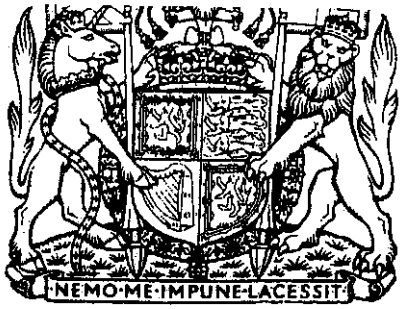

SCOTTISH LAW COMMISSION

MEMORANDUM No: 40
CONFIDENTIAL INFORMATION
14 April 1977

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 October 1977. All correspondence should be addressed to:

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SCOTTISH LAW COMMISSION

CONFIDENTIAL INFORMATION

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PART I: INTRODUCTION

1. On 13 May 1970 the Younger Committee was appointed with the following terms of reference:

> "To consider whether legislation is needed to give further protection to the individual citizen and to commercial and industrial interests against intrusions into privacy by private persons and organisations, or by companies, and to make recommendations".

Their report was published in July 1972[1]. In Chapter 21 of that report[2] the Committee recommended that the law relating to breach of confidence should be referred to the Law Commissions with a view to its clarification and statement in legislative form. They also expressed the hope that if this were done, the Law Commissions would take into account and co-ordinate their work with the recommendation that it should be a civil wrong, actionable at the suit of any person who has suffered damage thereby, to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means. The Committee envisaged that it would be necessary to provide defences to cover circumstances where the disclosure of the information was in the public interest or was made in privileged circumstances. They also envisaged that the remedies available would be similar to those appropriate to an action for breach of confidence.

2. The reason for these proposals was that the survey of the existing law which the Younger Committee had carried out led them to two conclusions: first, that the action for breach of confidence afforded, or at least was potentially capable of affording, much greater protection of privacy than was generally realised; and second, that it would not be satisfactory simply

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[1] (1972) Cmnd. 5012.

[2] The only chapter in Part III, entitled "Disclosure or other use of information". The chapter is reproduced as Appendix II to this Memorandum.

to leave this branch of the law, with its many uncertainties, to await further development and clarification by the courts.

3. The Committee also set out the broad aims which, in their view, the law of breach of confidence should have "as far as the protection of privacy is concerned". These were:

> "(a) to provide remedies against the disclosure or other use of information (not already generally known) by persons in possession of that information under an obligation of confidence;
>
> (b) to make remedies available not only against a person who was entrusted by another with information in confidence but also against a third party to whom that person disclosed the information;
>
> (c) to protect the public interest in the disclosure of certain kinds of information, and the defend[er]'s right of disclosure in certain privileged situations, by the provision of appropriate defences;
>
> (d) to afford remedies, whether by way of [interdict], damages or claims for loss of profit which do justice to the reasonable claims of [pursuers] and defend[ers] in differing situations."[1]

The Government of the day decided to accept these recommendations of the Younger Committee, and in consequence references were made both to this Commission and to the Law Commission for England and Wales. On 6 June 1973 the Secretary of State for Scotland requested us, under section 3(1)(e) of the Law Commissions Act 1965:

> "With a view to the protection of privacy -
>
> (1) to consider the law of Scotland relating to breach of confidence and to advise what statutory provisions, if any, are required to clarify or improve it;
>
> (2) to consider and advise what remedies, if any, should be provided in the law of Scotland for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained, and in what circumstances such remedies should be available."

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[1] Paragraph 631.

On 16 March 1973 the Law Commission for England and Wales were requested by the Lord Chancellor:

> "(a) to consider the law of England and Wales relating to the disclosure or use of information in breach of confidence and to advise what statutory provisions, if any, are required to clarify or improve it; and
>
> (b) to consider and advise what remedies, if any, should be provided in the law of England and Wales for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained and in what circumstances such remedies should be available."

The Law Commission published a Working Paper setting out their provisional conclusions on 15 October 1974.[1]

4. It will be seen that the reference given to us differs from that given to the Law Commission by the inclusion of the phrase "With a view to the protection of privacy". We consider that it is appropriate to interpret our remit in the light of the terms of reference of the Younger Committee itself, out of whose report our remit has emerged; and it appears clear that the word "privacy" in our terms of reference is intended to include both the expectation of privacy by a private person in relation to his personal information, relationships and communications, and also the expectation of commercial or industrial interests that their information and affairs should be protected from intrusion and disclosure. Accordingly, we have thought it right to consider both commercial and industrial information, and what might be more naturally regarded as private information relating to individuals and their families.

5. The law of Scotland, unlike the law in England and Wales, does not recognize breach of confidence as a separate category. This does not mean that our law does not afford protection for confidence, but that the protection which it does afford is to be found in a variety of sources.

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[1] Working Paper No 58: Breach of Confidence. Part VI of that Working Paper, which sets out the Law Commission's proposals for reform, is reproduced as Appendix I to this Memorandum.

6. The category which has principally been used hitherto for the protection of confidence is the law of contract. With this law there is associated a particular delict, sometimes referred to as the delict of inducing a breach of contract, and sometimes as the delict of interference with contractual relations. This category we shall call the law of contract and its associated delict. Scots law has also afforded protection to confidence by use of the more general law of delict, and it has afforded remedies for breach of confidence in a variety of other ways. We shall deal with these in turn in the following sections.

PART II: EXISTING LAW

(a) Contract and the associated delict of interference with contractual relations

(i) Where there is an express contractual obligation

7. Where a contract has been entered into between two parties which regulates the use and disclosure of information communicated by one party to the other, it will be enforced in the same way as any other contract, subject to the general rules governing the enforcement of contractual obligations, by means of the remedies which are generally available. There is a great deal of scope under that law for terms dealing with the confidentiality of information. The information may or may not be intrinsically confidential. For example, the use of information about races at a public racecourse, which is communicated under a system devised by a news agency, may be the subject of a contract between the news agency and its subscribers[1]. Not only trade secrets and plans for future developments, but also information about an individual's private life, could well be dealt with by express contract. The contract would be enforceable by the parties to it and also by a third party, if provision to that effect were made in the contract. Thus if a firm, involved in handling confidential

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[1] E.g. Exchange Telegraph Co. v. Giulianotti 1959 SC 19.

affairs for clients, included in an employee's contract of employment a provision restricting the use or disclosure of information relating to clients acquired by him in the course of his employment, Scots law would allow a client as well as the firm to enforce the contract if it contained a stipulation to this effect.

8. Where one of the parties to a contract parted with information in breach of contract, there would be a remedy against him, but not necessarily only against him. It is an actionable delict for a person deliberately and without lawful justification to procure or induce a breach of contract to the detriment of one of the parties to it. In Exchange Telegraph Co v. Giulianotti[1] a person had been a subscriber to a news agency which supplied racing information subject to a condition that the news supplied by the company was to be used only in the office or other place to which it was supplied and was not to be communicated to any other party or parties by messenger, telegraph, telephone or otherwise; after his contract with the agency had been terminated, he arranged with another subscriber to have the service relayed to his premises. It was held that interdict could be pronounced against the former subscriber.

9. The precise limits of the delict of interference with contractual relationships is a matter which is still subject to development. Scots law has adopted the same principles as English law[2]. It has been held in England that actual knowledge of the terms of a contract is not necessary in all cases to constitute the wrong, but that the necessary knowledge may be inferred from the circumstances.[3] Even if a person did not know of the actual terms of the contract, but

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[1] Supra.

[2] E.g. British Motor Trade Association v. Gray 1951 SC 586.

[3] J.T. Stratford & Son Ltd. v. Lindley 1965 AC 269, especially per Lord Reid at page 324.

had the means of knowledge which he deliberately disregarded, that would be enough[1]. Where the original information was of a kind which, it might be expected, should be disclosed only subject to conditions restricting its disclosure and use, the degree of knowledge required to constitute the wrong would be more readily inferred than where the information was of a more public character and of a kind likely to be disseminated without such restrictions.

10. The wrong of interference with contractual relationships may be committed by a person who was not a party to inducing the original breach of contract, if after he comes to know of the breach of contract he acts in a manner which takes advantage of that breach. The doctrine of interference with contractual relationships was developed in Scotland particularly in relation to the contract of master and servant and was referred to as "harbouring". In Rose Street Foundry and Engineering Co. v. Lewis & Sons[2] it was held that an employer who continued to employ a servant after he learned that the servant was at the time under contract to serve another employer and had wrongfully left that service, was liable in damages to the former employer. In British Motor Trade Association v. Gray[3] it was held that the delict of interference with contractual relationships was of general application, and was not restricted to the case of harbouring.[4] It follows that the general principles enunciated

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[1] Emerald Construction Co. Ltd. v. Lowthian [1966] 1 WLR 691 per Lord Denning M.R. at pp. 700 to 701; Daily Mirror Newspapers Ltd. v. Gardner 1968 2 QB 762, especially per Lord Denning M.R. at page 781 and Davies L.J. at page 784.

[2] 1917 SC 341.

[3] 1951 SC 586.

[4] See especially Lord President Cooper at p.599.

in the case of harbouring may be applied generally. Thus where a party received information in breach of an obligation restricting its use or disclosure, came to know of the obligation, and then made use of the information in a manner inconsistent with the obligation, he would be liable to a party to the original contract who had sustained loss.

11. The precise scope of the application of this principle to any particular case will depend on the terms of the original contract. It would be essential that the terms of the original contract were still apt to regulate the use or disclosure of the information at the time when the third party whose actings were in question had come to know that he had received the information in breach of the original contract. For example, if the term of the original contract was restricted to prohibiting disclosure of the information by the party to the original contract without any further prohibition, once the original disclosure had been made in breach of contract, it might not amount to a breach of the original contract if a third party used the information for his own purposes. On the other hand, if the original contract also provided that the information was to be used only for the purposes of the other party to the contract, use of it by a third party would itself be a breach of the prohibition.

12. The express terms of a contract can regulate in detail any questions likely to arise in relation to the disclosure or use of information. For example, it could provide that, if the information came to be disclosed to a third party, the party to the contract to whom the information had been communicated would be liable for breach of contract unless he could show (i) that the information was not disclosed by him and (ii) that he had taken reasonable care to prevent its accidental disclosure; or it might provide that the party to whom the information was communicated would take reasonable care to prevent its accidental disclosure to a third party, in which case the onus would remain on the other party to the contract to prove a lack of reasonable care before he could establish breach of contract in the event of accidental disclosure. Indeed there are a great variety of provisions regulating the manner in which the information communicated should be used or disclosed which could be dealt with in such an express contract.

(ii) Where there is an implied contractual obligation

13. The application of the law of contract to matters of confidence is, however, not restricted to cases where there is an express stipulation. In the law of Scotland a number of instances can be found in which, in the absence of express provisions, the court has implied an obligation not to disclose information or regulating the use to which information can be put. Some illustrations may be quoted from the decided cases.

14. In Liverpool Victoria Legal Friendly Society v. Houston[1] the Lord Ordinary, Lord Pearson, put the matter in this way:

> "But this leaves unaffected the principle which is at the bottom of the pursuers' case, namely, that where a servant acquires confidential information in the course of his service, the law implies a contract that the information shall not then or afterwards be ultroneously disclosed to a third party. To constitute a breach of this contract, it is not necessary that the confidential information should be published to the world, nor that the information is communicated gratuitously. It is enough that the information so acquired is supplied to a third person without any just or legitimate occasion for supplying it."

The case was reclaimed to the Inner House, who by a majority adhered to the Lord Ordinary's interlocutor, in which he awarded damages for breach of the implied contract.

15. In Roxburgh v. M'Arthur[2] one shawl manufacturer raised an action against another, alleging that the defender had prevailed upon a workman employed by the pursuer to disclose a particular shawl pattern which had been invented by the pursuer and which the workman was employed to weave. The pursuer based his action clearly on inducement of breach of contract. He set out in his pleadings that from

> "the understood agreement between the manufacturer and the artists and weavers employed by him, it was an essential and known condition of the engagement of such persons ... that they should not disclose, especially not to a rival manufacturer, the patterns which they had invented or woven"

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[1](1900) 3 F 42 at pp 47-48.

[2](1841) 3D 556.

and he further set out that

> "the defender being himself a manufacturer, [well knew] the rules and practices of the trade, and the obligations and duties of servants in regard to such patterns".

The court approved an issue and therefore must have held that the pursuer's case was sufficiently strong in law to justify inquiry into the facts.

16. A similar basis of action was used in the Jury Court case of Kerr v. Duke of Roxburgh[1]. Here the pursuer averred that the Duke had bribed a clerk formerly in the employment of the pursuer's law agents to disclose to him information which had been acquired while in their employment and which cast doubt on the pursuer's pedigree. The Duke, on the basis of this information, had raised an action of reduction of a service of the pursuer as heir male. That action had been unsuccessful. The pursuer then raised an action against the Duke claiming (i) such expenses which he had incurred in defending the previous action as had not been awarded to him by the court, and (ii) solatium. The jury awarded him £3,000. The ground of action appears to have been that the Duke had by bribery induced the clerk to breach a term of his contract by virtue of which he was bound not to disclose information about his employers' clients acquired by him while in their employment, and that this was a contract which a client was entitled to enforce.[2]

17. In Rutherfoord v. Boak[3] an issue was refused to the pursuer, but on the ground that he had not disclosed in his pleadings the precise nature of the information which the defender was alleged to have extracted from the pursuer's servant. This ground of judgment supports the general principle, since if as a matter of general law no such term was

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[1](1822) 3 Mur 126.

[2]See particularly the issue set out at pp. 126-7 and the Charge to the Jury (p.140).

[3]1836 14S 732.

to be implied in the servant's contract, the issue would have been refused on a broader ground. However, this case may point to the need for special procedural rules to prevent a pursuer incurring further loss by having to make further disclosures of the same information on record.

18. The existence of an implied obligation on a person not to use confidential information obtained by him from his employer except for the employer's purposes appears to be recognised by Lord Kyllachy in British Workman's and General Assurance Co. Ltd v. Wilkinson[1], although the case put forward by the employers there did not permit them to have that obligation enforced.

(iii) Where there is an obligation similar to contract

19. We now turn to consider some cases in which the existence of a contractual obligation, express or implied, is more doubtful. In Brown's Trustees v. Hay[2] an accountant was employed by a firm of law agents to wind up its affairs. While so engaged he obtained possession of certain documents belonging to a client of the firm, which he communicated to the Inland Revenue. In an action at the instance of the client against the accountant it was held that the client was entitled to interdict and to damages. At page 1117 Lord M'Laren, in giving his opinion in which the Lord President, Lord Adam, and Lord Kinnear concurred, said:

> "I am of opinion that the defender was not within his rights in making the communication complained of. It is true that there was no relation of contract between the defender and the pursuers, and therefore it cannot be said that the defender in making this communication committed a breach of professional confidence. The papers of the distillery, however, came into his possession in connection with the audit of his employer's books, and for the purposes of that audit only, and the law is not so powerless as to be unable to give protection to the owners of private papers against their unauthorised publication by anyone who may happen to have access to them. Two points are clear; first, that the ownership

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[1](1900) 8 SLT 67.

[2](1898) 25 R 1112.

> of manuscript papers, which have either a literary or a commercial value, gives their author, or the person for whose benefit they were compiled, a right of property in their contents so long as the owner chooses to keep their contents private; and secondly, that the person to whom the papers are entrusted for a special purpose has only a qualified possession for that purpose, so that any ultroneous use of the papers by him is an infringement of the proprietary rights of their owner".

In a later passage dealing with the second point, Lord M'Laren said:

> "it appears to me that Messrs Cameron & Allan" (these were the law agents) "having only a qualified right to the use of their client's business papers, could give no higher right to these papers than they themselves possessed, and that they did not in fact profess to give any right to them except the right of making such use of them as might be necessary for the purposes of the audit. Accordingly I cannot doubt that on a properly supported statement to the effect that Mr. Hay was going to communicate the contents of these papers to outside persons, interdict would have been granted against the publication of their contents, and this on the ground of reasonable and necessary protection of private property".

20. It will be seen that the idea of property in the papers forms the basis of this judgment but, while this is so, the crucial question related to the terms upon which the owners of the papers had handed them over to the defender's employers: it was implied that they were handed over to be used only to the extent necessary for the purposes of the audit. Although, therefore, the idea of private property in the papers is prominent in the judgment, it can be said that there were implied obligations on the law agents to use the papers and the information contained in them only for the purposes of their client, and to hand them over to the defender only for the purposes of the audit. Moreover, this was known to the defender when he obtained the papers. Viewed in this light the decision is consistent with the principles of law which we have already discussed.[1]

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[1] Paras. 13-18 supra.

21. The decision of the House of Lords in Caird v. Sime[1] is also based upon the ownership of property in private or unpublished works, but the main point for decision was the effect of the communication of previously unpublished work. The question was whether the pursuer, a professor in a Scottish University, authorized those who attended his lectures to publish what they heard without restriction, or whether he accepted their presence at his lectures subject to a condition that they were entitled to use what they heard there solely for their own instruction and were precluded from publishing it further.[2] Although there was otherwise no contractual relationship between the professor and the students, it appears from the speeches that the majority of the House held that the delivery of the lectures, as part of his ordinary course, was not equivalent to publication, and accordingly those who heard were under an obligation not to publish. Lord Watson[3] gives the ground of judgment in the earlier and somewhat similar English case of Abernethy v. Hutchinson[4] as being that all persons who attended these lectures were under an implied contract not to publish what they heard, although they might take it down for their own instruction and use. In the case before him, he agreed that there might be no contract between the professor and his students, and therefore no implied contract that they should not publish, but nevertheless the relationship between the professor and his students had as its consequence that the students should not publish. Therefore a condition not to publish was implied from the relationship when that relationship itself was established by contract or in some other way.

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[1](1887) 14 R. (H.L.) 37.

[2]See Lord Halsbury L.C. at p. 39.

[3]At p. 44.

[4]1825 3 L.J. (Ch) 209.

22. It is interesting to note that in the case of Abernethy v. Hutchinson Lord Eldon had granted an injunction against publication of a professor's lectures against a party who was not a student but who could give no satisfactory explanation of how he came to be in possession of the material of the lectures. The way in which this judgment was treated by the majority in Caird v. Sime shows that they accepted Lord Eldon's view as correct and authoritative. This strongly reinforces the view which we have expressed above that a person who makes use of information which was communicated originally in circumstances in which the law would infer an obligation against disclosure, is readily assumed to have been aware of that fact, and will be prevented by interdict from using or disclosing the material in breach of that implied term.

23. In Neuman v. Kennedy[1] the pursuers alleged that there was a duty of silence and non-disclosure which arose (i) out of an implied condition in a contract to print material, and (ii) out of the confidential relations of the parties, apart from contract. They claimed damages for breach of this duty. The pursuers were tailors who devised a form of word competition for the purpose of bringing their business more prominently before the public. The defenders to whom the scheme was given for printing showed it to a trade rival of the pursuers. At the stage of allowing a proof, which he did with some reluctance, the Lord Ordinary did not clearly select either of the grounds averred as being particularly appropriate but referred to Brown's Trustees v. Hay[2] as rather a special case arising apart from contract. From this we infer that, in the opinion of the judge, an obligation of silence or non-disclosure would, at least ordinarily, arise from contract.

24. The existence of an implied condition preventing publication is also recognised in connection with private correspondence. This is illustrated by the decision in

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[1](1905) 12 S.L.T. 763.

[2]Supra.

Cadell and Davies v. Stewart[1]. Upon this matter Professor Bell[2] states, in a passage adopted by Lord Craighill in White v. Dickson[3]

> "In Scotland, the Court of Session is held to have jurisdiction, by interdict, to protect not property merely, but reputation, and even private feelings, from outrage and invasion. In one respect the publication of private letters may outrage both; and the question has been, whether, where letters have been written and sent to a correspondent, the author, by sending them to his friend, authorizes him to disseminate them, or to publish them for gain? Now the purpose of the communication is quite different. It rather implies a veto on publication. Compositions for the public and for the eye of a friend are in a different spirit. It is one of the great charms of epistolary correspondence, that one writes not under the awe of a misjudging world; but throws out unscrupulously his genuine and undisguised sentiments, utters his most secret thoughts, and, with as little reserve as in the secrecy of his own chamber, expresses his feelings of affection, or his murmurs of disapprobation and of censure, in full reliance that they are confided to a friendly ear. By the publication of such effusions, confidential, careless, unthinking of consequences, a man may be wounded in the tenderest part; his literary reputation hurt; his character traduced. It is, accordingly, the understood or implied condition of the communication, the implied limitation of the right conferred, that such communications are not to be published. With these natural feelings on the breach of epistolary confidence, the determinations of the Court of Session have accorded."

Although the decision in White v. Dickson was that interdict should be refused, this was upon the ground that no harm was likely to result from publication of the letters, although the Court expressly pointed out that if injury was caused by the publication, the fact that interdict had been refused would not save the defender from the consequences of his act.

25. Further illustrations of the application of this principle are to be found in the employment of medical advisers to consider whether a woman was pregnant as a result of

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[1] 1804 Mor. Appx., Literary Property No. 4.

[2] Commentaries i, 111 to 112 (7th Edition)

[3] (1881) 8 R. 896.

premarital intercourse. In A.B. v. C.D.[1] it was held that although there was no express condition of secrecy imposed upon the medical practitioners when their services were engaged, such a condition was implied, and the communication of the results of their examination to the parish minister was in breach of this obligation. The decision in Watson v. M'Ewan[2] is not inconsistent with this decision, but is a recognition that in the interests of that aspect of public policy which is concerned with the administration of justice, what is otherwise confidential may be disclosed by a person who is called as a witness.

26. On the other hand, there are illustrations in the decided cases of circumstances in which the court held that no obligation of confidentiality or restriction on use or disclosure of information was implied. Thus in Craig v. Collie[3] the court held that the relationship between a member of a dissenting Church and the Synod thereof was not such as to entitle him to an interdict restraining publication of a report of proceedings in a charge against him before the Synod. The relationship between the parties and the purpose of the Synod's proceedings was such that the procedures could not be kept entirely secret, and no contract to that effect could be implied from their relationship.

27. Similarly, in Mushets v. Mackenzie[4] it was held that in view of the whole circumstances of the case a contract of confidentiality could not justifiably be implied. The pursuers, who had provided a reference for a servant at the defenders' request, then disclosed that the servant had left their service in breach of contract, expressing the opinion that it would be unfair for the defenders to continue to employ him in these

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[1](1851) 14 D 177.

[2](1905) 7 F (H.L.) 109.

[3](1828) 6 S 1147.

[4](1899) 1 F 756.

circumstances. The defenders dismissed the workman, and in justification of their action showed him the pursuers' reference. The workman brought an action (ultimately unsuccessful) against the pursuers, who in turn brought an action against the defenders based upon their disclosure of the reference to the servant. It was held by the Second Division[1] that in all the circumstances the defenders owed no obligation of confidence to the pursuers: the pursuers in this reference had more or less requested the servant's dismissal; in doing so the defenders would have to give reasons to the servant; and disclosure of the pursuers' statement was thus a normal, natural and necessary consequence of the provision of the reference.

(iv) Summary

28. To summarize the position so far:

(a) Obligations not to disclose information or not to use information except for the purposes of, and in the interests of, the person who communicated the information or to whom it relates, are matters which may be covered by express contract; if so, the contract will be enforced both against the original parties to it and those who induce a breach of it or who, not being parties to the original breach, use the information in a manner inconsistent with the terms of the original contract after they have come to know of these terms.[2]

(b) Where parties are in a contractual relationship, although there is no express term relating to the use or non-disclosure of information communicated by one to the other, the circumstances may be such as to imply a term; where a term is to be implied, it will be enforced in the same way as an express term.[3]

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[1] See especially per Lord Moncreiff at p. 763.

[2] Paras. 7-12.

[3] Paras. 13-18.

(c) Where parties are in a relationship which does not of itself arise from contract, the relationship may be such that a condition is to be implied that any information communicated by one party to the other is to be subject to restriction on its use or disclosure; if so, that obligation will be enforced on the same basis as if there was an agreement between the parties to the relationship that that condition should be observed.[1] It is perhaps a matter of some controversy as to what is the precise juristic ground which may give rise to an obligation in these circumstances.

(v) Defences

29. All the usual defences, such as personal bar, may be available, according to circumstances, where the obligation restricts the use or disclosure of information. We propose to restrict our comment on defences to those matters of particular interest in the context.

No title or interest to sue

30. In order that a pursuer should have a right to proceed with an action, he must have a title to sue the action, that is to say, he must be party to a legal relationship which entitles him to seek a remedy. He must also have such legitimate interest as the law will recognise in a decree being pronounced in his favour. This latter requirement is important if the information is public knowledge at the time when the action is raised.

31. Where information has been communicated subject to an agreement restricting its disclosure or use, the information may well become available to the general public, perhaps in a readily available form. If so, it would seem likely that the pursuer could have no interest to sue for enforcement of the conditions preventing use or disclosure of the information, since the defender could obtain the information from elsewhere and proceed to use it. On the other hand, where the information is available to the public only after a great deal of trouble

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[1] Paras. 19-27.

and research, the defender would have an advantage if he used it for his own purposes. This advantage, sometimes referred to as "the springboard doctrine", was described by Roxburgh J. in Terrapin Ltd. v. Builders' Supply Company (Hayes) Ltd:[1]

> "As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public .... it is, in my view, inherent in the principle upon which the Saltman case[2] rests that the possessor of such information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start."[3]

32. In Earl of Crawford v. Paton[4] a professional searcher of records was employed to make searches in public records of entries relating to persons of a certain name. He did this, and made notes of which he supplied a transcript to his employer. He was paid according to the amount of work he did. The work lasted for several years, and after it was completed the employer brought an action against the searcher concluding for delivery of the original notes, on the ground that he had paid for them, and that they were his property. Alternatively, and on the assumption that the notes were the property of the defender, he craved interdict against the defender communicating the notes to any person without his consent. He averred that the employment was confidential; and it was proved that on one occasion the defender had used the notes to facilitate researches which he was making for another client. The court held that, in the absence of express stipulation to the contrary, the notes remained the property of the searcher, and there was no evidence of any such actual or apprehended invasion of a legal right as to

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[1] 1960 R.P.C. 128, 130 footnote.

[2] Saltman Engineering Co Ltd v. Campbell Engineering Co Ltd (1948) 65 R.P.C. 203.

[3] See also Cranleigh Precision Engineering Limited v. Briant 1966 R.P.C. 81, and Levin v. Farmers Supply Association of Scotland 1973 S.L.T. (Notes) 43.

[4] 1911 S.C. 1017.

justify an interdict. Lord Salvesen gave as an express reason for his judgment that he did not see that the pursuer had a legitimate interest in preventing the proposed use of the notes, although there were cases where the defender might be restrained from using the notes in such a manner as to prejudice his employer.[1]

33. It accordingly appears that, where information had become easily available to the general public at the time of the action, a pursuer might not be regarded as having a legitimate interest to sue unless the original confidential communication gave the defender some advantage over the general public to the prejudice of the pursuer. This would be so even if there were an express obligation. The general rule in contract is that the original parties to the contract are presumed to have an interest to enforce it, and accordingly the onus would be on the defender: unless he could show that the circumstances had changed (for example, by publication of the information) in such a way that the pursuer no longer had a legitimate interest in enforcing the contract, the plea of no interest would fail.

Public policy

34. The defence that the enforcement of a particular contract is contrary to public policy would apply to contracts relating to the use or disclosure of information, especially if they were in restraint of trade. In this case the ordinary principle would apply, that the person seeking to enforce the contract would require to show that the restraint was reasonably necessary for the protection of some legitimate interest of his, and in particular was not merely effective to prevent competition. The borderline between those contracts which are to be enforced and those which are illegal is difficult to draw. In the sphere of information it has been particularly considered in relation to contracts between master and servant. An employer is entitled to protect his trade secrets and his trade connections, but he may not prevent his former servant from

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[1] At p. 1028.

making use of general skill or knowledge acquired by him during the period of service.[1]

35. A further important aspect of public policy is the need for disclosure to the courts. A party may have a right to object to a witness being called, or to documents being recovered, on the ground of confidentiality. Even where there is a contractual obligation, the party receiving information may in certain circumstances be ordained to disclose it to a court of law, and will not be liable if he does so. This is because such disclosure is in the public interest.[2] On the other hand, communications may be protected from disclosure in a court if they were made in connection with the preparation of litigation. This is because it is in the interests of public policy that parties should be able to take proper advice and make proper preparations for litigation.[3]

36. A further aspect of public policy which has not figured to any great extent in Scottish cases is whether disclosure is justified because the information relates to a state of affairs which the public interest requires should not be allowed to continue - see also paragraph 89 infra. The matter is touched upon in the opinion of Lord MacLaren in Brown's Trustees v. Hay[4], where he said:

> "What the defender did was to disclose the contents of the papers that were in his possession by

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[1] E.g. Morris v. Saxelby 1916 A.C. 688, especially per Lord Parker of Waddington at p. 710; Fitch v. Dewes 1920 2 Ch. 159, especially per Younger L.J. at p.185, affirmed 1921 2 AC 158; and Scottish Dairy Farmers' Dairy Co. (Glasgow) Ltd v. M'Ghee 1933 S.C. 148.

[2] Bower v. Russel May 26th 1810 F.C., per Lord President Blair; Leslie v. Grant 1805 5 Brown Supplement 874.

[3] Dickson on Evidence Vol 2 para. 1658; Walker & Walker on Evidence pp 413 et seq.

[4] (1898) 25 R 1112 at p.1118.

> furnishing a comparative statement of the actual returns of profits and what he put forward as the true state of the profit and loss accounts of the distillery. This act was defended as being done in the discharge of a public duty, but I have never heard or read that the duty of assisting the Treasury in the collection of the public revenue was of such a paramount nature that it must be carried out by private individuals at the cost of the betrayal of confidence and the invasion of the proprietary rights of other people."

37. In Weld-Blundell v. Stephens[1] it was sought to invoke the defence to excuse the disclosure of confidential information which was of a defamatory character. In this case a client sued his accountant for breach of an implied duty to keep secret a letter of instruction which contained a libel and which, following the careless conduct of the accountant's partner, subsequently came into the hands of the subject of the libel. In the Court of Appeal Warrington L.J. declined to accept the existence of a wide principle at common law under which a confidential agent would be justified in disclosing a confidential document because it was libellous or contained evidence of a private wrong:

> "Such a principle, if it existed, would be of very widespread application. A man discloses to his confidential agent that he has committed a trespass to land or goods, and the agent might with impunity communicate this to the persons concerned with disastrous results to his employer. Indeed I can see no distinction in this respect between cases of contract and cases of tort. Unless there be such a distinction, the disclosure by the agent of evidence of a breach of contract on his employer's part would be no breach of his duty to his employer. On the whole I can see no reason founded on public policy or any other ground why an agent should be at liberty to disclose evidence of a private wrong committed by his principal.[2]

In the House of Lords Viscount Finlay said of this portion of the judgment that it was obviously right, adding:[3]

> "Indeed, any decision to the contrary would involve consequences at once extravagant and unreasonable. It

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[1] 1919 1 K.B. 520; 1920 A.C. 956.

[2] At p. 535.

[3] At pp. 965-6.

> would be startling if it were the law that an agent who is negligent in the custody of a letter handed to him in confidence by his principal might plead in defence that the letter was libellous. There may, of course, be cases in which some higher duty is involved. Danger to the State or public duty may supersede the duty of the agent to his principal. But nothing of that nature arises in this case."[1]

(vi) Remedies

38. The remedies which have been afforded for breach of contract relating to use or disclosure of information are the remedies of interdict and damages. These remedies are afforded in accordance with the ordinary principles upon which they are available in support of contractual obligations in general.

39. The question may be raised whether, in an action for breach of contract, solatium for injured feelings is appropriate. It is clear that in an action for breach of promise of marriage damages will include injury to the feelings of the party whose contract has been broken;[2] but it has been said that in other actions injury to the feelings of the party whose contract has been broken, arising either from the fact or the manner of the breach, is not an element to be taken into account in estimating damages.[3]

40. These views are supported by reference to Addis v. Gramophone Co Ltd[4], particularly in the speech of Lord Shaw of Dunfermline.[5] That line of authority certainly supports the proposition that aggravations of a breach of contract by

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[1] The defence of public policy has been developed somewhat further in England since that decision: see Initial Services Ltd. v. Putterill [1968] 1 Q.B. 396; Fraser v. Evans [1969] 1 Q.B. 349; Hubbard v. Vosper [1972] 2 Q.B. 84; especially per Lord Denning M.R. at pp. 405, 362 and 95 respectively; and the discussion thereon in the Law Commission Working Paper at pp 29-31.

[2] Hogg v. Gow 27th May 1812 F.C.; Bell's Principles, 10th ed. s. 1508. It may be, however, that the award in actions for breach of promise of marriage was by way of reparation in delict.

[3] E.g. Gloag on Contract 2nd ed. p. 686; Walker on Damages p.123.

[4] 1909 A.C. 488. For recent developments see also Cox v. Philips Industries [1976] 3 All ER 161, and authorities cited therein.

[5] At p. 503.

reference to the manner in which it was performed are not actionable as breaches of contract, although if they are actionable wrongs in themselves they may be sued upon. The authorities do not appear directly to support the proposition that, where the breach of contract by its nature causes injury to feelings, the injury cannot be compensated for by way of damages.[1] Whether the general expression of view to which we have referred is soundly based or not, we consider that there is adequate authority for the view that injury done to feelings by disclosure of information forms a proper head of damages.[2]

(b) Delict

(i) Is there a separate category of delict?

41. In a recent decision, Levin v. Caledonian Produce (Holdings) Ltd.,[3] Lord Robertson made the following observations:

> "It is well settled in law that a relationship of trust or confidence may exist independently of contract, such as to entitle one party to restrain the other from disclosing, using or publishing something communicated under the cover of confidence ..., and in certain circumstances to claim damages."

He then referred to certain Scottish authorities which we have already considered, stated that the most recent cases on this branch of law were English, and referred to a number of English authorities on breach of confidence. He continued:

> "This branch of law is based on delict, or reparation, and the remedy is an equitable one. From these authorities it appears that in order to state a relevant action based upon breach of confidence, a pursuer must aver and prove three matters, videlicet: (1) There must be an agreement to treat the material as confidential, and a relationship giving rise to the duty; (2) the material is of such a character as to give rise to the duty to treat it as confidential; and (3) either the recipient must disclose the material to a third party or to the world at large, or the recipient must use the material for a purpose other than that for which it was confided to the recipient, to the detriment of the latter."

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[1] Diesen v. Samson 1971 S.L.T. (Sh. Ct.) 49; cf. Walker, Civil Remedies, p. 1013.

[2] See, e.g., A.B. v. C.D. (1851) 14 D 177.

[3] 1975 S.L.T. (Notes) 69.

42. In this judgment Lord Robertson treated the law of breach of confidence as part of, or as a particular part of, the law of delict. This treatment is emphasised by the fact that he rejected the pursuer's case based on alleged breach of contract. However, the first requirement which he stipulates is an agreement to treat the matter as confidential. If there is such an agreement, then it is reasonably plain that an action for breach of contract will lie, provided that injury or damage has been sustained. Where information is of a commercial character, as in Levin, it will generally be easy to establish that loss has occurred.

43. While this Outer House decision gives ground for supposing that a separate category of delict for breach of confidence might be treated as existing in Scotland, it is so far as we are aware the only Scottish case which does so expressly. We doubt therefore whether it would meanwhile of itself provide a secure foundation for subsequent development.

(ii) Defamation and convicium

44. Although authority is scarce, it seems clear that in appropriate circumstances a person aggrieved by a breach of confidence or by the disclosure of information unlawfully obtained would have a remedy under the law of defamation or convicium. Remedies under these headings have the advantage of being available not only against the person who is in breach of a confidence reposed in him or who has unlawfully obtained the information, but also against any third party who publishes or further disseminates the statement complained of. The main disadvantages of defamation for the aggrieved party are, first, that the statement complained of must be technically defamatory (and many disclosures, though embarrassing to the subject, would not be); second, that it is a complete defence for the defender to prove that the statement is true (and since the original source of the information will in most cases ex hypothesi be the pursuer himself, it is to be supposed that it will usually be true); third, that it is a defence that the statement was made on a privileged occasion (a complete defence in the case of absolute privilege, although it can be defeated by proof of

malice in the case of qualified privilege); and fourth, that the defence of fair comment on a matter of public interest could operate. As regards convicium,[1] the truth of the statement complained of is probably no defence, nor is the fact that it is not technically defamatory. But for the pursuer to succeed he must show that the statement was calculated to bring him into public hatred, ridicule and contempt, and was made by the defender with that intention.[2] Consequently, convicium too seems of only limited use as a remedy.

45. An example of resort by a court to the law of defamation in this context is to be found in Watson v. McEwan[3]. The pursuer employed the defender as her doctor. He subsequently gave a precognition to the solicitors acting for her husband, and gave evidence for the husband concerning matters allegedly learned by or disclosed to him while employed as her medical adviser. The pursuer seems quite clearly in her pleadings to have based her action upon breach of a contractual obligation of confidentiality arising out of the defender's employment as her doctor.[4] Nevertheless both the Second Division and the House of Lords treated the case solely from the standpoint of the law of defamation, the ultimate decision being in favour of the defender on the ground that a witness is privileged not only in respect of what he says in the witness box, but also in respect of statements made by him on precognition with a view to his giving evidence. Had the disclosure been made by the defender in circumstances which were not privileged, however, it seems clear that liability under the law of defamation would have been countenanced by the House.

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[1]See Walker on Delict, vol. II pp. 742-46.

[2]Sheriff v. Wilson (1855) 17 D. 528; Cunningham v. Phillips (1868) 6 M. 926; Macfarlane v. Black (1887) 14 R. 870; Paterson v. Welch (1893) 20 R. 744.

[3](1905) 7 F. (H.L.) 109; reported in Court of Session sub nom. AB v. CD (1904) 7 F. 72.

[4]See article 12 of the pursuer's Condescendence in (1904) 7 F. 72 at 75.

46. Although of only limited utility in this context, the law of defamation may sometimes be used to provide a remedy in cases of unlawfully obtained information. Certain methods of acquiring information may be recognized by the law as being defamatory; and the use to which information lawfully or unlawfully obtained is put may equally be defamatory. In Robertson v. Keith[1], the pursuer was believed by a chief constable to have information concerning, or in some way connected with, the unexplained absence from duty of one of his inspectors, a close friend of hers. Consequently the chief constable had a police watch placed on her house for a period of several days. She raised an action for solatium and damages for patrimonial loss against the chief constable on the ground inter alia that the surveillance which he had ordered to be maintained over her, and for which he was responsible, amounted in law to defamation. The Lord Ordinary (Moncrieff) found in favour of the defender on the ground that, since the defender was a chief constable acting in the course of what he conceived to be his duty, the pursuer would have to aver and prove express malice on his part, which she had not done. His Lordship[2] went on to say:

> "I may say that, if I had taken a different view of the question of liability, I should have found indisputable proof of a resulting injury to the pursuer. Her reputation was assailed by rumours of criminal action on her part which obtained wide currency. For this injury to her reputation I should have considered that she was entitled to a very substantial award under her claim for solatium".

In the Inner House the ground of action in defamation appears to have been abandoned by the pursuer[3], and the case was decided on other grounds. However, it is submitted that it may be reasonably inferred from this case that certain methods of acquisition or collection of information may give rise to liability in defamation on the part of the person using them or instructing their use - for example, if a defender ordered

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[1] 1936 S.C. 29.

[2] At p. 36.

[3] See per Lord Murray at pp. 59-60.

a watch to be kept on the pursuer or his house by a team of private investigators, whose presence was obvious to all and who were likely to be mistaken for police officers.

47. Defamation was also one of the grounds of decision in Adamson v. Martin[1]. The pursuer, a boy of sixteen, had just been released without bail on a very minor theft charge (of which he was subsequently acquitted). Upon leaving the court he was approached by a police sergeant and, overawed by the latter's appearance of authority, accompanied him to a room, where photographs and fingerprint impressions were taken. These photographs and fingerprint impressions were later placed in a police album of notorious criminals. The pursuer raised an action against the chief constable concluding, inter alia, for destruction of these items. His action was successful. In the Second Division one ground of decision, and one particularly clearly and forcefully expressed by Lord Salvesen, was the defamatory nature of the use to which the photographs and fingerprint impressions had been put:

> "It is true that the album is not open for inspection by the public, but it may be inspected from time to time by members of the police force in the course of their duty, and I cannot conceive any form of publication of a defamatory statement which would be more injurious to the person defamed ..... I do not think that any law-abiding citizen is bound to submit to being represented to successive members of the police force as being a person who is fittingly associated with notorious criminals in an album in which their features are preserved for identification".[2]

It would seem permissible to infer from this that whether information has been legitimately or unlawfully obtained, its use may constitute defamation. It is not, however, thought that such circumstances are likely to occur frequently.

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[1] 1916 S.C. 319.

[2] Per Lord Salvesen at pp 329-30.

(iii) The actio injuriarum

48. The remedy of perhaps the greatest potential utility is the actio injuriarum. Now that this nomen juris has been rescued from the misuse to which it had been subjected for over a century,[1] it may be that the Scottish courts will be able to make more use of the principle which it embodies than they have done in the recent past. This is not the least important of the areas which would benefit from a revitalized and more freely used remedy for feelings hurt by deliberately inflicted insult or affront. The normal, natural and probable consequences of obtaining and disseminating information may frequently involve insult or affront to the person affected thereby.

49. It is true that in Murray v. Beaverbrook Newspapers Ltd[2] Lord Justice-Clerk Thomson said:

> "The basis of this argument is that an unwarranted invasion of privacy by a newspaper is actionable. This Court is a court of law. It is not a court of manners, taste or journalistic propriety and so far as newspaper articles are concerned its function is to administer the law of defamation. Defamation consists in the making of a false statement derogatory of the character or reputation of the person spoken of. If such a statement is made, then unless the statement is privileged the pursuer has his remedy. But I know of no authority to the effect that mere invasion of privacy however hurtful and whatever its purpose and however repugnant to good taste is itself actionable."

It may be said, however, that in this case the argument for the pursuer had concentrated almost exclusively on the law of defamation rather than upon the actio injuriarum, and that the pursuer, having deliberately entered the arena of

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[1] See McKendrick v. Sinclair 1972 S.L.T. 110, especially per Lord Kilbrandon at p. 120; T.B. Smith, "Designation of Delictual Actions" 1972 S.L.T. (News) 125.

[2] Second Division, 18 June 1957, unreported: a case arising out of the publication of a newspaper article about a sheriff substitute who had written a letter to a newspaper advocating heavier fines for some motoring offences, and who had himself a year earlier been convicted of careless driving.

controversy by writing to the press, could scarcely demand immunity from comment. In the passage cited above from Bell's Commentaries,[1] the jurisdiction of the Court of Session to protect by interdict reputation and private feelings from outrage and injury is strongly asserted.

50. In modern Roman-Dutch law it is clear that the actio injuriarum, quite apart from the law of defamation, can provide a remedy for publications which constitute an "aggression upon the dignity" of a pursuer[2]. In Scots law there are indications that certain types of publication and certain methods of acquisition of information may give rise to delictual liability otherwise than under the law of defamation.

51. In Adamson v. Martin[3] Lord Salvesen appears to have found in the pursuer's favour on the question of ordering the destruction of the photographs and fingerprint impressions, not only because of the defamation involved in their appearance in the police album, but also because the manner in which they were obtained by the police caused insult or affront to the pursuer. Not merely in the circumstances of the case before him, but generally, he seemed to suggest that deliberately to take a photograph of an unwilling subject was an act which could give rise to such liability:

> "[The defender rests] his defence on the alleged common law right of the police to photograph any person who, they have reason to suppose, may contravene the law of the country in future. Indeed, I understood Mr Sandeman to maintain a common law right in every citizen to photograph anyone without his consent and to use such a photograph for any purpose that he pleased ... I do not feel it necessary for the purposes of this case to consider the general proposition how far members of the public can complain of being photographed, when the photographer is able to take an instantaneous photograph from a place where he is legitimately holding his instrument, although, as at present advised, I am of opinion that there is no such absolute right".[4]

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[1] i, 111-12 (7th ed); see para. 24 supra.

[2] See paras. 52-54 infra.

[3] 1916 S.C. 319: see para. 47 supra.

[4] At p. 328.

If this is good law it would seem to be open to a Scottish court to hold today that to take, or at any event to publish or use, a photograph of a person who has clearly demonstrated his lack of consent and his opposition thereto, is an insult or affront to dignity actionable under the actio injuriarum at the instance of the aggrieved party.

52. In Roman-Dutch law it has been held to amount to an injuria to publish a person's photograph in an advertisement, and to refer to him in the accompanying caption, without his consent. In O'Keeffe v. Argus Printing and Publishing Co.[1] the plaintiff, a radio announcer, complained that a photograph which she had allowed to be taken to illustrate a feature article was in fact used in an advertisement for firearms. It was held that this could entitle her to damages under the actio injuriarum for an aggression upon her dignity. Watermeyer A.J. (with whom de Villiers J.P. concurred) said[2]

> "Now the action which the plaintiff brings is the actio injuriarum. That is the action for damages open to a plaintiff who can show that the defendant has committed an intentional wrongful act which constitutes an aggression upon his person, dignity or reputation .... The case made out in the [plaintiff's] declaration is that there has been a violation of her dignity."

His Lordship then referred with approval to the following passage from Melius de Villiers, The Roman and Roman-Dutch Law of Injuries[3]:

> "The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of injuries are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation. By a person's reputation is here meant that character for moral or social worth to which he is entitled amongst his fellow-men; by dignity that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt".

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[1] 1954 (3) S.A. 244.

[2] At p.247.

[3] (1899) pp. 24-25.

Watermeyer J.A. then continued:[1]

> "I return now to the question of whether, in the light of modern conditions, the plaintiff can reasonably be held to have been subjected to offensive, degrading or humiliating treatment. In my opinion she can ... The unauthorised publication of a person's photograph and name for advertising purposes is.. capable of constituting an aggression upon that person's dignitas".

It was stressed in this case that it was for the court to determine, "in the light of modern conditions"[2], whether the treatment accorded to the plaintiff was so offensive, degrading or humiliating as to entitle her to a remedy. It was for the court to say whether, in the society in which the parties lived, what the defendant had done was or was not tolerable.

53. This factor was even more strongly emphasised in a more recent case in which, both at first instance and on appeal, the court approved the following passage from de Villiers:[3]

> "Whether an act is to be placed amongst those that involve an insult, indignity, humiliation or vexation depends to a great extent upon the modes of thought prevalent amongst any particular community or at any period of time, or upon those of different classes or grades of society, and the question must to a great extent therefore be left to the discretion of the Court where an action on account of the alleged injury is brought."

In Rhodesian Printing & Publishing Co. v. Duggan[4] it was held that the actio injuriarum could be resorted to, and an interdict granted, where a newspaper gave notice of its intention to publish an item to the effect that a private detective had discovered the whereabouts of an American couple who had, more than a year earlier and contrary to an American court order, removed from the custody of their respective divorced spouses the children of their earlier marriages and brought them secretly to Rhodesia. The newspaper intended to disclose the names and the the address of the American couple and their children. It was

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[1] At p.249. [2] At p. 248.

[3] Op. cit. at p.83.

[4] 1975 (1) S.A. 590 (affirming 1974 (4) S.A. 508).

held that, in all the circumstances, to do so would constitute an actionable *injuria* against the children (but not, it may be noted, against the adult plaintiffs). Davies J at first instance, in an opinion later expressly concurred in on appeal, said[1]:

> "A party who acts contrary to a Court order and surreptitiously disappears from his home with children who are in the custody of a former spouse, must expect publicity to ensue. In fact, it is by means of publicity that the custodian parent can best expect to find the whereabouts of the children. Although the children might be harmed by such publicity, until they are located their right to privacy must be subservient to the right of the custodian parent to trace them, and wide publicity as to their disappearance would not constitute an offensive invasion of their privacy going beyond the bounds of decency. Even after they are found, the absconding parent could hardly be heard to complain on his own behalf of continued publicity. But it seems to me that the position *vis-a-vis* the children is completely different. On the one hand, the need for further publicity disappears, and the public would have no legitimate interest in further news; the issue then becomes entirely a domestic issue, and no harm results to anyone, Press or public, in restoring ... the veil of privacy. On the other hand, publicity at this stage might well have a detrimental effect on the children, particularly if they are at an impressionable age ...; publicity then, to my mind, becomes offensive, uncalled for, and beyond the bounds of decency."

In the Appellate Division, Beadle C.J. commented:[2]

> "What the appellant proposed to publish would undoubtedly have upset the children's 'tranquility and enjoyment of their peace of mind', more particularly in their relationship with other children. *Prima facie*, therefore, such publication would have been an *injuria* and, far from the customs of the country sanctioning any such publication, the customs of the country would clearly have condemned it."

54. In neither of the cases mentioned in the two preceding paragraphs was the material obtained unlawfully or disclosed by someone under an obligation to keep it confidential. Had that been the case, it is thought the courts would have regarded the facts as warranting even more clearly a remedy under the *actio injuriarum*. In each case the court took

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[1] 1974 (4) S.A. 508 at 513-4.

[2] 1975 (1) S.A. 590 at 595.

the view that the remedy based upon injuria could be kept within proper bounds by the court, whose duty it was to maintain the proper balance between the interest of the individual, in being free from aggressions upon his dignity by publications which are "offensive, uncalled for, and beyond the bounds of decency", and the public interest, in the dissemination of information on matters of legitimate public concern.

55. While little authority exists in Scots law on the place of the actio injuriarum in relation to the disclosure of information, there do seem to be instances of its application in the sphere of the obtaining or collection of information. In Robertson v. Keith[1] the pursuer in the Inner House abandoned her ground of action based on defamation, and relied solely on the affront to her caused by the placing of her house under constant and obvious police surveillance. She was unsuccessful, because she was unable to establish that the defender had acted maliciously and without probable cause - requirements thought necessary by the court in view of the presumption in his favour raised by the defender's official position as chief constable. But it seems to have been accepted without demur that, in the absence of the special circumstance of the defender's office, there was no reason why the pursuer should not have succeeded with this ground of action.[2]

56. It would appear, therefore, that it is possible for a Scottish court to decide that the method of obtaining information involved affront or insult to the subject thereof, and to award damages for the hurt to his feelings under the actio injuriarum. Indeed, this principle may be seen in operation in the cases of Pollok v. Workman,[3] Conway v. Dalziel[4] and Hughes v. Robertson,[5] in each of which it was regarded as a relevant

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[1] 1936 S.C. 29: see para. 46 supra.

[2] See especially per Lord President Normand at p.41, Lord Justice-Clerk Aitchison at p.48, Lord Anderson at pp. 54-5, and Lord Murray at pp. 59-60.

[3] (1900) 2 F. 354.

[4] (1901) 3 F. 918.

[5] 1913 S.C. 394.

ground for a claim of solatium for injured feelings by near relatives of a deceased, that a post-mortem examination had been carried out upon the deceased's body without their consent. These are clear cases where the defenders obtained information in a manner amounting to a grave insult or affront to the pursuers, and where their liability for damages was recognized. A similar result might be expected where, for example, the defender, in order to obtain information, had entered the pursuer's house or intruded upon his premises without his consent and in the full knowledge that such consent would have been refused had it been sought.[1]

57. It may also be suggested that this principle extends to cases where a person is surreptitiously spied upon, particularly where use is made of technical devices to follow his movements or to enable his conversations to be overheard. To instal a bugging device in a person's home and thereby to overhear his private conversations, or perhaps even to achieve the same end by means of a long-range directional microphone which is situated outside his house but is capable of transmitting sounds from within, are activities which a court might with justification find calculated to cause affront to a person of ordinary sensibilities. This view has been taken in modern Roman-Dutch law. In S v. A and Another,[2] the accused, who were private detectives employed to obtain evidence of adultery in connexion with a proposed divorce action, were charged with crimen injuria in a magistrate's court, in that they

> "did wrongfully, unlawfully and wilfully enter the apartment or hotel room of one Leon Swartzberg and place or instal therein a transmitter wireless microphone to enable ... them (the accused) to listen to the private conversations or otherwise of the said Leon Swartzberg

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[1] See Cock v. Neville July 11 1797, Hume 602, where a trespass was regarded as of so insulting or affronting a character as to warrant an award of damages.

[2] 1971 (2) S.A. 293.

and did listen to such conversations with intent the said Leon Swartzberg then and there to injure and insult, and whereby he was injured and insulted".

The accused were convicted, and their convictions were upheld on appeal by the Supreme Court. Crimen injuria is merely the criminal aspect of the actio injuriarum, though it is recognized (and stated in the case under discussion) that for an insult or affront to involve criminal consequences it must be of a more serious and weighty character than would be sufficient to give rise to a civil action for injuria. Consequently, if the insult was sufficient to merit criminal conviction, a fortiori there would be civil liability under the actio injuriarum.

58. In this case also the court clearly recognised that in reaching a decision on whether the conduct complained of amounted in law to injuria it was necessary to have regard to the prevailing mores of society. Thus, Botha A.J. (with whom Cillié J.P. concurred) said:[1]

> "It is true, of course, that whether a particular encroachment on the dignitas of a person is slight or so serious as to merit punishment, is a question, the answer to which can vary from time to time and from place to place according to the modes of thought and ways of life prevalent amongst a particular community ... But I am unable to agree that the encroachment on a person's privacy by a private individual, albeit a private detective, by means of planting a listening-in device in his apartment and listening in to his private conversations constitutes only a slight impairment of his dignitas. On the contrary, I am of the firm view that what the appellants did as private investigators in this case amounted to a serious impairment of the complainant's dignitas. The Court must give effect to... the prevailing boni mores in accordance with public opinion ... On this basis my judgment is that the appellants' conduct was of such a reprehensible nature that it merits punishment."

(c) Other civil remedies

(i) Restitution

59. If the information is in corporeal form - for example, a written document, film, photograph or tape recording - it is

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[1] At p.299.

theoretically possible for the owner to recover the property by self-help, provided that he acts without delay. This remedy is seldom invoked in practice. Of more practical value is restitution.[1]

60. Thus if a document or any other corporeal repository of information is stolen from its owner, an obligation of restitution will lie upon whoever comes into possession of it, whether guilty or innocent. A similar obligation would rest upon the finder of lost or mislaid documents, or the person to whom the finder transferred them. Again, this obligation would arise in the case of documents delivered in error to the wrong addressee: the recipient mistakenly in possession of them would not be entitled to keep them, but would be under an obligation to restore them to the true owner, as would any third party to whom the original recipient had delivered them. Restitution would also appear to be the appropriate remedy where a document had been delivered under a contract such as loan, hire or deposit, and the person thus legitimately in possession transferred it to a third party without the authority or consent of the owner. Finally, where a document had been voluntarily delivered on the faith of an undertaking by the recipient which was not fulfilled, or in contemplation of an event which did not take place,[2] the owner would be entitled to have the document restored to him. This would cover the case where papers were delivered up by the owner in the mistaken belief that he was about to enter into a contract of some kind with the recipient, for example a partnership contract, or a contract for the supply of parts or components for the manufacture of an invention. These are all merely examples of the application of well-recognized aspects of the doctrine of restitution to the protection of documentary information.

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[1] "Whatever comes into our power or possession which belongs to another, without an intention in the owner of making a present of it, ought to be restored to him. And though the possessor should have purchased the subject for a price bona fide, still the owner must have it restored to him." Erskine, Institute, 3.1.10; cf. Stair, Institutions, I.7.1.

[2] causa data causa non secuta.

(ii) Recompense

61. Restitution will often be impossible, either because the corporeal moveable has been destroyed, or because the information is not in corporeal form. In this case the doctrine of recompense may afford a remedy. One of the several branches of this doctrine recognizes that if restitution is not physically possible, the person thus deprived of his property is entitled to claim from all bona fide possessors through whose hands it has passed any profit made through their possession thereof,[1] and from any mala fide (or perhaps even negligent) possessor the full market value thereof.[2] However, in Oliver & Boyd v. The Marr Typefounding Co. Ltd[3] and International Banking Corp. v. Ferguson, Shaw, & Sons[4] it was held that a person who, albeit in complete innocence, had made restitution of the object to the true owner impossible was liable for the full market value thereof and not merely for any profit gained by him.

62. This view was applied by the Sheriff Principal of Lanark in F.C. Finance Ltd. v. Langtry Investment Co. Ltd.[5], but disapproved by Lord McDonald in the Outer House of the Court of Session in North-West Securities Ltd. v. Barrhead Coachworks Ltd.[6] It is submitted that the attitude adopted in the first group of cases is the correct one, and that the liability of an innocent possessor cannot exceed the profit made by him on account of his possession. It may be that this liability on the part of innocent possessors to account for their profits, and on the part of mala fide possessors to account for the market value of the object, exists even if the object still exists and

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[1] To ascertain the rights and obligations of the various parties may be a complex matter, if the information has been garnered from a number of sources.

[2] Scot v. Low (1704) Mor. 9123; Walker v. Spence and Carfrae (1765) Mor. 12802; Faulds v. Townsend (1861) 23 D. 437; Jarvis v. Mansons (1954) 70 Sh. Ct. Rep. 5.

[3] (1901) 9 S.L.T. 170.

[4] 1910 S.C. 182.

[5] 1973 S.L.T. (Sh. Ct.) 11.

[6] 1976 S.L.T. 99.

restitution is accordingly possible. There is, however, insufficient authority to allow certainty on this point. The relevance of this line of authority to information in documentary form is difficult to assess. But where a person who had acquired possession of a document containing secret commercial information had disclosed that information to others, or had made use of it for his own benefit, a court might hold that restitution was impossible even though the actual document still existed. The contents of the document had been divulged or used by the possessor, with the result that its secrecy no longer existed; although it could be restored to its owner qua document, it could not be restored qua secret or confidential document. This would open the door to the doctrine of recompense.

(iii) Copyright

63. Protection may be accorded under the law of copyright to confidential information including commercial information, but only if it has been reduced to writing, and only for a period of fifty years after the owner's death.[1] A person who obtains, uses or discloses such information without the consent of the writer, or the successor to his rights, may in certain circumstances have committed an infringement of copyright and be liable accordingly. Statutory copyright protection was originally conferred upon published works only. However, a similar type of protection developed at common law in respect of unpublished material, and may be seen in operation, or at any event referred to, in Cadell and Davies v. Stewart[2], White v. Dickson[3] and Caird v. Sime[4]. The Copyright Act 1911[5] abolished common law copyright and extended statutory protection to unpublished works. The law is now contained in the Copyright Act 1956.

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[1] Copyright Act 1956, s.2(3).

[2] (1804) Mor. Appx Literary Property No 4; see para. 24 supra.

[3] (1881) 8R 896; see para. 24 supra.

[4] (1887) 14 R (H.L.) 37; see para. 21 supra.

[5] ss. 1 and 31.

64. The law of copyright exists to protect not ideas or information *per se*, but the manner in which they have been expressed. Consequently it would not be an infringement of copyright to read a man's diaries and then to publish an account of the information therein contained, provided the publisher was careful to avoid couching that information in the very words, or words not significantly different from, those to be found in the diaries themselves. Under the law of copyright, the author cannot complain that another has made unauthorised use of material provided by, or collected by, him; he has a remedy only if the other has followed too closely the literary form in which the material was expressed by the author. But it would be an infringement of the copyright in, for instance, diaries, memoirs and unpublished manuscripts to make a copy of the whole or part without the consent of the copyright holder. It would be an additional infringement to publish the copies.[1] The copyright in private letters vests in the writer and not in the recipient[2], though in certain circumstances a licence to the recipient to publish may be implied, as in the case of letters to newspapers. Thus the writer of a letter may have a remedy, where publication is unauthorised or threatened, under the law of copyright as well as under the law of contract.

65. The various remedies available to a person aggrieved by a breach or infringement of his copyright are laid down in section 17 of the 1956 Act. These remedies include interdict and damages. A court, in considering what damages are appropriate in the circumstances, may take into account the flagrancy of the infringement.[3] The damages are thus not limited to compensation for the reduced commercial value of the pursuer's copyright because of the infringement. Consequently damages would be available in cases of infringement of copyright in unpublished works, and could recognise the embarrassment or hurt to the feelings involved in the dissemination of material not intended by the author for publication. In *Williams* v. *Settle*[4] the Court of Appeal in

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[1] Copyright Act 1956, s.2(5).

[2] Cf. *Cadell and Davies* v. *Stewart*, *supra*.

[3] S.17(3).

[4] [1960] 1 W.L.R. 1072.

England approved an award of £1000 on the express basis that the infringement was in total disregard not only of the legal rights of the plaintiff but also of his feelings.

(iv) Patents and Designs

66. There are two other methods whereby certain types of information are protected by statute, viz patents and registered designs. A patent is the grant of an incorporeal right of property in the monopoly of an invention. Unlike copyright, a right to a patent does not arise automatically and must be applied for. If an application is successful it is granted for a period of 16 years[1], and it can be extended for a period of 5 years or, in exceptional circumstances, 10 years[2]. The reason for the recognition of rights of patent was expressed by Bell in the following terms:-

> "The right to a patent monopoly of a useful invention is granted on the principle of a compromise or bargain between the inventor and the public. If left to the common law, the inventor would be deprived of the benefit of his invention. If he held a monopoly of it forever, the public interest would suffer by high prices imposed by him wherever the use of his invention was valuable, and so would be deprived of the advantage of the discovery by other persons. On these grounds the bargain proceeds, by which there is given to the public the full benefit of the discovery, on a fair disclosure of it in its most beneficial shape, and in terms so plain and intelligible that it may be used without danger of useless expense, and without the necessity of further experiment; and the public, on the other hand, is restrained for a time from interfering with the gains".[3]

The law is at present consolidated in the Patents Act 1949. The remedies for infringement include interdict[4] and damages (or accounting and payment of profits in lieu of damages)[5,6]

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[1]Patents Act 1949, s.22.

[2]S.23. [3]Principles, 10th ed., s.1349.

[4]S.59(4).

[5]S.60.

[6]A Bill to reform the law of patents is presently before Parliament. In addition to restating the remedies of interdict, damages and an account of profits, the Bill allows an order to be made to deliver up or destroy any patented product in relation to which the patent is infringed, or any article in which that product is inextricably comprised (clause 59(1)(a)).

67. A similar protection can be afforded to any new or original design not previously published in the United Kingdom. On registration the proprietor obtains a copyright in the design for five years[1] and is entitled to apply for two further extensions, each of five years.[2]

(d) Criminal law

68. There are a variety of ways in which the existing criminal law of Scotland is able to control certain methods of obtaining and using information. Theft is relevant, provided the information is in corporeal form, for example in a document or on a tape. It is an essential element of theft that there is an intention permanently to deprive the owner of possession. If this intention exists at the time when the document is taken, the crime is completed, and it is of no consequence if the thief later returns it.[3] But if the intention initially is merely to borrow a document containing a formula and subsequently to return it, there is no theft: the document has merely been borrowed, and a formula cannot be stolen as it is incorporeal. There have been occasions on which the courts have held such conduct criminal. In the old case of Dewar[4] the accused was convicted, not of theft, but on the grounds that he had committed an irregular and punishable act. In Deuchars[5] the accused pleaded guilty to theft by housebreaking in similar circumstances, even although, strictly speaking, he need not have done so; and in Mackenzies[6] the court appears to have looked upon the charge as amounting to breach of trust.

69. In Strathern v. Seaforth[7] it was held that a person was guilty of a crime if he took possession of a motor car belonging

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[1] Registered Designs Act 1949, ss. 7(1) and 8(1).
[2] Ib., s.8(2).
[3] Hume, i 79.
[4] (1777) Hume, i.75.
[5] (1834) Bell's Notes 20.
[6] (1913) 7 Adam 189.
[7] 1926 J.C. 100.

to another, clandestinely, without receiving permission and knowing that permission, if asked, would have been refused. Although this is now a statutory offence,[1] we consider that the decision is authority for the view that if a person takes possession of a document or tape clandestinely, without permission when he knew that, if permission had been asked, it would have been refused, he will be guilty of a crime, even if he returns it intact. Indeed, we think that the basis of the decision could be extended to cover the case where a person surreptitiously reads a document belonging to another, without permission, and in circumstances where he knows that if permission had been asked it would not have been granted. This would be so if he not only read the document, but copied it or made notes from it.

70. There have also been cases where a charge of breach of trust has been brought. Breach of trust differs from theft, in that possession has passed with the consent of the owner, and it may be of wider application in that it is not necessarily restricted to things capable of being stolen, as is embezzlement. In Mackenzies the charge was dismissed as irrelevant, because it set forth only preparatory acts, and not a completed or attempted crime. Professor Gordon has referred to the possibility that the crime might apply to things other than corporeal moveables and money, and specifically mentioned secrets imparted in confidence. However, he concluded[2] that

> "if such a form of breach of trust does exist it is undeveloped and virtually unformulated, except in those cases in which it comes under the category of breach of duty by public officials".

More recently a stockbroker was charged with breach of trust[3] but, as he pleaded guilty, there was no discussion of the basis of the charge. It would seem from a scrutiny of the particulars in the indictment in that case that a charge of fraud would have been equally appropriate. A

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[1] Road Traffic Act 1972, s.175.

[2] Criminal Law, p. 509.

[3] H.M. Advocate v. White 1973, unreported.

charge of fraud might be appropriate where access to a document or information had been gained by a false pretence of some kind, such as the making of false statements or any fraudulent actings. On the other hand, if access was by legitimate means, the crime of fraud would not have been committed.

71. One situation which presents difficulty is where access is not by legitimate means, and yet the use of such means cannot be charged as a substantive crime. A typical example is housebreaking. Although a grave aggravation of theft, housebreaking itself is not a crime[1]. It is chargeable only along with theft, or as housebreaking with intent to steal, or possibly as an aggravation of assault, deriving from the old capital crime of hamesucken[2]. A crime of theft, aggravated in a serious way, is committed if a person breaks into a house and takes away a paper containing information. Although this is more doubtful, we consider that a crime would also be committed if a person broke into a house and merely made a written copy of the paper without removing it, thereby gaining the information.[3]

72. Mere entry on the property of another is not per se criminal. There are some special statutory exceptions. The Trespass (Scotland) Act 1865 makes it an offence to lodge in premises or occupy or encamp on land without the consent of the owner or occupier.[4] It is clear that something more than mere entry is required, however, and that actual taking possession of heritage, without ostensible right to do so, is necessary before an offence is committed[5]. Certain types of entry on land by rogues and vagabonds are struck at by the Vagrancy Act 1824[6], and unlawful presence on ships is prohibited by the

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[1] See Gordon, Criminal Law p. 492.

[2] Ib, p. 762.

[3] By applying the principle in Strathern v. Seaforth: see para. 68 supra.

[4] S.3.

[5] Paterson v. Robertson 1944 JC 166.

[6] S.4.

Merchant Shipping Act 1970[1].

73. If information is extorted by threats of a serious nature, such as to injure a person or destroy his property, that in itself is a crime at common law. Threats of a lesser nature may amount to a breach of the peace. Breach of the peace has acquired wide scope in Scotland, and anything likely to result in public disturbance or to interfere with the peace of the neighbourhood may be sufficient. It is by no means impossible that some forms of eavesdropping might be so regarded by the courts; certainly the offence can be committed on private premises, if it is calculated to result in public disturbance[2].

74. It is a crime at common law for a public official to commit a breach of duty. Such prosecutions are almost unknown nowadays, except in the case of bribery of judicial officials; but it is conceivable that a common law prosecution could still be brought where information was obtained or disclosed as a result of an official's behaviour. There are a number of statutes which impose specific duties on certain officials; for instance the Post Office Act 1953 makes it an offence for an employee of the Post Office inter alia to open mail.[3] Bribery and corruption is struck at by the Public Bodies Corrupt Practices Act 1889[4] and the Prevention of Corruption Act 1906; and there are a number of specific statutes dealing with the corruption of particular officials, such as the Customs and Excise Act 1952.[5]

75. There are also specific statutory provisions which give some protection to the confidentiality of information. Under the Wireless Telegraphy Act 1949[6] it is an offence to install or use any apparatus for wireless telegraphy except under licence from the appropriate minister. This section could

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[1] S.78.

[2] E.g. Young v. Heatly 1959 JC 66.

[3] S.58.

[4] S.1.

[5] S.9.

[6] S.1(1).

be used to deal with the use of some forms of electronic devices. The same Act prohibits the unauthorised use of wireless telegraphy apparatus with the intent to obtain information as to the contents, sender or addressee of any message,[1] and makes it an offence to disclose information so obtained.[2] The Post Office Act 1953 contains a number of provisions prohibiting interference with the mail: it prohibits a fraudulent retention or wilful keeping or detaining of any postal packet.[3] It creates an offence of maliciously, with intent to injure any other person, opening any postal packet due to be delivered to that person.[4] It prohibits interference with the mail by employees of the Post Office except on authority of the Secretary of State.[5] The Post Office (Data Processing Service) Act 1967 prohibits the disclosure of information obtained by an officer of the Post Office from the Post Office Data Processing Services.[6] Various statutes make it unlawful for civil servants to disclose information obtained by them in the course of their official duty: the most notable being the Official Secrets Act 1911.

76. The examples given in paragraphs 74 and 75 are not intended to be comprehensive. In addition, the ordinary principles of the criminal law will apply if there has been an attempt to commit one of the crimes or offences mentioned, or if a person has been acting in concert with another.

PART III: THE PROBLEMS OF THE EXISTING LAW AND DISCUSSION OF THE NEED FOR REFORM

77. We have seen that apart from special statutory protection for patents, designs and copyright, the civil law of Scotland contains no special provision designed for the protection of privacy in relation to breach of confidence. As has been seen, the principal basis upon which protection for confidential information has been afforded has so far been the law of contract; and it is competent to make contractual stipulations

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[1] S.5(6)(i).

[2] S.5(6)(ii).

[3] S.55.

[4] S.56.

[5] Ss. 57 and 58(i).

[6] S.2.

to protect information whether or not, in the absence of agreement, the information is of a kind which would be regarded as confidential. In other words, the parties to an agreement can make the information confidential even if the law would not imply an agreement to that effect. The result is that there is wide scope for regulating the terms upon which information may be communicated by one person to another. On the other hand, where no express arrangement has been made, it must always be open to doubt whether the law would imply a term restricting the use or communication of the information, unless the case is precisely covered by some previous authority. There have been insufficient cases in this branch of the law to give precise guidance on any situation which may arise. The court has, however, approached the question of implying a term by studying the circumstances and, generally speaking, would be likely to imply a term that information is confidential where the parties would be supposed to have that in mind.

78. In England the law of breach of confidence has developed as a separate body of doctrine, the origins of which are somewhat obscure. It is not easy for a Scottish Court to adopt the English doctrine directly, although some aspects of the doctrine as developed in judicial decisions could afford persuasive authority to the Scottish courts. For example, the "springboard doctrine" has been followed in the Outer House.[1] Indeed, English decisions may be of practical importance in Scotland, even although the theoretical basis for the English remedy is not the same.

79. Although we see very considerable attraction in the proposal of the Law Commission for England and Wales to introduce a new tort to deal with breach of confidence, we do observe that this proposal involves a fairly complicated series of special rules to deal with the various types of situation which may occur. The possibility of introducing a completely new statutory tort, to replace altogether the existing law of breach of confidence is the solution which

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[1] Levin v. Farmers Supply Association of Scotland 1973 SLT (Notes) 43; Levin v. Caledonian Produce (Holdings) Ltd 1975 SLT (Notes) 69. See para. 31 supra.

has provisionally commended itself to the Law Commission. In view of the fact that in Scotland there is no separate category of law dealing with breach of confidence, we would not consider it necessary to sweep away any existing law, even if a legislative solution were adopted. The Law Commission have found it difficult to frame the new law. They have expressed these difficulties as follows:

> "One of our principal difficulties has in fact been to formulate principles governing breach of confidence which are sufficiently precise and at the same time sufficiently flexible adequately to cover very different situations of fact: on the one hand, for example, the publication in a newspaper or in a book of information obtained in confidence about an individual's private affairs, and on the other hand, the exploitation by an industrial undertaking of an invention, the details of which have been confidentially disclosed to the undertaking by the inventor in the course of abortive negotiations for the sale of the invention. We have also found it very difficult to strike an acceptable balance between two conflicting aims of public policy: on the one hand, the aim of protecting information given in confidence or obtained by unlawful means, and on the other hand, the principle that there should be no unnecessary restrictions on the free circulation of true information."[1]

80. The resulting proposal involves a fairly complicated series of rules, but if it were thought desirable it could readily be adapted for Scotland. It would certainly be undesirable if the law of Scotland afforded less protection than the law of England to persons suffering loss. However, the Law Commission's proposals involve that a duty of confidence can be owed only if there was an agreed understanding, express or implied, that confidence should be observed. They propose in paragraph 70:

> "(i) A possessor of information should owe a duty of confidence in respect of that information if it was given to him by another person on the understanding, which the possessor expressly or impliedly accepted, that confidence would be observed in regard to it.
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> (ii) A possessor of information should owe a duty of confidence in respect of that information if it was

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[1] Para. 4.

acquired by him for another person or on another person's behalf on the understanding with that other person, which the possessor expressly or impliedly accepted, that confidence would be observed in regard to it.

(iii) A possessor of information should owe a duty of confidence in respect of that information if he knows, or ought to know, that the information has reached him, directly or indirectly, through another person who was subject to a duty of confidence in respect of it."

This is stated expressly in the first two of the propositions, and it must also be true of the third proposition (although there the possessor of the information was not himself a party to the agreement). Thus in all cases where the new tort would apply, there would in Scots law be a contract, either expressly or by implication, to treat the information as confidential.

81. We consider, moreover, that in a smaller jurisdiction such as Scotland, where specialization amongst legal practitioners is possible only to a much smaller degree than in England and Wales, the adoption of complicated new rules is to be avoided wherever possible, and that general principles should be used. It may therefore be preferable to continue to provide a remedy for breach of confidence under existing general principles of our law.

(i) The law of contract and its associated delict

82. We therefore turn to consider to what extent the law of contract affords a reasonable basis for the protection of confidence. We have stressed that parties to a communication of information are free to contract with regard to the terms upon which the recipient may disclose or use it, and subject to the availability of defences discussed earlier these terms will be enforced by the court.[1] Accordingly, the law of contract provides a framework within which parties are free to provide, in as much detail as they wish, terms to regulate the use and disclosure of information.

83. The fact that damages would not be awarded for annoyance or embarrassment appears to have been the principal reason why the Younger Committee concluded that privacy is not

[1] See paras. 29-37 supra.

sufficiently protected by the law of contract.[1] This appears to us to be the main problem as between the parties to the contract. We consider that in Scotland it is likely that a court, following existing authority, would award damages for injured feelings resulting from disclosure or use of information in breach of a contract of confidence.[2] We have reached the conclusion provisionally that this difficulty is not of itself sufficient to render it necessary to seek an entirely new basis for the protection of confidence, but that it should be made clear by statute that damages for breach of contract involving the use or disclosure of information should include, where appropriate, reparation for injury to feelings.

84. Perhaps the most difficult problem on this approach is that of enforcement of the contract against a third party. Although we have reached the view that a contract regulating the use of information can be enforced against a person to whom that information has been communicated in breach of contract, once he knows or ought to know that the information has been received in breach of contract and that to use it would constitute a breach of contract,[3] this is a matter which has not been expressly decided in the field of breach of confidence. Again, we have provisionally reached the conclusion that this of itself should not make it necessary to abandon the law of contract and the associated law of delict as a basis for the protection of confidence but that it may be desirable to provide by statute for enforcement against a third party in the circumstances which we have described.

85. We consider that the law with regard to the circumstances in which obligations of confidence would be implied is not very fully developed, and most decisions are now rather old. We are, therefore, anxious to know whether difficulty has been experienced in practice for this reason. As we have stressed, this difficulty can be obviated in any particular case if the parties agree the terms upon which the information may be disclosed or used. The Younger Committee appeared to suggest

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[1] (1972) Cmnd. 5012 p.294.

[2] See paras. 39-40 supra.

[3] Para. 28 supra.

the adoption of this solution in the case of bank references.[1] If practical difficulties have been experienced on this ground, we consider that it might be desirable to provide by legislation guidelines on the circumstances in which a restriction would be implied on the disclosure or use of information by a person to whom it was communicated. For example, it could be provided that in a contract of employment a term would be implied that the employee should not use any information communicated to him by his employer except for the employer's purposes, or disclose the information to any other person except with the employer's consent. Obligations could be implied by statute in the relationship between a doctor and his patient, a clergyman and his parishioner, a lawyer and his client, a student and his teacher, school, college or university, and so on.

86. Our provisional view is that the individual circumstances in which such obligations are likely to be required are so varied that no good purpose is likely to be served by providing by statute pro forma terms in particular cases. It is, however, possible that such obligations might be useful if there was a reluctance otherwise to obtain agreement in relation to matters of confidentiality. For example, if the banks were to show reluctance to adopt the Younger Committee's suggestion to which we have referred, one remedy would be to provide by statute that all information about the state of a customer's finances given by, or on behalf of, a customer to his bank should be confidential to the bank, and should neither be used by the bank except for the purposes of the bank, nor disclosed by the bank to third parties, without the customer's consent. These are matters upon which we would particularly welcome the views of those with practical experience.

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[1] At para. 307, in which they suggest that "the banks should make clear to all customers, existing or prospective, the existence and manner of operation of their reference system, and give them the opportunity either to grant a standing authority for the provision of references or to require the bank to seek their consent on every occasion".

87. We would draw attention in this connection to the particular case of information stored in computer systems. We refer to the White Paper "Computers and Privacy"[1] and the associated report "Computers: Safeguards for Privacy"[2] which discuss the problems raised by computers in relation to privacy. The major matters with which these are concerned do not create particular problems in the field we are now considering. The major difficulty is to ensure proper protection for privacy in the setting up and management of the systems. However, such systems do create a particular risk to confidentiality through accident, carelessness or lack of foresight, and it seems likely that in practice this is the way in which confidentiality is most likely to be compromised in the foreseeable future.[3] We consider that it may well be advisable, in view of the risk of accidental disclosure, to provide that where information is communicated for the purpose of being stored in a computer, the person to whom the information is communicated and the person responsible for the maintenance of the computer system should both be under an obligation that the information shall neither be disclosed nor used without the consent of the communicator except for the purposes for which it is communicated; and that both the person to whom the information is communicated and the person responsible for the management of the computer system should be held liable for any unauthorised use or disclosure of the information, unless they can show that such use or disclosure occurred without fault on their part.

88. We have pointed out, in discussing the existing law, that information which has been the subject of an obligation of confidence on being communicated by one person to another may be disclosed by the recipient in connection with proceedings in a court of law, without that recipient being in breach of contract, except in special cases, as when a law agent receives

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[1] Cmnd. 6353 (December 1975).

[2] Cmnd. 6354 (December 1975).

[3] See Cmnd. 6353, para. 18.

information in connection with litigation.[1] This is, as we have seen, an aspect of disclosure in the public interest. The public interest is a concept which courts have always found somewhat difficult to apply in practice. It would be possible to enlarge that concept in the present context, so that courts would not be entitled to require a person to disclose information acquired under an agreement of confidence even in connection with proceedings in a court of law. We understand that this is the position with regard to professional secrets in most legal systems in the EEC, where it is also a crime for a professional person to disclose information which has been confided in him in his professional capacity by a client.[2] We would welcome comment on this question, particularly in relation to the position of doctors in the National Health Service. At present their reports and notes of their examination of patients contained in the hospital records may well be subject to disclosure in a court of law. We would welcome comment upon whether disclosure in a court of law should be restricted, and if so how such a restriction might be operated in practice.[3]

89. We have also mentioned the possibility under the existing law of justifying disclosure where the information relates to a state of affairs which the public interest requires

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[1] Para. 35 supra.

[2] See The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community: a report prepared by D.A.O. Edward, Q.C. (published by Commission Consultative des Barreaux de la Communité Européenne, Brussels).

[3] In a recent action in England, a mother sued the NSPCC for damages for personal injuries, alleging that she had suffered shock, depression and continuing insomnia as a result of a visit paid to her home by an inspector in response to a complaint from an informant about the treatment of a baby. The House of Lords held that in this case documents which might reveal the informant's identity should not be disclosed. It was said that the public interest to be protected in this case was the effective functioning of an organisation authorised under an Act of Parliament to bring legal proceedings for the welfare of children. It was emphasised, however, that confidentiality did not of itself provide a ground of non-disclosure of the nature of the information or the identity of the informant if either of these matters would assist the court to ascertain relevant facts. D v. N.S.P.C.C. [1977] 2 W.L.R. 201.

should not be allowed to continue.[1] We would welcome comment upon whether this is a matter which in practice has given rise to difficulty and, if so, whether there are any guidelines which would be useful in determining the extent to which such disclosure should be allowed. The law on this matter at present is extremely vague, but it may be that the nature of the subject does not admit of greater precision.

(ii) The law of delict

90. We now turn to consider the application of the general law of delict to the matters of breach of confidence and the use of information unlawfully obtained. We are of the view that in cases of disclosure or use of private or personal information by a person to whom it has been communicated in confidence, or by a person who has obtained it unlawfully or who knows that it has been so communicated or obtained, the actio injuriarum is in principle capable of providing an appropriate and satisfactory remedy in Scots law.[2] Scottish cases - admittedly few in number - do exist in which injuria has been regarded as relevant in this area, and in modern Roman-Dutch law the doctrine has been more clearly and extensively resorted to. In that system it has been accepted that certain methods of acquisition of information and in some circumstances the publication of certain types of information can amount to a wrongful aggression upon a man's person, dignity or reputation, and the courts have been prepared to grant interdict or to award damages where the plaintiff is about to be, or has been, subjected to offensive, degrading or humiliating treatment. Under that system the courts have also recognised that the question of what types of behaviour are so offensive as to accord to the aggrieved party a delictual remedy under the actio injuriarum, is one which the

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[1] Para. 36 supra. Examples which have arisen in England include fraudulent business practices (Gartside v. Outram (1856) 26 L.J. Ch. 113) and failure to register an agreement under the Restrictive Trade Practices Act 1956 (Initial Services Ltd v. Putterill [1968] 1 Q.B. 396).

[2] See paras. 48-58 supra.

courts themselves must answer in the light of the customs of the country, "the prevailing boni mores"[1] or "the modes of thought prevalent amongst any particular community."[2] In this way the courts concerned strike what appears to them to be an appropriate balance between the interest of a pursuer in freedom from the deliberate infliction of offensive or degrading treatment, and the interest of a defender (and of the public) in the acquisition or free availability and dissemination of information on matters of legitimate public interest.

91. It is our view that there is in principle no good reason why, in Scotland also, the actio injuriarum should not be capable of use in this way. We think that under the present law it would be open to a Scottish court to apply the doctrine where persons have suffered insult or affront through the disclosure of information about them or through the methods by which information about them has been acquired. Solatium could be awarded for the hurt to feelings or aggression upon the dignity caused thereby, coupled with damages for any patrimonial loss sustained[3]. In view, however, of any doubt which may exist about the competency of the actio injuriarum in such circumstances in the light of the decision of the Second Division in Murray v. Beaverbrook Newspapers Ltd[4], we think that it would be desirable, for the avoidance of doubt, to enact a declaratory provision to the effect that an action based upon the delict of injuria should be competent where it is claimed that injury to the feelings has been sustained through the disclosure of information about the pursuer, or through the means whereby information about him has been obtained, where these amount to an unwarranted aggression upon the pursuer's person, dignity or reputation. It would then, in each case, be for the court to determine, in the light of prevailing community standards, whether the conduct of the

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[1] S v. A and Another 1971(2) SA 293, per Botha A.J. at p.299, quoted in paragraph 58 supra.

[2] Melius de Villiers, The Roman and Roman-Dutch Law of Injuries (1899), p.83 quoted in paragraph 53 supra.

[3] See Robertson v. Keith 1936 S.C. 29.

[4] See para. 49 supra.

defender amounted to an unjustifiable aggression upon the dignity of the pursuer.

92. Also clearly of relevance would be those factors which, in a defamation action, might lead to the conclusion that the occasion was privileged. Thus in Robertson v. Keith it was held that the pursuer could not succeed in her action of damages because the activities complained of (posting an obvious watch on her house) were performed by, or on the instructions of, the defender in his capacity as chief constable, with the aim of discovering the whereabouts of his missing inspector, and in the interest of the maintenance of police discipline; in consequence, his actings were privileged.[1] It is equally clear from this case that the pursuer's own conduct will be taken into account: in the circumstances the court was prepared to hold that the pursuer, by her evasiveness and lack of candour in answering the chief constable's reasonable enquiries, had only herself to blame when he used the methods which he did.

93. In our view it is preferable to invoke a general principle, such as that embodied in the actio injuriarum, rather than to create a new statutory right of action, limited strictly to breach of confidence and the disclosure or use of information unlawfully obtained. These are merely examples of conduct which may amount to an unwarrantable aggression upon an individual's dignity, and are not necessarily more worthy of special treatment than other types of intentional acts causing insult, indignity or humiliation. Thus, for example, it is not only the disclosure or use of information which may be objectionable, but also the methods adopted to acquire information, irrespective of whether it is, or is intended to be, disclosed at some later stage. Similarly, the unauthorised use of a person's name or photograph (for example for advertising

[1] See e.g. per Lord President Normand at p. 41, Lord Hunter at p. 53, Lord Anderson at pp. 57-8 and Lord Murray at p. 60).

purposes) might not fall under the terms of a statutory provision limited to cases of breach of confidence and the disclosure or use of information unlawfully obtained. The actio injuriarum embodies a suitable principle, while allowing the courts sufficient flexibility to take into account the interests not only of aggrieved parties, but also of collectors and users of information, and of the public in obtaining knowledge of matters of legitimate public concern.

94. If our suggestions were adopted, the actio injuriarum would be available where the use or disclosure of information offended against the prevailing standards of the day. An action based upon agreement would be available where the terms were either expressly agreed or implied. There would be some overlap where the use or disclosure offended against both general standards and the express or implied terms of an agreement. However, in our view this would not create any difficulty; such overlaps exist already, for example in the field of professional negligence, where an action is competent either in contract or in delict.

95. If it were thought undesirable to resort to the principles of the actio injuriarum, we would provisionally propose the introduction into Scots law of a statutory delict, consisting of the use or disclosure of information amounting to a substantial and unreasonable infringement of a "right of privacy", along the general lines envisaged in the Bill introduced in 1969 by Mr Brian Walden MP[1]. For the reasons stated earlier,[2] we do not think that it would be satisfactory to attempt in isolation statutory regulation of cases of breach of confidence and of disclosure or use of unlawfully obtained information. We regard such cases, moreover, merely as part of a more general problem, and we fear that to deal with them alone would introduce anomalies and inconsistencies into the law. It would nonetheless be feasible and useful, if a general right of privacy is not to be granted, to create a delict restricted to infringing the "right of privacy" by the use or disclosure of information. It seems to us that where

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[1] See Appendix III.

[2] Para. 81 supra.

use or disclosure alone is in issue, many of the problems which the Younger Committee found in the introduction of a general right of privacy would not emerge, and if such a restricted application of a general right of privacy worked well in practice it would be easy to extend the protection to all aspects of the right.

96. It is not our purpose in this Memorandum to examine Mr Walden's Bill in great detail. It is, in any event, drafted only with the law of England in view. However, it is appropriate to make a number of specific comments on it. We approve of the definition of "right of privacy" contained in clause 9(1), particularly since it is made clear in clause 1 that there would have to be a "substantial and unreasonable infringement" of the right. It is also our view that the defences specified in clause 3 are appropriate and satisfactory. As regards remedies (clause 4) we consider that any legislation for Scotland should specify that solatium as well as damages for patrimonial loss can competently be awarded. In addition, the court might be empowered to order the defender to destroy all articles or documents which had come into his possession by reason of or in consequence of the infringement.[1] In place of the limitation provision in clause 5, there should be inserted a 5-year prescriptive period consonant with the provisions of the Prescription and Limitation (Scotland) Act 1973.[2] As we are presently engaged in a wide-ranging study of the law of evidence in Scotland, we take the view that it would be inappropriate at present to propose an amendment of the law of evidence in the terms of clause 8. We have also considered whether the definition of "family" in clause 9(2) might appropriately be replaced by one co-extensive with the definition of "relative" contained in Schedule 1 to the Damages (Scotland) Act 1976. Our provisional view is that the latter definition would, in this context, be too extensive,

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[1] See Adamson v. Martin 1916 S.C. 319. A similar power is contained in the Patents Bill presently before Parliament - clause 59(1)(a). See para. 66 supra.

[2] S.6 and schedule 1, para. 1(d).

embracing as it does uncles, aunts and their issue, and divorced spouses. We would welcome comments on these points.

97. The proposals already made in this Memorandum would have the result that a person who has obtained information which he knows, or in all the circumstances ought to know, has been unlawfully obtained might be liable to the actio injuriarum. It would be relatively simple, if that were thought desirable, to provide that there should be a new delict, actionable at the instance of any person who has suffered damage thereby, to disclose or otherwise use information which, at the time of the disclosure or use, the discloser or user knew, or in all the circumstances ought to have known, was obtained by unlawful means. The same principles should, so far as possible, apply to this delict as would apply to the delict described in paragraphs 95 and 96.

98. As a subsidiary matter we provisionally propose that there should be a special court procedure for dealing with cases involving breach of confidence, in order to prevent the proceedings themselves causing further disclosure of the information. For example, this could be achieved by using statements lodged in process, but not printed in the pleadings, to describe the confidential information. A somewhat similar procedure already exists in relation to financial information in petitions for variation of trust.

(iii) Criminal law

99. Finally, we consider the criminal aspects of the problem. One of the most striking characteristics of the common law is its elasticity. This has the advantage that most activities which would be regarded as socially undesirable could probably be controlled by the application of existing principles. However, doubts exist whether some of these activities are criminal, notably where the information is in incorporeal form. Because of these doubts, the public will not necessarily have a clear understanding of what is criminal and what is not. This problem can largely be solved by the creation of specific statutory offences, even although there will be a residual area where it will still be open to the authorities to bring a prosecution even if the acts concerned do not give rise to statutory liability. Even if we considered that the common law was in practice sufficient, we would still be disposed to recommend, for the reasons

given, that certain statutory offences should be created. At the same time, we would not recommend any interference in, or extension of, the existing common law.

100. The primary purpose of criminal sanctions should, in this domain, be to provide support to the civil law. We do not propose that all those activities which might give rise to civil liability should automatically be criminal. This would not be practicable or desirable. It may frequently be debateable whether the use or disclosure of information was justifiable, particularly if the action were defended on the ground of public interest. It would be intolerable if an unsuccessful defender were to be automatically liable to criminal prosecution. In the commercial sphere a defender may have behaved honestly, but the pursuer may still require to be compensated for his loss. On the other hand, it may sometimes be desirable to prosecute in circumstances where there is no civil right, for example if an attempt to obtain information is unsuccessful, or information actually obtained has no value.[1] In our view the criminal law should not apply if the act in issue is the divulging rather than the obtaining of information; if the method of obtaining is itself not unlawful; and in most cases involving commercial information, unless a person has entered premises without permission, or has searched cupboards or files.

101. We have accordingly sought to identify the principal activities which would arouse sufficiently severe public disapproval to justify the introduction by legislation of criminal sanctions. On that basis we propose provisionally that criminal sanctions should be introduced by statute against the following activities:

(i) It should be a statutory offence to enter upon premises without the occupier's consent, and

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[1] A further example is that of "insider" trading - the breach of an obligation of confidence by a person engaged in the management of a company does not usually give rise to damages at the instance of the company if the breach has affected the value of its shares.

without lawful authority, for the purpose of obtaining confidential information or information which is of value, whether or not the information is actually obtained. We make this proposal because of the doubts expressed above[1] as to whether housebreaking unaccompanied by the removal of a corporeal moveable or by the intent to steal constitutes a crime.

(ii) It should be a statutory offence to search or examine the property owned or lawfully possessed by another person without that person's consent, or without lawful authority, with a view to obtaining confidential information or information which is of value. The term "property" should be sufficiently comprehensive to include vehicles, vessels, personal effects and tapes. It would thus be an offence to search a purse or a briefcase.

(iii) The use of certain technical surveillance devices should be made a criminal offence. This was a matter which was fully considered by the Younger Committee, who recommended at paragraph 53:

> "(i) It should be unlawful to use an electronic or optical device for the purpose of rendering ineffective, as protection against being overheard or observed, circumstances in which, were it not for the use of the device, another person would be justified in believing that he had protected himself or his possessions from surveillance whether by overhearing or observation (paragraph 560).
>
> (ii) Unlawful surveillance by device should, where it is done surreptitiously, be an offence punishable by imprisonment or fine and triable both summarily and on indictment (paragraphs 562-563).
>
> (iii) In certain circumstances the advertising of devices for unlawful surveillance should constitute the offence of incitement to commit the main offence (paragraph 564)."

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[1] In paras. 68-76.

102. We ourselves have some hesitation in adopting the precise formula advocated by the Younger Committee. We do not believe that the suggested test, namely that a person "would be justified in believing" that he had protected himself, would be readily enforceable, as it provides for a subjective rather than an objective criterion.[1] A more difficult problem is to identify the precise range of devices the use of which should be prohibited. We anticipate that the category would include any electronic or optical devices which permit a man of normal sight or hearing to receive visual or aural signals in circumstances in which he would otherwise be unable to do so, or which permit a record of such signals to be made.[2]

103. Our provisional conclusion is that the criminal law should not be extended by statute beyond these three categories, but we invite views on this matter.

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[1] A similar approach in defining the term "privacy" was strongly criticised by the New Zealand Law Revision Commission. (Report of sub-committee on Computer Data Banks and Privacy, April 1973, at pp 69-70).

[2] The use of such devices may amount to a breach of the peace, whether they are used on private or public premises.

PART IV: SUMMARY OF PROVISIONAL PROPOSALS AND OTHER MATTERS ON WHICH COMMENT IS INVITED

General:

1. Whatever decisions may be taken on the creation of new rights and obligations, any rights and obligations which exist under the present law of contract and delict should not be abolished (paragraph 79).

2. In the creation of new rights and obligations, it is preferable to resort to general principles of law wherever practicable, rather than to detailed rules (paragraph 81).

The law of contract and its associated delict

3. It should be made clear by statute that in an action for breach of contract involving the use or disclosure of information, damages should include, where appropriate, reparation for injury to feelings (paragraph 83).

4. There is a case for making it clear by statute that a contractual obligation is enforceable against a third party who knows, or ought reasonably to know, that information has been received by him in breach of contract and that to use it would constitute a breach of that contract (paragraph 84).

5. The law regarding the circumstances in which obligations of confidence can be implied is not fully developed, and comment is invited whether difficulty has been experienced in practice for this reason (paragraph 85).

6. If so, one possibility is to provide by legislation guidelines on the circumstances in which a restriction would be implied on the disclosure or use of information by a person to whom it was communicated, for example in the following relationships: employer/employee; doctor/patient; clergyman/parishioner; lawyer/client; student/teacher (paragraphs 85 and 86).

7. It may be advisable to provide that, where information is communicated for the purpose of being stored in a computer, the person to whom the information is communicated and the person responsible for the maintenance of the computer system should both be under an obligation that the information shall neither be disclosed nor used without the consent of the communicator except for the purposes for which it is communicated; and that both the person to whom the information is communicated and the person responsible for the management of the computer system should be held liable for any unauthorised use or disclosure of the information, unless they can show that such use or disclosure occurred without fault on their part (paragraph 87).

8. Should a person, in particular a doctor employed in the National Health Service, who has acquired information under an agreement of confidence, be obliged to disclose it in connection with proceedings in a court of law? (paragraph 88).

9. Are there any guidelines which could usefully be laid down to determine the extent to which disclosure should be allowed in the public interest? In particular, should disclosure be permitted if the information relates to a state of affairs which the public interest requires should not be allowed to continue? (paragraph 89).

The law of delict:

10. It would be desirable, for the avoidance of doubt, to enact a declaratory provision to the effect that an action based upon the delict of injuria should be competent, where it is claimed that injury to the feelings has been sustained through the disclosure of information about the pursuer, or through the means whereby information about him has been obtained, where these amount to an unwarranted aggression upon the pursuer's person, dignity or reputation (paragraph 91).

11. If it were thought undesirable to resort to the principles of the actio injuriarum, a statutory delict should be introduced, consisting of the use or disclosure of information amounting to a substantial and unreasonable infringement of a right of privacy, accompanied by the same heads of damage, defences, rules of evidence and law of prescription which apply to other branches of the law of delict (paragraphs 95 and 96).

12. If such a statutory delict is introduced, the court might be empowered to order the defender to destroy all articles or documents which had come into his possession by reason of or in consequence of the infringement (paragraph 96).

13. If such a statutory delict is introduced, a person should be entitled to be protected from substantial and unreasonable intrusion upon his family. The definition of "family" should not be as extensive as the category of relatives entitled to claim patrimonial loss in terms of the Damages (Scotland) Act 1976, and should exclude in particular uncles, aunts and their issue, and former spouses (paragraph 96).

14. If it were thought undesirable to resort to the principles of the actio injuriarum, it would also be possible to introduce a statutory delict, actionable at the instance of any person who has suffered damage thereby, to disclose or otherwise use information which, at the time of the disclosure or use, the discloser or user knew, or in all the circumstances ought to have known, was obtained by unlawful means (paragraph 97).

15. The same principles should, so far as possible, apply to this delict as would apply to the delict described in proposal 11 (paragraph 97).

16. There should be a special procedure, similar to that which already exists in relation to financial information in petitions for variation of trust, to prevent the proceedings themselves causing further disclosure of the information. This could be achieved by using statements lodged in process, but not printed in the pleadings, to describe the confidential information (paragraph 98).

Criminal law:

17. Criminal sanctions should be introduced by statute against the following activities:

(i) it should be a statutory offence to enter upon premises without the occupier's consent, and without lawful authority, for the purpose of obtaining confidential information or information which is of value, whether or not the information is actually obtained;

(ii) it should be a statutory offence to search or examine the property owned or lawfully possessed by another person without that person's consent, or without lawful authority, with a view to obtaining confidential information or information which is of value. The term "property" should be sufficiently comprehensive to include vehicles, vessels, personal effects and tapes;

(iii) the use of certain technical surveillance devices should be made a criminal offence. The category of device should include any electronic or optical devices which permit a man of normal sight or hearing to receive visual or aural signals in circumstances in which he would otherwise be unable to do so, or which permit a record of such signals to be made (paragraphs 101-102).

18. The criminal law should not be extended by statute beyond the three categories set out in proposal 17 (paragraph 103).

APPENDIX I

EXTRACT FROM LAW COMMISSION WORKING PAPER NO. 58 ("BREACH OF CONFIDENCE")

PART VI

SUMMARY OF PROPOSALS FOR REFORM

147. We conclude with a summary of the provisional proposals made and questions raised in this Working Paper on which we would welcome views and comments:

General

(1) There is a preliminary question as to whether the problems of the existing law

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196. See para. 117 above.

should be left to be worked out by the courts through the cases, but in our view there is a need for legislation to clarify and reform the law (paras. 54-56).

Breach of Confidence

(2) To provide a proper basis to the jurisdiction in breach of confidence cases, the action should be founded in tort and a new tort of breach of a statutory duty of confidence should be created (para. 59).

(3) The new tort would replace the existing cause of action for breach of confidence which should accordingly be abolished (para. 60).

(4) There is a need to distinguish the different situations which may give rise to an action for breach of the statutory duty of confidence and we suggest that the problem should be approached by taking into account the nature of the harm which a person to whom a duty of confidence is owed is liable to sustain and whether the information in question relates to him or not. On this basis, we suggest that there should be three categories of the new tort, namely:

Category I - The disclosure or use of information which would, in whole or in part, deprive the person to whom a duty of confidence is owed of the opportunity himself to obtain pecuniary advantage by the publication or use of such information.

Category II - The disclosure of information relating to the person to whom a duty of confidence is owed (the plaintiff) which the person subject to the duty (the defendant) knew, or ought to have known, would cause the plaintiff pecuniary loss and which in fact causes the plaintiff pecuniary loss.

Category III - The disclosure of information relating to the person to whom a duty of confidence is owed which would be likely to cause distress to a reasonable person in his position and which in fact causes him distress (paras. 61-65).

(5) We raise the question whether it is necessary to provide for the circumstances covered by Category II of the new tort (para. 66).

(6) There is a question whether the formulation of Category III of the new tort should be extended to cover annoyance or embarrassment which falls short of actual distress (para. 67).

(7) We put forward three propositions to cover the circumstances in which the statutory duty of confidence should arise. The first two propositions would cover cases where information is received from or on behalf of another on the understanding that it would be treated in confidence and the third proposition would cover cases where a third party knows, or ought to know, that information has reached him through another who was subject to a duty of confidence in respect of it. Our first two propositions would refine the existing

law by making it an essential element of the duty of confidence that the person who received the information accepted, either expressly or by implication, an obligation to treat it confidentially (paras. 70-73).

(8) In accordance with our propositions regarding the circumstances giving rise to the statutory duty of confidence, the duty should be owed to the person by whom the information was given, to the person for whom it was obtained and, where there is a chain of transmission, to any person in the chain who has imposed a duty in respect of it. There is a question whether a breach of the statutory duty should be separately actionable at the suit of the person to whom the information relates but we doubt whether such a separate right of action can be justified in the context of the law of confidence (paras. 74-75).

(9) We raise the question whether the profitable exploitation of information at a time when the user neither knew nor ought to have known that it was the subject of a duty of confidence should give the injured party any right to claim restitution; but we doubt whether any remedy for innocent use in these circumstances can be justified (paras. 76-80).

(10) The statutory duty of confidence in respect of information should be a duty of refraining from using or disclosing information except to the extent that the disclosure or use is authorised by the person to whom the duty is owed and should include a duty to take reasonable care to ensure that unauthorised disclosure or use does not take place (paras. 81-82).

(11) In relation to breaches of statutory duty falling within Category I of the new tort, it should be a defence that the information which is the subject of a duty of confidence was acquired for value in circumstances in which the acquirer neither knew nor ought to have known that it was subject to such a duty; but it should not be a defence that an innocent acquirer of information has subsequently changed his position (paras. 83-86).

(12) There should be a defence of lawful authority to enable a defendant to be released from his duty of confidence in respect of information to the extent that he is under a legal duty to disclose it; but the defence should not be available where the duty of disclosure is purely contractual in nature (paras. 87-88).

(13) There should be a defence of privilege corresponding to the defence of absolute privilege in defamation actions; but this defence should not be available in cases corresponding to those in which a defendant in a defamation action would have a defence of qualified privilege (paras. 89-90).

(14) There should be a defence of public interest. It is for consideration whether any statutory guidelines should be laid down to determine the scope of the defence but we incline to the view that the defence should be kept as flexible as possible (paras. 91-93).

(15) In relation to breaches of statutory duty falling within Category I of the new tort, it should be a defence to show that the information concerned was in the public domain; and information should

be treated as being in the public domain if the public have access to it by reason that it has been published generally (i.e. not in confidence to a restricted class of persons) or has been put on sale to the public or stored in a public archive. But where individual items of information have been applied or collected in a manner which requires the expenditure of a significant element of labour, skill or money, the resulting application or collection should not be treated as being in the public domain merely because the individual items from which it has been derived or of which it is composed are publicly available (paras. 95-97).

(16) These principles should also apply where information which was originally secret has come into the public domain as a result of a breach of confidence. A person responsible for putting secret information into the public domain in breach of confidence should be liable in damages which take into account the fact that he has rendered the information unprotectable in the future but he should not thereafter be liable to be enjoined from using the information (paras. 98-101).

(17) In relation to breaches of statutory duty falling within Category II or III of the new tort, we put forward an alternative approach to the problem of public domain. A complete defence would only be available in cases where a positive right of access to the information concerned is given by law; but the court would be required, in considering what relief, if any, should be granted to the plaintiff, to take

into account the extent to which the information which has been misused was generally known or was readily accessible to the public (paras. 102-105).

(18) Where information has been acquired in the course of carrying out work for or on behalf of another, it should be a defence to an action for breach of duty falling within Category I of the new tort that the information can fairly be regarded as representing an addition to the personal skill, experience or ability of the acquirer (paras. 106-108).

(19) To deal with the problems of misuse of an action for breach of duty falling within Category I of the new tort, particularly in relation to the protection of patentable information, it is for consideration whether there should be a defence that the information was not imparted in good faith; lack of good faith being established on proof that the sole or predominant motive of the plaintiff in imparting the information was to prevent the defendant from using it (paras. 109-112).

(20) In determining whether to grant an interlocutory injunction to prevent a breach of the statutory duty, the court should have regard to the case as a whole, the practice in regard to interlocutory injunctions in libel cases being not necessarily appropriate (para. 114).

(21) We raise the question of the principles on which the courts should award compensation in lieu of an injunction to prevent future breaches of the statutory duty; but as we envisage that these principles would in any event be followed

by the courts, we doubt whether there is any need to refer to them in the statute creating the new tort (paras. 115-118).

(22) We suggest that it might be advantageous if the courts were given an express power to make an order (to be called a proprietary order) by virtue of which all or any of the plaintiff's rights in information could be transferred to the defendant on terms set out in the order (para. 119).

(23) Damages for a breach of statutory duty falling within Category I or II of the new tort should be limited to the actual pecuniary loss suffered by the plaintiff; and in the case of a breach falling within Category III, should be awarded only for distress actually suffered by the plaintiff (paras. 120-121).

(24) While it would be anomalous to authorise the award of exemplary (or punitive) damages generally for breach of the statutory duty, there is a question whether a plaintiff should be entitled to claim exemplary damages in the limited classes of case in which they are still obtainable by a plaintiff in other actions in tort; but we doubt whether there should be power to award exemplary damages in respect of the new tort in any circumstances (para. 122).

(25) The remedy of an account of profits should continue to be available in respect of a breach of statutory duty falling within Category I of the new tort as an alternative to an award of damages, but we envisage that for practical reasons it would seldom be resorted to (para. 123).

(26) It should continue to be possible for the court in a proper case to order the destruction or delivery up of material in which confidential information is recorded (para. 124).

(27) It is for consideration whether a defendant who is unjustifiably threatened with proceedings for breach of the statutory duty should, at any rate where the information concerned is of a patentable nature, be entitled to obtain relief similar to that which is available under section 65 of the Patents Act 1949 to a person unjustifiably threatened with proceedings for infringement of a patent (paras. 125-126).

(28) On the death of a party to an action for breach of statutory duty falling within Category I or II of the new tort, the action should survive against or for the benefit of his estate, as the case may be. But where the action concerns a breach within Category III (i.e. is for distress) the rule applicable to defamation should be followed, whether it is the present rule (under which the action would not survive) or a new rule which may be introduced following any recommendation in this respect by the Faulks Committee on Defamation (para. 127).

(29) Where a person to whom the statutory duty of confidence is owed dies before a breach takes place, his personal representatives should have a limited right to continue to enforce the duty for the benefit of his estate (para. 128).

(30) Actions for breach of the statutory duty should not be triable by a jury as of right, but the

court should have power to order a trial by jury in an appropriate case (para. 129).

(31) County courts should have jurisdiction within their normal financial limits to try actions for breach of the statutory duty and their jurisdiction to grant injunctions to prevent a breach of the duty should extend to cases where no damage has yet been suffered (para. 130).

Disclosure or Other Use of Information Unlawfully Obtained

(32) There should be a new tort in respect of the disclosure or other use of information unlawfully obtained (para. 134).

(33) For the purposes of this tort, information should be regarded as having been obtained unlawfully if it has been obtained by means of a criminal offence or if there has been a temporary taking without authority of any object from which the information was obtained, and perhaps also if it has been obtained by means of a trespass to land. We raise the question of whether, as an alternative, the concept of "information unlawfully obtained" should be defined in broad terms as being information obtained without the authority of the holder of it in circumstances in which the holder could reasonably have expected that it would not have been so obtained, having regard to the precautions which he had taken to protect it (paras. 135-140).

(34) Where there has been misuse of information obtained unlawfully, there should be a right to sue -

(i) by the person from whom the information was unlawfully obtained;

(ii) in the case of information unlawfully obtained from a person who had acquired it on behalf of another person, by that other person;

(iii) in the case of information unlawfully obtained from a person to whom it had been entrusted in confidence by another person, by that other person.

We raise the question of whether a person to whom the information relates should have a separate right to sue (paras. 141-142).

(35) An action in respect of the misuse of information unlawfully obtained should lie against any person who obtained the information by unlawful means and against any person who knows or ought to know that it was so obtained (para. 143).

(36) The new tort should be divided into categories corresponding to the categories proposed for the tort of breach of confidence (para. 144).

(37) In all other respects except one, the principles to apply to an action in respect of the misuse of information unlawfully obtained should follow those applicable to an action for breach of the statutory duty of confidence. The one exception is that there should be no defence corresponding to the defence to an action for breach of confidence that the information concerned was innocently acquired for value (paras. 145-146).

APPENDIX II

EXTRACT FROM THE YOUNGER REPORT

PART III
DISCLOSURE OR OTHER USE OF INFORMATION

CHAPTER 21

CONFIDENTIAL INFORMATION AND INFORMATION UNLAWFULLY OBTAINED

629 In the course of this Report we have described a number of situations when the *acquisition of information* may involve a civil or a criminal wrong. Thus, the tort[174] of trespass may be committed by a person who enters a house without permission to eavesdrop on conversations, and if our recommendations in Chapter 19 are accepted it will become a crime in certain circumstances to use a technical device for the purpose of acquiring information. In this chapter, on the other hand, we are concerned with the legal restrictions which are, or in our view ought to be, imposed on the *disclosure or other use of information.*

630 Important restrictions on a person's freedom to disclose information in his possession are imposed by the law relating to breach of confidence. This branch of the law is discussed in greater detail in Appendix I. That survey of the present law has led us to two conclusions: first, that the action for breach of confidence affords, or at least is potentially capable of affording, much greater protection of privacy than is generally realised; secondly, that it would not be satisfactory simply to leave this branch of the law, with its many uncertainties, to await further development and clarification by the courts. We therefore recommend that the law relating to breach of confidence be referred to the Law Commissions with a view to its clarification and statement in legislative form.

631 We appreciate, however, that the resolution of uncertainties in the law necessarily involves decisions on the plane of policy regarding the broad aims of the law in question. As far as the protection of privacy is concerned, we think that the following broad aims of the law on breach of confidence would be generally accepted:

(a) to provide remedies against the disclosure or other use of information (not already generally known) by persons in possession of that information under an obligation of confidence;

(b) to make remedies available not only against a person who was entrusted by another with information in confidence but also against a third party to whom that person disclosed the information;

(c) to protect the public interest in the disclosure of certain kinds of information, and the defendant's right of disclosure in certain privileged situations, by the provision of appropriate defences;

[174] For the sake of convenience the terms we use in this Chapter are appropriate to English law. However, our observations apply equally to the corresponding concepts in Scottish law.

(d) to afford remedies, whether by way of injunction, damages or claims for loss of profit which do justice to the reasonable claims of plaintiffs and defendants in differing situations.

632 There is another type of situation which, although it may be partially covered by the law relating to breach of confidence, raises problems which cannot be entirely solved by an application of that branch of the law, at least as it is generally understood. Although it is possible to steal a document which contains information, the information itself, not being either tangible or intangible property[175], is not capable of being stolen in terms of the Theft Act 1968. It follows that anyone who comes into possession of "stolen" information even with knowledge of its origin, is not guilty of a criminal offence if he discloses it or if he uses it for profit[176]. We think that the damaging disclosure or other damaging use of information acquired by means of any unlawful act, with knowledge of how it was acquired, is an objectionable practice against which the law should afford protection. We recommend therefore that it should be a civil wrong, actionable at the suit of any person who has suffered damage thereby, to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means. It would be necessary to provide defences to cover situations where the disclosure of the information was in the public interest or was made in privileged circumstances. We envisage that the kinds of remedy available for this civil wrong would be similar to those appropriate to an action for breach of confidence.

633 We would hope that, if the task of clarifying and stating in legislative form the law relating to breach of confidence is entrusted to the Law Commissions, they would also take into account and coordinate their work with the recommendation we have made in paragraph 632. The Scottish Law Commission would no doubt consider the situation from the point of view of Scottish practice and procedure.

[175] By "intangible property" the Theft Act 1968 is generally taken to mean matter such as gases (though the point has not apparently been tested).

[176] Although there is little direct authority on the point, it is possible that the law regarding breach of confidence could be invoked to prevent disclosure of information by a person who knew that the document originally containing the information had been stolen, at least at the instance of the person from whom the document was stolen. See *Webb* v. *Rose* 1732, Skone James p. 41, and Gareth Jones 1970 86 *Law Quarterly Review*, p. 463 at p. 482. See also Appendix I paragraph 32 (iii).

APPENDIX III

MR BRIAN WALDEN'S BILL (*26 November 1969*)

A BILL TO

Establish a right of privacy, to make consequential amendments to the law of evidence, and for connected purposes.

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

Right of action for infringement of privacy

1. Any substantial and unreasonable infringement of a right of privacy taking place after the coming into force of this Act shall be actionable at the suit of any person whose right of privacy has been so infringed.

Joinder of parties

2. In any such action the plaintiff may join as a defendant any person who—
   (*a*) has committed the infringement; or
   (*b*) has knowingly been party to the infringement; or
   (*c*) knowing of the infringement, has made any use thereof for his own benefit or to the detriment of the plaintiff.

Defences

3. In any such action it shall be a defence for any defendant to show that—
   (*a*) the defendant, having exercised all reasonable care, neither knew nor intended that his conduct would constitute an infringement of the right of privacy of any person; or
   (*b*) the plaintiff, expressly or by implication, consented to the infringement; or
   (*c*) where the infringement was constituted by the publication of any words or visual images, there were reasonable grounds for the belief that such publication was in the public interest; or
   (*d*) the defendant's acts were reasonable and necessary for the protection of the person, property or lawful business or other interests of himself or of any other person for whose benefit or on whose instructions he committed the infringement; or
   (*e*) the infringement took place in circumstances such that, had the action been one for defamation, there would have been available to the defendant a defence of absolute or qualified privilege, provided that if the infringement was constituted by a publication in a newspaper, periodical or book, or in a sound or television broadcast, any defence under this paragraph shall be available only if the defendant also shows that the matters published were of public concern and their publication was for the public benefit; or
   (*f*) the defendant acted under authority conferred upon him by statute or by any other rule of law.

Remedies

4.—(1) In any such action the court may—
   (*a*) award damages;

(*b*) grant an injunction if it shall appear just and convenient;
(*c*) order the defendant to account to the plaintiff for any profits which he has made by reason or in consequence of the infringement;
(*d*) order the defendant to deliver up to the plaintiff all articles or documents which have come into his possession by reason or in consequence of the infringement.

(2) In awarding damages the court shall have regard to all the circumstances of the case, including—
(*a*) the effect on the health, welfare, social, business or financial position of the plaintiff or his family;
(*b*) any distress, annoyance or embarrassment suffered by the plaintiff or his family; and
(*c*) the conduct of the plaintiff and the defendant both before and after the infringement, including any apology or offer of amends made by the defendant or anything done by the defendant to mitigate the consequences of the infringement for the plaintiff.

Limitation

5. No such action shall be brought more than three years from the time when the plaintiff first became aware, or by the use of reasonable diligence could have become aware, of the infringement, nor in any case more than six years after the cause of action accrued to the plaintiff.

Miscellaneous provisions

6. The right of action conferred by this Act shall be in addition to and not in derogation of any right of action or other remedy available otherwise than by virtue of this Act provided that this section shall not be construed as requiring any damages awarded in an action brought by virtue of this Act to be disregarded in assessing damages in any proceedings instituted otherwise than by virtue of this Act and arising out of the same transaction.

Rules of court

7. The Lord Chancellor may make rules regulating the procedure of the court for the trial of actions for the infringement of the right of privacy and may by those rules make provision.
(*a*) where the action has been begun in or transferred to the High Court, for trial by judge and jury upon the application of any party to the action;
(*b*) for the trial of the action or of any interlocutory proceedings therein or any appeal therefrom otherwise than in open court.

Amendment of law of evidence

8. From and after the coming into force of this Act no evidence obtained by virtue or in consequence of the actionable infringement of any right of privacy by any of the means described in paragraphs (*a*), (*b*), (*c*) or (*d*) of section 9 (1) of this Act shall be admissible in any civil proceedings.

Definitions

9.—(1) "Right of privacy" means the right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communications with others, his property and his business affairs, including intrusion by—
(*a*) spying, prying, watching or besetting;
(*b*) the unauthorised overhearing or recording of spoken words;
(*c*) the unauthorised making of visual images;

(*d*) the unauthorised reading or copying of documents;

(*e*) the unauthorised use or disclosure of confidential information, or of facts (including his name, identity or likeness) calculated to cause him distress, annoyance or embarrassment, or to place him in a false light;

(*f*) the unauthorised appropriation of his name, identity or likeness for another's gain.

(2) "Family" means husband, wife, child, step-child, parent, step-parent, brother, sister, half-brother, half-sister, step-brother, step-sister (in each case whether legitimate or illegitimate and whether living or dead).

(3) "The court" means the High Court or any county court.

Amendment of Administration of Justice Act 1960 (1960 c. 65)

10. In section 12 (1) of the Administration of Justice Act 1960 (which relates to the publication of information relating to proceedings in private) there shall be inserted immediately after paragraph (*d*) the following new paragraph—

"(*dd*) where the court sits in private pursuant to rules of court made under the power conferred by section 7 of the Right of Privacy Act 1970."

Application to Crown, citation and commencement

11.—(1) This Act shall bind the Crown.

(2) This Act may be cited as the Right of Privacy Act 1970.

(3) This Act shall come into force on 1st January 1971.