the action is tried by a jury, the jury. That being so one might perhaps be inclined to think that, since so much may turn on the evidence of one witness, the impression formed by the judge who saw and heard him in the witness-box becomes more rather than less important. But that view of the effect of the section will not stand with the decision of the other Division of this Court in Morrison v J Kelly & Sons, where it was held that section 9(2) did not alter nor lessen the power of a court of appeal to review in appropriate cases the decision on an issue of fact of a judge of first instance or the necessity for that judge to state adequate and sufficient reasons for his acceptance or rejection of evidence."

23.14 The opinions in McLaren also consider the question whether a pursuer who would otherwise be uncorroborated is bound to adduce a witness whose evidence may either corroborate or contradict his own. The question arises from the following words of Lord President Clyde in Morrison (at p 79):

> "Section 9(2) of the 1968 Act does not eliminate corroboration altogether. On the contrary, corroborative evidence still constitutes a valuable check on the accuracy of a witness's evidence. There may be cases where owing to the nature of

the/

> the circumstances corroboration is unobtainable. Such a case may be an appropriate subject for the application of the subsection. But, where corroboration or contradiction of the pursuer's account of the matter is available, a Court would obviously be very slow indeed to proceed on the pursuer's evidence alone. The test under the subsection is a relatively high one. The Court must be 'satisfied that [the] fact has been established.' How could the Court be satisfied if corroborative evidence was available but without any explanation not produced.?"

That approach was adopted by Lord Avonside in McDougall v James Jones & Sons Ltd,[24] where an uncorroborated pursuer blamed his foreman for his accident. Lord Avonside held that the pursuer was a completely untrustworthy witness, and continued:

> "I should add this, that even if I had at best been somewhat suspicious of the credibility of the pursuer that would have availed him nothing in the circumstances of this case. Section 9(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968, would allow me to accept uncorroborated evidence if I were satisfied that any fact had been established by evidence which had been given in the action. I could not possibly be so satisfied. It was said by Mr Morrison [counsel for the pursuer] that the only other witness available was the foreman, Troup, and that since the foreman was, as it were, an agent of the defenders and himself blamed for the occurrence of the accident he could not be expected to call him. With this I disagree. If there is evidence available bearing on the proof of the matter it appears to me that that evidence must be led in any case in which the pursuer has spoken alone and where his testimony is of doubtful credit. Not only was there no suggestion that Mr Troup was not available, but in fact he was on the list of witnesses handed to me by agents for the pursuer as the pursuer's witness. It cannot be contemplated that the effect of the Act would be to allow a pursuer to succeed in these circumstances."

Similarly, in Mason v S L D Olding Ltd,[25] where a foreman named Lundie was blamed, Lord Robertson said:

> "It was argued on behalf of the pursuer that, provided the pursuer was accepted as a credible and reliable witness, no corroboration of his account was required (Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968 (cap 70) section 9(1)). But I do not think that this argument is
>
> valid/

[24] 27th November 1970, unreported.

[25] 14th June 1972, unreported. A reclaiming motion was refused on 24th January 1974 (unreported).

valid in the present case (see Morrison v J Kelly & Sons Ltd, 1970 SLT 198, Lord President Clyde at p 203). Corroboration of the vital parts of the pursuer's account was obtainable from Lundie, and no explanation was produced as to why he was not lead as a witness. Although the pursuer in his alternative case blamed Lundie, this was not his stronger case, and indeed, for reasons which I shall later mention, was of doubtful relevancy. Lundie was not present - according to the pursuer - at the time when the accident actually occurred, but his evidence would have accorded vital corroboration to the pursuer on the major branch of his case against the defenders. There is nothing unusual in a pursuer leading as a witness a fellow-workman, or superior, whom he blames for an accident. In the absence of the evidence of Lundie, without any explanation being offered to explain this absence, I am not statisfied that the pursuer has established, by the evidence he has led, the facts of the accident essential to his success (in terms of section 9(2) of the 1968 Act)."

23.15 In McLaren,[26] however, where McDougall[24] and Mason[25] were apparently not cited, the judges expressed a different view. The pursuer had blamed the defenders' lorry driver, and the defenders founded on the fact that he had not called the lorry driver as a witness. Lord Milligan said (at p 164):

"So far as absent witnesses are concerned I do not think that the pursuer can be blamed for not calling the driver of the lorry, as he had charged the driver with negligence."

Lord Kissen said (at p 166):

"I do not think that the failure to lead the evidence of a witness who might have been able to give corroborative evidence of a pursuer is of importance in a case where that corroborative witness is being blamed for the accident."

Lord Stott dealt with the matter fully (at pp 168-169):

"It is to be observed that one of the grounds of action in the case as plead by the pursuer is fault on the part of the lorry driver. So far as I am aware it has never been normal practice for a party to a reparation action in Scotland to adduce as a witness a person whom he is blaming for his injuries.

If/

---

[24] 27th November 1970, unreported.

[25] 14th June 1972, unreported. A reclaiming motion was refused on 24th January 1974 (unreported).

[26] 1973 SLT 158.

If the rule of law referred to in section 9 of the Act had still applied at the time of the proof, it might have been necessary for the pursuer to have adduced the lorry driver. But once that rule is gone I demur to the suggestion that it was incumbent upon the pursuer to adduce a witness who may or may not have been a hostile witness in order to see whether that witness's evidence corroborated or contradicted his own. The argument I think stems from some words of the Lord President in Morrison (at p 203 of the SLT report) which counsel for the reclaimers tended to read as an indication that it is inappropriate to apply section 9 in a case where corroborative evidence might have been obtainable. I doubt if the words will bear the meaning that counsel sought to ascribe to them but if they do I respectfully disagree with them. The terms of the section do not suggest that it was intended to benefit only the man working alone. They are general and comprehensive and appear to have been chosen not with reference to any special set of circumstances but as a general remedy for the anomaly and injustice arising from a rule of law whereby the Court, convinced that an injured man had given a truthful account of his accident, were nevertheless bound to reject it from lack of corroboration. The Act now requires to be read subject to the ratio of the decisions in Morrison v Kelly. But it is one thing to say, as was said in Morrison, that the evidence of a single witness should not have been accepted when there was a weight of evidence the other way. It is quite another to say, as counsel for the reclaimers appears to say, that the evidence of the pursuer should have been rejected because there was an uncalled witness whose evidence might have been contradictory."

23.16 In the light of McLaren[26] it now seems clear that although, as Lord Guthrie said in Morrison[21] (at p 80), the absence of corroborative testimony when such testimony was available is of importance in deciding whether a fact has been established by the evidence adduced, a pursuer is not obliged to call the person who, he avers, was responsible for his injuries: the evidence of the single witness must, however, be evaluated with special care.

23.17 Lord Stott's views about the generality of section 9 appear to be difficult to resist. It is unfortunate that they seem to conflict with the dicta of Lord President Clyde in Morrison[21] (at p 79) and with the opinion/

---

[21] 1970 SC 65.
[26] 1973 SLT 158.

opinion of the Court in McGowan[22] (at p 190). It seems clear that section 9 was intended to apply to all actions where the damages claimed consist of or include damages or solatium in respect of personal injuries, and not merely to cases where the pursuer was alone at the time of the accident. It would surely be a misdirection if a judge or sheriff were now to charge a civil jury in any personal injuries action on the basis of the pre-1968 law, whether because he considered section 9 to be inapplicable to the facts, or for any other reason.

23.18 A few other reported decisions on section 9 may be noted. If the Court accepts the evidence of the pursuer, the fact that the Court rejects as unreliable the evidence of the only eye-witness, who purports to corroborate the pursuer, does not deprive the pursuer of the assistance of section 9.[27] It is possible for an uncorroborated pursuer to be found entitled to damages but nevertheless contributorily negligent.[28] In another case, a motorist who drove into unlit roadworks sued the local authority for damages consisting of the cost of repairing his car and hiring another, inconvenience, and solatium for a bruised elbow. The element of solatium was assessed at a figure which amounted to 2.8 per cent of the total damages, but it was held that section 9 was nevertheless applicable, since the damages claimed included solatium in respect of personal injuries sustained by the pursuer.[29] The maxim de minimis non curat praetor seems to be inapplicable in such a case.[30]

23.19 It is necessary not only to review the reported decisions on section 9, but also to ascertain its effect in practice: in unreported cases, in actions which/

---

[22] 1972 SC 68.
[27] Thomson v Tough Ropes Ltd, 1978 SLT (Notes) 5.
[28] Ward v Upper Clyde Shipbuilders Ltd, 1973 SLT 182.
[29] Wanless v Glasgow Corporation, 1976 SLT (Sh Ct) 84.
[30] Trayner, Latin Maxims (4th ed), pp 145-146.

which were settled and in cases where claims were compromised without resort to litigation. The questions formulated in paragraph 23.03 above are whether the rules of the common law give rise to any difficulty or hardship, and if so, whether the function of the requirement of corroboration as a safeguard against the acceptance of untrue or unreliable testimony is of sufficient value to offset any such difficulty or hardship. In order to answer that question it would, ideally, be necessary to find the answers to the following questions. In how many cases since section 9 came into operation have pursuers been successful in the absence of corroboration? In how many cases has section 9 enabled a defender to discharge a burden of proof on an issue such as contributory negligence? In how many of these cases, in which section 9 was crucial to the success of one side or the other, it is thought that the judge or jury erred in their assessment of the credibility of the uncorroborated witness? How frequently has the prospect of the application of section 9 by the Court been taken into account in the negotiation of settlements? To what extent do the advisers of pursuers consider that section 9 has enabled them to settle meritorious claims which otherwise they could not have pressed? To what extent do the advisers of defenders consider that section 9 has forced them to settle unmeritorious claims which otherwise they would have defended? The answers to such questions may make it possible to ascertain whether section 9 has alleviated to any extent the difficulties and hardship which were said to justify its enactment, and whether experience has shown that a legal requirement of corroboration is an essential safeguard against the acceptance of untrue or unreliable testimony in civil cases.

23.20 Without such information it is difficult to formulate any proposals as to the reform of the law. At the present stage, three schemes may be envisaged/

envisaged, two of them simple, and one less so. (1) The first, inspired by the view that any benefit conferred by section 9 in particular cases has been outweighed by the disadvantage of the loss of corroboration as a mandatory safeguard, is simply to repeal section 9. This scheme would not, of course, commend itself to those who maintain that the pre-section 9 common law as to sufficiency of evidence was obscure and uncertain in its application to personal injuries cases, and afforded no real protection against dishonesty. (2) The second, based on the view that it is necessary to modify the common law in personal injuries cases only, in view of the hardship which would otherwise be suffered by credible, reliable but uncorroborated pursuers, and that section 9 works satisfactorily in practice, is simply to leave section 9 as it is and not to reform the law in any other respect.

23.21 (3) A third view may be that experience of section 9 in practice has demonstrated not only that it works satisfactorily in personal injury cases, but that the legal requirement of corroboration may safely be dispensed with in other areas of civil litigation. It may be argued in support of this view that the fact that statutory tribunals and inquiries may decide important issues untramelled by any formal requirement of corroboration[31] gives no ground for complaint. Those who favour this view would also say that while corroborative evidence constitues a valuable check on the accuracy of a witness's evidence, it is unnecessary to insist on it as a formal requirement of the law. As the decisions on section 9 demonstrate, the fact that corroboration will be unnecessary as a matter of law will not mean that corroborative evidence, if available, will be unnecessary as a matter of practice. On the contrary, the absence of corroborative evidence will mean that the evaluation and assessment of the single/

---

[31]See Douglas v Provident Clothing & Supply Co, 1969 SC 32.

single witness's evidence will require special care and attention; and if corroborative evidence is available but not adduced, that will be an important factor in the decision whether a fact has been established by the witness's uncorroborated testimony. It will in fact be rare for a party to a civil cause to depend on the uncorroborated evidence of one witness: any available corroborative testimony will nearly always be adduced for the practical reason that the prospects of a witness being believed are very much greater if his evidence is corroborated. Any judge, applying his experience and common sense to the assessment of the credibility and reliability of a single witness, will regard the witness's evidence with particular caution where the circumstances require it, - for example, where there has been inordinate and unexplained delay in the intimation of a claim or the raising of an action, or where there has been opportunity for fabrication of the evidence. But where the judge is convinced that the witness's evidence is honestly given and reliable, and that for good reasons no corroborative evidence is available, he will be entitled to hold the facts spoken to by the witness as proved.

23.22 Those who favour the abolition of the corroboration requirement in areas of civil litigation other than personal injuries may have different views about the areas to be selected. (a) Some may say that there is no room at all for any requirement of corroboration in civil causes. (b) Others may wish to limit it to cases where it is sought to challenge a deed or transaction for which two witnesses are required by statute. It may be said, for example, that it would be wrong for the law to require the authentication of a writ by two witnesses and yet to/

to allow it to be successfully challenged, eg on the ground of non-execution, on the evidence of one.[32]

23.23 (c) Another view is that corroboration should continue to be required in proceedings for breach of interdict or for any other contempt of court, on the ground that such proceedings are quasi-criminal in nature in respect that the standard of proof in criminal cases is applicable[33] and the offender is liable to punishment.[34] It may be argued that it would be anomalous to dispense in such proceedings with the requirement of corroboration, which is regarded as the greatest safeguard against a miscarriage of justice in criminal cases.[35] In this connection the Scottish Law Commission have recently invited views on the question whether in proceedings/

---

[32] The following list of statutory provisions requiring more than one witness is taken from the Appendix to the Scottish Law Commission's "Proposal for Reform of the Law of Evidence Relating to Corroboration". Citation Act, 1540 (c 10 (c 75)) - witnesses required to service of summons. Subscription of Deeds Act, 1579 (c 18 (c 80)) - witnesses required to subscription of deeds. Hornings Act, 1579 (c 45 (c 94)) - witnesses in proof of tenor of letters of horning. Mines and Metals Act, 1592 (c 31) - requirement for working of mines to be made before a notary and four witnesses. Registration Act, 1661 (c 243 (c 31)) - witnesses required to execution of comprisings. Subscription of Deeds Act, 1681 (c 5) - only witnesses subscribing a writ to be probative witnesses. Citation Act, 1686 (c 5 (c 4) - citations and executions to be subscribed by witnesses. Debtors (Scotland) Act, 1838 (c 114) s 25 - two valuators to be witnesses to poinding. Citation Amendment (Scotland) Act, 1871 (c 42) s 4 - in small debt proceedings, no witnesses required to citation or service of documents by an officer of the court, except in cases of poinding, sequestration or charging. Conveyancing (Scotland) Act, 1874 (c 94) s 4(2) - two witnesses required to delivery or posting of a notice of change of ownership; s 39 - writings inter alia attested by two witnesses not to be invalid because of informality of execution; s 41 - "notarial execution" before two witnesses. Conveyancing (Scotland) Act, 1924 (c 27) s 18(1) - "notarial execution" before two witnesses. Succession (Scotland) Act, 1964 (c 41) s 21 - two affidavits required to prove handwriting in a holograph testamentary disposition. Registration of Births, Deaths and Marriages (Scotland) Act, 1965 (c 49) s 18(1)(a) - a signature of register of births by father of an illegitimate child before the mother and the registrar; s 30(2) - Marriage Schedule to be signed by at least two of the witnesses present at the marriage; s 49 - a person unable to write may "make his mark" in presence of the registrar or two witnesses.

[33] See paras 22.31, 22.37 above.

[34] Kelso School Board v Hunter, (1874) 2 R 228, Lord Deas at pp 231-232.

[35] See para 23.28 below.

proceedings between spouses for a perpetual interdict against assault or molestation or for breach of such an interdict, the court should be empowered to pronounce the interdict, or as the case may be to find the breach proved, on the uncorroborated testimony of one witness even if that witness is a party.[36]

23.24 (d) Another view, which was expressed by the Scottish Law Commission in their "Proposal", is that the requirement should be abolished in any civil cause not being a consistorial cause or an action of affiliation. Consistorial causes were excluded on the ground that the criminal standard of proof was applicable. But the civil standard is now applicable in actions of divorce and separation;[37] and as to declarators of bastardy, it has been recommended in this memorandum that questions of legitimacy should now be determined by proof on the civil standard.[38] Actions of affiliation were excluded by the Commission because by their nature they resembled actions of declarator of legitimacy or bastardy, which are consistorial actions; because caution had to be exercised in accepting the pursuer's evidence, as in a criminal charge of sexual assault; and because of the existence of the special rule of corroboration by false denial. The first reason would be rendered unsound by the acceptance of the recommendation as to declarators of bastardy, and the third by the abolition of the rule of corroboration by false denial, which is discussed in the following paragraphs. There may be other views as to the appropriate areas for exclusion of the requirement of corroboration.

(2)/

---

[36] Scot Law Com memo no 41: Family Law - Occupancy Rights in the Matrimonial Home, Proposition 14, paras 2.71-2.74.

[37] Divorce (Scotland) Act, 1976, cap 39, secs 1(6), 4(1).

[38] Paras 13.04-13.05, 22.36 above.

(2) Corroboration by false denial

23.25 The rule of corroboration by contradiction applies only in actions of affiliation and aliment.[40] It has been authoritatively described as "at best a doubtful doctrine", which is "no doubt allowed in cases of affiliation and aliment owing to the penuria testium which is a feature of these cases."[41] In Wilkie v H M Advocate[42] Lord Justice-General Normand observed:

> "Corroboration by false contradiction owes its introduction into the law of affiliation and aliment to the disappearance of the old rule of semiplena probatio, and it cannot be traced back beyond M'Bayne v Davidson.[43] It was no doubt felt that in affiliation and aliment cases the penuria testium required some relaxation of the general rules of evidence corresponding to the former specialty of semiplena probatio. It would be a great misfortune if we were to give any support to the idea that corroboration by false contradiction has any place in our criminal law. There are many reasons, unfortunately, which induce people to conceal the truth or to tell falsehoods, and it cannot be presumed that the sole reason why an accused person has failed to tell the truth, or has told a lie, is a desire to conceal his guilt of the crime with which he is charged. The law was considered in Davies v Hunter,[44] and it was there emphatically said that corroboration by contradiction has no place in our law except in the chapter of affiliation and aliment. Although that was said in a civil action, it applies, and was I think intended to apply, to the criminal as well as to the civil law."

23.26 It may be argued that a doctrine which is of such doubtful validity that it is not admitted in criminal cases or in the general field of civil litigation/

[39] Walkers, para 174; Rathmill v McInnes, 1946 SLT (Notes) 3; Donald v Dey, (1954) 70 Sh Ct Rep 189; Macpherson v Beaton, 1955 SC 100; Roy v Pairman, 1958 SC 334; Morrison v Monaghan, 1969 SLT (notes) 25; Clarke v Halpin, 1977 SLT (Sh Ct) 50.

[40] Davies v Hunter, 1934 SC 10; Wilkie v HMA, 1938 JC 128; McVeigh v NCB, 1969 SC 268. In McInnes v McInnes, 1954 SC 396, false denials by the defender and the co-defender were taken into account in reaching a finding of adultery: see also Hall v Hall, 1958 SC 206. In Burnett v Burnett, 1955 SC 183, Lord Carmont said (at p 188) that McInnes should be applied only in a case where the facts were practically identical.

[41] Davies, n 40 supra, L J-C Aitchison at p 17.

[42] Wilkie, n 40 supra, at p 132.

[43] (1860) 22 D 738.

[44] 1934 SC 10.

litigation, ought not to be admitted at all. The reasons for not admitting it in the case of a false denial by an accused apply with equal force to the case of a defender in an action of affiliation and aliment. If a pursuer in such an action has difficulty in obtaining corroboration, to deal with the problem by the abolition of the requirement of corroboration in that category of case may seem preferable to the invocation of the doctrine of corroboration by false denial. It should be noted, however, that it is accepted in many other jurisdictions that corroboration of an applicant's evidence is necessary in affiliation proceedings,[45] and that a false denial may supply corroboration.[46] It has been suggested in Chapter 13 of this memorandum that the court should have power to direct blood tests of the parties.[47] In that event, the ascertainment of the truth may be more effectively assisted than by resort to the rule of corroboration by false denial.

23.27 If the doctrine is to remain, two matters require clarification. As Sheriff-Principal Reid had recently pointed out, there are

> "different views about the ratio on which a false denial may be treated as providing corroboration. On one view, its effect is to leave the evidence of a corroborating witness standing uncontradicted or to give a sinister complexion to evidence, otherwise neutral, from a corroborative witness so that the evidence, so regarded, confirms the pursuer's evidence (Macpherson v Largue, (1896) 23 R 785; Dawson v McKenzie, 1908 SC 648; Macpherson v Beaton, 1955 SC 107). On another view, the defender's false denial is an implied admission of guilt which corroborates the pursuer's evidence (Lowdon v McConnachie, 1933 SC 574, Lord Anderson at p 579).
>
> "There is an important distinction between these two views.
>
> The/

---

[45] A L Pickering, "Corroboration in Affiliation Cases" (1935) 9 ALJ 87; F Bates, "Lovers' Perjuries - Some Reflections on Corroboration of Evidence in Affiliation Proceedings", (1974) 48 ALJ 83.
[46] See J D Heydon, "Can Lies Corroborate?" (1973) 89 LQR 552.
[47] Paras 13.02-13.06 above.

The first presupposes the existence of evidence from a witness other than the parties. The second view, in principle, does not. If the pursuer's evidence is accepted, a false denial by the defender which amounts to an admission of guilt by him would, it is thought, always be sufficient corroboration. Of course, the false denial must be such as would amount to an implied admission of guilt - it must be on a material matter and show that the defender had something he wished to conceal because it could not be explained in a manner consistent with innocence (Macpherson v Beaton). On the second view, therefore, a pursuer might succeed on her own evidence and that of the defender provided only she could satisfy the court that the defender had made a false denial relevant to infer guilt."[48]

The learned Sheriff-Principal has also observed that it seems still to be an open question whether one independent credible witness who contradicts the defender on one material fact is sufficient in law to establish a false denial.[48] In Lowdon v McConnachie[49] there appears to have been a difference of opinion between Lord Hunter and Lord Anderson on the question whether the defender's denial of one fact spoken to by one credible independent witness was sufficient in law and, if sufficient, could ever be adequate in weight to provide corroboration of the pursuer's evidence.

3. Criminal trials

23.28 It appears that the abolition or relaxation of the requirement of corroboration in criminal cases has seldom been suggested.[50] On the contrary, the requirement has frequently been described as a safeguard against injustice. In Morton v H M Advocate[51] Lord Justice-Clerk Aitchison, delivering the opinion of a Full Bench, approved of the rule in these terms:

"It is a firmly established rule of our criminal law that a person cannot be convicted of a crime, or a statutory offence, on the uncorroborated testimony of one witness however credible,

except/

---

[48] Clarke, n 39 supra, at p 51.

[49] 1933 SC 574.

[50] Abolition was advocated by C de B Murray in "Plurality of Witnesses" (1943) 59 Sc L Rev 141, and "Quality or Quantity of Evidence", (1946) 62 Sc L Rev 249.

[51] 1938 JC 50, at pp 52, 54-55.

RE 68917 BL(723)

except in the case of certain statutory offences where the Legislature has directed that the evidence of one credible witness shall be sufficient. Subject to these statutory exceptions the rule is inflexible ...

"... it is desirable to reaffirm clearly and explicitly that, by the law of Scotland, no person can be convicted of a crime or a statutory offence, except where the Legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged. This rule has proved an invaluable safeguard in the practice of our criminal Courts against unjust conviction, and it is a rule from which the Courts ought not to sanction any departure."

The Thomson Committee observed in their Third Report:

"The greatest safeguard against a miscarriage of justice is - and should continue to be - the rule of law that the Crown must prove its case beyond reasonable doubt on corroborated evidence."[52]

The Working Party on Identification Procedure expressed their views in these terms:

"We consider that the requirement of corroboration in effect places a higher onus on the prosecution than exists in England, and that the requirement of corroboration substantially reduces the number of miscarriages of justice which could arise if only a single witness were required."[53]

23.29 It seems clear, accordingly, that whatever changes may be made in the law relating to corroboration in civil cases, the requirement of corroboration must be retained in criminal cases. It is thought that it may be justifiable to relax the rule to some extent in civil cases, while retaining it in criminal cases, upon the grounds that in criminal cases a higher standard of proof is required than in civil cases, the issues may be of grave importance to the accused, and the presence of the jury in trials on indictment makes it necessary to reduce the risk of their acceptance of evidence which is untrue of unreliable.

23.30/

---

[52] Criminal Appeals in Scotland (Third Report), (1977, Cmnd 7005), para 1.09.

[53] Identification Procedure under Scottish Criminal Law, (1978, Cmnd 7096), para 2.05. See also paras 5.01-5.02.

RE 68917 BL(724)

23.30 Apart from the issues raised by the case of Gillespie v Macmillan,[54] which have already been considered,[55] the law as to the sufficiency of evidence in criminal cases does not appear to have caused major difficulties in recent years.[56] Several of the modern reported decisions on the topic of corroboration in criminal trials have been concerned with the evidence of the accused in the witness-box as corroboration,[57] and the nature and quantity of evidence required to corroborate an extra-judicial confession,[58] including a statement by an accused charged with a road traffic offence that he was the driver of the car.[59] In Sinclair v Clark[60] Lord Justice-Clerk Thomson referred to the rule requiring corroboration of an extra-judicial confession in these terms:

> "There is a rule in our law - a somewhat archaic rule - the merit of which in modern conditions is not always obvious, at all events where the admission is made in circumstances beyond suspicion, that short of a solemn plea of guilt, an admission of guilt by an accused is not conclusive against him, unless it is corroborated by something beyond the actual admission. One reason for this rule is to ensure that there is nothing phoney or quixotic about the confession. What is required in the way of independent evidence in order to elide such a risk must depend on the facts of the case, and, in particular, the nature and character of the confession and the circumstances in which it is made."

That false confessions may be made is illustrated by Boyle v H M Advocate,[61] where/

---

[54] 1957 JC 31.

[55] Paras 23.04-23.05 above.

[56] In a case of rape, evidence of the woman's condition after the event is capable of affording corroboration of her evidence that she has been raped; and specific corroboration of her evidence of any specific element in the modus of the crime is not required: Yates v HMA, 1977 SLT (Notes) 42.

[57] Drysdale v Adair, 1947 SLT (Notes) 63; McArthur v Stewart, 1955 JC 71; Milne v Whalley, 1975 SLT (Notes) 75.

[58] Manuel v HMA, 1958 JC 41; Connelly v HMA, 1958 SLT 79; Allan v Hamilton, 1972 SLT (Notes) 2. An extra-judicial confession in a criminal cause may be proved by the evidence of one witness: Mills v HMA, 1935 JC 77, Innes v HMA, 1955 SLT (Notes) 69.

[59] Mitchell v Macdonald, 1959 SLT (Notes) 74; Sinclair v Clark, 1962 JC 57; Sinclair v MacLeod, 1964 JC 19; MacLeod v Nicol, 1970 JC 58. As to implied admission by conduct see Douglas v Pirie, 1975 SLT 206.

[60] 1962 JC 57, at p 62.

[61] 1976 SLT 126.

where the successful appellant had for some reason untruthfully pleaded guilty to robbing a bank and had been sentenced to nine years' imprisonment.

23.31 Other recent decisions have been concerned with some of the statutory exceptions to the rule requiring corroboration.[62] It has been held in a road traffic case in the sheriff court that "special reasons" for refraining from disqualification may be proved by the uncorroborated evidence of the accused.[63] As to the statutory exceptions, it may be noted that it has been recommended by the House of Commons Select Committee on Violence in Marriage that the corroboration requirement should be abolished in respect of assaults taking place between husband and wife in the home. It was not suggested, however, that the requirement created difficulty in civil proceedings between husband and wife.[64]

23.32 The rule which is often referred to as "the Moorov[65] doctrine" has been subjected to some analysis and criticism,[66] but Moorov has now stood as a leading authority for nearly 50 years, and has recently been approved by the House of Lords.[67] It is thought that the Sheriffs Walker's exposition of the law may be accepted, subject to two observations. The learned authors consider the authorities under the heading "Similar criminal acts", and/

---

[62] Walkers, para 384; Gerber v British Railways Board, 1969 JC 7; Sutherland v Aitchison, 1970 SLT (Notes) 48.

[63] Farrell v Moir, 1974 SLT (Sh Ct) 89. Where the legal burden of proof of an issue in a trial is placed on the accused by statute, he must produce corroborated evidence: see Templeton v Lyons, 1942 JC 102. As to the burden of proof on the accused see Chapter 22 above.

[64] See W A Wilson, "Battered Wives and Battered Law", 1976 SLT (News) 11.

[65] Moorov v HMA, 1930 JC 68.

[66] By P K Vandore, "The Moorov Doctrine", 1974 Jur Rev 30, 179; and by Dr Bernard S Jackson, in essays which the writer has had the advantage of reading in draft. On the historical roots of the law relating to corroboration see Dr Jackson's Essays in Jewish and Comparative Legal History (Leiden, E J Brill, 1975), chaps 6 ("Two or Three Witnesses") and 7 ("Testes Singulares in Early Jewish Law and the New Testament").

[67] R v Kilbourne, [1973] AC 729. See also R v Boardman, [1975] AC 421; R v Scarott, [1978] QB 1016; R Cross, "Fourth Time Lucky - Similar Fact Evidence in the House of Lords", [1975] Crim LR 62; L H Hoffmann, "Similar Facts after Boardman", (1975) 91 LQR 193.

and divide their treatment into two paragraphs, "(a) Interrelation of character, circumstances and time", and "(b) Common purpose".[68] Paragraph (a) begins:

> "Where an accused is charged with two or more crimes and only one witness implicates him in each, they afford mutual corroboration if the crimes are so inter-related by character, circumstances and time as to justify an inference that they are parts of a course of criminal conduct systematically pursued by the accused."

Paragraph (b) begins:

> "A similar rule applies when the several crimes charged are all directed to the same end."

The only comments which need be made are, firstly, that the learned authors consider Harris v Clark,[69] a case of the reset of goods stolen by employees of the same warehouse on three occasions within a year, in paragraph (b), although it may be said to belong to paragraph (a) on the ground that since the victim of each crime was the same the inference could be drawn that each was part of a course of criminal conduct systematically pursued by the accused. Secondly, the learned authors appear to have difficulty in reconciling the decisions with Dickson's statement that the principle would not apply where the acts charged are uttering forged notes to several persons at different times and places.[70] It may be suggested that Moorov supports the view that such acts would now attract the application of the principle provided that they were so inter-related as to lead to the inference of the existence of an underlying "unity of intent, project, campaign or adventure",[71] namely the object of profiting from the uttering of the forged notes. It is thought that in modern times a presiding judge in such a case would not be reluctant to direct the jury that such an inference might be drawn.

23.33/

---

[68] Walkers, para 388.
[69] 1958 JC 3.
[70] Dickson, para 1810.
[71] Moorov v HMA, 1930 JC 68, L J-G Clyde at p 73.

23.33 Since the publication of the learned authors' work, the Moorov doctrine has been considered and applied in a number of cases. H M Advocate v Kennedy,[72] in which Lord Migdale held that evidence of lewd practices against females could be used as corroborating evidence of sodomy against a male, seems inconsistent with both H M Advocate v Cox,[73] where Lord Hunter held that evidence of incest could not be taken as corroboration of evidence of sodomy against a male, and H M Advocate v W B,[74] where Lord Justice-Clerk Grant held that evidence of lewd practices with females could not be used as corroborative evidence of incest.[75] It is thought with respect that the two latter decisions may be regarded as correct, since they are consistent with the principle that it is a sine qua non of the application of the doctrine that the crime should be the same in a reasonable sense of that term.[76] A recent example of the application of the doctrine where only two charges were before the jury is Harvey v H M Advocate.[77] Each charge was of assault upon a woman. The particular method of assault was different in each case, but the two assaults were closely connected in time and place, and each was an unprovoked and sudden assault upon a woman uunknown to her assailant. It was held that in these circumstances the doctrine was applicable. As Lord Wheatley observed in McPherson v H M Advocate:

> "The more identical concurrent factors are, the easier it becomes to apply Moorov."[78]

The/

---

[72] 5th December 1963, unreported: see W M [Reid], "An Extension of Moorov", (1963) 79 Sc L Rev 221.
[73] 1962 JC 27.
[74] 1969 JC 72. His Lordship also held that evidence of incest could be used as corroborative evidence of lewd practices.
[75] cf Moorov v HMA, 1930 JC 68, Lord Sands at p 91.
[76] See Cox, n 73 supra, at p 29.
[77] 26th November 1975, unreported.
[78] 1st June 1972, unreported on this point in 1972 SLT (Notes) 71.

The doctrine cannot, however, be applied to the evidence of an occasion where there is no identification of the accused.[79] Where the crimes are so inter-related by character, circumstances and time that the underlying scheme or pattern is manifest, it may be unnecessary for the presiding judge to give the jury an explicit direction in terms of the doctrine.[80] The doctrine may be applied in appropriate civil cases.[81] The permissible interval of time between incidents to evidence of which it is sought to apply the doctrine has recently been considered in H M Advocate v Cox,[73] H M Advocate v W B,[74] and Michlek v Michlek.[81]

---

[79] McRae v HMA, 1975 SLT 174.

[80] Foley v HMA, 20th February 1975, unreported.

[81] Michlek v Michlek, 1971 SLT (Notes) 50. Its application in civil proceedings is, however, limited by the considerations that proof cannot be led without a basis on averment and that averments of incidents similar to that which is founded on will generally be held to be irrelevant and excluded from probation (A v B, (1895) 22R 402; Inglis v National Bank of Scotland Ltd, 1909 SC 1038; cf W Alexander & Sons v Dundee Corporation, 1950 SC 123; and see Walkers, paras 15-16).

RE 68917 BL(729)

PART VI: THE PRODUCTION OF EVIDENCE

Chapter 24

WITNESSES

1. Introduction

24.01 This Part of the paper reviews the procedural machinery which at present exists for making evidence available to the Court: the means whereby the testimony of witnesses may be ascertained and brought before the Court, and the rules relating to the production, recovery and inspection of documents and other property.

24.02 It seems necessary, when considering reform in these fields, to recognise the existence of a conflict between two theories about the object and methods of civil litigation: in the words of Jerome Frank J, "the 'fight' theory versus the 'truth' theory",[1] or, in the words of the Winn Committee, the "trial by ambush" theory versus the "cards on the table" theory.[2] Supporters of the "trial by ambush" theory place great emphasis on the value of preparation of the case by each side at arm's length and of the element of surprise as a legitimate tactic in the court-room, while those in favour of the "cards on the table" theory argue that justice could best be done if as much information as possible were to be available to all parties at the earliest possible stage and if each party were to know as much as possible, before the day in court, about the other side's case and evidence. Thus, Master Jacob, in his Reservations as to the Winn Report, wrote:

> "I think that further consideration may have to be given to the question, perhaps in the context of a wider enquiry into our procedural system, whether our pre-trial procedures should not be further released from their present restrictive practices, so as to reveal before the trial all the information concerning the

respective/

---

[1]Jerome Frank, Courts on Trial (Princeton, 1950), p 80.

[2]Report of the Committee on Personal Injuries Litigation, (1968, Cmnd 3691), paras 131-132.

RE 68917 BL(731)

respective cases of the parties, with the object of producing early confrontation between them, enabling them to make a realistic appraisal of their case, encouraging settlements, reducing the number and length of trials and eliminating surprise at the trial."[3]

24.03 Among the reforms advocated by those in favour of "cards on the table" are the exchange of witnesses' names and addresses, the exchange of witnesses' precognitions, the exchange of experts' reports, the pre-trial conference as a device for the promotion of reasonable settlement, and the Canadian system of pre-trial "examination for discovery" under which each party is entitled orally to examine the opposite party or the wider American system whereby the parties may examine not only each other but potential witnesses. The "truth" theory might give rise to proposals that the Court should play a more active role than at present both before and at the trial, not only by examining possibilities of settlement as in the pre-trial conference, but by being entitled to call and examine witnesses and to appoint its own experts.[4]

24.04 Different views have been expressed as to the suitability of various "cards on the table" devices for adoption into English practice.[5] It is outwith the scope of this paper to devise a comprehensive, radical approach to Scottish pre-trial civil procedure, but such ideas as fall within the writer's remit are noted where appropriate. The calling and examination of witnesses/

---

[3]Ibid, p 155.

[4]See Master I H Jacob and Professor G S A Wheatcroft, "Courts and Methods of Administering Justice", Third Commonwealth and Empire Law Conference, 1966, p 305, cit M Zander, Cases and Materials on the English Legal System (2nd ed), pp 208-210.

[5]Compare Geoffrey Bindman, "Another Kind of Discovery", Law Guardian, May 1965, and Master Jacob's Note on Reservations in the Winn Report with Professor Benjamin Kaplan, "An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure", (1971) 69 Mich L R 821. There is a useful collection of relevant materials in Michael Zander, Cases and Materials on the English Legal System (2nd ed), chapter 2.

RE 68917 BL(732)

witnesses by the judge, and the exclusion of inadmissible evidence by him _ex proprio motu_, are considered in Chapter 8, paras 8.19, 8.36 and 8.41. The appointment of court experts and the exchange of experts' reports are discussed in Chapter 17, paras 17.27-17.43; the exchange of precognitions in Chapter 24, paras 24.19-24.20, and the exchange of witnesses' names and addresses at paras 24.53-24.60.

24.05 In criminal procedure, the question of how far each side should disclose its case to its opponent raises questions as to the whole aim and purpose of criminal procedure. It is thought that it would be generally acknowledged that in criminal trials the objective of ascertainment of the truth is necessarily limited by other objectives - by the preservation of respect for human dignity and privacy, and by the need to minimise the risk of convicting innocent persons. These considerations place restrictions on the collection and presentation of information by the Crown. The defence, on the other hand, may be said to suffer from a shortage of conveniently enforceable rights to the disclosure of information, which are obviously necessary if the defence is to be able properly to examine and challenge prosecution evidence and expose evidence which may be suspect. The reasons are, perhaps, that the Crown does not prosecute in a partisan spirit but acts objectively and does not withhold relevant information from the defence, so that formal means of enforcing disclosure are unnecessary; and that until comparatively recent times the defence of accused persons was very frequently conducted gratuitously by counsel and agents for the poor who seldom had the time or the resources to engage in any pre-trial disclosure procedures. In modern times, however, the need of the defence for adequate and enforceable rights of obtaining information before the trial has been recognised in the deliberations of the Thomson Committee, who have considered/

considered such questions as the obligation on a witness to be precognosced by the defence, the exchange of precognitions and lists of witnesses and productions, and the nature and extent of the facilities for investigation which should be available to the defence. The views of the Committee on these and other matters related to the availability of evidence in criminal cases are taken into account in this and the following chapter.

2. Precognition

24.06 The following paragraphs are concerned with the witness's obligation to be precognosced; the preparation of the precognition, the use and disposal of it before the proof or trial, and the privilege afforded to statements made on precognition. The refreshment of the witness's memory from his precognition is discussed in Chapter 8, paras 8.50-8.51, and the admissibility of statements made on precognition in Chapter 19, paras 19.29-19.30, 19.47-19.50.

(1) Obligation on witness to be precognosced

(a) In criminal cases[6]

24.07 (i) Precognition by the Crown. In H M Advocate v Monson[7] Lord Justice-Clerk Macdonald said:

> "I consider it to be the duty of every true citizen to give such information to the Crown as he may be asked to give in reference to the case in which he is to be called; and also that every citizen who is to be called for the Crown should give similar information to the prisoner's legal advisers, if he is called upon and asked what he is going to say."

But although the duty to be precognosced is owed by the witness to the Crown and to the defence alike, it may be enforced only by the Crown. It is thought that the Crown has adequate means of enforcing the obligation. In solemn procedure, a warrant to cite witnesses for precognition is craved in/

---

[6] R & B, 5-67 ff, 13-83.
[7] (1893) 21 R (J) 5, at p 11; (1893) 1 Adam 114, at p 135.

RE 68917 BL(734)

in the petition. The procurator-fiscal may, and on some occasion does, precognosce a witness on oath before the sheriff.[8] In summary procedure a witness may be cited for precognition by the prosecutor, and is liable to be proceeded against for contempt of court if he fails without reasonable excuse to attend or refuses to give information within his knowledge. He may be punished for such contempt by a fine not exceeding £25 or by imprisonment for any period not exceeding 20 days.[9] It is thought that the figure of £25 should now be increased, notwithstanding the fact that in practice defaulting witnesses are apparently not prosecuted.[10] In both solemn and summary cases a warrant may be granted before any charge is brought, although that should be done only in very serious cases[11] or, it has been suggested,[12] for the purpose of investigating some unascertained crime. It is thought that it would be neither desirable nor necessary to introduce additional methods of compelling witnesses to be precognosced, such as by empowering the police to arrest a potential witness and detain him for questioning for a specified period.

24.08 The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1976,[13] provides by section 2 a procedure for the citation of witnesses for precognition which might with advantage be extended, at least to summary criminal procedure. The procurator-fiscal may, for the purposes of carrying out his investigation of the circumstances of a death to which the Act applies, cite witnesses for precognition. If a witness fails/

---

[8]See paras 24.14-24.17 below.

[9]1975 Acts, secs 315(3), 344(4).

[10]See Grant, para 691.

[11]Forbes v Main, 1908 SC (J) 46, Lord Justice-Clerk Macdonald at p 47; (1908) 5 Adam 503.

[12]R & B, para 5-68.

[13]1976, cap 14.

fails without reasonable excuse and after receiving reasonable notice to attend for precognition, or refuses to give information, the procurator-fiscal may apply to the sheriff for an order requiring him to do so. If the witness fails to comply with such an order, he is liable to be summarily punished forthwith by a fine of up to £25 or imprisonment for up to 20 days. It is thought that the making of an order by the sheriff places the witness beyond doubt as to the existence and nature of his duty. It is difficult to see why there should be three separate procedures for the citation of witnesses for precognition by the Crown according to whether the procedure is solemn, summary or by way of inquiry under the Fatal Accidents, etc, Act. It may be thought to be unnecessary to alter the existing machinery in solemn procedure beyond the extent recommended by the Thomson Committee as to precognition on oath.[14] But there seems to be no reason why the procedure in summary cases and in fatal accidents, etc, inquiries should not be the same, and it is suggested that the procedure in the latter should be applied to the former.

24.09 (ii) Precognition by the defence. The legal adviser of an accused person cannot compel a witness to be precognosced by them. It is not uncommon for a person with relevant information, whether on the Crown list of witnesses or not, to decline to be precognosced by the defence, and thus to put the defence in a difficulty. If the person is called as a witness by the Crown, the defence may embarrass him in cross-examination by obliging him to admit his refusal to be precognosced, and may thereby create an impression of unfairness; but even that limited redress is not available where the potential witness is not on the Crown list/

---

[14]See paras 24.14-24.17 below.

RE 68917 BL(736)

list. Such a witness could be cited for the defence and examined without a precognition having been taken, but it is very doubtful to what extent that course is willingly adopted by responsible solicitors or counsel. The Grant Committee recommended that defence solicitors should not have power to compel witnesses to appear for precognition: it seemed to them that there was a danger that powers of compulsion granted to defence solicitors might be overworked, and difficulties could arise where an accused person elected to defend himself. They suggested instead that it should be made possible to cite defence witnesses for precognition before the sheriff.[15] The Thomson Committee similarly recommended that where witnesses refuse to give precognitions to the defence, the defence should be entitled to apply to the sheriff for a warrant to cite those witnesses for precognition. Before granting such an order the sheriff would require to be satisfied that it was in the circumstances reasonable and necessary. There would have to be sanctions to cover the case of the witness who on being cited failed without reasonable excuse to attend or who on attending refused to give information within his knowledge.[16] The fact that a sheriff has taken precognitions from witnesses would, in the view of the Grant Committee, constitute good reason for his not presiding over the subsequent trial,[15] but if necessary the precognition or trial could be taken by an honorary or temporary sheriff. The Thomson Committee observed that the Crown should inform their witnesses that they should agree to their being precognosced by the defence at a time and place convenient to themselves.[17]

(b) Obligation on witness to be precognosced in civil cases

24.10 Comment is invited on the question whether any similar device is necessary/

---

[15]Grant, paras 690-691.
[16]Thomson, para 17.16.
[17]Thomson, para 17.11.

RE 68917 BL(737)

necessary or desirable in civil procedure. Notice of the other side's case is more amply afforded by a record than by an indictment or complaint, and relevant documents and other materials, which are more frequently of importance in civil than in criminal cases, may (subject to privilege[18]) be recovered before the day in court.[19] That such a device would be a major procedural innovation is clear from the words of Lord President Dunedin in Henderson v Patrick Thomson Ltd:[20]

> "... though for reasons of public policy the Courts can and will compel persons *invitos* to give testimony, they have never asserted, or tried to exercise, that power as regards giving precognitions. I have never heard of a compulsory order in a civil case to submit to precognition. It is practically otherwise in the Criminal Court, but even there it is not, technically speaking, precognition that the lieges must submit to at the instance of the Lord Advocate or the procurator-fiscal acting for him; it is examination."

Nevertheless there remains a difficulty in civil cases where a person thought to have information helpful to one party declines to be precognosced by that party and is not cited by the other party, or declines to make an affidavit for the purposes of proceedings in which affidavits are admissible (see Chapter 10).

(2) Preparation and pre-trial use and disposal of the precognition

(a) Precognition of witness in presence of other witnesses

24.11 "Each witness should be precognosced separately and outwith the presence of the other witnesses."[21] There is apparently no modern authority on the consequences of failure to observe this rule. Both Hume[22] and Dickson[23] indicated that a witness precognosced other than in accordance/

---

[18]See Chapter 18 above.
[19]See Chapter 25 below.
[20]1911 SC 246, at p 248.
[21]R & B, para 5-69.
[22]Hume, ii, 82.
[23]Para 1592.

accordance with the rule could be excluded altogether. Dickson[23] stated the law thus:

> "A common, but highly reprehensible, practice is to precognosce witnesses in each other's presence, by which means the recollection of one is refreshed and eked out by the statements of another, and a story more consistent than true is sometimes patched up among them. Where an improper purpose of this kind appears, the witnesses will be excluded, because their evidence has become tainted by the party's attempt to tutor them; and if the irregularity arose from gross carelessness and ignorance, without an improper intention, it will be fatal, where, from the delicate nature of the question in issue, or the information which the witnesses may have received, that course is necessary for the justice of the case."

Lewis, however, wrote that in modern practice (1925) witnesses were no longer excluded on the ground that they had been precognosced in the presence of other witnesses, but that such circumstances might still provide considerations affecting credibility.[24] The Sheriffs Walker do not seem to discuss the matter, no doubt upon the view that such circumstances no longer provide a ground of exclusion; and the learned editor of Renton and Brown, although preserving in the fourth edition the statement quoted at the beginning of this paragraph, does not suggest that breach of the rule may lead to the exclusion of the witness. Although there does not appear to be any reported authority in point, it is thought that the modern law is correctly stated by Lewis. It seems very likely that any departure from the rule would not now result in exclusion, but would still be regarded by the Court as highly reprehensible and would furnish matter of severely critical comment on the credibility of the witness's evidence. It may be unnecessary to regulate the matter by statute.

(b) Signature of precognition

24.12 The question whether witnesses in criminal cases should be obliged to/

---

[23] Para 1592.
[24] _Manual_, pp 122-123.

to sign their precognitions has been considered by the Thomson Committee. The question "was prompted by widespread concern at the large number of witnesses who depart from their precognitions at the trial." The Committee recommended that witnesses giving precognitions to procurators-fiscal should be asked, as a matter of practice, to sign them. They acknowledged that the signing of precognitions would not "come near" to solving the problem of witnesses giving evidence in the witness-box which differed from that given on precognition. They considered, however, that signature might encourage the witness to be more careful and responsible when giving the precognition, and produce a higher degree of consistency between the evidence given on precognition and that given in the witness-box; and that refusal to sign might indicate to the procurator-fiscal that the witness should be precognosced on oath before a sheriff.

24.13 The considerations in favour of signature, other than the last, appear to be applicable with equal force to precognitions given to the defence and to precognitions taken in civil cases, although no doubt Crown witnesses are more prone than others to depart from their precognitions. Would it therefore be appropriate to introduce a general rule of practice, applicable in both civil and criminal proceedings, that witnesses giving precognitions should be asked to sign them? Against the proposal it may be argued that there is no sanction for failure to sign a precognition, and it is objectionable for legal practice or procedure to imply sanctions which do not in fact exist. There are also practical difficulties. The witness would either require to wait after giving his precognition, for the precognition to be drafted and typed: or he would require to attend or be found at a later time in order to sign the precognition/

---

[25]Thomson, paras 17.07-17.08.

precognition, and at that time problems might arise in relation to recollection of what was said at the precognition. It seems doubtful whether it would be reasonable to impose this additional burden of inconvenience on the majority of witnesses who give both their precognitions and their evidence in the witness-box honestly and carefully. The considerations in favour of signature would carry greater weight if precognitions were to become to any extent admissible. The question of the admissibility of precognitions has already been discussed in Chapter 19. If precognitions were to be admissible, it would perhaps be desirable to require a more specific acknowledgment by the witness of the truth of its contents than his mere signature, which in the case of many witnesses would signify as little as the word "TRUTH" which is still optimistically adhibited to Crown precognitions. But if precognitions are to remain inadmissible, a more effective method of curbing dishonesty than signature of precognitions would be a greater use of the power to precognosce on oath before the sheriff, with the conditions discussed in the following paragraphs.

(c) Precognition on oath[26]

24.14 (i) Utility. It is thought that even if precognitions were to be made admissible, the procurator-fiscal should continue to have power to precognosce witnesses on oath before the sheriff. There does not seem to be any need for the extension of the power to parties to civil litigation. In criminal cases, it is still a useful method of eliciting information from a reluctant witness.[27] He may be apprehended and brought before the sheriff. If he refuses to take the oath he is liable to be imprisoned, and if he obstinately refuses to answer/

---

[26] R & B, para 5-69; Thomson, paras 17.03, 17.09, 44.06-44.16.
[27] See Coll, Petr, 1977 SLT 58, and para 24.09 above.

answer the questions put to him, he may "be coerced with imprisonment" until he complies.[28] He is also liable to be prosecuted for perjury, committed either before the sheriff or at the trial, if his evidence differs from his sworn precognition. He is not entitled to have it destroyed before he is examined.[27]

24.15 (ii) Identification on oath. The Working Party on Identification Procedure have concluded that witnesses at identification parades should not be put on oath. They justified their view by reference to "certain practical difficulties (eg the attendance of a sheriff or magistrate to administer the oath would be required)," and the facts that courts are accustomed to accepting testimony about procedures which take place outside court, and that evidence of what then occurred may in certain circumstances be properly preferred to the evidence actually given in court.[29] These latter considerations do not appear to deal effectively with the problem of wilful failure by dishonest or recalcitrant witnesses to pick out at an identification parade accused persons incriminated on precognition. The present identification procedure may provide a loophole in the Thomson Committee's proposed measures for deterring or punishing false testimony.

24.16 (iii) New criminal offence? The Thomson Committee were of the view that procurators-fiscal would be encouraged to use their existing powers of taking "essential suspect witnesses" before a sheriff for precognition on oath, if it were made an offence for a person to give evidence which substantially contradicts or is materially different from that/

---

[27]See Coll, Petr, 1977 SLT 58.
[28]Hume, ii, 82.
[29]Identification Procedure under Scottish Criminal Law, (1978, Cmnd 7096), para 5.13. The Working Party also rejected a suggestion that the attendance of witnesses at parades should be enforced by citation (para 4.28).

RE 68917 BL(742)

that previously given on oath. In a prosecution for perjury the Crown would be in difficulty if unable to prove which of the two statements was false. The Committee were divided on the question whether a departure from a precognition made on oath should be an offence, and the issues are fully discussed in their Report.[30] The majority of the Committee recommended that if a person makes a sworn statement 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 attracting the same punishment as that for a contravention of section 1 of the False Oaths (Scotland) Act, 1933, as amended, namely, imprisonment for a term not exceeding two years or a fine or both. They further recommended that the rule that a witness is not bound to incriminate himself should not apply to a Crown witness who has made a sworn statement on oath before a sheriff which directly or indirectly incriminates an accused and has at the trial refused to give that evidence or prevaricated on this point or given evidence which does not so incriminate the accused.

24.17 (iv) Admissibility. It may be thought that sworn precognitions should be admissible, even if other precognitions are not, upon the view that since the sworn precognition is taken in solemn circumstances, and in question and answer form, with the presence of the sheriff to secure fairness and lack of oppression, the sworn precognition is less likely to be inaccurately taken and tendentiously cast than any other form of precognition. The Thomson Committee have recommended that it should be competent to use a statement made previously by a witness on precognition before a sheriff on oath to test the witness's credibility

at/

---

[30] Thomson, paras 44.08-44.12.

at the trial. In their view such a statement need not be lodged as a production prior to the trial, and "such a document purporting to be signed by the sheriff should speak for itself and would not need to be lodged until it was to be used."[31] It has recently been held that a precognition on oath will normally be admissible as a basis for challenging the evidence of a witness under section 3 of the Evidence (Scotland) Act, 1852.[32]

(d) Giving copy of precognition to witness

24.18 Witnesses are not permitted to read precognitions taken by the Crown. The question whether a witness should have the right to see his precognition prior to the trial has already been discussed in the context of the law as to the use of documents to refresh memory.[33] It may be added that allowing witnesses to read their precognitions raises the danger of tutoring of witnesses.

(e) Exchange of precognitions

24.19 (i) Criminal cases. There is a question whether precognitions and police statements should be exchanged between Crown and defence before a criminal trial. There does not seem to be any necessity for rules on the subject. Many witnesses might be reluctant to give statements or precognitions to the Crown if they knew that their contents might, as a matter of course, be disclosed to the accused and his associates. In certain circumstances, however, the Crown may be obliged to disclose to the accused's legal advisers evidence in the possession of the Crown which is material to the defence.[34] The Grant Committee were divided and made no recommendation on a proposal that the defence should have a right to see Crown/

---

[31] Thomson, paras 44.06-44.07. See para 19.50 above.
[32] Coll, Petitioner, 1977 SLT 58. See para 19.50 above.
[33] Paras 8.50-8.51 above.
[34] Smith v H M Advocate, 1952 JC 66.

Crown precognitions.[35] Professor Glanville Williams, however, disapproves of the non-disclosure of prosecution statements to the defence, on the ground that the defence is hampered in its effort to find out how the witness has changed his story in the course of time. He is of the view that each side should be entitled to tape-recordings of the other's interviews with the witnesses; but this would be unworkable in Scottish practice. He also considers that statements of witnesses whom the prosecution do not wish to call should be made available to the defence, to use or not to use at their discretion.[36] The Thomson Committee shared the view of the majority of those who gave evidence to them that in general Crown precognitions should not be made available to the defence. They considered, however, that a practice should be encouraged, subject to the discretion of the Crown, of timeous delivery by the Crown to the defence agent of selected precognitions of witnesses who are to give formal evidence, with a view to the saving of time and expense at the trial by the admission of such evidence.[37] They did not consider that defence precognitions should be made available to the Crown, but they thought that the present period of three days afforded to the Crown for the precognition of defence witnesses in indictment cases is in many cases insufficient.[38]

24.20 (ii) Civil cases. A proposal for the exchange of precognitions in civil cases was briefly mentioned and rejected by the Winn Committee in the context of personal injuries litigation in England. Their view was:

"We do not think the time has yet come, if it ever will, when

this/

---

[35]Grant, para 692, rec 322.
[36]Proof of Guilt, pp 99-104.
[37]Thomson, para 17.12.
[38]Thomson, para 17.14; and see para 24.53 below.

this fundamental change should be recommended."

Master Jacob, however, said in paragraph 12 of his Reservations:

> "I should ... like to reserve my position with regard to the rejection of the proposal for the exchange of the proofs of witnesses (paragraphs 368-369). For my part, I think that such a proposal, properly and carefully framed, may be one of the most fruitful developments in the field of civil litigation, and may well go a long way to prevent what has been called 'trial by ambush' (see paragraph 131). Indeed, it is the logical development and fulfilment of the principle that civil litigation should be conducted on the basis of 'Cards on the Table'".

Master Jacob went on to point out that at present, English pre-trial procedures encourage the parties to withhold as much relevant information as they possibly can until the trial. Master Jacob and Professor G S A Wheatcroft have envisaged the exchange of proofs as part of a new approach to the pre-trial system:

> "... the time has come to consider a wholly new approach and to give a new function to the pre-trial process.
>
> "The first step in this direction would be to make the written statements of the witnesses admissible in evidence at the trial. It should be the duty of the parties to lodge with the court, at the same time as each serves his pleading, the written statements of the witnesses whom he proposes to call at the trial, if necessary made on oath. When all such statements have been lodged, the parties should be able to exchange copies of their respective witnesses' statements. Each side will then become aware at an early stage in the pre-trial process of the evidence which the other side proposes to adduce at the trial. There is no danger that any party will be able to alter or tamper with his evidence or that of his witness, for he will have already committed such evidence into writing: nor is it necessary that such statements should be 'contradictory' in the sense that each statement is required to answer the preceding one. The statements so lodged will then be admitted in evidence at the trial, unless application is made on proper grounds to have a particular witness attend for further examination or cross-examination. Moreover, the parties will be confined at the trial to the
>
> evidence/

[39] Report of the Committee on Personal Injuries Litigation (the Winn Report), 1968 (Cmnd 3691), paras 368-369. Cf Master Heward's review of Going to Law: A Critique of English Civil Procedure ("Justice" Report, 1974) in (1975) 91 LQR 131 at p 135: "The exchange of proofs of evidence offends no principle of justice." The Evershed Committee were not in favour of the exchange of proofs, which is done only in the Restrictive Practices Court, where it has been said to be "enormously expensive and time-consuming": see para 24.60 below.

evidence embodied in these statements, unless for good reason the court allows such statements to be supplemented by further evidence.

"Under such a system, the evidence of the witnesses will be recorded much sooner after the event, so that their memory will be more reliable: it will be recorded in a form which will do greater justice to the evidence, and will not be dependent upon the demeanour or behaviour of the witness in the box: it will make many more witnesses willing to come forward, and not hold back because they are frightened to come to court and give evidence; and it will enable the trial judge to study the evidence with greater closeness and attention. Such a system works satisfactorily in the Chancery Division in the originating summons procedure; and its introduction into the general pre-trial process will transform the trial system from one predominantly based on oral evidence to one predominantly based on written evidence."[40]

(f) Precognitions for judge

24.21 The question of the pre-trial use of precognitions is related to the question whether there is any need for a rule in Scottish civil or criminal practice that the judge may, or should, see the precognitions. If the present trial system continues, it seems likely that he would thereby be embarrassed in assessing credibility and in reaching a view of the issues on the basis of the evidence elicited in court. The Thomson Committee made no proposal in the matter.[41]

(g) Destruction of precognition

24.22 It is said that a witness is entitled to have his precognition destroyed before he is examined.[42] This rule, if it be a rule, does not apply to precognitions on oath;[43] and it may be that it should be abolished altogether, if it was not abolished by section 5 of the Evidence/

[40] Courts and Methods of Administering Justice", Third Commonwealth and Empire Law Conference, 1966, p 305, cit M Zander, Cases and Materials on the English Legal System (2nd ed), pp 250-251.

[41] Thomson, para 44.17.

[42] Hume, ii, 82, 381; Dickson, para 1591; Cook v McNeill, (1906) 5 Adam 47, L J-C Macdonald at p 51; Lewis, p 174; Macdonald, p 298; R & B, para 5-72.

[43] Coll, Petr, 1977 SLT 58.

RE 68917 BL(747)

Evidence (Scotland) Act, 1852.[44] It is said that it does not apply in modern conditions.[45] If it did, it could apparently render impossible, if the law as to admissibility were to be altered, the admission of the precognition at the trial. It would, however, be necessary to consider the justifications of the privilege which are stated by Hume and Dickson. According to Hume, the witness may have it cancelled

> "that he may be at absolute freedom in telling his story at the trial."[46]

Dickson makes the interesting psychological observation:

> "... otherwise he would likely feel trammelled by it, and would try to make his evidence at the trial agree with his previous ex parte statement, instead of speaking freely from his recollection at the time."[47]

It is therefore necessary to balance any such embarrassment likely to be felt by honest witnesses against any likelihood that unreliable witnesses would feel obliged to refrain from mendacity.

(h) Interviewing of defence witnesses by police

24.23 The Thomson Committee considered the practice which sometimes occurs of having defence witnesses interviewed by police officers involved in the case to which the evidence relates. The practice is undesirable, but it seems difficult to find a practicable alternative. The Grant Committee considered that it was unavoidable.[48] There seems to be little prospect of the procurator-fiscal service having sufficient resources of manpower to do this work, even if defence witnesses were to be required to attend for precognition and did not have to be sought out at inconvenient/

[44] See Anon, "Evidence: Contradiction by Precognition", 1959 SLT (News) 33, at p 35.
[45] Thomson, para 17.05.
[46] Hume, ii, 381.
[47] Dickson, para 1591.
[48] Grant, para 677. For a view of the difficulties involved in the corresponding English practice, see [1975] Crim LR 1.

RE 68917 BL(748)

inconvenient times and places. A police officer who was not involved in the case would probably find it difficult to take a useful statement in view of his unfamiliarity with all the circumstances. The Thomson Committee shared the views of their witnesses whose evidence was that procurators-fiscal should do the work wherever possible, but they considered that if, because of the staffing situation in the offices of procurators-fiscal, it is found necessary for the police to continue to assist with the work, it is preferable that an officer familiar with the case should precognosce the witnesses.[49]

(3) Privilege

24.24 The rule that statements made on precognition are protected by absolute privilege rests on Watson v McEwan,[50] the unanimous decision of three Lords of Appeal in an action of defamation. In the Court of Session,[51] different views had been expressed. In the Outer House, Lord Kincairney approved an issue relating to statements made by way of precognition, stating (at p 79):

> "... I have no doubt that there is no absolute privilege attached to words spoken in precognition, and I am not prepared to say that they are privileged at all."

In the Second Division the majority agreed that that issue should be allowed but Lord Young, dissenting, took the view (at p 82) that the statements enjoyed the same privilege as statements made in the witness-box. Lord Moncrieff (at p 86) was not prepared to hold that statements voluntarily given in answer to questions in precognition were necessarily privileged. Although, therefore, only four of the total of eight judges were clearly of the view that such statements enjoyed absolute privilege, that/

---

[49] Thomson, para 28.03.
[50] (1905) 7 F (HL) 109. See also Beresford v White, (1914) 30 TLR 591.
[51] (1904) 7 F 72, sub nom AB v CD.

that view is justified by the public interest in the administration of justice,[52] and the point appears to be settled.[53] It nevertheless seems possible to justify a qualification of that view, to the effect that no protection should be afforded in the case where the person precognosced gives expression to a calumnious statement altogether irrelevant to the subject-matter of the case about which he is being precognosced, or to the questions put to him.[54] It would, however, be necessary to preserve the very highly confidential nature of Crown precognitions.[55] The question whether a precognition should be admissible to contradict the evidence of a witness is discussed in Chapter 18.

3. Citation[56]

24.25 The following paragraphs are concerned with a variety of problems relating to the citation of witnesses.

(1) In criminal cases[57]

(a) Citation of witnesses in Scotland

24.26 There is a question whether the system of citation of witnesses, and in particular of defence witnesses, could be improved. In some areas the police are willing to cite defence witnesses, but where they decline to do so the defence must, to ensure valid citation, employ a messenger-at-arms or a sheriff officer.[58] The Sheriffs Walker suggest that if a judge/

---

[52] See 7 F (HL) 109, Earl of Halsbury L C at pp 111-112.
[53] See R v Kellatt, [1976] QB 372, at p 393.
[54] Cf 7 F 72, Lord Trayner at p 85.
[55] See R & B, para 5-70; M'Kie v Western SMT Co, 1952 SC 206.
[56] See Walkers, chap 26. Most of the difficulties mentioned in this section are referred to in that chapter. On the compellability of a person who has not been cited but is present in court, see para 3.31 above. The Working Party on Identification Procedure under Scottish Criminal Law rejected a suggestion that witnesses should be cited to attend identification parades (Cmnd 7096, para 4.28).
[57] As to securing the attendance of witnesses who have absconded or may abscond before the trial by their apprehension on warrant, see R & B para 7-35, Stallworth, Petr, 1978 SLT 93 (solemn procedure) and R & B paras 13-91-13-93, 1954 Act, sec 19 (1975 Act, sec 320) (summary procedure).
[58] See A G W[alker], "Citation of Defence Witnesses in Criminal Trials", (1954) 70 Sc L Rev 52.

judge or sheriff were satisfied before the jury were empanelled that a material witness for the defence had been warned in some formal way, eg by registered letter, and had failed to appear, that might be sufficient reason for adjourning the trial. It is, however, unsatisfactory that no convenient mode of citation is generally available. It is understandable that the police should be reluctant to undertake the duty, especially in areas where they are seriously under strength. The Grant Committee recommended that the defence should have power to cite witnesses by post, and saw no difficulty in providing a statutory form of citation adapted from the 1954 Act, Second Sched, Part IV. They pointed out that for summary proceedings the necessary authority could be provided by Act of Adjournal under section 43 of the Criminal Justice (Scotland) Act, 1963.[59] The Thomson Committee, however, were of the view that postal citation is most unsatisfactory. They recommended that the courts should provide their own citation service, which would be under the control of the procurator-fiscal. The staff would have transport available in order to effect delivery by hand within the sheriff court district and district court district. They would cite prosecution witnesses, and would be available, under a statutory procedure, to cite defence witnesses, but the present system whereby the accused or his solicitor may use an officer of law to serve citations would still remain available.[60]

(b) Citation of witnesses in England and Northern Ireland

24.27 (i) Solemn procedure. A witness in England or Northern Ireland may be cited to attend a trial in Scotland, and failure to obey the citation may be punished by the appropriate English or Northern Irish/

[59] Sec 457 of the 1975 Act; Grant, paras 676, 689.
[60] Thomson, paras 14.01-14.10.

Irish court;[61] but it is unsatisfactory that there seems to be no power to enforce attendance. It would be useful to ascertain whether or not any difficulties are encountered in effecting service which, it is understood, is usually made through the police. A minor matter to be amended, if new legislation is to be drafted, is that the Writ of Subpoena Act, 1805,[61] mentions only the Court of Justiciary, although its terms seem wide enough to include the lower courts and have been so understood in practice.

24.28 (ii) Summary procedure. To procure the attendance of a witness from England or Wales, process may be issued under section 4(3) of the Summary Jurisdiction (Process) Act, 1881,[62] if the court is satisfied on oath of the probability that the evidence of such witness will be material and that he will not appear voluntarily without such process; but the witness is not subject to any liability for failure to obey the process unless a reasonable amount for his expenses is paid or tendered to him. Four matters seem to require comment. (i) Again, there seems to be no power to enforce attendance. (ii) The procedure is very wasteful of police and court time. (iii) As the Sheriffs Walker point out, the Act of 1881 contemplates a warrant issued by a court, which was necessary in 1881. Since under the Summary Jurisdiction (Scotland) Act, 1954, no warrant is issued by the court, the two Acts do not fit, but this is concealed by the device of having the order assigning a diet signed by the sheriff or magistrate instead of the clerk of court. (iv) There does not seem to be any means of procuring the attendance of a witness from Northern Ireland.

24.29/

---

[61] Writ of Subpoena Act, 1805 (45 Geo III, cap 92), sec 3; Supreme Court of Judicature (Northern Ireland) Order, 1921 (SI 1921, No 1802), sec 3, General Adaptation of Enactments (Northern Ireland) Order, 1921 (SI 1921, No 1804), sec 5; R & B, para 7-36.

[62] 44 and 45 Vict cap 24; R & B, para 13-94.

RE 68917 BL(752)

24.29 (iii) General. All these procedures are fully described and discussed in the Thomson Report. The Committee expressed the view that "the procedure for service of citations outwith Scotland requires a drastic overhaul." They could not make specific recommendations in relation to procedures which apply outwith Scotland, but they recommended that the appropriate authorities in England and Wales and Northern Ireland be approached by the Scottish authorities with a view to entering into discussions to establish a simple method of citation which would apply throughout the whole of the United Kingdom.[63]

(c) Form of notice of citation

24.30 (i) Present practice. The notice of citation in summary procedure is prescribed by the Act of 1954, Second Sched, Part IV, and is in clear terms. For solemn procedure, the Criminal Procedure (Scotland) Act, 1887, gives forms of warrant for citation and of execution of citation in Scheds B and D, but no form of notice. The third edition of Renton and Brown gave a clear form (at p 464), and there are in general use forms in substantially similar terms which contain a warning of liability to punishment for non-attendance and, printed on the back, a claim form for travelling expenses, subsistence and loss of earnings.

24.31 (ii) Additional information. It is thought that the citation form is a convenient document on which to give witnesses information about their rights and duties. Reference has been made in the preceding paragraph to claims for travelling expenses and loss of wages. It has already been noted that the Thomson Committee have recommended that the form should include information about the oath and affirmation, and penalties for perjury.[64] It has also been suggested that the form should be/

---

[63] Thomson, paras 14.19-14.26.
[64] Para 8.06 above; Thomson, para 42.13.

be used to inform the witness of any right which he may be given by law to see his precognition or statement before giving evidence.[65]

(2) Court of Session

(a) Witnesses in England and Wales

24.32 (i) Enforcement of attendance. There are three problems relating to the attendance of such witnesses. The main problem is that their attendance cannot be enforced, in any event without resort to complicated procedure.[66] If the procedure under the Attendance of Witnesses Act, 1854,[67] has been followed, they may be punished for failure to attend by the courts of their own residence; and it may therefore be that wilful failure to attend is rare. But if, as is suggested below,[68] provision were to be made enabling a witness to satisfy the court that he could not give any material evidence, it would not seem to be undesirable to make provision for the enforcement of the attendance of a witness who did not satisfy the court.

24.33 (ii) Necessity for affidavit. The two other problems are procedural. First, on the reported authorities it is doubtful whether an application under the Act requires to be supported by an affidavit.[69] It is thought, however, that in modern practice it is normally sufficient for the solicitor to sign and lodge a note which sets forth his belief that the witness will not attend unless cited and that his evidence is necessary and/

---

[65] Para 8.51 above.

[66] In Vegetable Oils Products Co, 1923 SLT 114, a witness failed to attend, having been personally served in London with a certified copy of a special warrant granted by the Lord Ordinary under the 1854 Act. The Lord Ordinary granted a warrant for his apprehension, and this interlocutor having been made an order of the High Court in England upon an application to that Court by originating summons, the tipstaff apprehended the witness and brought him to Edinburgh.

[67] 17 and 18 Vict cap 34.

[68] Para 24.40 below.

[69] Pirie v Caledonian Railway Co, (1890) 17 R 608 (affidavit not required, but certificate by solicitor lodged); Macdonald v Highland Railway Co, (1892) 20 R 217 (affidavit required); and see Maclaren, Court of Session Practice, p 346; Anton, Private International Law, p 561; Walkers, para 334, n 21.

and material;[70] and that the Court should retain a discretion to require further specification of the grounds of the application.

24.34 (iii) Witness to opinion. In two briefly reported cases in 1892 and 1893 the Court seemed to indicate that a warrant would not be granted where the witness was to speak to matters of opinion only, and not to facts.[71] It is conceivable that such a rule, if indeed it ever existed, could cause hardship. It is suggested, however, that probably the Court would now be no more than "reluctant"[72] to grant a warrant in such a case, particularly if the witness were to be entitled to satisfy the Court that he would be unable to give any material evidence.

(b) Witnesses in proofs

24.35 Although section 43 of the Court of Session Act, 1850,[73] which provides that the interlocutor fixing a jury trial is warrant to cite witnesses in Scotland, does not apply to proofs, the interlocutor fixing a proof is in practice regarded as having the same effect. The practice is so firmly established[74] that any statutory regulation of the position is probably unnecessary.

(c) Form of citation[75]

24.36 The forms of citation to witnesses could with advantage be rephrased in ordinary language. A witness in a Court of Session proof receives a citation in the following terms, inter alia:

"... lawfully Summon, Warn and Charge you ... to compear before/

---

[70] Thomson and Middleton, Manual of Court of Session Procedure, p 93.
[71] Macdonald v Highland Railway Co, (1892) 20 R 217; Gilmour v North British Railway Co, (1893) 1 SLT 370.
[72] Anton, p 561.
[73] 13 and 14 Vict cap 36.
[74] See, eg, Coldstream, Procedure in the Court of Session (4th ed 1889), p 78.
[75] See R Campbell, Law and Practice of Citation and Diligence (1862), chap 7.

before the Lords of Council and Session ... to answer at the instance of the said [pursuer or defender] THAT IS TO SAY, to bear leal and soothfast witnessing, and give and declare your oath of verity in so far as you know or shall be interrogated respecting the points and articles admitted to probation: with certification as effeirs."

A witness in a Court of Session jury trial is cited

"to bear honest and true testimony, upon oath, in so far as you know or shall be inquired at, regarding the matters to be then and there tried"

but otherwise his form is in similar terms. A suitable model for a new Court of Session form may be found in the form prescribed for the sheriff court, which is in the following terms:

"K L [design him], you are hereby required to attend at the Sheriff Court House at [street address] [if necessary, add within Court Room No , or in Chambers], on , the day of at o'clock noon, to give evidence for the pursuer [or appellant or complainer] [or defender or respondent] in the action A B [design him], pursuer, against C D [design him], and [if necessary] you are required to bring with you [specify documents] under penalty of forty shillings if you fail to attend." [76]

The forms of letters of first and second diligence should be revised to correspond with the wording of any new forms of citation.

(3) Sheriff Court

24.37 The main defect in the arrangements for enforcing the attendance of witnesses in civil proceedings in the sheriff court is that there is no method for effective citation of witnesses furth of Scotland. In particular, the sheriff has no power to summon witnesses who are resident in England or Northern Ireland. The Grant Committee had some sympathy with complaints which they received about this matter, but found some difficulty in recommending that the sheriff should have powers over persons who/

[76] Sheriff Courts (Scotland) Act, 1907, First Sched, Form F. The penalty of "forty shillings" has not been amended to take account of the decimalisation of the currency. As to the penalty for failure to attend, see para 24.46 below.

who are resident, not merely outside his own jurisdiction, but in a different country, and made no recommendations.[77] It may be suggested, however, that since the subject-matter of the jurisdiction of the sheriff court in ordinary actions is virtually concurrent with the jurisdiction of the Outer House - actions of divorce being the only numerically large category of case within the privative jurisdiction of the Court of Session - the two courts should have the same powers to secure the attendance of witnesses, at least in ordinary actions. Any inconvenience to witnesses could be to a large extent circumvented, it is suggested, by a procedure enabling them to satisfy the Court that their attendance would be unnecessary.[78]

(4) Other tribunals

(a) Arbitrations

24.38 Since the Attendance of Witnesses Act, 1854, does not apply to arbitrations, the Court of Session has no power to issue a warrant to cite a witness out of Scotland to appear before an arbiter in Scotland.[79] The appropriate course is for the arbiter to appoint a commissioner to take the witness's evidence; but as the Court has no power to enforce the appearance of witnesses before a commissioner outwith the jurisdiction, it is for the commissioner to take such steps as he can to invoke where necessary the assistance of the courts of the country in which his duties fall to be executed, should there by any difficulty in procuring the attendance of the witness.[80] It may be that there should be a method for effective citation of witnesses resident in the United Kingdom.

(b)/

---

[77] Grant, para 529, rec 180.

[78] See para 24.40 below.

[79] Highland Railway Co v Mitchell, (1868) 6 Macph 896.

[80] John Nimmo & Son Ltd, (1905) 8 F 173; D A Guild, The Law of Arbitration in Scotland, p 61.

(b) Courts of voluntary churches

24.39 In Presbytery of Lews v Fraser[81] Lord Ardmillan[82] expressed the opinion that the Court should enforce the attendance of witnesses before the courts of voluntary churches, as well as the courts of the Church of Scotland. Lord President Inglis and Lord Deas, however, reserved their opinions on the point, holding that warrant to cite witnesses to attend the courts of the Church of Scotland was granted on the ground that these were among the established judicatures of the country. It may be thought unnecessary or undesirable to resolve the question by legislation.

(5) Prevention of unnecessary attendance

24.40 It has been suggested above that provision might be made to enable a witness who has been cited to satisfy the court, prior to the proof of trial, of his inability to give material evidence. Such a provision could prevent the unnecessary attendance of judges (if they were to be generally competent and compellable) and others on frivolous citations, and of witnesses from elsewhere in the United Kingdom who had been unnecessarily cited under any extended provisions of the Attendance of Witnesses Act. There is a suggestive formula in section 2(2) of the (English) Criminal Procedure (Attendance of Witnesses) Act, 1965.[83] Section 2(1) provides that the court may issue a "witness summons" requiring the person to whom it is directed to attend before the court and give evidence or produce any document or thing specified in the summons. Section 2(2) enacts:-

"If any person in respect of whom a witness summons has been

issued/

[81](1874) 1 R 888, at p 894.

[82]"Perhaps in this respect the most liberal-minded of the judges of last generation" (W G Black and J R Christie, The Parochial Ecclesiastical Law of Scotland (4th ed, 1928), p x).

[83]1965, cap 69. See Sched 1 for the provisions relating to procedure and costs.

issued applies to the court out of which the summons was issued or to the High Court, and satisfies the Court that he cannot give any material evidence or, as the case may be, produce any document or thing likely to be material evidence, the Court may direct that the summons shall be of no effect."

The Thomson Committee has recommended that in the criminal courts any person should be entitled to apply to the court to be excused attendance on the ground that the citation is vexatious or malicious. They also recommend that where the defence propose to cite as a witness a person in legal custody they must first make application to the court for a warrant to do so.[84]

(6) Inducias

(a) Civil cases

24.41 The induciae would have to be long enough to enable such a procedure to be carried out without undue haste. At present, in the sheriff's ordinary court, citation must be made upon an induciae of not less than forty-eight hours,[85] and the practice in the Court of Session is the same.[86] Such an induciae is in any event too short to enable parties to attempt to find witnesses whose citations have been returned. It seems arguable that witnesses in these cases should be cited on or before the twenty-eighth day prior to the day in court, which is the time when productions are lodged in Court of Session actions.[87] A twenty-eight day induciae might also help to reduce the number of late settlements, which render it difficult to make the most effective use of judicial time for the benefit of other litigants.

(b)/

[84] Thomson, paras 14.11-14.12.

[85] Sheriff Courts (Scotland) Act, 1907, First Sched, rule 71. In summary causes the period of notice required to be given to witnesses and havers is not less than seven days. Act of Sederunt (Summary Cause Rules, Sheriff Court), 1976, Schedule, rule 29.

[86] Thomson and Middleton, Manual of Court of Session Procedure, p 92.

[87] RC 107, 121, as amended by A S (RC Amendment No 8), 1972, rule 1(1). It is conceived that a similar rule might be introduced in the sheriff court. See para 25.25 below.

(b) Criminal cases

24.42 (i) Solemn procedure. Under the present law, the first or pleading diet must be not less than six clear days after the service of the indictment, and the second or trial diet not less than nine clear days after the first diet.[88] The Thomson Committee considered a proposal that there should be a statutory provision that all indictments (other than section 31[89] indictments) should be served at least one month prior to the pleading diet. The Committee were agreed that the overall time between the service of the indictment and the trial should be extended, and considered it more important to lengthen the period between the service of the indictment and the first diet than the period between the two diets. They recommended that the former period should be increased from the present six days to twenty days.[90] They also recommended minor modifications of section 43 of the Act of 1887[91] whereby, when an accused person is in custody, the indictment would be served within 80 days of full committal, and the trial would have to commence within 110 days.[92] A deduction of 20 days from the balance of 30 days leaves only 10 days for the period between the two diets. It would be satisfactory if an adequate induciae for citation of witnesses could be fitted into any new timetable, to enable them to challenge the necessity for their attendance. It would no doubt be necessary to permit citation outwith the induciae in relation to the parties' entitlement to examine witnesses whose names are not included in the list of witnesses.[93]

24.43/

---

[88] Criminal Procedure (Scotland) Act, 1887, sec 25; now 1975 Act, sec 75; R & B, para 7-02.
[89] Sec 102 of the 1975 Act.
[90] Thomson, para 15.07.
[91] Sec 101 of the 1975 Act.
[92] Thomson, para 25.04.
[93] See para 24.53 below.

24.43 (ii) Summary procedure. Neither the Summary Jurisdiction (Scotland) Act, 1954, nor the 1975 Act fix any induciae in the case of witnesses, but in Renton and Brown[94] it is recommended that they should be given at least forty-eight hours' notice whenever possible. It may be desirable to make provision for a general minimum period between the diets of pleading and trial, to allow a similarly adequate induciae for citation of witnesses.

(7) Peers as witnesses in inferior courts

24.44 It is doubtful whether the lower courts may issue warrant for the apprehension of a peer who has disobeyed a citation as a witness. It would be competent to obtain the authority of the Court of Session or the High Court of Justiciary (as the case might be) to compel the peer to attend before the inferior judge;[95] but it would be as well to remove the doubt.

(8) Penalty for disobedience to citation

(a) Criminal cases

24.45 Witnesses in solemn procedure used to be cited to attend "under the pain of one hundred merks Scots." This appears to be an ancient common law penalty for failure to attend without reasonable excuse.[96] In modern practice the citation form contains a warning that witnesses failing to attend the court without reasonable excuse are liable to be apprehended and punished. In summary proceedings, a witness who wilfully fails to attend after being duly cited is deemed guilty of/

---

[94] R & B, para 13-77. They are not liable to prosecution for failure to attend for precognition unless given twenty-four hours' notice (1975 Act, sec 344(4)(a)).

[95] Dickson, para 1691; Walkers, para 332.

[96] See Hume, ii, 373; Court of Justiciary (Scotland) Act, 1868 (31 and 32 Vict cap 95), sec 9, Sched (B) Nos 1 and 2. Sec 9 was repealed by the Statute Law Revision Act, 1893 (56 vict cap 14).

of contempt of court and is liable to be summarily punished forthwith by a fine not exceeding £25 or up to twenty days imprisonment.[97] In H M Advocate v Bell[98] the Lord Advocate presented a petition and complaint against a material witness for the Crown who had failed to obey his citation to a trial in the High Court. Lord Justice-Clerk Aitchison found him guilty of contempt of court and imposed a sentence of one month's imprisonment, observing that the disregarding of a citation to attend in a criminal trial was a very grave offence and that the Court would not be prepared to take so lenient a course in any future case that might occur. In England there is a statutory maximum of three months' imprisonment for failure to attend before any court.[99]

(b) Civil cases

24.46 Letters of second diligence may be taken out, and the witness may be dealt with for contempt. In addition, in ordinary actions in the sheriff court, a penalty for failure to attend without reasonable excuse, not exceeding £2, may be decerned for in favour of the party citing the witness (rules 71, 73 and see para 24.36 above). It seems that these arrangements are satisfactory, subject to a realistic increase in the maximum penalty in rule 71.

4. Evidence on commission[1]

(1) Civil cases

(a) Interrogatories[2]

24.47 (i) Cross-interrogatories. The system of examination by interrogatories/

---

[97] 1975 Act, sec 344(1).
[98] 1936 JC 89.
[99] Criminal Procedure (Attendance of Witnesses) Act, 1965 (cap 69), sec 3.
[1] See Walkers, chap 32; Anton, Private International Law, pp 559-562. As to evidence for foreign courts see Anton, pp 562-564; Evidence (Proceedings in Other Jurisdictions) Act, 1975 (cap 34); HMA, Petr, 1978 SLT (Notes) 17; In re Westinghouse Electric Corporation, [1978] 2 WLR 81.
[2] See Henderson v Henderson, 1953 SLT 270.

interrogatories and cross-interrogatories is open to criticism. In Barr v British Transport Commission[3] Lord Kilbrandon said:

> "... cross-interrogatories are, as every practitioner knows, a farce. No one can cross-examine a witness if he has not heard the examination-in-chief, and no one can conduct a cross-examination in ignorance of the answers which are being given to the questions as the cross-examination proceeds."

In Charteris v Charteris[4] Lord President Clyde said:

> "Examination by interrogatories and cross-interrogatories is, of course, not an ideal system. The fact is that you cannot either examine or cross-examine a witness in the most adequate and satisfactory way on questions which are all framed before he answers any of them. But this system is a practical and relatively inexpensive method of securing the evidence of a witness who is not available to give oral evidence."

It is thought that not all practitioners would necessarily concur in the use of the adjective "practical". It is, however, difficult to see what other device short of an open commission could be employed without additional expense and delay. The inconvenience could perhaps be to some extent moderated by allowing the preparation of cross-interrogatories to be postponed until after the answers to the interrogatories had been lodged in process. In Charteris,[4] however, the Court refused a motion to that effect on behalf of the defender, the Lord President observing:

> "... the terms of the interrogatories give [the defender] clear notice of the issues on which the pursuer anticipates that the witness will give evidence, and, if the defender's case has been properly prepared, he will know what are the matters on which he requires to challenge the witness."

That is no doubt true, but the cross-examiner remains at a grave disadvantage. The procedure proposed in Charteris[4] would be novel, but it is not contrary to R C 100, and it would not cause delay if the commission were to be granted, as is normally should be, an adequate time before the proof or trial. Any additional expense could if necessary be borne by the party who preferred to operate the proposed procedure.

24.48/

---

[3] 1963 SLT (Notes) 59.
[4] 1967 SC 33, at p 35.

RE 68917 BL(763)

24.48 (ii) Signature by witness. Sheriff Dobie suggested[5] that notwithstanding the general terms of rule 65 of the 1907 Act, First Sched, if the evidence was not recorded in shorthand the witness should sign and also the commissioner and clerk. The description of such a practice in Maclaren[6] has now received judicial approval: the practice is said - it is thought, with respect, correctly - to be justified as providing proper authentication of the evidence given by the witness.[7]

(b) Availability of evidence to parties before proof

24.49 In Duke of Argyll v Duchess of Argyll[8] Lord Wheatley made the following observations about the practice of making evidence taken on commission available to parties before the proof:

> "... I understand that in conformity with modern practice there was available to [the defender] before the proof the evidence taken on commission, so that she had access in advance, if she desired to use it, to the text of that evidence. Of course, as a party she was entitled to be present when such evidence was being taken, and to be certiorated of it in that manner, but I cannot but feel that the modern practice is wrong, and that evidence taken on commission should lie in retentis and not be available before the proof to the parties or their advisers, who should decide on its use from their recollection of its contents, and not have it available before it is formally put in as evidence in the case."

In practice, however, it is the function of a party's junior counsel or agent to take an accurate note of the substance of the evidence while the examination on commission is proceeding, for the assistance of the questioner. It is suggested that if it were to appear that a party had studied any note of the evidence before the day in court, that would afford matter of comment on his credibility as to the matters spoken to by the witness.

(2)/

---

[5] Sheriff Court Practice, p 208.
[6] Court of Session Practice, p 1048.
[7] Elrick v Elrick, 1973 SLT (Notes) 68.
[8] 1963 SLT (Notes) 42, at p 43.

RE 68917 BL(764)

(2) Criminal cases

24.50 To take evidence on commission in a criminal case would be contrary to section 10 of the Criminal Justice Act, 1587 (now section 145(1) of the 1975 Act), and to the practice of the High Court of Justiciary since its establishment.[9] It is believed, however, that difficulties arise when an essential witness is unable to attend court. It is thought that in such a case there may be room for a new statutory provision for evidence on commission. The Thomson Committee recommend that the court should have a discretion to appoint a commissioner to take the evidence of a witness as in civil cases, where (a) the witness through illness or infirmity is unable to come to the trial, (b) the witness is necessary either for the Crown or the defence, and (c) the admission of the witness's evidence in his absence from the witness-box will not be prejudicial to a fair trial of the accused. The Committee consider that having regard to condition (c), in practice the court would allow evidence to be taken on commission only when the evidence is of a formal nature; and that attempts should be made to adjust a minute of admission or agreement before recourse is made to this procedure. They also recommend that a criminal court should have the power to order that evidence of a witness abroad be taken on commission. The tests and procedure to be applied would be the same as for ill or infirm witnesses in this country, except that the precise procedure abroad would vary according to the terms of the Agreement between this country and the country where the witness is to be found. They appreciate that/

---

[9] HMA v Hunter, (1905) 7 F (J) 73; R & B, para 10-29; Selected Justiciary Cases 1624-1650, vol iii, ed Sheriff J Irvine Smith (Stair Society, vol 28), pp 706, 708. The High Court of Justiciary has no power to refer to a special commissioner certain questions arising on a criminal appeal: 1975 Act, secs 252(d), 253(2).

that this procedure would not be available where the witness abroad was a vital witness whose evidence was not purely formal, but they can see no acceptable solution to that situation.[10] The specification of any new statutory grounds justifying the granting of a commission would obviously require careful consideration. They might include the inability of the witness to attend the trial by reason of age, or by reason of an obligation to go furth of the United Kingdom permanently or for a prolonged period.[11] A requirement that the accused should be present, as in the legislation noted below,[12] would render commissions abroad impracticable, but might not create undue difficulty where the commission was to be executed in Scotland. It is thought that interrogatories would generally be dispensed with and that the commissioner and advocates would be Scottish legal practitioners. There would probably be no room for the distinction drawn in civil proceedings between commissions executed before and after the allowance of enquiry. Either side would no doubt be entitled to put in the report as part of its evidence at the trial.

24.51 The Criminal Law Revision Committee, unlike the Thomson Committee, rejected the idea of proposing legislation to allow evidence to be taken, in the United Kingdom or abroad, for use in criminal proceedings in England and Wales. They decided that a provision for obtaining oral evidence on commission "would open the door too wide to the danger that evidence might be introduced at a late stage which could not be adequately tested."[13] In Scotland, such a danger could be obviated by suitable procedural rules to the effect that unless on special cause shown/

---

[10] Thomson, paras 43.23-43.30.

[11] For formulae in civil proceedings, see Evidence (Scotland) Act, 1866, sec 2; Sheriff Courts (Scotland) Act, 1907, First Sched, rule 70; RC 101; Dickson, para 1727.

[12] Para 24.52 below.

[13] CLRC, para 277.

RE 68917 BL(766)

shown a commission should not be granted later than a specified period after the exchange of lists of witnesses[14] and must be executed not later than a specified period before the trial diet.

24.52 Another procedure is suggested by section 5 of the Tokyo Convention Act, 1967,[15] which applies to Scotland and makes provision as to evidence in proceedings for an offence committed on board an aircraft. It provides that where in such proceedings the testimony of any person is required and the court is satisfied that the person in question cannot be found in the United Kingdom, there shall be admissible in evidence before that court any deposition relating to the subject-matter of those proceedings previously made on oath by that person outside the United Kingdom which was so made (a) in the presence of the person charged with the offence, and (b) before a judge or magistrate of a country such as is mentioned in section 1(3) of the British Nationality Act, 1948, as for the time being in force, or which is part of Her Majesty's dominions, or in which Her Majesty for the time being has jurisdiction, or before a consular officer of Her Majesty's Government in the United Kingdom. Similarly, under section 691 of the Merchant Shipping Act, 1894,[16] a deposition made outside the United Kingdom, before a justice or magistrate in Her Majesty's dominions or before any British counsular officer elsewhere, is admissible at a criminal trial in the United Kingdom if the witness cannot be found in the United Kingdom, provided that the accused was present when the deposition was made. Such provisions do not cover the case of a witness who is present in Scotland when his evidence is sought but will be unable to attend the trial.

5./

[14] See paras 24.53-24.59 below.
[15] 1967, cap 52.
[16] 57 and 58 Vict cap 60.

5. Lists of witnesses

(1) Criminal cases

24.53 The Thomson Committee considered various questions about lists of witnesses. First: Should there be a rule in solemn procedure that only witnesses, whose names have been supplied to the other party at least three days before the trial, may be led in evidence? If so, should there be any relaxation on cause shown? Such a rule would appear to be not materially different from the existing rules in solemn procedure. A rule for summary procedure is considered in paragraph 24.56 below. The present rules in solemn procedure[17] are that by section 1 of the 1921 Act (now section 81 of the 1975 Act) the prosecutor may examine witnesses whose names are not included in the list annexed to the indictment provided that he obtains leave to do so and provided that written notice containing the witnesses' names and addresses has been given to the accused not less than two clear days before the jury is sworn; while by section 36 of the 1887 Act (section 82 of the 1975 Act) the accused must give written notice of the names and designations of any witnesses he wishes to examine, who are not on the Crown list, at least three clear days before the jury is sworn, although if he is unable to give such notice but can satisfy the Court before the jury is sworn of his inability, the Court may allow the witnesses to be examined, giving such remedy to the prosecutor - by adjournment or postponement of the trial, or otherwise - as shall seem just.[18] Some such rules are obviously necessary. As the Court in Lindie[19] said of the provision in section 36:

> "As this section, which applies in similar terms to cases to be tried before a jury in the sheriff court, has been
>
> judicially/

---

[17] R & B, paras 6-13, 7-17, 18-68.
[18] See G H Gordon, "Lindie v H M Advocate", (1974) 19 J L S Sc 5, at pp 7-8.
[19] Lindie v HMA, 1974 SLT 208.

judicially interpreted its provisions are premptory unless the Crown waives objection - see Lowson v H M Advocate, 1943 JC 141, and Manley v H M Advocate, 1947 SN 36, 1947 SLT (Notes) 10. The object of this strict rule is clear. It is to secure that unless objection is waived by the Crown in appropriate cases witnesses to be led for the defence will be available for precognition in time to allow tests of the accuracy and reliability of what they propose to say to be made before they enter the witness-box. As it well known, the Crown, for similar reasons, may not lead, in a trial of an accused person, any witness not on the Crown list appended to the indictment or in respect of whom an appropriate notice has not been served under the provisions of the Criminal Procedure (Scotland) Act, 1921, section 1."

24.54 The Thomson Committee considered that on the whole the existing procedure works reasonably well, but they recommended that the period of three days should be extended to seven days (other than in exceptional cases where defence witnesses do not become available until after the first diet), and the period of two days to three days, in order to allow the other side time for precognition. It may be thought that the period should be the same in each case. They further recommended that section 1 should be further amended to allow the court to waive the requirement of notice on cause shown.[20] The discrepancies between the two existing rules seem difficult to justify, and it seems desirable that the rights of the Crown and the defence in this regard should be exactly the same. It is suggested in Chapter 25 that a similar rule should be introduced about lists of productions.

24.55 It has been submitted that the law should be changed so as to make it unnecessary to give notice of an intention to lead the evidence of any co-accused whose name appears on the indictment.[18] The present law is that where two or more accused are being tried together and one of/

[18] See G H Gordon, "Lindie v H M Advocate", (1974) 19 J L S Sc 5, at pp 7-8.

[20] Thomson, para 18.03, rec 83. If the Committee's recommendation that defence witnesses should be cited by the procurator-fiscal is accepted (para 14.10, rec 65), the extension of the period of notice of the list of defence witnesses may be unnecessary in a number of cases.

of them pleads guilty or the charge against him is dropped, his co-accused may not call him as a witness if his name has not been included in the co-accused's list of defence witnesses.[19] The case for the proposed alteration in the law is argued fully and, it is thought with respect, convincingly in the undernoted article.[18] The main reason for requiring notice - to allow the prosecution to precognosce or make inquiries about the witness - is inapplicable to a co-accused.

24.56 Another series of questions considered by the Thomson Committee was whether, in summary cases, if the defence requests a list of witnesses, it should be obligatory for the Crown to supply it, and if so, whether failure to supply it at least fourteen days before the trial should be cause for an adjournment; and whether the Crown should have a reciprocal right. It is understood that in present-day practice the Crown normally supplies a list of witnesses on the understanding that the defence will supply a list in return. In any comprehensive codification of law and practice, it might be desirable to enact a rule that such lists should be exchanged by a specified time before the trial, but to reserve to each side the right to examine a witness not included in the list, on cause shown. Whether failure to supply a list should justify an adjournment would seem to be a matter best left to the discretion of the Court. If, on the other hand, a more limited statutory reform is contemplated, it should be noted that the Grant Committee did not approve of the introduction of a statutory obligation to supply lists of witnesses in summary criminal procedure, and the Thomson Committee reached the same conclusion.[21] In the opinion of the latter Committee, the/

---

[18] See G H Gordon, "Lindie v H M Advocate", (1974) 19 J L S Sc 5, at pp 7-8.
[19] Lindie v HMA, 1974 SLT 208.
[21] Grant, para 715; Thomson, para 18.05.

the informal exchange procedure in summary cases works reasonably well, and they were against introducing into summary procedure technical rules of no practical benefit.

24.57 A further question considered by the Thomson Committee was: Should special defences be required, or can they be replaced by a requirement that a defence list of witnesses be served on the Crown? The purpose of the special defence is to give fair notice to the Crown;[22] but if this suggestion were to be adopted, the Crown would have no notice of the special defence in cases where the accused himself was the only witness, and would thus be placed at an apparently unfair disadvantage, The Committee rejected the suggestion.[23]

24.58 The Thomson Committee also considered whether it should be competent for the Crown to call as a witness any whose name appears in the list of witnesses for the defence. It is thought that each side should be entitled to call witnesses on the other's list. The object of the lists is to give each side notice of the witnesses whom the other side proposes to call, and it is difficult to see how either could be prejudiced by the calling of a witness whom it has precognosced and placed on its own list. The Committee recommended that each party should have the same right to call the other's witnesses.[24]

24.59 In formulating any new provisions as to lists of witnesses it will be necessary to keep in view the Committee's recommendation that for the limited purposes of leading fresh evidence and evidence in replication, the Crown and the defence should be permitted to lead evidence from witnesses whose names are not included in the respective lists/

---

[22] Lambie v HMA, 1973 JC 53, at p 58.
[23] Thomson, paras 37.05-37.07.
[24] Thomson, para 43.22.

lists of witnesses.[25] It will also be necessary to keep in view the present law to the effect that witnesses who are not included in the lists lodged may be examined to prove the service of the indictment,[26] or as to the declaration of the accused,[27] or to prove that an extract conviction applies to the accused,[27] or to prove the mental capacity of a person tendered as a witness.[28] Account should also be taken of authority to the effect that the accused may, at the desire of the court, examine a witness *in causa*, though not included in the lists,[29] and that, even if the accused has failed to comply with section 36 of the 1887 Act, (section 82 of the 1975 Act), the court may allow him to examine witnesses if the Crown takes no objection.[30]

(2) Civil cases

24.60 The present law as to the pre-trial disclosure of the identity of witnesses is not entirely satisfactory. In general, there is no obligation on a party to disclose names of witnesses unless they are put forward in the pleadings as representing that party in the matters at issue,[31] such as an allegedly negligent employee.[32] But it is possible for a pursuer in an action of damages for personal injuries to recover a list of witnesses indirectly, if it happens to be contained in a report made to the defender at or about the time of the accident by a responsible employee/

---

[25] Thomson, para 43.12.
[26] 1975 Act, sec 73 (formerly Circuit Courts (Scotland) Act, 1828 (9 Geo IV, cap 29), sec 7.
[27] 1975 Act, sec 79(2) (formerly 1887 Act, sec 35).
[28] *HMA* v *M'Kenzie*, (1869) 1 Coup 244.
[29] *Smith and Campbell*, (1855) 2 Irv 1 at p 40.
[30] *Lowson* v *HMA*, 1943 JC 141.
[31] *Henderson* v *Patrick Thomson Ltd*, 1911 SC 246, Lord President Dunedin at pp 249-250.
[32] *Clarke* v *Edinburgh and District Tramways Co Ltd*, 1914 SC 775; *McDade* v *Glasgow Corporation*, 1966 SLT (Notes) 4; *McGinn* v *Meiklejohn Ltd*, 1969 SLT (Notes) 49; *Halloran* v *GGPTE*, 1976 SLT 77.

employee who was present at the time of the accident.[33] This situation may be justified by the argument that the recoverability of such reports is a tolerable exception to the general principle that reports and records of accidents prepared by or on behalf of one side are not recoverable by the other side;[34] and by the argument that any list of witnesses thus recovered need not necessarily include all or any of the names of the witnesses whom the defender proposed to call. But personal injury cases make up a large proportion of the contested litigation in the courts; and rather than have a numerically large class of litigants who enjoy the advantage over their opponents of recovering, with luck, lists of at least some of their opponents' witnesses, and of others whom their opponents have rejected after precognition as being contrary to their interest, it may seem better to make a general provision that unless the Court for good cause ordered otherwise, parties should be required to exchange the names of their proposed witnesses by a specified period before the proof or jury trial. In England, the Evershed Committee rejected suggestions that parties should exchange both the names of witnesses and the witnesses' proofs.[35] That is done in the Restrictive Practices Court, which appears to be the only court having jurisdiction in Scotland in which such exchanges may take place.[36] The Winn Committee considered/

---

[33] Macphee v Glasgow Corporation, 1915 SC 990; McCulloch v Glasgow Corporation, 1918 SC 155. Cf Ross v Glasgow Corporation, 1919, 2 SLT 209, and M'Bride v Lewis, 1922 SLT 381 (the word "not" seems to have been omitted from the first sentence of the penultimate paragraph of the Lord Ordinary's opinion). See paras 18.25-18.26 above.

[34] Young v NCB, 1957 SC 99; Johnstone v NCB, 1968 SC 128.

[35] Final Report of the Committee on Supreme Court Practice and Procedure (1953, Cmnd 8878).

[36] Brian Abel-Smith and Robert Stevens, In Search of Justice (Allen Lane The Penguin Press, 1968), p 210n; Wilberforce, Campbell and Elles, The Law of Restrictive Trade Practices and Monopolies (2nd ed), para 730. The procedure is said to be "enormously expensive and time-consuming" (LRC 17, Note of Dissent, para 8).

considered that there should be no exchange of the names of witnesses, observing:

> "Foreign jurisdictions seem to be equally divided in relation to exchanging the names of witnesses. Except in some American States the strong tendency of countries operating in a common law atmosphere is against exchange."[37]

A recent report by Justice, however, recommends that the parties should state the names, occupations and addresses of their witnesses in their pleadings.[38] The question of the exchange of precognitions in civil cases has been mentioned in para 24.20 above.

---

[37] Report of the Committee on Personal Injuries Litigation (1968, Cmnd 3691), para 370; but see Master Jacob's Reservations at p 155.

[38] Going to Law: A Critique of English Civil Procedure (Stevens & Sons, 1974), p 44; and see paras 24.02-24.04 above.

Chapter 25

DISCLOSURE AND PRODUCTION OF DOCUMENTS AND OTHER PROPERTY

25.01 This chapter deals with the disclosure and production of documents other than precognitions, and of other property. The disclosure of precognitions is considered above, at paras 24.19-24.20. Questions of privilege are discussed in Chapter 18, and questions relating to the lodging of documents used in cross-examination or to refresh memory are discussed in Chapter 8, paras 8.32, 8.44-8.47.

1. Civil proceedings[1]

(1) Recovery, etc

(a) Administration of Justice (Scotland) Act, 1972, sec 1

25.02 Section 1 of the Administration of Justice (Scotland) Act, 1972,[2] has conferred on the Court of Session and the sheriff court powers in relation to pre-trial disclosure which are similar to those conferred on the High Court and the county courts in England and Wales by the Administration of Justice Acts, 1969 and 1970.[3] The effect of section 1, very briefly stated, is that the parties to civil proceedings in Scotland are now entitled to apply for orders of court for the inspection, photographing, preservation, custody and detention of documents/

---

[1] Walkers, chap 23.
[2] 1972, cap 59. It is thought that sec 1 resolves at least some of the difficulties towards which Chapter 4 of the Draft Code was directed.
[3] 1969, cap 58, sec 21; 1970, cap 31, secs 31 and 32. Decisions of the English courts on these provisions, which may be of value in the construction and application of sec 1 of the 1972 Act, are mentioned in the following footnotes; but there has been a wide divergence in practice and attitude between the Scottish and English courts (see Lunan v Forresterhill and Associated Hospitals, 1975 SLT (News) 40, 46; Baxter v Lothian Health Board, 1976 SLT (Notes) 37; McIvor v Southern Health and Social Services Board, [1978] 1 WLR 757).

documents and other property (including, where appropriate, land). The property concerned must appear to the Court to be property as to which any question may relevantly arise in any existing civil proceedings before that Court or in civil proceedings which are likely[4] to be brought. The Court may order the production and recovery of any such property, the taking of samples thereof and the carrying out of any experiment thereon or therewith. Further, unless there is special reason why the application should not be granted, the Court may exercise these powers at any time after the commencement of proceedings, on the application of any party or minuter or of any other person who appears to the Court to have an interest to be joined as such party or minuter; and where proceedings have not been commenced, the Court may exercise these powers on the application at any time of a person who appears to the Court to be likely[4] to be a party to or minuter in proceedings which are likely[4] to be brought.[5] Section 1 does not affect the existing rules[6] relating to the privilege of witnesses and havers, confidentiality of communications and withholding or non-disclosure of information on the grounds of public interest. Section 47 of the Crown Proceedings Act, 1947,[7] which relates to the recovery/

---

[4]For differing views on the construction of "likely" see Dunning v United Liverpool Hospitals, [1973] 1 WLR 586; see also Connolly v Edinburgh Northern Hospitals, 1974 SLT (Notes) 53.

[5]The Court of Appeal has indicated that an application for discovery before the commencement of proceedings in a personal injuries case may properly be granted where the applicant has stated in writing all that he can about the circumstances in which he was injured and the court is satisfied that early disclosure would virtually decide whether litigation would or would not be begun: in particular, where an applicant is legally aided, it is in the public interest that legal aid should not be continued beyond the stage at which it becomes clear that an action would have no substantial prospect of success (Shaw v Vauxhall Motors Ltd, [1974] 1 WLR 1035).

[6]Discussed in Chapter 18 above.

[7]10 and 11 Geo VI, cap 44.

recovery of documents in possession of the Crown, applies in relation to any application in respect of a document before the commencement of proceedings.

25.03 (i) Disclosure before closing of record. Before section 1 of the 1972 Act came into force, the parties to civil proceeedings in Scotland were entitled to apply for orders for the production and recovery of documents and things[8] and for the inspection of machinery,[9] premises and other real evidence, but the relevance and thus the recoverability of the evidence concerned usually had to be judged by reference to the pleadings as, in theory, finally adjusted and printed in the closed record.[10] In the absence of agreement or of circumstances justifying the exercise of discretion by the Court, the general rule was that a party could not recover documents or inspect property until after the record had been closed. Consequently, it not infrequently happened that a litigant was deprived, until after his action had gone beyond the stage of adjustment, of information from written records - often contemporary and highly important - and from other sources which had all along been available to his opponent. As a result, much time and effort was wasted, and after recovery, substantial amendment of the pleadings might be required and a new light cast on the whole case.[11]

25.04 (ii) Tests of recoverability. The Sheriffs Walker state two tests which a specification of documents must pass before it may be approved.[12] The first is that a diligence will not be granted for the recovery/

---

[8]Eg a typewriter: Mactaggart v MacKillop, 1938 SLT 559, affd 1939 SLT 203.

[9]See Maclaren, Court of Session Practice, p 521; Dobie, Sheriff Court Practice, p 184; Terrell v NCB, 1948 SLT (Notes) 57.

[10]See Walkers, paras 287, 418.

[11]See Boyle v Glasgow Royal Infirmary, 1969 SC 72.

[12]Walkers, paras 288, 289.

recovery of documents unless the documents will, or at least may, have a bearing on the averments remitted to proof. The second test relates to the purpose of recovery. The learned authors criticise two propositions: that a document which is to be used for cross-examination only is not recoverable by diligence; and that

> "the proper use of diligence is to recover writings of the nature of evidence, and capable of being used as evidence in the cause: we must be satisfied that the writings are of such a kind that they may be used in evidence."[13]

The learned authors continue:

> "It is thought that the rule justified by the decisions can be stated most precisely in negative form. A document is not recoverable if it has not been communicated to or by one of the parties and if it can be used only to provide material for the examination-in-chief or in cross of a witness who is not a party. To state the rule positively, and at the same time comprehensively, is more difficult, but it is thought that it may be stated thus. Subject to confidentiality and relevancy, a document is recoverable if it is a deed granted by or in favour of a party or his predecessor in title, or a communication sent to, or by or on behalf of, a party, or a written record kept by or on behalf of a party."

25.05 It appears that the rules stated by the learned authors have been superseded by section 1 of the Act of 1972, and that the modern rule is that subject to the existing rules relating to the privilege of witnesses and havers, confidentiality of communications and withholding or non-disclosure of information on the grounds of public interest, the court may make an order for disclosure if it appears to the court that a question may relevantly arise as to the property concerned in any civil proceedings which have been or are likely to be brought. But differing views have been expressed in the Outer House. It was said in Baxter v Lothian Health Board[14] that the common law/

---

[13] Livingstone v Dinwoodie, (1860) 22 D 1333, at p 1334. The first proposition is incorrect, and the second "no longer obtains": Black v Bairds & Dalmellington, 1939 SC 472, L J-C Aitchison at p 478; and see Johnston v SSEB, 1968 SLT (Notes) 7.

[14] 1976 SLT (Notes) 37.

law test of recoverability before the closing of the record continues to apply,

> "namely that a pursuer who moves for the recovery of documents before the record is closed must show cause why recovery should be allowed at this stage."[14]

It is, however, submitted with respect that the purpose of section 1 is to abolish entirely the mystique of restricted recoverability prior to the closing of the record, and that the preferable view is to be found in McGown v Erskine,[15] from which it appears that a party who moves for recovery before that stage, like a party who moves for recovery thereafter, is not obliged to do more than satisfy the court that a question as to the property concerned may relevantly arise in the action: it is for the party opposing the motion to demonstrate a special reason why it should not be granted.

25.06 (iii) Section 1 in practice. It therefore seems likely that section 1 of the Act of 1972 has removed the causes of some dissatisfaction with the law and practice relating to the disclosure, recovery and preservation of evidence; but the procedural rules made thereunder[16] have only recently come into force, and it would be useful to obtain the views of the profession about the operation of section 1 in practice. Applications for the recovery of hospital records have been made by petition before the service of a summons,[17] and have been granted after the service of a summons but before defences were lodged,[18] and before the closing of the record.[19]

25.07/

[14] 1976 SLT (Notes) 37.
[15] 1978 SLT (Notes) 4.
[16] A S (R C Amendment No 7), 1973, came into operation on 16th January 1973; A S (Sheriff Court Procedure Amendment), 1973, came into operation on 3rd May 1973.
[17] Connolly v Edinburgh Northern Hospitals, 1974 SLT (Notes) 53.
[18] Lunan v Forresterhill and Associated Hospitals, 1975 SLT (Notes) 40, 46; McGown v Erskine, 1978 SLT (Notes) 4.
[19] Baxter v Lothian Health Board, 1976 SLT (Notes) 37.

25.07 Two recent English cases are noteworthy in this context, although not decided under the corresponding English legislation. In Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd [20] it was held that those who disclosed documents on discovery were entitled to the court's protection against any use of the documents otherwise than in the action in which they were disclosed. In Anton Piller KG v Manufacturing Processes Ltd [21] it was held that a court may in an exceptional case on a plaintiff's ex parte application order a defendant to permit the plaintiff to enter his premises for the purpose of inspecting and removing documents where there is a real possibility that they may be destroyed or removed before any application inter partes can be made.

(b) Action for discovery?

25.08 It is interesting to consider whether it is necessary or desirable to revive the civil law actio ad exhibendum, an action calling for the production of a thing, for the purpose of some other proceeding.[22] It is thought that such an action could with advantage be employed in order to obtain information essential for the commencement of an action. Actions for the discovery of the names of persons to be sued appear to be well known in some civil law countries.[23] In Hart v Stone [24] de Villiers C J cited Voet as authority for saying that

> "the judges had very large powers of ordering a disclosure of facts where justice would be defeated without a disclosure."

In/

---

[20] [1975] QB 613. See also Riddick v Thames Board Mills Ltd, [1977] QB 881; Medway v Doublelock Ltd, [1978] 1 WLR 710.

[21] [1976] Ch 55. On Anton Piller orders see Ex p Island Records Ltd, [1978] Ch 122.

[22] See D 10.4.

[23] Stuart v Ismail, 1942 AD 327; (1894) 11 Cape Law Journal 100; cit by P Prescott, "Finding out who [sic] to sue", (1973) 89 LQR 482.

[24] (1883) 1 Buch App Cas 309, at p 314; cit by Lord Kilbrandon in Norwich Pharmacal Co v Customs and Excise Commissioners, [1974] AC 133, at p 205.

In Colonial Government v Tatham[25] the jurisdiction was explained in these terms:

> "Before granting such an application we must be satisfied that the applicant believes that he has a bona fide claim against some person or persons whose names he seeks to discover, and whose name can be supplied by the respondent, and that he has no other appropriate remedy ...
>
> "The principle which underlies the jurisdiction which the law gives to courts of equity in cases of this nature, is that where discovery is absolutely necessary in order to enable a party to proceed with a bona fide claim, it is the duty of the court to assist with the administration of justice by granting an order for discovery, unless some well-founded objection exists against the exercise of such jurisdiction."

Erskine, in his treatment of succession in heritable rights, discusses the heir's

> "privilege to pursue for exhibition ad deliberandum against all possessors, or havers, of writings, whether granted in favour of the ancestor, or by him in favour of others; that so upon balancing the debts with the estate he may be able to form a judgment whether the succession be damnosa or lucrosa."[26]

25.09 It is thought that the actio ad exhibendum is the origin of the English suit for discovery,[27] which was discussed by the House of Lords in the Norwich Pharmacal Co case.[28] Lord Reid said of the authorities:

> "They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong-doers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

The/

---

[25] (1902) 23 Natal LR 153, at pp 157, 158; also cit by Lord Kilbrandon, n 24 supra.

[26] Institute, III, viii, 56-57; also cit by Lord Kilbrandon, n 24 supra.

[27] P Prescott, "Finding out who to sue", (1973) 89 LQR 482.

[28] Norwich Pharmacal Co v Customs and Excise Commissioners, [1974] AC 133. See also Loose v Williamson, [1978] 1 WLR 639.

The majority of their Lordships expressed the principle in similar terms. Lord Kilbrandon would have been prepared to require disclosure whether or not the defendants had become "mixed up" in the acts of the wrongdoers:

> "The plaintiff is demanding what he conceives to be his right, but that right in so far as it has patrimonial substance is not truly opposed to any interest of the defendants; he is demanding access to a court of law, in order that he may establish that third parties are unlawfully causing him damage. If he is successful, the defendants will not be the losers, except in so far as they may have been put to a little clerical trouble. If it be objected that their disclosures under pressure may discourage future customers, the answer is that they should be having no business with wrongdoers. Nor is their position easily distinguishable from that of the recipient of a subpoena, which, in total disregard of his probable loss of time and money, forces him to attend the court for the very same purpose as that for which discovery is ordered, namely, to assist a private citizen to justify a claim in law. The policy of the administration of justice demands this service from him."

25.10 It has been submitted in the undernoted article[27] that the wider proposition indicated by Lord Kilbrandon possesses merit. The system whereby society requires an injured party to apply to the wrongdoer for compensation breaks down whenever the victim is unable to discover the identity or whereabouts of the party at fault. So, just because we do channel relief through the person of the wrongdoer, we should regard it as incumbent on the community that its members should do what they can, within reason, to enable the victim to identify the person whom he must sue. It may be that a broadly based action for discovery would be of assistance to aggrieved parties who are unaware of the identities of those from whom they should seek relief, and thus do not know whether the proper defender is worth suing, or would be prepared to make a reasonable settlement. Since they cannot, accordingly, aver that civil proceedings "are likely to be brought", it would seem that they cannot obtain an order under section 1(1) of the Administration of Justice/

---

[27] P Prescott, "Finding out who to sue", (1973) 89 LQR 482.

Justice (Scotland) Act, 1972. Possible applications of the remedy of discovery include: identifying undisclosed principals, members of unincorporated bodies, owners of shares or ships, occupiers of land from which a nuisance emanates, or negligent employees (in order to get round exemption clauses); and tracing the whereabouts of debtors, defaulting payers of aliment, or of stolen property (eg negotiable instruments innocently dealt with by stockbrokers).[27]

25.11 If it were to be decided in principle that an action of discovery should be introduced, or reintroduced, into Scottish practice, a number of ancillary matters would obviously require consideration. It would no doubt have to be provided that existing rules as to privilege should remain unaffected, as in section 1(4) of the Act of 1972. It might also be necessary to devise principles as to expenses. It appears that in England the plaintiff in an action of discovery, even if successful, may well have to pay the defendant's costs, since he has brought the action against an innocent person for his own benefit. The question whether the wrongdoer, once he has been identified and his liability established, may in certain circumstances be found liable in the costs of the action of discovery, has not been decided in England.[27]

(c) Particular classes of document

25.12 (i) Statutory reports and records. It may be useful to consider the law relating to the recovery of reports and other documents which a person is bound by statute to compile. In Johnstone v NCB[29] the Court held that the pursuer was not entitled to recover reports made by his employers, the defenders, to a government department in performance of a statutory/

---

[27] P Prescott, "Finding out who to sue", (1973) 89 LQR 482.
[29] 1968 SC 128.

statutory obligation. Lord President Clyde, delivering the opinion of the Court, stated one of the grounds of decision as follows (at p 134):

> "In our opinion, unless there is something in the statutory provisions to indicate the contrary, reports and other documents which a person is bound under statutory provisions to make available to a government department for some statutory purpose should not be recoverable by his opponent in a litigation. We can find nothing in the statutory provisions in this case which would justify such recovery. Indeed to allow it would only lead to confusion. For the investigations made by the defenders would in most cases be partial investigations, by no means necessarily directed to the issues in this litigation, and based on hearsay accounts of what had happened."

The Court does not appear to have heard any argument on the point and, in desiderating a statutory provision that the documents should be competent evidence, seems to have departed from what Lord Justice-Clerk Aitchison described as "the modern tendency to relax the strictness of the older practice in the recovery of documents" which, he said, was "due to the anxiety of judges that the ascertainment of the truth should not be hampered by too great an insistence upon technical rules."[30] The justifications of the rule which are stated appear to relate only to the evidential value of the records; and the question whether a document is recoverable does not depend on whether it is evidence or could be used in evidence.[31]

25.13 The rule is frequently ignored in practice, in relation to accident books kept in terms of reg 3 of the National Insurance (Industrial Injuries) (Claims and Payments) Regulations, 1964.[32] In Dobbie v Forth Ports Authority[33] Lord Robertson granted a diligence for the recovery of/

---

[30] Black v Bairds & Dalmellington, 1939 SC 472, at p 475.
[31] 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 NCB, 1957 SC 99, Lord Blades at p 108.
[32] SI 1964, No 73.
[33] 1973 SLT (Notes) 15.

of the defenders' accident books and said that he had found the submissions in support of the objection to recovery

> "somewhat surprising, because it is common practice in industrial accident cases for the employer's accident book to be lodged in process and referred to. Indeed, in my recollection, it has frequently been made the subject of a call in such a specification without objection. Again, in my experience, it is normally the defenders who seek to found upon it in cross-examination in order to attempt to discredit the pursuer by some statement he is alleged to have made. But the accident book has often no evidential value because the person who made the entry is frequently not identified or has not been present at the accident. I regard the matter as one of evidential value, rather than of competency."

The Inner House, following Johnstone,[29] reversed the Lord Ordinary's interlocutor.[34] It is thought that it is arguable that the fact that a document is prepared in pursuance of a statutory duty should not in itself be a bar to its recoverability. The judgment of the Lord Ordinary in Dobbie[33] gives some indication of the utility of such a document in present-day practice; and it may be added that if a document is conscientiously compiled in order to fulfil a requirement of the law, it is more likely to be accurate than otherwise. Any difficulties which at present arise because the compiler of the document cannot be identified or because he obtained the information recorded by indirect means, could perhaps be circumvented by any new provisions as to the admissibility of records, such as have been discussed in Chapter 12. The evidential value of the document would remain a matter for the court to determine. It is difficult to see why the admission of such documents should cause confusion: if a person is under a statutory responsibility to compile a document, he ought to be able to explain the circumstances in which it was compiled. A judge would have no difficulty in explaining to a civil jury/

---

[29] 1968 SC 128.
[33] 1973 SLT (Notes) 15.
[34] 1975 SLT 142.

jury the considerations affecting the document's evidential value; and in any event few civil jury trials take place in modern practice.

25.14 The question which Lord President Clyde referred to in Johnstone[29] as the "wider aspect of the matter" also appears to deserve consideration. The primary ground of decision in Johnstone[29] was based on the principle that reports and records of accidents prepared by or on behalf of one side are not recoverable under a specification of documents by the other side, with the exception of reports by employees present at the time of the accident and made to their employers at or about the time of the accident. The statutory records called for by the puruser were, however, outwith that exception, and accordingly irrecoverable. It is submitted that records which are compiled under a statutory requirement are compiled in the public interest, and are not documents "prepared by or on behalf of one side" in the sense in which that expression is used by the Court in Johnstone.[29] A submission to that effect was made in Dobbie,[34] and Lord Fraser (at p 146) indicated that if the matter had been free from authority he would have felt some sympathy with it.

25.15 It is also noteworthy that three of their Lordships in Dobbie[34] reserved their opinions as to the recoverability of accident books in very special circumstances, as where on the pleadings there is a dispute as to whether an accident occurred and the defenders knew about it at the time.[35] It is submitted that provisions which had the effect of making accident books generally admissible, subject to comment on their evidential value/

---

[29] 1968 SC 128.
[34] 1975 SLT 142.
[35] L J-C Wheatley, Lord Milligan at p 144; Lord Kissen at p 145. In Comer v James Scott & Co (Electrical Engineers) Ltd, 1976 SLT (Notes) D2, Lord Dunpark allowed a call for the recovery of the defenders' accident book in order to throw light on the disputed question whether they were the pursuers' employers at the time of the accident, and in Boyes v Eaton Yale & Towne Inc 1978 SLT (Notes) 6 his Lordship allowed a similar call where an entry which was averred to have been made in an accident book was relevant to a material disputed fact. Cf McIntyre v National Coal Board, 1978 SLT (Sh Ct) 32.

value, would be preferable to the questionable and uncertain state of the present law. The Winn Committee was of the view that the employer's reports to the Ministry of Social Security and to the Factory Inspector, and entries in the general accident register and first-aid register should be made available by an employer on application whether or not any action had been started.[36] The view that the employer's report to the Factory Inspector should be confidential seemed to them "a very curious and unduly limited official attitude."[37]

25.16 <u>(ii) Transcripts of shorthand notes of criminal trials on indictment.</u> The availability of these appears to be unduly restricted. Section 274 of the 1975 Act provides by subsection (1) that shorthand notes shall be taken, and that on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the Clerk of Justiciary so directs: provided that a transcript shall be furnished to any party interested upon the payment of such charges as the Treasury may fix. By subsection (2) the Secretary of State may "if he thinks fit in any case" direct a transcript to be made and furnished to him. There is no provision in the Act for anyone else to direct the making of a transcript. Section 275(1) of the Act provides that the shorthand writer shall sign the notes taken by him and retain them unless and until he is directed by the Clerk of Justiciary to forward a transcript of such shorthand notes to him. Section 275 further enacts:

> "(3) The shorthand writer shall also furnish to a party interested in a trial or other proceeding in relation to which a person may appeal under this Part of this Act, and to no other person, a transcript of the whole or any part of the

shorthand/

---

[36]Report of the Committee on Person-l Injuries Litigation (1968, Cmnd 3691), para 169.

[37]<u>Ibid</u>, para 170. The Committee also considered that Factory Inspector's reports should be more readily available and more informative (paras 150, 154, 173), but there has not yet been any change in practice.

shorthand notes of any such trial or other proceeding on payment by such party interested to such shorthand writer of his charges on such scale as the Treasury may fix.

"(5) For the purposes of this and the last foregoing section, 'a party interested' shall mean the prosecutor or the person convicted or any other person named in, or immediately affected by, any order made by the judge of the court in which the conviction took place, or other person authorised to act on behalf of a party interested, as herein defined."

25.17 The effect of these provisions and their predecessors is that a transcript may not be obtained for use in civil proceedings. Thus, in Storrie v Murray,[38] an action of damages, the sheriff refused the defender's motion for the granting of a diligence to recover the notes of a trial of the defender on a charge of attempting to murder the pursuer. The sheriff's view was that he had no discretion to allow the motion because the shorthand writer was expressly forbidden by the Act of Adjournal to furnish a transcript of the notes of evidence to a person such as the defender, and that it was not competent for a civil court to order a shorthand writer to do something which was the subject of express statutory prohibition. The Sheriff-Principal, Sir Allan G Walker, QC, refusing an appeal, expressed his agreement with the Sheriff and added (at p 47, col ii):

"It seems clear that the shorthand notes taken at criminal trials must be retained in safe keeping until a transcript of them has been made and copied. It is difficult, however, to understand why it is against the public interest to furnish a certified copy of such a transcript to any member of the public who has an interest to obtain it. The procurator-fiscal was unable to suggest any reason why, from the point of view of the public interest, a copy of such a transcript should not be supplied in such cases. The evidence itself was given publicly in open court in the presence of the press and members of the public, any one of whom was entitled to make his own shorthand notes of what was said by the witnesses. One would imagine that, apart altogether from civil litigants, such as the defender in the present action, social historians or research students might well have a legitimate interest to obtain an

authentic/

---

[38] 1974 SLT (Sh Ct) 45.

authentic record of evidence given at a criminal trial. The effect of the refusal of this motion in the present action may well be that the defender, instead of merely citing the shorthand writer as a witness to identify a copy of his shorthand notes, may have to adduce the evidence of officials or police officers or of members of the press or of the public to speak to their own imperfect recollection of what the pursuer said in evidence at the criminal trial. This appears to be an unfortunate, and perhaps an unintended result of the provisions of the Act of Adjournal in its present form. The difficulty which has arisen in the present case, and which might well arise in other instances where a legitimate interest in obtaining a copy of the notes of evidence can be established, could perhaps be avoided if the Lord Advocate were given a discretion to authorise the release of a transcript, or of the copy of a transcript, in suitable cases."

25.18 A commentator on the case[39] has observed:

> "Subtle arguments such as that the prohibition applied only to cases where the transcript was originally ordered by the Clerk of Court; or that a trial which led to an acquittal was not a proceeding in relation to which a person might appeal under the Act and so was not affected by the Act of Adjournal at all; or that an acquitted accused was a person immediately affected by an order of the trial judge and so entitled to a transcript, were no doubt wisely not advanced. The scheme of the legislation is clear; notes are taken for the court, and transcripts are to be provided only in connection with appeals. The best reason for this is the fact that the shorthand writers require to be protected from requests for t-ranscripts which they la-ck the capacity to fulfil. It cannot have anything to do with confidentiality, since the material concerned is public. The result, however, is that the availability of a transcript depends on the accident of whether there is an appeal in which such a transcript is ordered, or the case happens to be one in which the trial judge has the notes transcribed daily during the trial as used to happen in murder trials, or a transcript is directed by the Secretary of State as is done in some cases which are likely to require consideration in connection with parole or other functions of the Secretary of State ... There remains ... the question whether the notes can be handed over in a case where a transcript has been ordered by the Clerk. The legislation, further, does not prohibit the Clerk from supplying anyone with a transcript."

The commentator adds that the Sheriff-Principal's suggestion that the Lord Advocate be given a discretion to authorise the release of a transcript in suitable cases

> "presumably includes cases where there was initially no transcript and what would be required would be a direction to make

and/

---

[39](1974) 38 JCL 306.

and release a transcript. It may be noted that in England the shorthand writer was allowed to make a transcript available to anyone with leave of an appeal court judge in 1958, and that the present Criminal Appeal Rules (SI 1968, No 1262, rule 19) authorise the supply of a transcript of any proceedings in respect of which an appeal lies to anyone on payment of an agreed sum."

25.19 (iii) Bankers' books. Some simplification of the procedure prescribed by the Bankers' Books Evidence Act, 1879,[40] has already been suggested.[41] The Act provides by section 7:

"On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs."

It has been said in England that in civil proceedings there the courts have set their face against section 7 being used as a kind of searching inquiry or fishing expedition beyond the ordinary rules of discovery, and that an order under section 7, which can be a very serious interference with the liberty of the subject, must only be made after the most careful thought and on the clearest grounds.[42] Although there appears to be no reported Scottish authority in point,[43] it seems likely that the Scottish courts would adopt a similar approach. There is a question as to the extent to which the provisions of section 7 are, or would remain, necessary in regard to civil proceedings, in view of the terms of section 1 of the Administration of Justice (Scotland) Act, 1972, and any introduction of/

---

[40] 42 and 43 Vict cap 11, secs 3-5.

[41] Para 12.37 above.

[42] Williams v Summerfield, [1972] 2 QB 513; see Cross, p 527.

[43] The matter does not seem to have been discussed in Burrows, Petitioner, (1905) 21 Sh Ct Rep 215, or Forrest v MacGregor, 1913, 1 SLT 372.

of a new action ad exhibendum.[44] The use of section 7 in criminal cases is considered below, at para 25.48.

(d) Execution of commission

25.20 (i) Forms of citation to haver. It has already been suggested[45] that the forms of citation to witnesses should be reviewed. The forms of citation to havers[46] are more intelligible than these, but they could also be usefully recast.

25.21 (ii) Duty of haver. The question sometimes arises, in cases where diligence is granted for the recovery of- a vry large volume of documents from which excerpts are to be taken, whether it is the duty of the commissioner or of the haver to make the excerpts. According to Sheriff Dobie, who does not cite any authority, the selection of the excerpts from business books is a matter for the commissioner.[47] It may be that the answer depends on the nature of the documents and the wording of the specification. In Burg-h of Ayr v British Transport Commission,[48] in relation to a call upon the haver to produce documents "in order that excerpts may be taken therefrom", it was agreed by the parties that the haver would sufficiently implement the call by delivering the documents to the commissioner, whose duty it would be to make extracts therefrom; but in relation to a call for letters relative to particular matters, which did not include the phrase quoted, both the Sheriff-substitute and the Sheriff rejected a submission that it was the duty of the commissioner, not of the haver, to make a search of the haver's voluminous records in order/

---

[44]See paras 25.08-25.11 above. In Burrows (n 43 supra) an order under sec 7 was granted before the closing of the record.

[45]Para 24.36 above.

[46]See R Campbell, Law and Practice of Citation and Diligence (1862), chap 7.

[47]Sheriff Court Practice, p 198.

[48]1956 SLT (Sh Ct) 3; (1956) 72 Sh Ct Rep 73.

order to find the letters. The Sheriff (C J D Shaw, QC, now Lord Kilbrandon) disallowed the very wide calls which had given rise to the submission, but observed obiter (at pp 6, 82-83);

> "In my opinion, the commissioner has no duty (except where he is ordered to make excerpts from books described in the specification and so laid before him) to do more than to receive the documents, and no others, produced by the haver conform to the specification, and to interrogate the haver, or to allow him to be interrogated, upon the limited matters set out in Maclaren, Court of Session Practice, pp 1078-1079, and Dobie, Sheriff Court Practice, pp 197-200. It is not enough for a haver to appear before the commissioner, to depone that he may or may hot have documents of which the Court has ordered production, and invite the commissioner to find out for himself whether he has or not."

25.22 It may or may not be satisfactory that the scope of the respective duties of the commissioner and the haver should depend in any particular case on the terms of the specification and the nature of the documents sought. Perhaps it would be helpful to have a general rule that it is the duty of the haver to search his records and produce the documents and excerpts required, under the supervision of the commissioner. Frequently the haver's knowledge of the matters at issue and of the methods of storing and indexing his documents would enable him to fulfil such a duty more efficiently than the commissioner. In Forsyth[49] Lord Mackenzie said:

> "I do not doubt that it is an ordinary practice for an agent, when cited to produce books, himself to go through these and make the necessary excerpts. There are obvious considerations of good sense and convenience in favour of such a course being adopted. It does not, however, appear to me to be obligatory either on the haver to make excerpts or copies or on the opposing litigant to accept such documents."

At present the haver is entitled to be paid a fee for searching before being called upon to produce under the specification:[49] if he were to be required to excerpt, he should similarly be entitled to a fee for excerpting. On the other hand, such a general rule may be unnecessary, since/

---

[49] Forsyth v Pringle Taylor & Lamond Lowson, (1906) 14 SLT 658.

since the commissioner may be authorised by the Court to employ assistants to excerpt under his supervision those entries in respect of which he considers that such assistance is appropriate and necessary.[50]

25.23 (iii) Objection by haver. It would perhaps be useful to enact rules as to the procedure before a commissioner when a haver objects to produce documents in his possession. It has been said that in Court of Session practice, where the haver refuses to produce, an order from the Court for production should be obtained, failure to obey which renders him liable to imprisonment for contempt of court.[51] A peremptory procedure of that kind does not, however, seem appropriate to a case where a haver, in good faith, raises a novel question of confidentiality or public policy, or claims that an order to produce is oppressive or an abuse of the process of the court.[52] Difficult questions of that kind may not emerge until the diet of examination. It is thought that if a haver's objection to production is repelled by the commissioner, he should be entitled to decline to produce, even under seal, and to appeal at once to the Court, who would give a ruling as early as practicable before the date of the diet of proof. In the sheriff court, there are no statutory provisions as to the procedure to be followed when a haver objects to produce. Sheriff Dobie suggests, as an alternative to a second order for production with the sanction of punishment for contempt, that the haver may be cited to produce at the diet of proof, and, if his objection is there repelled, he must either make the production called for or appeal forthwith.[53] It is thought, however, that there should be a procedure/

---

[50] Maclaren, Court of Session Practice, p 1045; Argyllshire Weavers Ltd v A Macaulay (Tweeds) Ltd. 1962 SLT (Notes) 96.

[51] Maclaren, p 1078; Thomson and Middleton, p 382.

[52] Cf Senior v Holdsworth, ex ITN, [1975] PB 23.

[53] Dobie, Sheriff Court Practice, pp 197-198.

procedure common to both courts for the determination of objections by havers before the diet of proof and without resorting in the first instance to any threat of punishment for contempt.

25.24 (iv) Optional procedure in Sheriff Court. In Court of Session actions it is usually unnecessary to execute the commission since the documents are obtained under the optional procedure provided by RC 96, whereby an order for delivery is served on the haver. There is no such optional procedure in the sheriff court, and although in practice the documents are normally obtained without carrying the commission into execution, it would be useful to enact a rule in terms similar to RC 96. The Grant Committee observed that the introduction to the sheriff court of the optional procedure available in the Court of Session would do no more than recognise the existing practice, and they recommended that that should be done.[54] A sheriff court rule similar to RC 97, which applies to the payment of the commissioner, and to the lodging and intimation of his reports and the documents recovered, may also be useful.

(2) Civil proceedings - lodging productions

25.25 (a) Time - Sheriff Court. In Court of Session actions, all productions which are intended to be used or put in evidence should now be lodged on or before the twenty-eighth day prior to the day appointed for the proof or jury trial.[55] It may be that, with a view to consistency between the two courts and the reduction in the number of late settlements, the period of four days in the rule in ordinary actions in the sheriff court, where at present documents may be lodged four days before the proof of jury trial,[56] should be extended to at least fourteen days. Any rule as to the induciae/

---

[54] Grant, para 567.
[55] RC 107, 121, as amended by A S (RC Amendment No 8), 1972, rule 1(1).
[56] Sheriff Courts (Scotland) Act, 1907, First Sched, rules 68 (added by AS 16th July 1936). In summary causes, productions must be lodged not later then seven days before the proof: Act of Sederunt (Summary Cause Rules, Sheriff Court), 1976, Schedule, rule 24.

inducιae for citation of witnesses should be kept in view here (see para 24.41 above).

25.26 (b) Late lodging - jury trial in Sheriff Court. In the Court of Session,[55] and in sheriff court proofs,[56] no other productions may be used or put in evidence unless by consent of parties or by permission of the presiding judge on cause shown and on such terms as to expenses or otherwise as to him shall seem proper. In the case of sheriff court jury trials, however, rule 142 provides:

> "... the Sheriff may allow productions to be exhibited and produced at the trial if he is satisfied that they could not reasonably have been lodged earlier and that reasonable notice had been given to the other parties of intention to produce at the trial."

It is difficult to appreciate why the rule for sheriff court jury trials should differ in this respect from the other rules, and it is suggested that it should be the same. The Grant Committee recommended that the various rules of court relating to productions should be consolidated in one rule.[57]

(3) Civil proceedings - view

25.27 (a) Court of Session jury trial. Provision for a view by the jury is made by the Jury Trials (Scotland) Acts, 1815[58] and 1819[59] and RC 120. Section 29 of the 1815 Act seems to imply that a view should take place before the trial, but in Redpath v Central SMT Co[58] the Lord Ordinary/

---

[55] RC 107, 121, as amended by A S (RC Amendment No 8), 1972, rule 1(1).

[56] Sheriff Courts (Scotland) Act, 1907, First Sched, rules 68 (added by AS 16th July 1936). In summary causes, productions must be lodged not later than seven days before the proof: Act of Sederunt (Summary Causes Rules, Sheriff Court), 1976, Schedule, rule 24.

[57] Grant, para 595, rec 236.

[58] 55 Geo III, cap 42, sec 29. See Redpath v Central SMT Co, 1947 SN 177 (motion for view of locus of road accident refused). As to the consequences of an unauthorised inspection of a locus by a juror compare Sutherland v Prestongrange Coal and Fire-Brick Co Ltd, (1888) 15 R 494, with Hope v Gemmell, (1898) 1 F 74.

[59] 59 Geo III, cap 35, sec 35.

Ordinary appeared to contemplate that a view might take place in the course of the trial. It has been said that no fees are allowed to the parties' solicitors for attending the view, on the ground that there should be no discussions at the view and the explanation should be made by the showers alone;[60] if that is correct, it seems unsatisfactory, but the matter is probably of very small practical importance.

25.28 (b) Sheriff Court jury trial. There is no express statutory provision for a view by a sheriff court jury, but rule 137 of the 1907 Act, First Sched, provides that the law and practice relating to the taking of evidence in proofs before the Sheriff shall apply to jury trials. View by a judge is considered in the next paragraph. Civil jury trials rarely occur in the sheriff court,[61] and the question of a view seems very unlikely to arise.

25.29 (c) Proofs. There is a question whether any rule need be made about a view by the judge. It appears that there are no statutory provisions or rules of court on the matter, and that it is governed by the common law. In Hattie v Leitch[62] Lord Justice-Clerk Macdonald observed that a view by the judge should take place before the evidence is led, and for the purpose of understanding the evidence afterwards to be led - not for the purpose of criticising evidence which has already been led. The indication that the view should take place before the proof is slightly inconvenient in cases where it become apparent only in the course of a proof that a view would be helpful: in such a case a view may be held only/

---

[60] Maclaren, Court of Session Practice, p 598; but the proposition does not appear to be justified by the case cited (Arrott v Whyte, (1826) 4 Mur 149 (note)).

[61] In 1965 there were only eight (Grant, para 183).

[62] (1889) 16 R 1128, at p 1131.

only with the consent of all parties[63] and, it is thought, the court's interlocutor or minute should so state. It may be useful to make provision that a judge may carry out an inspection at any time. Whether he should do so only in the presence of the parties' solicitors and counsel and with their consent, is debateable. Sheriff Dobie,[64] following Sheriff Fyfe, states that a view by the Sheriff should take place in the presence of the parties' solicitors, and Hattie,[62] which they cite, may imply that that is the correct procedure. Such a procedure certainly appears to be desirable in many cases, although perhaps unnecessary and expensive where the view is of a public place whose features are agreed not to have materially altered since the date of the incident in question.

25.30 It is interesting that in England RSC Ord 35, rule 8(1), provides:

> "The judge by whom any cause or matter is tried may inspect any place or thing with respect to which any question arises in the cause or matter."[65]

In Goold v Evans & Co[66] Denning L J said:

> "The judge must make his view in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. The only exception is when a judge goes by himself to see some public place, such as the site of a road accident, with neither party present."

In/

---

[62] (1889) 16 R 1128, at p 1131.

[63] In Wyngrove v Scottish Omnibuses, 1966 SC (HL) 47, the Lord Ordinary of consent inspected a bus in Parliament Square in the course of the proof, in the presence of the parties' counsel and agents. In Shanlin v Collins, 1973 SLT (Sh Ct) 21, the Sheriff of consent inspected the locus after the proof and before the hearing on evidence, in the presence of the parties' agents. (The views are not mentioned in the reports.)

[64] Dobie, Sheriff Court Practice, p 184; T A Fyfe, Law and Practice of the Sheriff Courts, p 201.

[65] As to the principles to be applied in exercising the jurisdiction conferred by the rule, and in considering an application for an inspection outwith the territorial jurisdiction of the court, see Tito v Waddell, [1975] 1 WLR 1303.

[66] [1951] 2 TLR 1189, at p 1191.

In Salisbury v Woodland,[67] where the judge of first instance had inspected such a public place alone after the hearing, the majority of the Court of Appeal indicated that although it was not improper it was undesirable for a judge to hold a private view of a public place without the parties' consent and in their absence, because unknown to him circumstances affecting the locus might have changed between the accident and trial.

25.31 (iv) Function of view. It has already been noted that in Hattie[62] Lord Justice-Clerk Macdonald observed that a view should take place for the purpose of understanding the evidence to be led. Similarly, section 29 of the Jury Trials (Scotland) Act, 1815,[58] makes provision for a view by jurors "in order to their better understanding the evidence that will be given upon the trial of [the] issues." In England, Canada and Australia in recent years different opinions have been expressed on the question whether what takes place at a view is real evidence or, as was said in Hattie,[62] merely an aid to the understanding of the evidence. The weight of English authority appears to be to the effect that the function of a view is not merely to enable the judge to follow the evidence: a view, including a demonstration, constitutes part of the evidence upon which the judge is entitled to form his own judgment, to the extent that he may prefer the real evidence supplied by a view to any oral evidence adduced.[68] It is thought that, provided that safeguards are enacted as to the presence or consent of the parties, that should now be the law of Scotland.

2./

---

[58] 55 Geo III, cap 42, sec 29. See Redpath v Central SMT Co, 1947 SN 177 (motion for view of locus of road accident refused). As to the consequences of an unauthorised inspection of a locus by a juror compare Sutherland v Prestongrange Coal and Fire-Brick Co Ltd, (1888) 15 R 494, with Hope v Gemmell, (1898) 1 F 74.

[62] (1889) 16 R 1128, at p 1131.

[67] [1970] 1 QB 324, Widgery L J at p 344; Harman L J at p 346, cf Sachs L J at p 350.

[68] See Cross, pp 11-12, and authorities and articles there cited, esp Buckingham v Daily News Ltd, [1956] 2 QB 534; cf Scott v Numurkah Corporation, (1954) 91 CLR 300 (High Court of Australia), E Solomon, "Views as Evidence", (1960) 34 ALJ 46, and Tito, n 65 supra.

2. Criminal proceedings

(1) Medical examination and personal search

25.32 The powers of personal search which the police may exercise on arrest do not extend to the invasion of or removal of any part of the person's body. The taking of blood samples, dental impressions and all searches which involve invasion of the body or removal of any part of it, such as hair or nail-clippings, should ordinarily be previously authorised by a warrant granted by a sheriff upon the application of the procurator-fiscal. A recent innovation which may be noted here is the practice of applying for warrants to take samples of blood and saliva from persons accused, after arrest. In H M Advocate v Milford[69] the procurator-fiscal presented a petition to the sheriff craving the court to grant warrant to a medical practitioner to take a blood sample from a prisoner who had been committed for trial on a charge of rape and who had refused to give such a sample. The Sheriff, having heard argument from the fiscal and the accused's solicitor, granted the warrant, having regard to Hay v H M Advocate.[70] It is believed that in at least one subsequent unreported case a sheriff refused to grant a warrant to take a sample of blood from a person who was in prison awaiting trial.[71] It is understood, however, that such warrants are now not infrequently granted without opposition. In Wilson v Milne,[72] where the High Court refused to pass a bill of suspension following the granting of a warrant to take a blood sample, Lord Justice-General Emslie said.

"The cases of Hay and Milford set out the circumstances in which

warrants/

---

[69] 1973 SLT 12.
[70] 1968 JC 40.
[71] See 1973 JCL 134.
[72] 1975 SLT (Notes) 26.

warrants to take *inter alia* a sample of blood may be granted. The case of *Hay* had to do with a warrant to take a mouth print of a person suspected of crime. The case of *Milford* had to do with the taking of a blood sample from a person who was in custody, having been charged with a serious crime. From these cases it is clear that it is not incompetent to grant warrants to take a blood sample from an accused person. It is equally clear, however, that such a warrant ought not to be lightly granted and it may safely be said ought only to be granted where the circumstances are special and where the granting of the warrant will not disturb the delicate balance which must be maintained between the public interest and the interest of the accused."

25.33 It should be noted that although the courts have power to grant such warrants in criminal cases, they have no analogous power in civil cases. It has been pointed out in Chapter 13 that the Court of Session has refused to ordain persons to allow samples of their blood to be taken. Even if the law were to be reformed on the lines of Part III of the Family Law Reform Act, 1969, as proposed in Chapter 13, while the court would have power in any civil proceedings in which paternity was in issue to require the taking of a blood test, no blood test could be carried out on an adult unless he consented. The court would, however, be entitled to draw such inferences as appeared proper from the failure of a person to comply with a direction to submit to a blood test; and thus the court would be provided with no more than an indirect means of obliging adults to submit to a blood test. The provisions are similar in effect to section 7(1) of the Road Traffic Act, 1972,[73] whereby the refusal of the accused to provide a specimen of blood or urine for analysis may, unless reasonable cause therefor is shown, be treated as supporting any prosecution evidence, or rebutting any defence evidence, with respect to his condition. A critic of the power of the Scottish courts to grant warrant to take blood and other samples has suggested that in England the common law should go no further/

---

[73] 1972, cap 20.

further than to provide that the trial court may draw proper inferences from the accused's refusal to undergo the relevant medical examination: when faced with the conflict between personal liberty and the administration of justice the common law should prefer a solution based on inference rather than one based on direct force.[74]

25.34 It may be useful to prescribe rules as to the procedure to be adopted when applications for warrants to take samples of blood and saliva are presented. In Glasgow, the petition, which usually craves warrant to take samples of both blood and saliva, is generally intimated to the accused's solicitor and both parties may be represented at a hearing before the sheriff, when a police officer is examined on oath by the procurator-fiscal depute and depones to the facts stated in the petition. The officer may be, but in practice is not, cross-examined; the motion of the procurator-fiscal depute to grant the crave of the petition is unopposed; and the sheriff, having considered the propriety of the warrant sought, grants the motion. The tests subsequently taken have sometimes failed to implicate the accused in the commission of the crime. It would be useful to ascertain what procedures are adopted in other courts, and with what results. In particular, it would be interesting to know at what stage the application for the warrant is made, whether any intimation of the application is made to the defence, and whether any evidence is adduced in support of the application. It is thought that the application could in appropriate circumstances be added to the normal application for a warrant to search and arrest, and that no intimation is necessary if the application is made prior to the accused's appearance on petition and committal for further examination/

---

[74] "Warrants for blood tests", [1975] Crim LR 305.

examination. It seems at least very desirable, and in the interests of justice it is probably essential, that intimation should be made thereafter. It is true that no intimation need be made at any stage of an application under section 7 of the Bankers' Books Evidence Act, 1879,[75] but the section specifically so provides; and an application for samples of the kind under consideration is likely to be of crucial importance to both parties, and there may be room for argument that the sheriff should not exercise his discretion in favour of granting the application. It does not appear to be necessary to adduce evidence in support of the application, unless the application is to be opposed.

25.35 The Thomson Committee, on the other hand, have made only one proposal as to the procedure in such applications. They recommend that if a sheriff's warrant is sought after an accused person has been arrested and the purpose is to authorise some invasion of his person or property, which cannot at that stage be carried out without warrant, then he or his solicitor should be notified except in those cases where the evidence sought could be destroyed.[76] They consider that subject always to the right of the suspect or accused person where person or property is to be invaded to take a bill of suspension, there should be no right of appeal against the sheriff's decision to grant or refuse a warrant for a specific purpose such as the taking of blood.[77] It may be admitted that, since the granting of a warrant appears to be within the discretion of the Sheriff in the circumstances of each case, the scope for appeal would probably be limited; but it seems arguable that where a serious crime has been/

[75] 42 and 43 Vict cap 11.
[76] Criminal Appeals in Scotland (Third Report) (Cmnd 7005), para 18.05, rec 85.
[77] Ibid, para 18.05.

been committed the detection or elimination of the accused as the criminal by the means sought is a matter of gravity both for the accused and for the public, and it is undesirable that the discretion of the Sheriff should be completely unfettered. In the future, the information which a blood sample could afford may come to be of even greater significance than at present. It is understood that the Home Office is considering supporting a change in the law to allow blood samples to be taken from all convicted criminals and the details stored in a computer, upon the view that the science of blood analysis has been refined to the point where it can be used for identification purposes in a similar way to fingerprint records.[78] It is submitted that the High Court should be empowered on appeal by either side to reverse the Sheriff and to settle any new principles which the Sheriffs are to apply in this novel field.[79]

(2) Investigation by defence

(a) Recovery of documents and other property

25.36 (i) Application to sheriff. When documents which the accused requires for the preparation of his defence are in the possession of the Crown or third parties and are not available to him, he is entitled to petition the High Court of Justiciary to grant a commission and diligence for their recovery.[80] In Downie v H M Advocate[81] the competency of presenting a petition to the High Court in a sheriff court case was not challenged. Whether in such a case an application can be made to the sheriff/

[78] "Plan to store blood details of criminals", The Times, 13th June 1975. See also "Building up a medical history from blood stains", The Times, 31st August 1976.

[79] In Milford, 1973 SLT 12, the sheriff by issuing an opinion and suspending execution of the warrant seemed to invite an application to the High Court in order to obtain authoritative guidance. In Wilson v Milne, 1975 SLT (Notes) 26, where a warrant to take a sample of his blood had been granted, the accused presented a bill of suspension to the High Court.

[80] R & B, para 7-18.

[81] 1952 JC 37.

sheriff does not appear to have yet been decided. It is thought that it probably can, since an application for a warrant to inspect and examine a production listed in an indictment is competent in the court where the trial is to take place,[82] and it would seem strange if all the pre-trial disclosure procedure could not take place in the same court; but it would be useful to have the matter clarified. The Thomson Committee have recommended that the High Court should have exclusive jurisdiction, upon the view that such applications will require to be made only in quite exceptional circumstances and will usually involve difficult and complex questions, appropriate for High Court decision. In any event, as the Committee point out, intimation should be made to the persons alleged to be in possession of the documents or articles requested.[83] As to whether recovery should be possible before service of the indictment, see paras 25.42-25.43.

25.37 (ii) Test of relevancy of call. In H M Advocate v Hasson,[84] an application by an accused for a commission and diligence to recover documents, Lord Cameron observed:

> "The real difficulty in dealing with such an application as the present lies not in deciding as to its competency, but as to the relevance and width of the calls which are made and as to the accused's right to recover the particular documents covered by the calls in the specification. As the Lord Justice-General pointed out in Downie, there is the obvious initial difficulty in considering such a specification that it is not - as in civil procedure - related to adjusted pleadings. Beyond the indictment and (where tendered) the terms of a special defence, there are no written pleadings. Further, in the presentation of a defence very considerable latitude is necessarily allowed to an accused person and, in practice, it is often difficult, if not

impossible/

---

[80] R & B, para 7-18.
[82] Davies, 1973 SLT (Notes) 36.
[83] Thomson, para 26.05.
[84] 1971 JC 35, at pp 38-39.

impossible, to discern ab ante the relevance of a particular document or piece of evidence. This means that the familiar tests of the legitimacy of a call for production of a document cannot be applied not, in particular, is it in consequence easy to recognise and reject a particular call as being of the character of a 'fishing' diligence.

"... the problem remains for solution of deciding which documents are or are not recoverable and the limits of such recovery. On this point the late learned editor of [Renton and Brown, 3rd ed] expresses the opinion '... that, in general, a statement by the accused's responsible adviser that the document in question is required for the conduct of the defence should be regarded by the court as sufficient.' As at present advised, I would regard this as too broad and bald a statement of the law, and I am not prepared to accept it as an adequate or sufficient test of the relevancy of a call for production of documents in the hands of third parties, especially when themselves not on the list of witnesses for the Crown or defence. In light of modern conditions I think this is an issue of very considerable difficulty and one which will at some time require authoritative definition and determination. I think something more than the mere ipse dixit of a responsible adviser is required, even if it be only an indication in general terms of the relation of the call to the charge or charges and the proposed defence to them. There are, as I have briefly indicated, very obvious difficulties in defining the limits within which such specifications may be granted. I do not think that it can be safely assumed that the well-known rules which are applicable to specifications in civil proceedings are necessarily applicable in criminal practice. Thus, for example, the rule which protects a witness against self-incrimination may place certain difficulties in the way of forcing a particular haver to produce incriminating documents, and there are other matters of substance and procedure which will require consideration."

25.38 The Thomson Committee agreed with Lord Cameron's view that there must be at least a general indication of the relationship of the call to the charge and to the proposed defence.[85] It seems difficult to desiderate anything more specific. The nearest analogue in civil procedure is an application for the inspection, etc, of documents and other property under section 1 of the Administration of Justice (Scotland) Act, 1972, before an action is raised, when there are no pleadings. There, the court/

---

[85]Thomson, para 26.04.

court has power to make an order where the documents and other property

> "appear to the court to be property as to which any question may relevantly arise ... in civil proceedings which are likely to be brought."[86]

25.39 It is not clear that the principle that no man is bound to incriminate himself would entitle a haver to withhold documentary evidence.[87] In Hasson the problem did not arise because the person named in one of the calls, although also named in the accused's special defence of incrimination, was on the Crown list of witnesses and, if called, could not have been prosecuted for the crime. It is, however, possible to envisage a case where the Crown, having seen the documents decides not to call the haver but to prosecute him.[88]

(b) Inspection and examination of productions

25.40 It is obviously important that the defence should have an adequate opportunity to inspect and examine productions before the trial. It is now clear from the decision of the High Court of Justiciary in Anderson v Laverock[89] that if the denial of such an opportunity results in material prejudice to the defence, a subsequent conviction may be quashed. The Court said (at p 14):

> "It seems almost unnecessary to propound that in the interests of justice and fair play the defence, whenever possible, should have the same opportunity as the prosecution to examine a material and possibly contentious production. The fact that such opportunity has not been afforded to the defence is not per se a ground for quashing a conviction. There may be a variety of reasons, some good some bad, why the opportunity was not provided. The production may have been lost or destroyed before the opportunity reasonably presented itself. It was said by the Advocate-Depute that, even if the opportunity was available but was not presented, the only effect of this was

possibly/

[86] See paras 25.02-25.07 above.
[87] Maclaren, Court of Session Practice, p 1079, and cases cited in nn 10-12.
[88] See commentary on Hasson in (1971) 35 JCL 191.
[89] 1976 JC 9.

possibly to affect the quality of the evidence of the prosecution witnesses who testified to the appearance of the production. In our opinion it goes further than that. It becomes a question whether prejudice was suffered. The questions then arise: 'Was there prejudice?' and 'If so, was it of such materiality as to cause such an injustice that the ensuing conviction falls to be quashed?' The materiality of the production will always be an important factor. It is impossible to lay down hard and fast rules to cover every possible case. Each case will depend on its own facts."

25.41 It seems possible to discern in Anderson v Laverock[89] the application of a general principle that where the Crown intend to dispose of property which would otherwise be primary and material evidence in a forthcoming trial, they should, as a matter of correct procedure, and so far as reasonably practicable, inform the defence that the property is to be disposed of and afford the defence an opportunity of examining it prior to disposal. In Anderson[89] the accused was charged with a contravention of section 7(1) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act, 1951, in that he had been found in possession of salmon in circumstances which afforded reasonable grounds for suspecting that he had obtained them as a result of committing an offence under section 1 or 2 of the Act. Shortly after he was charged, the fish were destroyed, without the accused having been given any opportunity to examine them. At the trial, the Crown led secondary evidence of their appearance which indicated that they had been taken by cleeks or gaffs, and not by rod and line. In quashing the conviction, the Court said (at pp 15-16):

"Provision is made in the Act for forfeiture of any fish seized, and persons seizing the fish are authorised to sell it, the net proceeds of the sale being used in lieu of the fish for forfeiture. The Act specifies the three categories of persons who may seize the fish, but does not say that such persons have to warn the persons from whom the fish has been seized of their intention to sell it, or provide him with an opportunity to inspect it before it leaves their possession for sale. That,

however/

[89] 1976 JC 9.

however, does not entitle us to ignore the canons of justice and fair play. Where it is reasonably practicable, as it was here, we are of the opinion that a person who has lawfully seized a fish and intends disposing of it one way or another should inform the person from whom it has been seized that the fish is going to be disposed of and that, before it is, he will have the opportunity of examining it or having it examined. Reasonable practicability will depend on the circumstances, which could include such considerations as the delay that would be occasioned by the request and the effect of such delay on the effective disposal of the fish. Here the appellant was provided with no such information or opportunity. The question of reasonable practicability did not therefore arise, but as the fish were going to be destroyed and not sold for consumption there was no obvious extreme urgency. The suggestion by the Advocate-Depute that the information given to the appellant that he could have his solicitor present at the police station (an offer which incidentally was not accepted) was an effective substitute is not a tenable one in the circumstances of this case.

"We are accordingly of the opinion that the sheriff applied the wrong test here, and what we conceive to be the correct procedure was not followed. That in itself, however, is not sufficient. It has to be established that the appellant suffered a material prejudice thereby before the conviction is quashed ... Since the marks or absence of significant marks on the fish were crucial to establishing the Crown case, and we are informed by the Sheriff that the Crown witnesses who made the inspection were cross-examined at length and in detail about the physical appearance of the fish, we cannot say that the deprivation of the opportunity to have them examined before disposal by or on behalf of the appellant did not result in substantial prejudice to him."

25.42 It therefore appears that if the defence is materially prejudiced by not having been given an adequate opportunity to inspect and examine before the trial property of material importance which either is a Crown production or would have been a Crown production if it had not been disposed of by the Crown, any subsequent conviction will be quashed. It seems, however, that although the absence of such an opportunity may imperil a conviction, the defence has no right to such an opportunity other than in solemn procedure after service of the indictment. In Davies[90] the High Court/

[90] 1973 SLT (Notes) 36.

Court made it clear that after the indictment is served, an application for warrant to inspect and examine a production listed in the indictment is competent in the court where the trial is to take place. However, the court reserved their opinions as to the right of the accused to inspect and examine productions before service of the indictment. Lord Justice-Clerk Wheatley, with whom Lord Milligan and Lord Leechman agreed, said (at p 37):

> "Before the indictment is served, the productions, which at this stage are only potential productions, are in the possession and control of the procurator-fiscal. He has a responsibility to safeguard such productions so that they can be lodged with the sheriff clerk at the appropriate time. In any given case it would be a matter for his discretion in the first instance whether at that earlier stage productions should be handed over to the defence for inspection and examination. Whether he could be compelled at that stage by an order of court to hand over to the defence productions for inspection and examination is another matter, and is not a point on which I would like to express an opinion until the issue is specifically raised."

25.43 The Thomson Committee did not consider that the defence should be entitled to ask for such an order, on the ground that, until the indictment is served, the defence do not know the precise nature of the charges which are to be brought against the accused in court.[91] It is thought that the absence of a right to apply for such an order might be acceptable if the Committee's recommendations as to the extension of the overall time between the indictment and the trial were to be implemented.[92] It is submitted that the policy of the law should be to provide a right which will eliminate material inconvenience to the defence prior to the trial, and not merely to provide a remedy in the event of the defence establishing material prejudice on appeal after conviction. If that is correct, it should be made possible for orders for the inspection, recovery and examination/

---

[91] Thomson, para 26.06.
[92] Thomson, paras 15.07, 25.04, and see para 24.42 above.

examination of documents and other property before the trial by the defence to be made in both solemn and summary procedure. The court could be empowered, as in civil proceedings under section 1 of the Administration of Justice (Scotland) Act, 1972,[93] to grant such orders for the inspection, recovery and examination of documents and other property

> "which appear to the court to be property as to which any question may relevantly arise in any existing [criminal] proceedings before the court or in [criminal] proceedings which are likely to be brought."

It would be necessary to consider the preservation of the present rules as to the withholding or non-disclosure of information on the grounds of public interest, as in section 1(4) of the Act of 1972.

(c) Inspection of criminal records

25.44 The Thomson Committee have considered the question whether the defence should have access to criminal records and facilities for obtaining extracts, and have concluded that they should not.[94]

(d) Right to identification parade

25.45 Rule 4 of the Scottish Home and Health Department Consolidated Police Circular relative to identification parades provides:

> "The decision to hold an identification parade should rest with the officer in charge of a case or his superior officer. This would, of course, be subject to any requirement of the Prosecutor. It appears that an accused person has no right to insist on an identification parade, but the Prosecutor should be consulted before such a request is refused."

The Working Party on Identification Procedure have observed that the rule should be reworded as follows:

> "If a suspect or an accused or his solicitor requests an identification parade, and if the police are in doubt about granting it, the request should be referred to the Procurator Fiscal for his instructions."[95]

They/

---

[93] See paras 25.02-25.07 above.

[94] Thomson, paras 27.01-27.07.

[95] Identification Procedure under Scottish Criminal Law (1978, Cmnd 7096), para 4.11.

They have recommended that the Procurator Fiscal should retain the right to refuse an unreasonable request for an identification parade in order to prevent abuse.[96] They have further recommended that where a request for a parade is refused, the accused should have the right to apply to the High Court or the sheriff court for an order requiring the prosecuting authorities to make the necessary arrangements if the Court considers the application to be reasonable.[97] They have proposed that section 310 of the 1975 Act, which makes provision for incidental applications in summary criminal procedure, might be amended to provide statutory authority for such an order, and there might be parallel provision for solemn procedure.[98]

(3) Exchange of lists of productions

25.46 (a) Solemn procedure. It is suggested that the same rule as to exchange of lists should apply to both prosecution and defence, as has been proposed in the case of lists of witnesses.[99] Under the present rules, the prosecutor may put in evidence any production not included in the list annexed to the indictment provided that he obtains leave to do so and written notice has been given to the accused not less than two clear days before the jury is sworn.[1] The accused, on the other hand, must give written notice of any productions he wishes to put in evidence, which are not on the Crown list, at least three clear days before the jury is sworn, although if he is unable to give such notice but can satisfy the Court before the jury is sworn of his inability, the Court may allow the production/

---

[96] Ibid, para 4.11, rec 6.20.

[97] Ibid, paras 4.11-4.12, rec 6.21.

[98] Ibid, para 4.12, rec 6.22.

[99] Para 24.53 above. As to the time for lodging productions, see R & B, paras 7-09-7.13. The present law and practice did not attract comment from the Thomson Committee, but would no doubt have to be considered and restated in any comprehensive enactment.

[1] Criminal Procedure (Scotland) Act, 1921, sec 1: now 1975 Act, sec 81.

production to be lodged, giving such remedy to the prosecutor - by adjournment or postponement of the trial, or otherwise - as shall seem just.[2] Here, as in the case of lists of witnesses, the discrepancies between the two sections seem difficult to justify. It seems desirable to assimilate the rules relating to lists of witnesses and productions into a single rule applicable to both sides, with provision for relaxation of the rule on cause shown and for the use by either side of the others' witnesses and productions without notice.

25.47 (b) Summary procedure. A rule relating to the exchange of lists of witnesses has already been discussed.[3] If adopted, it may be desirable to extend it to lists of productions.

(4) Bankers' books

25.48 Reference has already been made to section 7 of the Bankers' Books Evidence Act, 1879,[4] in the context of civil proceedings.[5] In England, observations on the approach to an application in criminal proceedings for an order under section 7 were made in Williams v Summerfield.[6] It was said that it was not a valid objection to an application that it was a means of requiring the accused to incriminate himself, but that the jurisdiction to make an order should be exercised with care, and among the considerations to be taken into account are whether there is other evidence in the possession of the prosecution to support the charge, or whether the application is a fishing expedition in the hope of finding some material upon which the charge can be hung. It seems likely that a similar approach would be adopted in Scotland.

(5)/

[2] Criminal Procedure (Scotland) Act, 1887, sec 36: now 1975 Act, sec 82(2).
[3] Para 24.56 above.
[4] 41 and 42 Vict cap 11.
[5] Para 25.19 above.
[6] [1972] 2 QB 513.

(5) Examination of productions by jury

25.49 The Thomson Committee have considered a proposal that the jury should have a right to require any physical or documentary productions to be made available to them during their deliberations, and have expressed the view that the present law, which gives the presiding judge a discretion to allow the jury to see productions,[7] is satisfactory.[8] It seems clear that they should not be permitted to see any item which has not been spoken to in evidence. In H M Advocate v Hayes[9] Lord Cameron told the jury that they were entitled to have with them in the jury room any of the productions in the case which had been proved, so that they could examine them and see them for themselves.

(6) View

25.50 It may not be generally known that it is competent for a judge and jury to view a locus.[10] It appears that no rules have been laid down as to a view by the court in summary procedure, other than an indication that there is no objection to an accidental and casual visit which does not influence the decision.[11] It may be desirable to formulate such rules, if only for the benefit of lay justices. Provisions as to a view by the judge in civil cases, and the function of a view, have already been discussed.[12]

---

[7] R & B, para 10-44.
[8] Thomson, paras 35.01-35.04. As to the jury's opinion of handwriting, see para 17.21 above.
[9] 1973 SLT 202, at p 205.
[10] See HMA v Nicoll (High Court, Dundee), The Scotsman, 21st November 1975, in which the judge and jury visited the locus of an alleged murder in Perth after all the evidence had been led.
[11] Sime v Linton, (1897) 24 R (J) 70.
[12] Paras 25.29-25.31 above.