Scottish Law Commission

DISCUSSION PAPER No 77

Criminal Evidence

Affidavit Evidence, Hearsay and Related Matters in Criminal Proceedings

SEPTEMBER 1988

This Discussion Paper 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 on this Discussion Paper were submitted by 11th February 1989. All correspondence should be addressed to:-

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NOTES

1. In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

2. References are made in this Discussion Paper to the English Criminal Justice Bill and the Civil Evidence (Scotland) Bill which were under consideration by Parliament while this Paper was being prepared. It is likely that both these measures will have been enacted prior to publication of this Paper

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AFFIDAVIT EVIDENCE HEARSAY AND RELATED MATTERS IN CRIMINAL PROCEEDINGS

PART I

INTRODUCTION

1.1 The law of evidence was included in our First Programme of Law Reform[1] and in September 1980 we published a Consultative Memorandum[2], covering a very wide area of the law of evidence and making many provisional proposals for law reform on which comment was invited. We have since determined not to publish one very large report on the law of evidence, but rather to work towards a series of reports dealing with distinct areas of the law where a need for reform has been identified.

1.2 To date we have published a Report on Evidence in Cases of Rape and Other Sexual Offences[3] and a Report on Corroboration, Hearsay and Related Matters in Civil Proceedings.[4] We have also recently published a Discussion Paper on the Evidence of Children and Other Potentially Vulnerable Witnesses.[5] The next topics which we have identified as being in need of further examination are in the context of criminal proceedings, and include affidavits, hearsay, computer evidence and the prior statements of witnesses and accused persons. There have been many legal developments since the publication of our Consultative Memorandum in 1980 and these have required us to look at many questions afresh and in greater detail. Accordingly, we considered it important to engage in further consultation on these areas before coming to any firm conclusions and making recommendations in a report.

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[1] Scot. Law Com. No. 1, 1965

[2] Consultative Memorandum No.46, "Law of Evidence".

[3] Scot. Law Com. No. 78, 20 July 1983, and implemented by section 36 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985.

[4] Scot. Law Com. No. 100, 21st May 1986.

[5] Discussion Paper No 75. We decided recently to use the term "discussion paper" in preference to "consultative memorandum".

1.3 In this Discussion Paper we have not presented a comprehensive statement of the present law. In 1979 Sheriff I.D. Macphail produced for us an extensive Research Paper on the Law of Evidence which was given wide distribution and which provided a detailed statement of the law and an analysis of problems encountered with it. In view of a continuing demand for this work by practitioners, the Law Society of Scotland recently republished the Research Paper as a book[1], the contents as regards Scots law having been up-dated by Sheriff Macphail. In the course of this Paper we shall make reference to this revised publication for its detailed account of the present law.

1.4 Before proceeding further we should make it clear that we recognise that the scope for reform of the law of evidence in criminal proceedings is more restricted than in the case of civil proceedings. The risk of loss of liberty and the right to a fair trial are important considerations which, among other things, must limit the extent to which, for example, a greater use of hearsay evidence could be contemplated in criminal proceedings. Indeed, such a limitation is expressly declared in the European Convention on Human Rights, Article 6 of which states:

> "Everyone charged with a criminal offence has the following minimum rights:
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> ....
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

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[1] "Evidence. A Revised Version of a Research Paper on the Law of Evidence in Scotland", 1987, (hereafter referred to as "Macphail").

We shall be referring to that Article from time to time in this Discussion Paper, and also to the leading case of Unterpertinger (1/1985/87/134) in which the Court of Human Rights held there had been a violation of Article 6 when in Austria an accused was convicted mainly on the basis of written statements made to the police by two non-compellable witnesses who refused to give oral testimony at the trial.

PART II

ADMISSION OF EVIDENCE BY AFFIDAVIT

(a) The problem

2.1 In criminal trials a great deal of time is often spent in leading evidence which is either routine or uncontroversial, and which is unlikely to be challenged and subjected to cross-examination. This does not mean, however, that this evidence is unimportant and could be omitted. On the contrary, such evidence will often be required as part of the proof of a crucial fact.

2.2 Uncontroversial evidence can of course be agreed by joint minute of admissions[1]. But negotiating the admission of particular facts may be a source of difficulty and delay. Indeed the party against whom such evidence is to be used will frequently be reluctant to admit the facts in question because of the possibility, however remote, that the other party might, in the absence of the admitted facts, fail to produce the requisite proof. This approach, though understandable, is neither conducive to the speedy despatch of court business nor to the convenience of the witnesses concerned who may have to wait in the court building for hours, or even days, simply to give their small piece of uncontroversial evidence.

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[1] Criminal Procedure (Scotland) Act 1975, sections 150 and 354. See also Renton and Brown "Criminal Procedure According to the Law of Scotland" (5th ed.), hereafter referred to as "Renton and Brown", at para 18.05. The duties of procurators-fiscal, as instructed by the Lord Advocate, to meet defence solicitors to discuss, amongst other things, the evidence available to the Crown and to arrange minutes of admission on evidence which is not to be contested, are referred to in 1980 SLT (News) 42.

2.3 The problem of unproductive attendance at court could affect any witnesses, but it is one which in particular has a marked effect on police resources in Scotland. While it is undoubtedly a part of the normal duties of police officers to attend court to give evidence, there is no doubt that this also requires a substantial number of police man hours. Indeed, we have received information from the Association of Chief Police Officers (Scotland) confirming that fact and, most significantly, it appears that, although many hours are spent by police officers at court waiting to give evidence, only a small minority of the officers concerned actually go into the witness box. This can in part be explained by prosecutions not proceeding to trial, for instance due to the accused pleading guilty at a late stage, but even where trials do proceed a significant number of witnesses are either not called, or if they are, they are not cross-examined in relation to their evidence.

2.4 We have also received representations from the Federation Against Copyright Theft regarding difficulties encountered in Scotland in respect of prosecutions for piracy of copyright in video recordings. For the Crown to prove all the elements of its case against an accused, it may be necessary to bring witnesses from abroad at great expense to testify as to the subsistence of copyright in a particular film, or other work. To some extent this problem might be alleviated if our provisional proposals on business records, discussed in Part III below, were to be implemented[1] and it might also be possible in some instances to obtain evidence by means of letter of request to a foreign

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[1] Some states keep registers of the subsistence of copyright in particular works, extracts from which could be admitted for these purposes.

jurisdiction[1] but there may remain a substantial residue of cases where, in the absence of some further measures, it would still be necessary to obtain oral testimony by witnesses in court in order to prove formal but essential matters.

2.5 The witness who has to travel from afar to give some formal evidence, which at trial is not contested, is only one example, however, of what appears to be a wider problem of considerable public and private resources being tied up in the giving of, or waiting to give, evidence in court when frequently there is no real need for the presence of the witness in person. This is confirmed by the absence of cross-examination of the witness in many instances. In such cases, therefore, we consider that the admission of the witness's evidence in a document, or affidavit, could be justified, provided adequate safeguards were retained to protect the interests of a party against whom the evidence was being led. If this could be achieved, we estimate that considerable amounts of time and money could be saved in Scottish criminal proceedings.

2.6 As will shortly be seen, we propose that the principal safeguard for a party against whom a written statement is tendered should be the right to require the attendance as a

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[1] Where there is an agreement with that foreign jurisdiction to receive letters of request. See the Report (1986) of the Fraud Trials Committee, chaired by Lord Roskill, at para. 5.44, on the need for more conventions, treaties and international agreements to provide reciprocal arrangements regarding the taking and receipt of evidence.

witness of the person who made the statement. That, of course, carries with it the risk that parties or their advisers - whether through excessive caution or for any other reason - could stultify the new procedure from the outset simply by exercising that right in every case. We have considered whether it would be possible to devise any sanction against the unreasonable exercise of a right to require the attendance of witnesses (possibly involving some restriction of legal aid fees), but we have concluded that, at least in the first instance, it would be preferable to rely on the good will and commonsense of practitioners to enable the new procedure to work in a satisfactory manner.

(b) Certificate evidence

2.7 There is some provision under the present law whereby formal evidence may be received and proved by the production of a certificate. The best known example is probably section 10 of the Road Traffic Act 1972 which makes provision for certificate evidence regarding the proof of blood-alcohol levels in road traffic offences. Another example is to be found in section 26(1) of the Criminal Justice (Scotland) Act 1980, which provides that, in prosecutions of the offences specified in Schedule 1 of the Act, a certificate purporting to be signed by certain persons, certifying a particular matter, shall, subject to the conditions mentioned below, be "sufficient evidence of that matter". The kinds of matters dealt with are the type and classification of controlled drugs; certain facts in relation to immigrants; information regarding the payment of state benefits; and the accuracy of police speedometers, radar etc.[1]

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[1] See Renton and Brown at paras. 18-66 and 18-67.

2.8 The conditions required of certificate evidence under the 1980 Act are that the prosecution has served a copy of the certificate on the accused not less than 14 days before his trial and that the accused, where that has been done, has not served a notice challenging the matter certified.[1]

2.9 These examples of certificate evidence procedure seem to work well enough and the interests of the defence are preserved by the right to challenge the accuracy of the matters being certified. The subject-matter of certificate evidence is of course very specifically identified and we wish to consider a more general solution. Some aspects of this procedure might be useful, however, in considering reform proposals of a general nature.

(c) Section 9 of the English Criminal Justice Act 1967

2.10 An example of provisions of general scope whereby written statements may be admissible can be seen in section 9 of the English Criminal Justice Act 1967, the full terms of which can be found in Appendix I below. In summary, section 9 states that for a written statement to be admissible in place of oral testimony: the statement must purport to be signed by the person who made it; it must contain a declaration by its maker that to the best of his knowledge and belief the statement is true and that he understands he will be liable to prosecution if he knew anything in it to be false or did not believe it to be true; before the hearing the party proposing to tender the statement must

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[1] Section 26(3) of the 1980 Act.

serve a copy of it on the other parties; and none of the parties, within 7 days of the service of the copy of the statement, has served a notice objecting to the evidence being tendered. Notwithstanding these provisions the parties may agree before or during the proceedings that the written statement may be tendered in evidence. Equally, even if the notice procedure has been followed and no objection taken, the party who originally introduced the written statement may call the maker of the statement to give evidence.

2.11 The procedure under section 9 of the 1967 Act, although primarily intended for evidence of a routine nature, clearly can apply to any kind of statement, and, unlike evidence by certificate, may be used by any party to the proceedings and not only by the Crown. The main safeguards offered under these provisions are that a written statement is admissible only when a notice procedure has been followed and, further, that a party can object to evidence being tendered in that way and his objection will be decisive in rendering the statement inadmissible. We consider the notice procedure to be an important safeguard which, as a model for potential reform, should not be qualified by any judicial discretion to over-ride a party's objections to the admission of a written statement.[1] Even if no objection is raised during the notice procedure, however, and the written statement would thus be admissible, the court may on its own motion, or on the application of any party, require the maker of the statement to attend the court proceedings to give evidence.[2]

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[1] This could conflict with an accused's right to examine witnesses against him. See Article 6 of the European Convention on Human Rights and the Unterpertinger case, discussed at para 1.4 above.

[2] Section 9(4)(b) of the 1967 Act.

2.12 An example of the operation of section 9 of the 1967 Act can be seen in the case of <u>Lister</u> v. <u>Quaife</u>.[1] Of section 9 Lord Justice May stated:[2]

> "That is an extremely useful and very well-known section. So familiar have practitioners become with it and with its operation that its precise effect may not on occasion have been fully appreciated."

The precise effect of section 9 is very important, however, in assessing how useful a model it might be for the purposes of law reform.

2.13 In <u>Lister</u> v. <u>Quaife</u> a woman was accused of stealing some clothing from a large store. She claimed she had bought the clothing at an earlier date from another branch of the store. The prosecution gave notice under section 9 of the 1967 Act of two written statements from witnesses, who were employees of the store, who asserted that at the earlier date mentioned by the accused the clothing in question had not been on sale at any of their shops. No notice of objection to the admission of these written statements was made by the accused and the makers of the statements did not attend the trial. The accused, nonetheless, maintained her line of defence which was in contradiction to the evidence in the written statements. She was acquitted and the prosecution appealed.

2.14 In cases of oral testimony where the defence lawyer has not cross-examined a prosecution witness on particular matters it would not normally then be open for him to lead evidence on those matters which contradicted the evidence of prosecution

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[1] (1982) 75 Cr. App. R.313.

[2] At page 317.

witnesses. Of course if evidence is tendered in written form it is not possible to engage in cross-examination. In terms of section 9 of the 1967 Act, written statements submitted under its provisions are simply admissible in evidence "to the like extent as oral evidence". Thus in Lister v. Quaife, considering that the evidence in the Crown statements was not conclusive proof and given what in fact had happened and that the burden of proof had remained with the Crown throughout, the Divisional Court were able to conclude that the justices in the lower court had not come to a "perverse conclusion" by taking into account the accused's testimony and by considering that it had introduced an element of doubt, whereby an acquittal was justified.

2.15 Lister v. Quaife was an unusual case in that the evidence in the written statements tendered by the Crown was not merely formal or routine in nature. The statements were a very important part of the prosecution case. Of course section 9 of the 1967 Act is in quite general terms and could be used to admit any kind of evidence, but if crucial Crown evidence is tendered by written statement it might also be usual for the accused to object to its admission, which was not done here. The defence will normally want to take advantage of the opportunity of cross-examining important Crown witnesses. This exceptional case of Lister v. Quaife could have wider implications, however, for the operation of a procedure for the admission of written statements.

2.16 The objective of rules such as that in section 9 of the 1967 Act is, of course, that as much routine evidence as possible should be admitted by written statement, thus sparing witnesses unnecessary attendance at court. Where evidence tendered is purely formal, where no objection regarding its admission is taken,

and where no evidence contradicting the written statement is led, no problems will arise. But equally if defence lawyers became concerned, quite understandably, that by not taking objection during the notice procedure, they could be precluding their clients from an effective defence at trial by not being able to lead evidence contradicting that given in written statements, objection by counter-notice could become the rule as a matter of precaution and the objective of the procedure would be frustrated.

2.17 One way out of the difficulty outlined above would be simply to provide a procedure for the admission of written statements which specifically did not preclude any party at the trial from contradicting evidence in a written statement. When a party did not object to a statement being admitted in writing it would thus be recognised that he had merely given his tacit consent to evidence being tendered in that way and he would not otherwise be restricted in the presentation of his case. We have considered the alternative of contradiction of a written statement being permitted only with leave of the court, but have concluded that this would merely be productive of undesirable levels of uncertainty which in practice could hamper the acceptance of a procedure for the admission of written statements.

2.18 If at trial, however, evidence were led by one party contradicting the evidence in a written statement tendered by another, it may only be fair that that other person should be able to lead additional evidence in response. Under the present law there is provision for additional evidence to be led by either the prosecution or defence using, as appropriate, sections 149,[1] 149A, 350 and 350A of the Criminal Procedure (Scotland) Act 1975, for solemn and summary proceedings respectively. Section 149(1), for

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[1] As amended by the Criminal Justice (Scotland) Act 1987, schedule 1, para 9.

instance, gives the judge a discretion to permit a party to lead additional evidence where prima facie it would be material and, at the time the jury was sworn, either the additional evidence was not available and could not reasonably have been made available, or the materiality of such additional evidence could not reasonably have been foreseen by the party. Also, section 149A gives the judge a discretion to permit the prosecutor to lead additional evidence for the purpose of, amongst other things, contradicting evidence led by the defence which could not reasonably have been anticipated by the prosecutor.[1]

2.19 In our view provisions similar to those in the 1975 Act should be introduced to enable additional evidence to be led in cases where, although a party has not taken formal objection to a written statement, he has nonetheless given or led evidence in contradiction of the evidence in the statement. Provisionally we are of the view that this should be an entitlement and not merely a matter for the discretion of the court. There is also a question as to whether any additional evidence should be limited to that of the maker of the written statement, or should also include other evidence in replication. For the present we have no firm views on this and would welcome the views of consultees.

2.20 We are of the opinion that, for a written statement to be admissible under the proposed procedure, the formalities of

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[1] For the potential scope of the 1975 Act's provisions see Sandlan v. HMA 1983 SCCR 71, where the prosecution was permitted to lead evidence in replication to evidence elicited from an accused when cross-examined on behalf of a co-accused, the defence also being able to lead additional evidence to counter that led in replication by the prosecution. See also Renton and Brown, paras 18.74-18.75 and Salusbury-Hughes v. HMA 1987 SCCR 38 for a case where additional evidence was not permitted.

execution of the writing should be kept relatively simple. This would facilitate the use of the procedure and keep costs down for all parties. Section 9 of the 1967 Act again, we think, would be a suitable model. That provision requires merely that a statement be signed by the person who made it and that it contains a declaration that to his best knowledge and belief the statement is true and that it is understood that he would be liable to prosecution for any falsehood. To require more elaborate formalities, such as affirmation before a notary public, should not be necessary in this context. If there were any doubt as to the authenticity or accuracy of a written statement, any party to the proceedings could object and the writing would be rendered inadmissible under the proposed procedure. Special rules could be made for witnesses and recipients of notices etc who cannot read.

2.21 A further matter for consideration is whether the court should be given a power, operable on its own motion or on the application of a party to the proceedings, to require the attendance as a witness of a person who has given a written statement, notwithstanding that the statement is otherwise admissible through lack of objection.[1] Such a power would make the operation of the new procedure unpredictable, but it could be a valuable safeguard, for example in a case where an accused is unrepresented. As presently advised, we are disposed to think that the court should have such a power.

2.22 If a procedure such as we have been outlining in the preceding paragraphs were to be introduced in Scotland, it would of course be necessary to make provision on a number of matters of detail such as the time scale for serving written statements and counter notices, the possible use of facsimile signatures on written statements,[2] and the identification of documents or other

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[1] cf 1967 Act, s 9(4)(b).

[2] See, for example, Cardle v. McKay 1982 SCCR 33.

productions referred to in a written statement. We do not suppose that such matters would present insuperable difficulties, and for the present we do not examine them in detail.

2.23 In the circumstances we seek the views of consultees on the following broad propositions:

1.(a) **Provision should be made to enable the evidence of a witness to be given in court in the form of a written statement, signed by the witness.**

(b) **Such a statement should be served on all other parties not less than a specified number of days prior to a trial taking place; and, if no counter notice requiring the attendance of the witness in court is served within a specified number of days thereafter, the statement should be admissible to the like extent as oral evidence.**

(c) **Any party on whom such a statement is served should be entitled, by giving a counter notice within the prescribed time limit, to require the attendance as a witness of the maker of the written statement.**

(d) **Even where no counter notice has been given, the court should have a discretion to declare a written statement inadmissible in the absence of its maker giving evidence in person.**

(e) Where a written statement is admitted in the absence of a counter notice, it should nonetheless be permissible for a party against whom the written statement has been used to give or lead evidence which is inconsistent with the evidence contained in the written statement.

(f) Where that happens, the party who tendered the written statement should be entitled to lead additional evidence. Should that be restricted to the maker of the written statement, or should other evidence in replication be permitted?

PART III
THE RULE AGAINST HEARSAY

General

3.1 In this chapter we examine to what extent there is any need for reform of the rule against hearsay. The rule against hearsay is, broadly speaking, to the effect that a statement made other than by a witness giving evidence in court is not admissible as evidence of the facts contained in it. Of hearsay Dickson stated[1]:

> "Hearsay evidence is testimony delivered by one who depones, not from his personal knowledge of a fact, but from his recollection of what another told him regarding it."

A.B. Wilkinson commented on this definition[2]:

> "That serves well as a definition of oral hearsay although one might add that testimony which refers to the deponent's own previous statement, oral or written, while not strictly hearsay, falls under a like condemnation. What is contained in a document if tendered as evidence of facts it narrates is, however, equally hearsay. That is so even if the narrative does not depend on the recollection of someone other than its author, as where the document is the authentic writ of a witness of the facts it narrates or has been compiled to his dictation or is a contemporary record of what he said. The same, of course, is true of electronic recordings and computerised information. Nor is evidence taken out of the category of

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[1] W.G. Dickson, "Law of Evidence in Scotland" (1st edn.), p. 56, para. 83; (3rd edn.) p.185, para. 244 (hereafter referred to as "Dickson", references being taken from the 3rd edition).

[2] "The Rule Against Hearsay in Scotland", 1982 JR 213, at p. 218. See also Macphail at para. s.19.02.

> hearsay by the fact that the original communication was not in words. Intentionally assertive or negatory conduct (eg. where something is indicated or denied by gesture) may be the subject of hearsay no less than the written or spoken word."

It could be debated whether the term "hearsay" should be applied to anything other than a reported account of another's statement submitted as evidence of the truth of its contents. In this Discussion Paper, however, we shall deal with problems of the hearsay rule in the sense described by Wilkinson, so recognising its application to any statement the maker of which is not present in court as a witness and which is adduced as evidence of the truth of its contents.[1] We shall examine separately the law on the prior statements of witnesses and of the accused.[2]

3.2 Explaining the justification for the rule against hearsay, when delivering the judgment of the Privy Council in Teper v. The Queen[3], Lord Normand stated:[4]

> "The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost."

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[1] That such statements generally would be inadmissible is also the underlying assumption of the Criminal Evidence Act 1965, discussed below, which at present governs the admissibility of documentary records in criminal proceedings in Scotland. See also "Cross on Evidence", 6th edn. at p. 38: "In spite of the etymological ineptitude the rule applies to what people wrote as well as to what they were heard to say,..."

[2] See Part IV below.

[3] [1952] AC 480.

[4] At p 486: This statement is also cited by the House of Lords in R v. Blastland [1985] 3 WLR 345, at p 350.

The hearsay rule also applies in England and Wales. In a recent appeal before the House of Lords, Lord Havers considered the definition of and justification for the rule, stating:[1]

> "I accept the definition of the hearsay rule in Cross on Evidence (6th edn, 1985) p 38: 'an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted' (Cross's emphasis). The rule is so firmly entrenched that the reasons for its adoption are of little more than historical interest but I suspect that the principal reason that led the judges to adopt it many years ago was the fear that juries might give undue weight to evidence the truth of which could not be tested by cross-examination, and possibly also the risk of an account becoming distorted as it passed from one person to another."

In summary, the exclusion of hearsay evidence has been justified on the basis that hearsay: is not the best evidence; has not been given on oath; is not subject to the test of cross-examination; could be difficult for juries to evaluate; and, where relevant, may have been distorted through repetition from one person to another. It has also been thought that the admission of hearsay evidence might lead to superfluous evidence being brought before the courts.

3.3 In a few instances only has the present common law recognised exceptions to the rule against hearsay in criminal proceedings - notably where, at the time of going to trial, the maker of the statement is dead, or is permanently insane, or is a prisoner of war[2], or where the statement forms part of the res gestae (ie was made in the course of, or was closely connected with a particular criminal incident), or the statement is an

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[1] R v. Sharp [1988] 1 All ER 65, at p 68.

[2] Although there may be some doubt as to the application of this particular exception in criminal as opposed to civil proceedings. See HMA v. Monson (1893) 21R(J)5, at p 10, and Macdonald, "Criminal Law of Scotland", (5th ed) at p 318. See also paras 3.12-3.13 below.

admission made by the accused himself.[1] Under the common law, the mere fact that a witness cannot be found does not permit the admission of a prior statement made by him in exception to the hearsay rule.[2]

3.4 In counter argument to the justifications for the hearsay rule it could be stated that: hearsay evidence, particularly if it is a near contemporaneous written account of an event, may often be better evidence than an oral report made much later which relies on the witness's memory of detailed events; the taking of an oath of itself is no guarantee of the trustworthiness of a witness's testimony and the absence of the oath should not be fatal to the admissibility of a statement, the reliability of which may not otherwise be in doubt; juries at present have to evaluate the weight to be given to hearsay evidence admitted in exception to the hearsay rule; and hearsay evidence which is superfluous could be dealt with by the courts in the same way as any other non-hearsay evidence which is superfluous. However, what would be inescapable, should a hearsay statement be admitted in lieu of direct oral testimony, would be the lack of opportunity to cross-examine the witness who first made the statement as to its accuracy and full context. Moreover, if the statement were reported by someone other than its original maker, there would be

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[1] See Wilkinson, "The Rule Against Hearsay in Scotland", 1982 JR 213, at pp 218-221, for a list of possible common law exceptions to the hearsay rule in civil and criminal proceedings respectively, and also specific statutory exceptions to the rule. See also Macphail at paras 19.22, S19.22 and S19.22A.

[2] See Monson, cited above.

a danger, even if the intermediary were honest, of the statement becoming distorted through repetition and by the intermediary's lack of direct, personal knowledge of the facts in issue. These last two factors in our view remain of particular importance in justification of the rule against the admission of hearsay evidence in criminal proceedings.

3.5 Conclusions relevant to hearsay evidence in civil proceedings can be distinguished from what might be appropriate in criminal cases. In our Report on Corroboration, Hearsay and Related Matters in Civil Proceedings[1] we recommended the total abolition of the rule against hearsay subject only to certain safeguards to enable a party to object to the use of a hearsay statement in the absence of its maker being called as a witness.

3.6 In the context of civil proceedings we considered that abolition of the hearsay rule, coupled with the ground of objection mentioned above, would be appropriate bearing in mind, amongst other factors, that the standard of proof to be applied would be on a balance of probabilities. In implementing our Report in the Civil Evidence (Scotland) Bill, which is currently before Parliament, the Government decided to be more radical still and the Bill aims simply to abolish the rule against hearsay without introducing any ground of objection to the admission of such evidence.

3.7 For the purposes of criminal proceedings, however, we do not favour the approach to hearsay evidence adopted either in our Report on evidence in civil proceedings or in the Civil Evidence (Scotland) Bill. We are of the view that the high standard of proof beyond reasonable doubt demanded of the Crown in criminal

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[1] Scot Law Com No 100.

trials and the nature of the proceedings themselves, where an individual's liberty may be at stake, require a different approach. We consider that, as far as practicable, the right to cross-examine the original maker of a statement should be maintained in criminal proceedings and that the basic approach of the present common law, which observes that principle, should be preserved.[1]

3.8 What we have in mind is the retention of the common law rule against the admission of hearsay evidence in criminal proceedings, subject to the present exceptions to that rule being examined to see if they might be clarified, extended or improved. This would be to preserve the underlying approach of the present law whilst exploring in what ways some of the exceptions to the hearsay rule might be improved.

3.9 Accordingly, we seek the views of consultees on the following general proposition:

2. **The general rule against the admission of hearsay evidence in criminal proceedings should not be abolished. However, the existing exceptions to that rule should be examined to see whether they can be clarified, extended or improved.**

3.10 Against that background we now turn to examine the existing exceptions to the rule against hearsay.

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[1] See the European Convention on Human Rights, and the case of Unterpertinger, referred to in para 1.4 above.

Common law exceptions to the hearsay rule

(a) Introduction

3.11 First, we will consider potential reform of the common law exceptions to the hearsay rule, before turning to an examination of the statutory rules on the admissibility of business records. In the course of this discussion we will also consider whether any exceptions to the hearsay rule should be qualified so as to deny their application in certain circumstances. For instance, it may be that a statement, otherwise admissible in exception to the hearsay rule, should be excluded if it were prepared in the course of a criminal investigation or for the purposes of pending or contemplated criminal proceedings. Our examination of hearsay evidence should, therefore, be considered as a whole, including such qualifications as may be proposed later in this Paper.

(b) Present common law exceptions

3.12 It is not our inten tion to restate all aspects of the hearsay rule in criminal proceedings. We thefore concentrate on areas where there is doubt as to the present exceptions to the rule, or where there may be an argument for some new exceptions. We do not intend to review the law regarding the admission of statements made against interest by accused persons, although in Part IV below we consider the evidential role of the prior statements of accused persons and witnesses which have been admitted in evidence. Nor do we seek to redefine the use and

function of res gestae statements.[1] We consider that the law applicable to both these categories of statement can best be left to the courts. Of the current common law exceptions to the hearsay rule relevant to criminal proceedings, this leaves for our attention statements made by a person who is either deceased, or permanently insane or a prisoner of war.[2]

3.13 Issues raised in Monson v. HMA[3] indicate some of the uncertainties in the present common law exceptions to the hearsay rule but also demonstrate the current boundaries to those exceptions, which cannot be extended. In that case the Crown sought to lead evidence of a statement made by a witness whom they had been unable to trace. When rejecting the statement, and considering the basis of the hearsay rule, the Lord Justice-Clerk said:[4]

> "There is a relaxation of this rule in the case of persons who are dead, and there is apparently - I do not know on what authority - a relaxation also in the case of a person who is hopelessly insane. From a person in this position it is as impossible to get evidence as it is from a dead person; and therefore it is held that if you can prove what

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[1] See Renton and Brown, para 18-46. See also Wilkinson, "The Scottish Law of Evidence", at p 41, where it is noted that to the extent that there may be an exception to the hearsay rule regarding statements as to the physical or mental condition of the maker, this may be regarded as part of or akin to the res gestae exception. See also "Cross on Evidence", (6th ed), pp 596-597.

[2] See Wilkinson, "The Scottish Law of Evidence" at pp 49-50.

[3] (1893) 21R(J)5.

[4] At pp 9-10.

the person said, it may be admitted as evidence, subject of course to the observation that it is evidence at second hand. Another case has been referred to. That is the case of a prisoner of war confined in a foreign country, whom it is impossible for the litigant requiring his evidence to examine. This was decided in a civil case[1], and, of course, the same absolute strictness may not always be applied in civil proceedings as is observed in protecting the interests of a prisoner charged with crime. But as regards these two cases - the case of an insane witness and the case of one who is a prisoner of war - it is quite plain that the difficulty of the prosecutor does not consist just in this, that he cannot find the witness. ... ...

But here the reason given by the Crown for their failure to produce Sweeney as a witness is that they have not been able to find him. Now, it is a new idea to me, as a principle of law, that you are entitled to take secondary evidence of a witness whom you cannot find. ...It seems to me, on the face of it, that it would be a most dangerous principle. If parties are unable to find a witness, that is a misfortune to the litigant, and a misfortune to which he must just submit. To say that if Sweeney had been found he might have been a competent witness is to state no ground for allowing hearsay evidence of what he said. If the Crown had him and made him a witness his credibility could be tested by cross-examination, and by the observation of the jury of his way and manner in giving his evidence. It is the failure of the prosecutor to find him that makes all this impossible."[2]

In criminal proceedings, therefore, the common law hearsay exceptions are quite restricted.

3.14 Apart from recognising the fact that a few hearsay exceptions have arisen under the common law, it could be asked whether there is any rationale which can justify their existence. Wilkinson has sought to do so by reference to Wigmore's analysis

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[1] Cleland's Creditors (1708) Mor 12634.

[2] See also Dickson, paras 266-273; Macdonald's Criminal Law (5th ed), pp 317-318; and Wilkinson, "The Scottish Law of Evidence", pp 49-51.

of hearsay exceptions found in the experience of Anglo-American law.[1] Wilkinson suggests that the present hearsay exceptions in Scots law can be justified:[2]

> "...on one or other of the twin principles postulated by Wigmore, the necessity principle and the principle of circumstantial probability of trustworthiness. By the necessity principle Wigmore meant, to paraphrase him, that the admission of evidence was justified on the ground of necessity when it came from a source which would otherwise be lost or when it was such that we could not expect to get evidence of the same value from the same or other sources. By circumstantial probability of trustworthiness he meant the evidence was of a kind to which such a degree of probability of accuracy and trustworthiness attached as to make the reported statement an adequate substitute for evidence tested by cross-examination in the conventional manner. These principles Wigmore applied not to the admission of particular items of evidence but to the explanation of the various exceptions to the exclusion of hearsay. The admission of the statements of deceased persons constitutes a strong example of the application of the first principle, the res gestae exception of the second."

In addition to the question whether the exceptions to the hearsay rule that the witness is dead, permanently insane or a prisoner of war can be justified, it could also be asked whether there is any need for clarification[3], rationalisation or extension of these exceptions.

3.15 An extended range of hearsay exceptions can be seen, for instance, in clause 22 of the English Criminal Justice Bill, which

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[1] Wigmore, "Evidence in Trials at Common Law", Bk I, p 204, paras 1421, 1422.

[2] 1982 JR 213, at p 229; see also Macphail at para S19.22A.

[3] The existence of the hearsay exceptions relating to the witness being insane, or a prisoner of war, is not entirely clear in criminal proceedings. See para 3.13 above.

is currently before Parliament. In general terms[1], this provides that in criminal proceedings a statement made by a person **in a document** is to be admissible as evidence of any fact of which direct oral evidence by that person would be admissible if:[2]

(a) the person who made the statement is dead or by reason of his bodily or mental condition is unfit to attend as a witness; or

(b) the person who made the statement is outside the United Kingdom and it is not reasonably practicable to secure his attendance; or

(c) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement; or

(d) all reasonable steps have been taken to find the person who made the statement, but he cannot be found.

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[1] See Appendix II below for the full text of clause 22 and Part II and schedule 2 of the Criminal Justice Bill, which include other provisions on evidence. The Bill was introduced in the House of Lords and the version appended here is that ordered to be printed on 29 March 1988, as amended by the House of Commons Standing Committee H.

[2] See clause 22(2).

We consider below whether any or all of these exceptions could be applied to oral as well as documentary hearsay.

3.16 **Option (a)** would be a rationalisation of Scots law's common law exceptions to the hearsay rule that the maker of the statement is dead or permanently insane. It would go further, however, to include temporary as well as permanent mental incapacity and any physical infirmity which prevented the witness from making his statement directly in court. For the purposes of Scots criminal proceedings, however, this category would have to take into account the possibility of a witness, although unable to give evidence in court, nonetheless being capable of giving evidence on commission.[1]

3.17 **Option (b)**, although it would be wide enough to encapsulate any exception relating to prisoners of war, would represent a substantial change from the present law by admitting evidence of a statement made by a person simply because he is outside the UK and it is not reasonably practicable to secure his attendance in court. If consultees are of the view that such a change should be made, however, this option could be pursued in a number of ways. For instance, a variation on this approach could be that the witness was furth of Scotland, instead of "outside the UK". Another option would be that, rather than the test for admissibility being whether it was "reasonably practicable" to bring the witness to court, the test could be whether it was both "reasonable and practicable" to do so. For example, although it may be "reasonably practicable" to secure some-one's attendance from abroad, it may not be "reasonable" to do so if the evidence

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[1] See section 32(1)(b) of the Criminal Justice (Scotland) Act 1980.

were uncontentious and of relatively minor importance. Alternatively, the test could be confined to practicability alone. An additional consideration might be whether it was reasonable and/or practicable to secure the evidence of a witness in a foreign jurisdiction by means of letter of request.[1]

3.18 **Option (c)** would be an example of the operation of the best evidence rule, though novel in its general application, by recognising that a written statement, particularly if of a detailed nature, may be more reliable evidence than the witness's recollection and oral account made much later. On the other hand, this option can be distinguished from the others in that it does not necessarily postulate the unavailability of the witness. It could accordingly be argued that in such a case the witness should at least be adduced in court so as to state in terms that he can no longer remember the matters contained in his earlier statement. **Option (d)** would go much further than the present law[2] by admitting hearsay evidence simply because the maker of the statement could not be found. It could be regarded, however,

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[1] See section 32(1)(a) and (2) of the Criminal Justice (Scotland) Act 1980. See also HMA v. Lesacher 1982 SCCR 418; and Muirhead v. HMA 1983 SCCR 133. Under section 32(2) of the 1980 Act, an application to issue a letter of request may be granted by the judge only if he is satisfied that no unfairness would thereby arise for the other party. Of this procedure Lord Cameron observed in Muirhead that (at p 142): "...it would be difficult to be satisfied in the case of a witness whose evidence is other than formal, that there could be no unfairness to the opposite party, be he prosecutor or accused, if he were deprived of the opportunity of oral cross-examination before the jury or the judge, and particularly so in a case in which examination and cross-examination were to be conducted not viva voce before a commissioner but in the much less satisfactory form of the admission of interrogatories and cross-interrogatories."

[2] See HMA v. Monson (1893) 21R(J)5; and para 3.13 above.

as a further example of the admission of evidence through "necessity", in terms of the principles stated by Wigmore.[1]

3.19 An additional exception is provided for in clause 22(3) of the English Bill, which is to the effect that a statement in a document is to be admissible if it was made to a police officer, or other person charged with the duty of investigating offences and charging offenders, and "...the person who made it does not give oral evidence through fear or because he is kept out of the way." We do not, however, put forward for consideration a provision of that nature, as we are of the view that where the witness, for whatever reason, cannot be found his case would fall within option (d) above. On the other hand, if option (d) were not to find favour, there might be more to be said for a provision modelled on clause 22(3), though we doubt whether it is desirable to base a hearsay exception, at least for some cases, on the substantiation of allegations of intimidation by or on behalf of the accused, when at that time he may not be before the court charged with any offence in respect of those allegations. In circumstances where the witness is found, but through fear makes no statement in the witness box, we consider in Part IV below whether any prior statement made by him should be admissible as evidence of fact.

3.20 Clause 22 of the English Criminal Justice Bill is of course restricted to the admission of a hearsay statement contained in a document in which the words of the maker of the statement are recorded. Where Scots common law already recognises exceptions to the hearsay rule, however, oral reports of another person's statement can also be adduced. In considering any reforms of the hearsay rule, therefore, it would be necessary to decide whether

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[1] See para 3.14 above.

any or all of the exceptions should be restricted to situations where the maker of the statement's words are contained in a document. The term "document" for these purposes could be widely defined to include any disc, tape or film etc.[1] Perhaps some new exceptions could be justified only if the statement was recorded in a document in the words of its original maker, or possibly in a more or less verbatim form by someone else such as a police officer, and there was, therefore, no, or at least little, risk of inaccuracy or distortion of the statement through it being recounted by another witness. If oral hearsay should be admitted in some categories of case, however, one option would be that this exception could be restricted to a first-hand account by another witness who himself had direct, personal knowledge of what the maker of the statement said. This would exclude "multiple hearsay", given that the circumstances of a statement being passed on from one person to another could greatly increase the likelihood of inaccuracy arising in the ultimate report of that statement.

(c) Potential reform

3.21 In considering potential reforms the principles stated by Wigmore[2] would logically suggest that a wider range of exceptions could be adopted. For instance the "necessity" principle could be used to justify the admission of hearsay in any situation where the

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[1] See section 17(3) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 for the definition of "document" in civil proceedings, and likewise in clause 9 of the Civil Evidence (Scotland) Bill. The same width of meaning for the term "document" is intended under the English Criminal Justice Bill - see schedule 2, at para 5.

[2] See para 3.14 above.

maker of the statement happened not to be available - ie, not only where the witness was dead, but also where, for example, the witness could not be found. Wigmore's principle of "circumstantial probability of trustworthiness" could also be used to justify the admission of a written statement containing a detailed set of facts, particularly if made near contemporaneously to the event in question, and the witness could not reasonably be expected to have any recollection, or did not in fact have any recollection, of the matters contained in the statement. Indeed, this might be seen as an application of both principles, if, in the absence of the written statement, little or no evidence would be forthcoming from the witness. Apart from what theoretically may be justified, however, we think that other practical and policy considerations should also be borne in mind.

3.22 For instance in Monson v. HMA[1] a practical distinction was drawn between the existing hearsay exceptions and the exception contended for by the Crown, namely that hearsay should be admitted simply because the original maker of the statement could not be found. The distinction made was that, at least with the present exceptions, the question whether a witness was dead, insane or a prisoner of war would have to be established as a clear matter of fact and the reason why the witness could not give evidence in any of those cases would then be obvious. The witness's unavailability or incapacity in those circumstances would also be outwith the control of any party to the proceedings. Where it is stated that a witness cannot be found, however, it could be a matter of dispute or doubt whether adequate steps had been taken to trace him. In Monson, Lord Justice-Clerk Macdonald was not prepared to countenance the admission of hearsay through what he saw as the Crown's failure to find the

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[1] (1893) 21R(J)5. See also para 3.13 above.

witness. Similarly, with other potential exceptions to the hearsay rule, such as it not being reasonable and practicable to secure the attendance of a witness who is abroad, it could be contentious whether in any given case these conditions were satisfied. Were these additional hearsay exceptions to be adopted, therefore, the courts could in practice be faced with new areas of dispute, which would have to be resolved, regarding the admissibility of certain categories of hearsay evidence.

3.23 Given that in some cases it would be established that the requirements of any new hearsay exceptions had been satisfied, we consider that the likely effect of an increase in the volume of hearsay evidence admitted in criminal proceedings should also be assessed. At present, considering the restricted nature of the current hearsay exceptions, the leading of hearsay evidence is likely to be relatively rare. With an extended list of exceptions of general application, however, the admission of hearsay evidence could become far more common and, in our view, the implications of this for the overall conduct of criminal proceedings should be given careful evaluation.

3.24 Apart from the possible creation of **new** hearsay exceptions, whether the **present** exceptions to the hearsay rule should be clarified and rationalised could be regarded, if so desired, as an independent question.[1] For instance if consultees concluded that additional hearsay exceptions should not be created, this decision could be without prejudice to the adoption of a statutory rule which, in general terms, could be to the effect that evidence of a statement (whether contained in a document or reported orally -

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[1] Other than with the at present dubious category of prisoners of war, which could be covered by a more general exception relating to the witness being abroad and it not being reasonable and practicable to secure his attendance, should consultees favour any rule of that kind.

provided it was a first-hand account[1] and was otherwise admissible) should be admitted where the maker of the statement is dead or by reason of his bodily or mental condition is unfit to attend as a witness or to give evidence on commission. A provision of that kind would remove any doubts regarding the present law and would also rationalise the law by ensuring that exceptions to the hearsay rule could be made in circumstances where a witness is, for example, either in a coma or temporarily insane, as well as where a witness is either dead or permanently insane.

3.25 Clearly, the retention of the present law on hearsay evidence in criminal proceedings, without any restatement or extension, would also be an option. Regardless of what option or options are selected, however, we would envisage that in solemn proceedings the courts would at least continue to direct juries to take into account, for the purposes of assessing what weight should be attached to particular evidence, that a hearsay statement has not been given on oath or been tested by cross-examination.

3.26 At this stage we do not make any reform proposals as such, but merely outline what seem to us the most relevant options for consideration. The problem raises many issues of policy and, therefore, we would wish to receive a wide range of opinions before forming a view on what particular approach should be adopted. Accordingly, we would very much welcome the views of consultees on what reforms, if any, should be recommended regarding hearsay evidence in criminal proceedings.

3.27 Consultees views are sought on the following questions:

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[1] See para 3.20 above.

3.(1) Should a statement made by a person otherwise than in the course of criminal proceedings be admissible as evidence of fact, in exception to the hearsay rule, in any or all of the following circumstances (on the assumption that the evidence in other respects would be relevant and admissible and subject to the proposals below which could qualify the admissibility of hearsay statements):

(a) the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness or give evidence on commission, (NB, a provision based on this item alone would be a restatement and rationalisation of the present law);

(b) the person who made the statement is outside the United Kingdom (or, as an alternative, furth of Scotland) and it is not reasonable and practicable (or, as an alternative, it is not practicable) to secure his attendance, or to secure his evidence by means of a letter of request to a foreign jurisdiction;

(c) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement;

(d) all reasonable steps have been taken to find the person who made the statement, but he cannot be found?

(2) Should any or all of the above exceptions, if selected, be restricted to situations where the maker of the statement has recorded his words in a "document" (including a tape, video tape, film etc), or where his words have been recorded verbatim by someone else,

<u>or</u>

with any or all of the above exceptions, should it be provided that the statement may be reported orally by a witness, provided that witness has direct, personal knowledge of what the maker of the statement said?

(3) Alternatively, should the present common law on hearsay evidence in criminal proceedings be retained?

(d) <u>Discretion to exclude otherwise admissible hearsay evidence</u>

3.28 Even if some new hearsay exceptions are to be permitted, or at least the present exceptions are to be maintained, it might still be the case that in certain circumstances hearsay evidence of dubious quality should be excluded. To some extent the present law already recognises a need to do this, for although the hearsay exception admitting the evidence of a deceased witness is probably the most clearly recognised of the common law exceptions, it has not been applied by the courts without qualification. In particular, Dickson has noted that the diary of a deceased has not been admitted against an accused in a murder trial.[1] The case

[1] See Dickson at paras 266-273.

concerned was that of Madeline Smith[1].

3.29 Madeline Smith was charged with the murder, by arsenic poisoning, of her former fiance. In the course of the trial the Crown sought to lead evidence of the contents of a memorandum book kept by the deceased. The entries, made over a period of weeks, were brief but made reference to meetings with the accused and to periods of illness suffered by the deceased thereafter. The defence objected to the admission of the memorandum. The point was considered by the High Court (Lord Justice-Clerk Hope, Lord Handyside and Lord Ivory (dissenting)). The Lord Justice-Clerk held:[2]

> "What is proposed in this case is to tender in evidence a thing altogether unprecedented according to the research of the bar and bench, of which no trace or indication occurs in any book whatever, viz, that a memorandum made by the deceased shall be legal proof of a fact against the panel in a charge of murder. It is no answer to say that it may not be sufficient proof, but still should go to the Jury: the first point is - whether it is legal evidence. I am unable to admit such evidence; it might relax the sacred rules of evidence to an extent that the mind could hardly contemplate. One cannot tell how many documents might exist and be found in the repositories of a deceased person; a man may have threatened another, he may have hatred against him, and be determined to revenge himself, and what entries may he not make in a diary for this purpose?"

Lord Handyside agreed, pointing out that with an oral account of a hearsay statement of a deceased it would at least be possible to conduct a limited form of cross-examination of the reporter of the statement as to the circumstances in which the communication had been made to him. With diaries, or memoranda of the kind

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[1] 1857, 2 Irv 641.

[2] At pp 657-658.

in question, he noted that no such inquiry could be made and he added that the danger with that kind of document was that:[1]

> "It may be an idle, purposeless piece of writing; or it may be a record of unfounded suspicions and malicious charges, treasured up by hostile and malignant feelings in a moody spiteful mind."

The sparse contents of the memorandum in the case of Madeline Smith compare somewhat inadequately with the potential feared by the Court.[2] But the Lord Justice-Clerk assessed that the deceased had had a motive for keeping his memorandum, which was to record all his meetings with the accused for later use in any attempt to break up her engagement and potential marriage to another.[3]

3.30 Lewis[4] refers to the case of Madeline Smith as authority for the proposition that a diary of a deceased person is not admissible against a person charged with murder. The Walkers, referring to the Smith case, take a more optimistic line, stating:[5]

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[1] At p 601.

[2] Some sample extracts read (see page 648 of the case report):

> "Thurs. 19. Saw Mimi a few moments
> - Was very ill during the night.
>
> Frid. 20. Passed two pleasant hours with M. in the drawing room.
>
> Sat. 21. Don't feel well - went to T.F. Kennedy's.
>
> Sun. 22 Saw Mimi in drawing-room
> - Promised me French Bible
> - Taken very ill."

[3] See p 656, (though it is not suggested that he kept the memorandum with the motive of showing that he was being poisoned.) By contrast, Lord Ivory, in his dissent, considered that the document should have been admitted valeat quantum, and that the jury should have considered its weight, credibility and value. See pp 661-662.

[4] W.J. Lewis, "The Law of Evidence in Scotland" (1925), at p. 196, foot-note.

[5] Walker and Walker, "The Law of Evidence in Scotland", at para 372, p 396.

> "Letters written and probably a diary kept by a deceased person are admissible unless they appear to be prejudiced or tendentious."

Whatever may be the correct interpretation of the rulings given in the Madeline Smith case, certainly it would be strange if a rigid exclusionary rule were to apply only in respect of one category of document, namely a diary, or near equivalent, of a deceased person. Although some diaries may contain lies or fantasy, that could equally be the case with delivered letters where the sender was being malicious or fanciful.

3.31 In a Scottish peerage case the House of Lords had occasion to pass comment on the approach taken by the majority of the court in Madeline Smith. This was the Lauderdale Peerage Case[1] where Lord Watson observed that Madeline Smith appeared "to have been decided consistently with principle"[2], which he had identified as being that:[3]

> "...the statement of a deceased person, whether oral or written, is not admissible as evidence, when its own terms, or the circumstances in which it was made, are such as to beget a reasonable suspicion, either that the statement was not in accordance with the truth, or that it was a coloured or one-sided version of the truth."

With reference to the view taken by the majority of the court in the case of Madeline Smith, Lord Watson added that in circumstances where a judge had concluded that the principle he had outlined was applicable to particular evidence, it was the duty of the judge "more especially in a criminal case"[4] to reject the

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[1] (1885) 10 App Cas 692.

[2] At p 708.

[3] At p 707.

[4] At p 708.

evidence.[1]

3.32 In recent times inconsistencies have arisen, however, with the application in criminal proceedings of the principle stated in the Lauderdale Peerage Case. The applicability of the principle has been both recognised and rejected by different courts.

3.33 The case of Pirie v. Geddes[2] shows how the court in that instance was prepared to apply the principle and declined to admit an oral report by a police officer of a statement of a deceased witness. There the managing director of a coal merchants company was charged with having defrauded his customers over a period of years by falsifying documentation to state that larger quantities of fuel had been supplied than had in fact been delivered. At the trial a number of the firm's drivers testified that they had falsified documents, but they claimed that they had done so on the instructions of the accused. It also emerged that the largest number of falsified documents had been made by a deceased employee. The prosecution led evidence from a detective that he had commenced investigations against the

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[1] Lord Watson's opinion was supported by the Lord Chancellor, the Earl of Selborne, who made reference to the circumstances of the case of Madeline Smith and observed (at p 711) that the principle that: "...declarations are not to be admitted when there is such ground for suspecting that there may have been a purpose inconsistent with good faith or inconsistent with truth as to make it unsafe to receive them, should be applied with great strictness in criminal cases."

[2] 1973 SLT (Sh Ct) 81.

accused only after he had received a telephone call from this deceased employee. Objection was taken on behalf of the accused when the procurator-fiscal sought to examine the detective as to what the deceased had told him on the telephone.

3.34 In his ruling on the objection, Sheriff Nicholson expressly adopted Lord Watson's statement of principle in the Lauderdale Peerage Case, but he took the view that the rule which it stated should be applied even more stringently in criminal than in civil cases.[1] Applying the principle to the case before him, Sheriff Nicholson considered that, although the deceased may well have acted from the noblest of motives and may have made his statement to the police entirely free from bias or prejudice, he could not:[2]

> "reject as being in any sense unlikely the possibility that he (the deceased) did so in order to show himself in the best possible light and that consequently what he said to Detective Constable Park may have been an account which was at least to some extent less than the whole truth."

Accordingly the objection to the admission of the deceased witness's statement was upheld.

3.35 A different emphasis was applied, however, by the High Court on appeal in the later case of Irving v. HM Advocate[3]. In that instance a woman had complained to the police that she had been raped. She made an initial statement to the police which was typed on a typewriter as she spoke. Later that day, at an identification parade, she identified a man who was then charged with theft and rape. The woman, having been very upset at these

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[1] At p 82. See also para 3.31 above.

[2] At p 82.

[3] 1978 JC 28.

initial stages, was requested by the police, after the identification parade, to return the following day to give an additional statement, which she did. Her second, more detailed account differed from that of the first given, in that she said she had been sexually assaulted by three men and not just one. Her second statement was also taken down on a typewriter as it was given. Thereafter the woman, an alcoholic, died of acute alcoholic poisoning. At the trial of the man who had been charged after the first statement had been made, the two typed statements of the deceased were lodged as productions, but were not founded on, as instead the Crown adduced the police officers who had taken the statements to give their verbal recollections of what the deceased had said, in exception to the hearsay rule.

3.36 Objection was taken on behalf of the accused to the admission of these statements on the grounds, amongst others, that the statements, whether reported orally or in writing, were of the nature of precognitions, and were thus inadmissible, and also that, following the Lauderdale Peerage Case, a statement was not admissible if its terms, or the circumstances in which it was made, were such as to create a reasonable suspicion that it was not in accordance with the truth or was a coloured or one-sided version of the truth.

3.37 Lord Cameron considered that the determining factor was the narrow issue of whether or not the statements were in the nature of precognitions. He did not consider the Lauderdale Peerage Case to be of direct relevance to the proceedings. He stated:[1]

> "I think it is necessary in the first place to distinguish between civil and criminal proceedings. In civil

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[1] At p 31.

proceedings whether at a preliminary stage or post litem motam parties are at arm's length and it is not difficult to infer that statements taken from potential witnesses who have been approached or examined by agents for parties have been so approached or examined because it was hoped or expected that they would be likely to give evidence in favour of the party in whose interest and on whose instructions the agent was acting. Therefore authorities concerned with civil proceedings - as was of course the Lauderdale Peerage case - are not necessarily of direct relevance to the actings of the police carrying out their duties in the public interest and as recipients of volunteered complaints of allegedly criminal acts."

He considered that the function of the police in pursuing their inquiries was:[1] "not a search for support of a partisan view of an issue to be litigated between adversaries in a private litigation but is the vindication of public justice." He determined that the statements were admissible on the narrow basis that they were not "in the nature of a precognition."

3.38 Lord Robertson reached the same conclusion, but afforded more consideration to the argument founded on the Lauderdale Peerage case. He distinguished that case, however, from the one before him, stating that as there had been no suggestion or suspicion of bad faith in relation to the statements, the principle stated in the Lauderdale Peerage case did not apply so as to affect the admissibility of the statements.[2] He also did not consider that the statements were precognitions.[3] This approach can be contrasted with that taken in Pirie v. Geddes, where Counsel for the accused had submitted simply that it was likely that the deceased, in making his statement to the police, would have sought to have shown himself in the best light, whilst throwing suspicion on the accused. It was on the basis of this likelihood that the statement of the deceased was held inadmissible.

[1] At p 34.

[2] At p 38.

[3] At p 40. He observed that whether the statements were of the nature of precognitions did not depend on whether they were written down or given by police officers from verbal recollection. He regarded the written statements as the best evidence, however, although that point had not been in issue in the appeal.

3.39 In the subsequent case of HMA v. Docherty,[1] in which the court was referred to both Pirie v. Geddes and HMA v. Irving, Lord Stewart clearly indicated in an obiter dictum that, had the facts of the case before him been different, he would have been prepared to make use of the Lauderdale Peerage Case in criminal proceedings. He referred to the common law rules on the admission of statements made by deceased persons and observed:[2]

> "These statements are admissible if they are not of the nature of precognitions or for some other reason considered to be suspect. No doubt it is the law, as was said by the Earl of Selborne in the Lauderdale Peerage Case that such rules should be applied with great strictness in criminal cases. Indeed had the now deceased Jackson[3] made a statement, say, to the police, heaping blame upon the present accused, then whether or not that statement was in the nature of a precognition, it seems to me in the highest degree unlikely that I would have permitted evidence of that statement to go before a jury had the prosecutor attempted to lead it."

3.40 The above cases illustrate a considerable range of judicial opinion on the applicability of a discretion in criminal proceedings to exclude otherwise admissible hearsay evidence where its reliability may be open to doubt. It seems to us that there would be advantage in seeking to resolve this uncertainty one way or another. One possibility would simply be to provide by statute that there is to be no discretion in such matters. Otherwise admissible hearsay would always be admissible, and it would simply be for the court, in appropriate cases, to warn a jury that they might wish to consider that particular piece of evidence with

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[1] 1980 SLT (Notes) 33.

[2] At p 34.

[3] With whom it was alleged the accused had perpetrated the crimes charged.

caution. Another possibility would be to resolve the uncertainty by putting beyond doubt the existence of a judicial discretion to exclude hearsay evidence in these circumstances. The clear statement of a **discretion** would also remove any argument of the opposite extreme that in some circumstances there was a rigid **rule** that documents of a particular category automatically would be excluded - as, on one interpretation, would be so following the Madeline Smith case regarding the diaries of deceased witnesses.

3.41 A judicial discretion to exclude hearsay evidence, the reliability of which may be in doubt, could be supported as a means of alleviating the potential harshness of the admission of a statement which cannot be tested by cross-examination at trial. A discretion of that nature could in our view promote the principle of fairness to all parties in criminal proceedings. We consider that were any extension to the hearsay exceptions to be favoured, the existence of a judicial discretion, whereby dubious hearsay evidence could still be excluded, might be of particular importance.

3.42 By way of a comparative law note it may be of interest that in English criminal proceedings a judge at present has a general discretion at common law "to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value."[1] This power is preserved by clause 27(1)(b) of the English Criminal Justice Bill[2], although the Bill itself introduces various discretions. In particular, under clause 24(1)(c), despite a statement in a document being admissible under one of the exceptions in clause

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[1] See Lord Diplock in R v Sang [1980] AC 402, at p 437. See also "Cross on Evidence" (6th ed), hereafter referred to as "Cross"), at pp 561-562.

[2] Whereby nothing in Part II of the Bill (which deals with documentary evidence) is to prejudice "any power of a court to exclude at its discretion a statement admissible by virtue of this Part of this Act".

22[1], the court may, under an exclusionary discretion, direct that the statement should not be admitted if it is of the opinion that this would be "in the interests of justice". Clause 25 also introduces a rule to the effect that where a statement in a document, otherwise admissible under that Part of the Bill, appears to have been prepared for the purposes of pending or contemplated criminal proceedings, or of a criminal investigation, the statement shall not be given in evidence in any criminal proceedings without the leave of the court. This inclusionary discretion may be exercised if the court considers that the statement ought to be admitted "in the interests of justice".

3.43 If there is to be provision for a judicial discretion regarding the admissibility of hearsay statements, we would wish to avoid the creation of a multiplicity of different kinds of discretion, if at all possible. In the Scottish cases we have discussed, where the existence of a discretion was recognised, it was an exclusionary discretion to be exercised in accordance with the principle stated in the Lauderdale Peerage Case.[2] We consider that to be the principle which should be followed in any new statutory discretion.

3.44 We accordingly seek the views of consultees on the following alternatives:

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[1] See para 3.15 above and Appendix II below, for the full text.

[2] The cases also involved circumstances where statements had, or might have, been given in the course of criminal investigations or for the purposes of pending or contemplated criminal proceedings. See paras 3.33-3.39 above.

4.(a) It should be expressly declared by statute that, where hearsay evidence would otherwise be admissible in criminal proceedings, there should be no judicial discretion to exclude it on any ground.

(b) Alternatively, it should be expressly declared by statute that, where hearsay evidence would otherwise be admissible in criminal proceedings, the judge should nonetheless have a discretion to exclude that evidence if its terms, or the circumstances in which the statement was made, give rise to a reasonable suspicion either that the statement was not in accordance with the truth, or was a distorted, one-sided version of the truth.

(e) Precognitions

3.45 In considering what statements should be admissible in exception to the hearsay rule, and in what circumstances statements within those categories might be excluded as a matter of judicial discretion, there is one category of statement which we consider should remain excluded as evidence in all instances, as under the present law - precognitions. A "precognition", in general terms, would be a statement taken from a witness by the police on the instructions of a procurator-fiscal, or by the procurator-fiscal himself, when the trial of an accused who has been arrested and charged is in view. A precognition could also be taken from a witness by an agent for the defence. Of precognitions, Lord Justice-Clerk Thomson stated:[1]

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[1] Kerr v HMA 1958 JC 14, at pp 18-19.

> "What amounts to a precognition is a question of some considerable difficulty. That has been pointed out on a number of occasions ....In a precognition you cannot be sure that you are getting what the potential witness has to say in a pure undefiled form. It is filtered through the mind of another, whose job it is to put what he thinks the witness means into a form suitable for use in judicial proceedings. This process tends to colour the report. Precognoscers as a rule appear to be gifted with a measure of optimism that no amount of disillusionment can damp."

Bearing the above considerations in mind, we do not propose any alteration in the present law which excludes precognitions.

3.46 We accordingly propose:

> 5. **In any statutory provisions governing the admissibility in evidence of hearsay statements, precognitions[1] should remain excluded as evidence.**

Business documents - statutory hearsay exceptions

(a) Introduction

3.47 We now turn to examine the statutory provisions governing the admissibility, in exception to the hearsay rule, of trade and business documents in criminal proceedings. Documents of this kind will often have been compiled as the result of the work of a number of people and the information contained in them may have

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[1] We would not seek to define the term "precognition". It has been held recently by the High Court that although the trial judge will normally determine whether a statement is a precognition, he may leave this question to the jury, under suitable directions, if the question of the nature of a particular statement is truly an open one. See Low v HMA 1988 SLT 97.

passed through several hands. The hearsay exceptions discussed above were restricted to "first-hand" hearsay and, accordingly, there remains a need for separate rules on business documents. We will not be concerned here with the law governing the admission of particular categories of public document[1], nor with other specific hearsay exceptions under statute.[2]

(b) Records and the Criminal Evidence Act 1965

3.48 An English appeal before the House of Lords, Myers v DPP[3], was instrumental in bringing about the current statutory provision on the admissibility of documentary records in Scotland. In that case factory workers with personal knowledge of the serial numbers on the engine blocks of certain vehicles had entered those numbers on cards, which in turn were put on microfilm, the original cards being then destroyed. A representative of the company, who did not have personal knowledge of the entries, sought at a trial to speak to the microfilm and to the transcripts he had made from it. The House of Lords ruled the evidence to be inadmissible, it being stated by Lord Morris of Borth-Y-Gest that if the cards were admitted then:[4]

> "...unsworn written assertions or statements made by unknown, untraced and unidentified persons (who may or may not be alive) are being put forward as proof of the truth of those statements. Unless we can adjust the existing law, it seems to me to be clear that such hearsay evidence is not admissible."

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[1] See Macphail, c 11.

[2] See Macphail, at para S 19.22.

[3] [1965] AC 1001.

[4] At p 1026

It was also held that the courts could not create new exceptions to the hearsay rule and that, accordingly, any new exceptions would have to be created by statute. In his speech Lord Reid[1] noted that the law on hearsay, and the numerous exceptions to its exclusionary rule, had developed in an unprincipled way. He considered that even more uncertainty would be added to the law if the courts were to continue to create new exceptions as might seem appropriate in particular cases.

3.49 Records of the kind seen in Myers are not only very common, but also the nature of the evidence contained in them, such as lists of serial numbers of individual items, makes it highly unlikely that the person who observed a particular serial number is going to have any memory of it for other than a very short period of time. A business document may often contain a compilation of a number of statements made by several employees in different locations. This would be very common at present where a computer network is in use as part of the administration of an undertaking. To call the maker, or every maker, of a statement in a business document, particularly where it is unlikely that details of the records will be remembered, is more likely to lead to confusion in court proceedings than if the evidence were presented in a form which would normally be relied on in every day administration. Detailed records of businesses or other organisations may themselves be the best evidence which cannot be improved on by oral testimony. The common law has recognised that reality but has not embraced a hearsay exception of comprehensive application for business and other documents that would admit their contents as evidence of full independent

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[1] At pp. 1022-1023

value.[1] If all business records were inadmissible, however, the prosecution of crimes where the identification of mass produced articles was necessary would prove very difficult.[2] In 1965 the Criminal Evidence Act (the "1965 Act") was enacted to render admissible as evidence certain categories of documentary record. The Act applied throughout Great Britain.[3]

3.50 The full terms of the 1965 Act can be found in Appendix III, but its central provisions can be seen in section 1(1), which reads:

> "In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if -

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[1] See Grant v. Johnston (1845) 7D 390 at p 393 where Lord Medwyn stated: "If regularly kept, bank's or merchant's books are admitted to supplement or support a proof in such matters as, from their minuteness and multiplicity, it cannot be that the testimony of witnesses, unaided by reference to them, could be expected to supply the requisite evidence." See also Erskine, iii, 1, 29; Walker and Walker, "The Law of Evidence in Scotland", at para 228; and Wilkinson, "The Scottish Law of Evidence", at pp 55-56.

[2] See Lawton J. in R v Crayden [1978] 1 WLR 604 at p 607.

[3] The Act has recently been disapplied for England and Wales by the Police and Criminal Evidence Act 1984 ("PACE"), see section 68 and Schedule 3, Part I.

> (a) The document is, or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and
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> (b) The person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all circumstances) to have any recollection of the matters dealt with in the information he supplied."

These terms, whilst dealing with the kind of document in the Myers case, nonetheless are restricted in their application to "records" "relating to any trade or business and compiled in the course of that trade or business". These two aspects of the wording of the 1965 Act have been interpreted restrictively by the courts and have led to reforms in England and Wales, where the 1965 Act no longer applies. We suggest that reforms to widen the scope of the statutory business documents exception to the hearsay rule should also be made for Scotland. We consider that in general it is reasonable to admit business documents as evidence, given that the system of recording transactions, communications and other events in business and administrative documents will usually be one on which organisations themselves will depend in everyday practice and, therefore, the evidence so generated is likely to be trustworthy. Moreover, in many instances business documents will also be the best evidence, particularly those recording very detailed or unexceptional facts or events of which witnesses would be unlikely to have any recollection.

(c) Areas for reform

(i) "Trade and business" documents

3.51 Documents are admissible under section 1(1)(a) of the 1965 Act if they are or form part of a record relating to any "trade or business". Under section 1(4) of the Act "business" is defined as including "any public transport, public utility or similar undertaking carried on by a local authority and the activities of the Post Office". In view of this wording the courts have held that the 1965 Act does not apply to the records of a government department[1] or of a National Health Service hospital.[2] For civil proceedings in Scotland this problem was avoided by the more widely phrased wording of section 7 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1966, which applies to documents which are or form part of "a record compiled in the performance of a duty to record information ...etc".[3] In England and Wales a similar approach was taken in section 68(1)(a) of the Police and Criminal Evidence Act 1984 ("PACE") to extend the range of documents which would be admissible.[4] PACE also disapplied the Criminal Evidence Act 1965 for England and Wales.

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[1] e.g. Home Office records, see R v. Gwilliam [1968] 1 WLR 1839 and R v. Patel [1981] 3 All ER 94.

[2] R v. Crayden, above.

[3] Under this provision in civil proceedings National Health hospital records of blood tests were held admissible. See Docherty v. McGlynn 1985 SLT 237.

[4] PACE, section 68(1)(a). For the full terms of section 68 and the related schedule 3 of the Act see Appendix IV below.

3.52 The broadening of the scope of the 1965 Act's provisions for England and Wales, to ensure that public sector documents were also covered, implemented a recommendation of the Criminal Law Revision Committee.[1] Even before the 1984 Act's provisions had been enacted, however, the Lord Chancellor and the Home Secretary had announced their intention to establish an independent committee of enquiry to consider the conduct of criminal proceedings in England and Wales arising from fraud.[2] The Committee was appointed under the chairmanship of Lord Roskill ("the Roskill Committee") and submitted its Report on 9th December 1985. The Report, which was published in early 1986[3] examined the rules of evidence, including those in PACE, as they affected the admission of documentary evidence in fraud trials, and recommended a number of radical reforms.[4] The Government adopted these recommendations, which led to Part II of the current English Criminal Justice Bill, and to clause 23 in particular which deals with the admissibility of business documents etc. When enacted these provisions will admit a wider range of documents than under PACE, many of the provisions of which will be superseded by the new rules. The relevant part of clause 23[5] provides that a statement in a document is to be admissible as evidence of any fact of which direct oral evidence would be admissible if "the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office". The use of the term "record" which featured in the 1965 Act has been deliberately avoided for the reasons next considered.

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[1] Eleventh Report, "Evidence (General)", 1972, Cmnd 4991, para 258 and clause 34. The Committee said of the 1965 Act that it "was passed as an interim measure as a result of the decision in Myers."

[2] See Hansard (HC), 8 November 1983, vol 48, Written Answers, cols 83-84 and (HL) vol 444, Written Answers, col 790.

[3] Fraud Trials Committee Report, 1986

[4] See Chapter 5 of the Report. See also p 78 for its summary of recommendations on the rules of evidence.

[5] See Appendix II for the full text.

(ii) "Records"

3.53 The Roskill Committee observed that although the 1984 PACE provisions were helpful in admitting many relevant documentary records of a routine nature, equally there were a number of areas where documentary evidence would not be admissible and where the personal attendance of a witness would be required. They stated:[1]

> "First, those documents which are not records compiled by a person acting under a duty. There are many letters, memoranda, reports, file entries, charts and other business documents which could not be said to fall into this class. There have already been a number of court decisions on the interpretation of the word "record" both under the 1965 Act and under the legislation relating to evidence in civil cases which employs the same formulation."

Having noted that the courts' interpretation of "records" left many business, government and professional records inadmissible, the Committee concluded that: "The distinction between "records" and non-records seems to us to be artificial and of doubtful value."

3.54 The case-law on the meaning of a "record" is English, and some of the cases concern civil proceedings, but in this context, as the statutory terminology in civil and criminal proceedings on both sides of the Border has the same origins, these authorities should also be relevant and at least persuasive in Scotland regarding the Criminal Evidence Act 1965. For example, in R v Tirado[2] a file of letters was not a "record" for the purposes of the 1965 Act. Moreover, in H v Schering Chemicals Ltd.,[3] where the meaning of "record" in section 4 of the English Civil Evidence

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[1] At para 5.16.

[2] (1975) 59 Cr. App. R. 80.

[3] [1983] 1 WLR 143.

Act 1968 was in issue, Bingham J stated:[1]

> "The intention of that section was, I believe, to admit in evidence records which a historian would regard as original or primary sources, that is, documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts."

This test was accepted by Peter Gibson J. in Savings and Investment Bank Ltd. v Gasco Investments (Netherlands) B.V.[2] where it was held that a report prepared by Board of Trade inspectors did not constitute a "record", as it fell short of a compilation of the information supplied to the inspectors, in that some of the information supplied was not included in the report and also because the report contained the inspectors' comments and conclusions on the information supplied.

3.55 Of the case last mentioned above, Cross commented:[3]

> "The difficulty created by this approach is that if such a report is not a record, it is very difficult to see how its contents ever can be proved, short of repeating the very same process according to which it was originally compiled, which is clearly impractical. It ought to be possible to put such a report in evidence, subject to its being proved by its authors."

We agree with the Roskill Committee and with Cross that the distinction in the 1965 Act and PACE between "records" and non-records, the former being admissible but the latter not, is artificial and may exclude many kinds of documentary evidence, such as letters, memoranda and reports, which may be highly relevant, reliable material to which little might be added by the

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[1] At p. 146.

[2] [1984] 1 WLR 271, at pp 284-285.

[3] At p 494. See also Macphail at paras S12.03 and 12.04.

oral testimony of the person who supplied the information stated in the document.

(iii) Options for reform

3.56 A feature of section 7 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1966 and section 68 of PACE, is that documents admitted under those provisions should have been compiled "in the performance of a duty". This requirement is absent in the 1965 Act and in clause 23 of the present Criminal Justice Bill and indeed we see no need for this additional criterion which could prove unnecessarily restrictive. In some cases the duty to keep records of a particular kind may be clear, but in many others it will not, but there may be little if anything to distinguish documents falling in one category or another. We are attracted instead to the wider expression in clause 23 admitting documents created or received in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.

3.57 We have also considered whether the example of clause 23 of the English Bill might be extended slightly to include an additional category of document. What we have in mind are records kept by an individual as part of a regular hobby or routine. An example would be local weather records kept purely out of personal interest, but not in the course of a business or even an unpaid office. Although records of that kind could be highly relevant in criminal proceedings, a category of documents prepared as part of a regular routine would be so wide as to include personal diaries and even regularly sent personal letters.

We are of the opinion that documents of a personal nature of that kind, which in many instances could be distinguished from business and administrative documents by being less likely to be objective, should be admitted as evidence only if they fall within any recognised general category of hearsay exception, or could be used as the prior statement of a witness who gives testimony at trial.[1] If consultees favour a considerable widening of the general hearsay exceptions, the above distinctions may be of little practical relevance, but that would not be the case if the opposite view were adopted.

3.58 Clause 23 of the English Bill also deals with the case where the information in a business document has passed through a chain of intermediaries. In such cases it is to be a requirement for admissibility that each person in the chain should have received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office. This seems to be a desirable additional guarantee of reliability.

3.59 Bearing in mind the above considerations and also the unnecessary restrictiveness of the present Criminal Evidence Act 1965, our provisional view is that a rule on the admissibility of business and administrative documents, modelled, at least in part, on the widely phrased principal provisions of clause 23 of the English Criminal Justice Bill, should be adopted for Scotland. We therefore seek views on the following propositions:

> **6.(1) The provisions of the Criminal Evidence Act 1965, on the admissibility of business records, should be repealed and replaced by more widely phrased hearsay exceptions to the effect that a statement in a**

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[1] See the provisional proposals in Part IV below.

document should be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible if: the document was created or received by a person in the course of any trade, business, profession or other occupation, or as the holder of any paid or unpaid office; and the information in the document was supplied by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

(2) Where the information in a document within the above category has passed through a chain of intermediaries, for the statement to be admissible should it be necessary that each person in the chain who supplied the information should have received it in the course of a trade, business, profession or other occupation, or as the holder of any paid or unpaid office? (See clause 23(2) of the English Criminal Justice Bill).

(d) Additional criteria for the admissibility of business documents

3.60 It could be asked whether criteria additional to those stated above should also be satisfied, as under the Criminal Evidence Act 1965, if a business document is to be admissible in exception to the hearsay rule. Under section 1(1)(b) of the 1965 Act the additional criteria are that: the person who supplied the information in the statement is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected to have any recollection of the

matters dealt with in the information he supplied. Following that policy approach it would not be sufficient to rely on the circumstantial guarantees of trustworthiness of a document being produced in the course of a business to justify a hearsay exception. That would only be achieved if additional conditions relating to the necessity of the admission of the evidence were also satisfied, where in effect the maker of the statement would not be available as a witness, or would not be of practical value as a witness, and hence no better evidence could be obtained.

3.61 The approach taken in clause 23 of the English Criminal Justice Bill is that, in general, if the criteria relating to the circumstances in which the statement in the document was made are satisfied (ie the person who supplied the information had personal knowledge of the matters dealt with in the document which was created or received in the course of a trade, business, profession etc) then the statement is admissible in exception to the hearsay rule. For the general case, therefore, the additional criteria of the 1965 Act have not been retained. However, those criteria have been re-introduced (with some modifications), and have to be satisfied, in addition to the other conditions of clause 23, where the statement has been prepared for the purposes of pending or contemplated criminal proceedings or of a criminal investigation.[1] We are not attracted to this approach. This is because we consider that the additional criteria either should apply in all cases, or not at all, and because we would prefer a different policy, which we discuss below, regarding business documents prepared for the purposes of criminal proceedings and investigations.

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[1] See clause 23(4) of the Criminal Justice Bill.

3.62 We are not aware of any difficulties having arisen in Scotland regarding the practical operation of the additional criteria of the 1965 Act. In most instances of business records it would be clear that it could not reasonably be expected for the maker of the statement to have any recollection of it. But in the English case of R v. Nicholls[1] the point was raised whether the Crown should not have led some foundation evidence to establish that the criteria of admissibility of business records under the 1965 Act had been established. The Court of Appeal considered that, objection having been raised by the accused, the question of the admissibility of the documents should have been investigated at a trial within a trial. Indeed it could be observed that the more criteria there are for the admission of a business document, the greater the potential need for some foundation testimony to establish that those criteria have been satisfied. Whether particular criteria are necessary in the first place is, in our view, very much a matter of policy on which we would welcome the opinions of consultees. Consultees' views on the need for additional criteria on the admissibility of business documents may be influenced by the provisional proposals, discussed below, regarding the exclusion of business documents produced for the purposes of criminal proceedings and investigations and also regarding the potential application to business documents of a general court discretion to exclude hearsay evidence of dubious content.

3.63 We accordingly seek the views of consultees on the following question:

7. Should an up-dated version of the additional criteria of section 1(1)(b) of the Criminal Evidence Act 1965 be

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[1] (1976) 63 Cr App R 187.

stated in any reformed version of the statutory rules on the admissibility of business documents? If thought necessary these criteria could be any or all of the following:

(a) the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness or give evidence on commission;

(b) the person who made the statement is outside the United Kingdom (or, as an alternative, furth of Scotland) and it is not reasonable and practicable (or, as an alternative, it is not practicable) to secure his attendance, or to secure his evidence by means of a letter of request to a foreign jurisdiction;

(c) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement;

(d) all reasonable steps have been taken to find the person who made the statement, but he cannot be found.[1]

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[1] cf proposition 3, para 3.27 above. Although the criteria in that proposition are similar to those set out above, they could, in the case of business records, apply to any person in a chain of intermediaries whereas, in the case of hearsay generally, they might apply only to the maker of a first-hand hearsay statement.

(e) Documents prepared for the purposes of a criminal investigation or for pending or contemplated criminal proceedings

3.64 If it is accepted by consultees that the provisions of the 1965 Act on the admissibility of business documents should be replaced by wider rules, which would admit documents produced or received in the course of the work of most kinds of organisations, there is one important qualification which we consider should be made to rules in those terms. We consider that where a document is prepared in the course of a criminal investigation or for the purposes of pending or contemplated criminal proceedings it should not fall within the business documents exception and should remain excluded, unless it falls within another hearsay exception.[1] This approach would cover not only precognitions taken from witnesses, but also notes taken and reports prepared by police or prosecution authorities. These could vary substantially in importance, but we do not consider that a business documents hearsay exception should be capable of operating in such a way as to admit in evidence, as a matter of normal course, police notes of a particular incident or statement without the officer who wrote those notes having to be available for cross-examination. We do not consider that this would be fair to the accused. If, however, police evidence is of an uncontroversial nature, it could be presented by means of the affidavit procedure proposed in Part II above, provided no objection is taken by any party to the proceedings. Alternatively, if our proposals in Part IV below are accepted, police notes and other reports prepared in the course of criminal investigations, or for the purposes of

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[1] eg. Where the maker of the statement was dead. The fact that the statement had been given in the course of a criminal investigation would not of itself exclude the statement, either under the present law or under our proposals on general hearsay exceptions. But if the statement's terms or the circumstances in which it was made gave rise to the suspicion either that it was not in accordance with the truth or was a distorted version of it, the judge could exclude the statement under the discretion provisionally proposed in para 3.44 above.

criminal proceedings, could be admitted as evidence, provided the maker of any such document was a witness at the subsequent trial and could thus be examined as to his prior statements, and provided, of course, that any such statement did not also contain a record of a statement made by some other person who was not called as a witness. This approach we consider should in general preserve the accused's rights to challenge witnesses against him, whilst also giving the Crown adequate opportunities to present all relevant evidence.)

3.65 Notwithstanding our proposal that documents prepared in the course of a criminal investigation or for the purposes of pending or contemplated criminal proceedings should be excluded from a business documents exception, there may nonetheless be documents of a general nature, kept for example by the police, which should fall under that exception. For example, records of a statistical nature kept by the police could conceivably be relevant in the course of a criminal prosecution, and we do not think that they should be excluded from the benefit of a general business records exception. On the other hand it might be arguable that such records had been prepared "for the purposes of contemplated criminal proceedings". We think that the point would probably be met if it were made clear that the exclusion applies to documents prepared for the purposes of pending or contemplated criminal proceedings against a particular person or persons.

3.66 We accordingly seek views on the following proposition:

8. **Any new business documents exception to the hearsay rule should expressly exclude the admission, under that exception, not only of precognitions but also of any other document prepared in the course of a criminal investigation or for the purposes of pending or contemplated criminal proceedings against a particular person or persons.**

(f) Discretion to exclude business documents

3.67 In paragraph 3.44 above we provisionally suggested that, although a statement might be admissible in exception to the hearsay rule, a judicial discretion could be created to exclude that statement if its terms, or the circumstances in which it was made, gave rise to a reasonable suspicion either that the statement was not in accordance with the truth, or was a distorted, one-sided version of the truth. We consider that, were it to be introduced, this discretion should have general application to include all hearsay exceptions, including business documents. This would be to cover the situation where, for example, a business document, rather than having objectively recorded events or statements, as would normally be expected, instead contains subjectively motivated or tendentious comment. On the face of the statement, or in view of the circumstances in which it was made, it may be apparent to the judge that the statement is untrustworthy and should not be admitted in the absence of its maker.[1] The alternative approach, which we also suggested in paragraph 3.44, is that otherwise admissible hearsay should remain admissible, with a judge warning a jury as appropriate that it may wish to view a particular piece of such evidence with some caution.

3.68 We envisage that in the great majority of instances business documents will be uncontentious. Normally, therefore, the problem being considered here will not arise. For cases where it does, however, we seek the views of consultees on the following alternatives:

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[1] If the maker of the statement were available to be cross-examined in relation to it, the statement could be admitted as the prior statement of a witness. See the proposals in Part IV below.

9.(a) Judges should be empowered to exclude a statement in a document, which would otherwise be admissible in terms of a business documents exception to the hearsay rule, where the terms of the statement itself, or the circumstances in which it was made, give rise to a reasonable suspicion either that the statement was not in accordance with the truth, or that it was a distorted, one-sided version of the truth.

(b) Alternatively, it should be expressly declared by statute that, where such a statement would otherwise be admissible as in (a) above, there should be no judicial discretion to exclude it.

PART IV
THE PRIOR STATEMENTS OF WITNESSES AND THE ACCUSED

Introduction

4.1 The prior statements of witnesses may not strictly speaking be within the category of hearsay, yet the law imposes considerable restrictions on the extent to which these statements can be used as evidence. Separate rules have evolved regarding witnesses' prior consistent and inconsistent statements respectively. The prior statements of accused persons fall into a special category given that an accused may or may not give evidence as a witness in the course of his trial. We shall also examine, therefore, the rules which have developed regarding the admissibility of prior statements made by the accused. The present law on the prior statement of witnesses and the accused, when considered overall, appears complex if not confusing. We shall assess whether this complexity is necessary and whether some simplification in the law might be justified.

(a) Prior consistent statements of witnesses

4.2 Macphail summarises the law on the prior consistent statements of witnesses:[1]

> "There appears to be a general rule that evidence may not be led that a witness has previously made a statement which is consistent with his testimony in the witness-box. The rule has been described as one of expediency rather than of principle[2], and no doubt exists in order to discourage the manufacture of "self-serving" testimony, and to avoid the introduction of superfluous evidence. The exceptions to the rule include statements forming part of

[1] At para 19.38.

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

the res gestae, statements made de recenti,[1] statements by accused persons when cautioned and charged (which are in practice led irrespective of whether they are consistent with his defence), and statements by prosecution witnesses, who identify the accused in court, that they have identified him on some specified previous occasion, such as an identification parade[2]."

Thus, in general, the prior consistent statement of a witness may not be led in evidence.

(b) Prior inconsistent statements of witnesses

(i) Sections 147 and 349 of the 1975 Act

4.3 Sections 147 and 349 of the Criminal Procedure (Scotland) Act 1975 provide:

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

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[1] Statements forming part of the res gestae are statements, such as excited utterances, made in the course of an incident or event. Statements made de recenti are statements made very shortly after an occurrence: typically, such a statement may be a complaint, or account of events, given by a victim to the first person seen after an event. A statement made de recenti can only support the maker's credibility: it is not evidence of the facts stated in it.

[2] See also Macphail, at para 19.60.

These provisions are in unqualified terms, yet as a matter of practice it is accepted that a witness cannot be contradicted by what he may have said in a precognition. We consider, however, that it would be preferable if this practice were dealt with expressly in terms of the statute[1]. With the exception of prior statements as to identification, as in the case of Muldoon v. Herron discussed immediately below, the prior inconsistent statement of a witness may be used only for the purpose of bringing his reliability in question and may not be used as evidence of fact.[2]

(ii) Muldoon v. Herron

4.4 In the five judge Full Bench case of Muldoon v. Herron[3] evidence about the person whom a witness on a previous occasion had identified was admitted not merely to attack the witness's credibility, given that her statement in court was inconsistent with her earlier identification, but also as evidence of who was in fact identified. This in turn was used as corroboration of a further police statement of an identification made by another witness, who at the time of trial said he was unable to make any identification. Thus, in those circumstances (where intimidation of

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[1] See Macphail at paras 19.47 and S19.47.

[2] It has been held that a judge's failure to direct the jury that a witness's previous inconsistent statement implicating the accused is relevant only to the question of the witness's credibility, and is not evidence against the accused, is a misdirection. See Lambie v. HMA 23rd July 1973; not reported on this point, 1973 JC 53; and Paterson v. HMA 1974 JC 35. See Macphail, at para S19.53.

[3] 1970 JC 30.

witnesses was suspected) the prior inconsistent statements were used as evidence of the facts contained in them.

4.5 The majority opinions in Muldoon v. Herron[1] described the identification evidence as "real" or "primary". Wilkinson offers an alternative, and to our minds more realistic, analysis:[2]

> "Evidence of a prior identification is, therefore, evidence of statements made on a previous occasion and is no different in principle from other instances of reported statements. It makes no difference that the previous identification may have been by pointing to the person identified rather than by words. The gesture of pointing is, as assertive conduct, the equivalent of a statement. The admission of evidence of identification of the kind in issue in Muldoon v. Herron must therefore, despite dicta to the contrary, be taken to constitute an exception to the rule against hearsay. Once that is accepted the question arises of whether there is any logical justification for distinguishing between evidence of identification on a previous occasion and evidence of other statements relevant to the issue made on previous occasions. The difficulty becomes acute when in the one statement a witness has both identified the perpetrator of a crime and described its commission in terms which make the one inextricable from the other.
>
> The decision in Muldoon bears to be restricted to identifications made to the police but it is doubtful if in fairness, or in principle, it can be so restricted. It appears that the doctrine in Muldoon can be invoked only where the person alleged to have made the identification on the previous occasion gives evidence and either denies, or cannot remember, having identified the accused."

Despite the apparent logic of extending the line followed in Muldoon to other circumstances where the prior statement or assertion of a witness is in issue, the courts have restricted that

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[1] Lord Wheatley dissented.

[2] "The Scottish Law of Evidence", at pp 54-55.

approach to comparable factual circumstances.[1]

(c) Confessions of accused

4.6 Whether an accused gives evidence or not, any prior statement made by him against his interests is admissible as evidence of fact, though subject to the common law safeguard that an accused's prior statement will not be evidence against him if it was obtained unfairly.[2]

(d) Prior self-serving statements of the accused

4.7 As with the prior consistent statement of a witness, a self-serving statement made prior to trial by an accused in general may not be led in evidence. In certain circumstances, however, statements made by the accused which in whole or in part assist his defence may be adduced. This may arise when a witness happens to disclose in the course of examination at trial what the accused has said on a previous occasion, or the Crown may lead evidence of a statement made by the accused to the police, or at judicial examination, or the Crown may permit the accused to do so.

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[1] See McAllister and McLaughlan v. HMA, 27 Nov 1975, Crown Office Circular 1413, (1976) 40 JCL 116; Neeson v. HMA 1984 SCCR 72; and Smith v. HMA 1986 SCCR 135.

[2] See Tonge v. HMA 1982 SLT 506 and Chalmers v. HMA 1954 JC 66.

4.8 In the case of Brown v. HMA[1] the Crown led evidence of a statement the accused had made to the police after he had been cautioned and charged. The statement supported the accused's defence but at trial the jury had been directed that this was not an explanation to which they were entitled to pay any attention. On appeal the High Court had to consider: (1) whether the accused was entitled to rely on that evidence as tending to show the truth of the contents of that statement; and (2) whether the accused could rely on that evidence as showing that a statement in those terms had in fact been made. Lord Justice-Clerk Grant held:[2]

> "The answer to the first of these questions is clearly in the negative (Hume on Crimes, vol ii, pp 325, 401; Alison on Criminal Law, vol ii, p 555; Macdonald on Criminal Law, (5th ed) p 316). As is stated by Alison, however, in the passage to which I have referred, "though a prisoner is no more entitled to refer to a declaration as evidence of what it contains than the prosecutor is to found on the libel for the same purpose, yet he is fully entitled to found upon the declaration as a material circumstance in his favour, if it contains a full, fair and candid statement, such as bears probability on its face, and if it is confirmed by what the witnesses, either on one side or the other, prove at the trial." Thus an accused may found on a declaration or declarations in order to show that he has told a consistent story throughout. Whether a declaration shows such a consistency, or is of the nature described by Alison, is eminently a question of fact for the jury. It is, of course, for the Crown to decide whether to produce a declaration or not, and the accused cannot lay it before the jury unless the Crown consents."

The Lord Justice-Clerk noted, however, that the Crown practice was to allow a declaration by the accused to be read to the court, if the accused so requested. He added:[3]

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[1] 1964 JC 10.

[2] At p 13.

[3] At p 14.

"There could be no purpose for such a practice if, that having been done, the accused was not entitled to rely on the declaration for any purpose whatever."

Thus although the accused's prior statement, in so far as favourable to his defence, could not in law be proof of the facts contained in it, nonetheless, it could be used to enhance the weight and credibility to be attached to other evidence. This ruling has been confirmed recently by a five judge Bench of the High Court in the case of Hendry v. HMA[1].

4.9 During the trial in Hendry the Crown had read to the jury the record of the accused's judicial examination, which included a statement supporting his plea of self-defence. The accused did not give any evidence himself, nor did he call any witnesses. The trial judge directed the jury that any statement made by the accused at judicial examination was not evidence in his favour. The accused was convicted of assault and he appealed. In the judgment of the Court, Lord Justice-Clerk Wheatley stated:[2]

> "...It behoves the judge to point out to the jury that the statement has been placed in evidence and is before them, and is relevant for purposes other than as a substitute for evidence in the witness-box, such as (1) proof that such a statement was made at that early stage of the judicial proceedings and (2) for their consideration whether it is acceptable, and, if it is, whether it confirms other evidence in the case of an exculpatory nature from whatever source, thus adding weight and credibility to such other evidence.
>
> It follows from all this that if the statement does not find correspondence in any of the other evidence in the case it has no evidential value."

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[1] 1985 SCCR 274.

[2] At p 280.

Whether the prior statement is in any way consistent with other evidence in the case is normally a matter for the jury.[1] In the Hendry case, however, the High Court upheld the conviction on the basis that, as there had been no other evidence in favour of the accused's defence of self-defence, there was nothing which the accused's prior self-serving statement at judicial examination could have supported.

4.10 In those cases where it is likely that there will at least be some supportive evidence for the accused, the directions of the court to the jury as to the evidential function of a prior consistent statement must seem unrealistic and obscure. In the words of one writer:[2]

> "...Legally, since there need only be some other positive evidence for the self-serving statement to act as supportive evidence, it is difficult to see how there is any distinction between making evidence more credible and being evidence itself in favour of the accused."

Wilkinson also asserts on this point:[3]

> "...Despite the authorities to the contrary, the declaration becomes evidence of the facts it asserts, that is, evidence in the accused's favour in the full sense... The kind of distinction Alison seeks to make is of little value in a question with a party who bears no onus."

In other words, from the point of view of the defence, which of course has no case to prove, all evidence which may be used to

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[1] See Lord Justice-Clerk Grant in Brown v. HMA 1964 JC 10 at pp 13-14.

[2] Contributed article, "Hearsay Evidence and Self-serving Statements at Judicial Examination" 1985 SLT (News) 355, at p 356.

[3] "The Rule against Hearsay in Scotland", 1982 JR 213, at pp 224-225.

some extent to cast doubt on the prosecution case performs the same function. No practical distinction would arise, therefore, between evidence which in law was admissible as evidence of fact for the purposes of the defence of an accused and that which, although not within that legal category, could be used in support of the defence case. The only distinction which could arise would be that if the jury concluded that a prior self-serving statement of an accused could not confirm any other admissible evidence of an exculpatory nature, then they would have to disregard what they had heard, it being in law of no evidential value.

4.11 In Hendry the High Court stated that they had made their ruling in light of the circumstances of the case, including the fact that it had been the Crown which had produced the record of the judicial examination in evidence. The Lord Justice-Clerk added:[1]

> "Where the record is produced by the defence, further considerations may come into play, but on these we make no observations, leaving that to be done in a case where that factor exists."

In solemn proceedings it would be open to the defence to use the transcript of the judicial examination, given that in terms of section 78(2) of the Criminal Procedure (Scotland) Act 1975:

> "The list of productions shall include the record, made under section 20B of this Act... of proceedings at the examination of the accused."[2]

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[1] 1985 SCCR 274, at p 280.

[2] See HMA v. Cafferty 1984 SCCR 444, at p 446 where Sheriff Kelbie held that the Crown must lodge as a production the record of a judicial examination, whether it is helpful to the prosecution or not.

Under section 82A of the 1975 Act it is competent for an accused to put in evidence any production included in any list lodged by the prosecution.[1] Prior to the reintroduction of the procedure of judicial examination[2] it was the practice, as noted by the High Court in Brown v. HMA[3], for the Crown to allow a declaration by the accused to be read to the court if the accused so requested. In Brown the Court did not appear to distinguish, in terms of potential evidential function, declarations led by the Crown and those led by the defence. The Court in Hendry[4] expressly upheld the ruling in Brown and, accordingly, it is not clear in what way an accused's statement made at judicial examination, which in whole or part is exculpatory and which is adduced on behalf of the accused, might be treated differently from that led by the Crown, or from that led in the past by the defence with the Crown's consent.[5]

(e) Prior statements of accused - part admission/part exculpatory

4.12 In a recent appeal the House of Lords had the opportunity to examine the English law on the evidential rules applicable to a statement made by an accused which in part was an admission and in part was exculpatory. In R v. Sharp[6] a statement of that kind

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[1] Although under section 151(2) of the 1975 Act the court, on an application by either the accused or the prosecutor may refuse to allow the record, or some part of the record of the judicial examination to be read to the jury.

[2] See section 6 of the Criminal Justice (Scotland) Act 1980, amending section 20 of the Criminal Procedure (Scotland) Act 1975.

[3] 1964 JC 10, at p 14. See also para 4.8 above.

[4] 1985 SCCR 274, at p 279.

[5] For a review of judicial examination procedure see S R Moody, "The Operation of the Judicial Examination Procedure: A Study in Two Scottish Cities", Central Research Unit, Scottish Office, 1986.

[6] [1988] 1 All ER 65.

was in issue. Lord Havers explained how the law had come to treat these 'mixed statements':[1]

> "...For example, 'I admit that I stabbed him but he was about to shoot me', or, as in this appeal, 'I admit I was at the scene of the burglary but I was looking for something that had fallen off my car'. All the authorities agree that it would be unfair to admit the admission without admitting the explanation and the only question is how best to help the jury evaluate the accused's statement. The view expressed in R v. Duncan is that the whole statement should be left to the jury as evidence of the facts but that attention should be drawn, when appropriate, to the different weight they might think it right to attach to the admission as opposed to the explanation or excuses. The other view, which I might refer to as the 'purist' approach, is that, as an exculpatory statement is never evidence of the facts it relates, the jury should be directed that the excuse or explanation is only admitted to show the context in which the admission was made and they must not regard the excuse or explanation as evidence of its truth.
>
> The weight of authority appears to support the decision in R v. Duncan."

In R v. Duncan[2], Lord Chief Justice Lane, in holding that a mixed statement should be left to the jury in all its aspects as evidence of the facts, took the view that:[3] "Judges should not be obliged to give meaningless or unintelligible directions to juries." Lord Havers agreed with this in Sharp, stating:[4]

> "...A jury will make little of a direction that attempts to draw a distinction between evidence which is evidence of facts and evidence in the same statement which whilst not being evidence of facts is nevertheless evidentiary material of which they may make use in evaluating evidence which

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[1] At p 68.

[2] (1981) 73 Cr App R 359, CA.

[3] At p 364.

[4] At p 71.

is evidence of the facts. One only has to write out the foregoing sentence to see the confusion it engenders."

The Lord Chancellor, Lord Mackay of Clashfern, concurred with Lord Havers and expressly approved Lord Lane's ruling in R v. Duncan. He said:[1]

> "It has to be borne in mind that the purpose of giving directions to a jury is that they may apply them in reaching their verdict in the particular case. The vast majority of jurors will not have had the experience of studying law and accordingly the concepts to be put before them must in my opinion be capable of reasonably straightforward expression and application if this purpose is to be achieved."

Thus it was held that under English law a mixed statement adduced in evidence would be admissible in all respects as evidence of the facts of its contents.

4.13 In Scotland it would appear that where an out of court statement made by an accused is partly an admission and is partly exculpatory, the admission would be evidence of fact, but, following Brown v. HMA, the exculpatory qualification would not, albeit that if the jury determined that the qualification was consistent with other evidence in the case it could at least be used to confirm that evidence. In other words, with a mixed statement a jury would have to be directed to draw distinctions between part of the statement which was evidence of fact and part which was not, and in respect of the latter either to disregard it entirely or, if in the jury's assessment other evidence in the case afforded an appropriate basis to do so, to have regard to the exculpatory part of the statement in so far as it confirmed that other evidence, adding to its weight and credibility.

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[1] At p 66.

Reform

(a) General observations

4.14 In our opinion the present law of evidence on the prior statements of witnesses has become unprincipled, fragmented and unrealistic. Indeed we suspect that in practice, where no direction to acquit on the basis of a legal insufficiency of evidence for a conviction has been given, juries may tend to ignore the fine distinctions in judges' directions that evidence may be admissible for one purpose, but not for another, and instead may consider all the evidence they have heard, attaching such weight to individual items as they think appropriate.

(b) Prior statements of witnesses

4.15 Under the present law there is the anomaly that the prior statement of a witness may be admissible as evidence of fact if it relates to a prior identification of an accused under certain circumstances, but cannot be evidence of fact if it deals with other matters. We see no reason in principle why a prior inconsistent statement of a witness should be admissible as evidence of fact in some circumstances but not in others. The prior statement of a witness may also be the best evidence available, given that by the time a case goes to trial the witness may have forgotten the details of an event. Indeed, in some cases a prior statement may be neither consistent nor inconsistent as where a witness says "I cannot now remember, but I told X at

the time". A prior consistent, or indeed inconsistent statement of a witness, particularly if it has been written down or otherwise recorded at or near the time of the event in question could provide far more reliable evidence than the later recollection of the witness.[1] The witness may, of course, still have relevant evidence to give as to the general context in which the statement was made, or as to the event itself.

4.16 In our view, where in criminal proceedings a person, including the accused, has been examined as to a prior statement made by him, other than a precognition, that statement should be admissible as evidence of the facts contained in it. Unlike the situation of a hearsay statement where its maker would not be present in court, by definition the admission of a prior statement of a witness would afford the opportunity of examination and cross-examination of that witness as to the circumstances in which his statement was made and its full context. The effect of the reform which we are suggesting would be that not only would a prior statement of a witness be admissible as evidence of fact, whether it was consistent with or contradicted the witness's testimony, but also, of course, the prior statement should be capable of being used simply to support or attack the credibility of the witness. Under the present law for a prior statement to be used to attack a witness's credibility, that statement must be put to the witness who is alleged to have made it.[2] We would wish the same procedure to be followed were a witness's prior statement to be admissible as evidence of fact. Given that an accused may not necessarily give oral testimony at his trial, however, we consider below additional rules for that situation and for situations where co-accused may be involved.

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[1] On the use of documents to refresh a witness's memory under the present law, see Macphail at paras L19.45-51; and Wilkinson, "The Scottish Law of Evidence", at pp 162-163.

[2] See Renton and Brown, para 18-83.

4.17 We accordingly seek the views of consultees on the following propositions:

> **10.(a) In criminal proceedings where a person has been examined as to a prior statement made by him, that prior statement should be admissible as evidence of the facts contained in it and to support or attack the credibility of that person;**
>
> **(b) A 'prior statement' for these purposes should not include a precognition.[1]**

(c) Safeguards

4.18 We do not wish the above proposals in any way to affect the current legal rules which qualify the admission in evidence of statements made against interest by an accused.[2] The proposals would admit a wide range of material as evidence of fact, however, where technically this would not be possible at present. Safeguards afforded under the common law to protect the interests of the accused against unfairly obtained confessions, or illegally procured real evidence, have not in the past extended to the prior statements of witnesses. As in the case of real evidence, however, the methods by which a prior statement has

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[1] We do not seek to define the term "precognition". It has been held recently by the High Court that although the trial judge will normally determine whether a statement is a precognition, he may leave this question to the jury, under suitable directions, if the question of the nature of a particular statement is truly an open one. See Low v. HMA 1988 SLT 97.

[2] See para 4.6 above.

been obtained could affect the fairness of subsequent proceedings against an accused. For instance, a prior statement of a witness may have been recorded during an illegal telephone tap, or a prior statement may be contained in a document which was stolen from a locked desk. In such cases we consider that the evidence should be excluded, unless the illegality can be excused by some emergency or other good reason.

4.19 It might be that the common law could in practice extend the application of its safeguards against the admission of illegally obtained real evidence to cover illegally procured statements from witnesses other than those who are accused.[1] To avoid any doubt on this important point, however, we consider it would be safer to apply those rules by means of statutory provision. We envisage a ground of objection that evidence of a statement made by a witness has been obtained illegally, subject to a court discretion to determine the admissibility of the evidence in the same way as it would if objection had been taken to the admission of illegally procured real evidence. In respect of the case law governing the admissibility of illegally obtained real evidence, Wilkinson has concluded:[2]

> "The result is that there is an inclusionary discretion to be exercised on a consideration of whether the irregularity can be excused and of fairness to the accused. Prima facie evidence irregularly obtained is inadmissible but it

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[1] For a description of the common law, see Macphail, paras 21.01-21.07.

[2] "The Scottish Law of Evidence", p 120. The discretion is wide in this area and the emphasis in its application may vary from time to time. See W. Finnie, "Police Powers of Search in the Light of Leckie v. Miln", 1982 SLT (News) 289, where he illustrates through the cases what he describes as "cycles of judicial liberalism and emphatic judicial endorsement of the need to stamp out crime." See also Renton and Brown at para 18-100.

may be admitted if the irregularity can be excused and its admission would not prejudice a fair trial for the accused."

Lord Justice General Cooper's ruling in Lawrie v. Muir[1] remains the guiding statement of principle in this area. It includes the passage:[2]

> "Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with crimes. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick..."

We intend that the same principles should extend to the admissibility of illegally obtained prior statements of witnesses and be applied in the same way.

4.20 We accordingly propose:

11. **Without prejudice to the current legal rules which qualify the admission in evidence of statements made against interest by an accused, it should be competent for objection to be taken to the admission of a prior statement of a witness on the ground that it has been obtained illegally; and the court should consider the objection and make a determination as it would have done had the admission of real evidence been objected to on those grounds.**

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[1] 1950 JC 19.

[2] At p 27.

(d) Prior statements of the accused

4.21 Where an accused does not give evidence at his own trial he cannot, of course, be examined and cross-examined regarding the content and context of prior statements made by him. Under the present law, however, the prior admissions of an accused can be evidence of fact against him in exception to the hearsay rule and, as discussed above[1], although prior exculpatory statements as such are not admissible they may be used to confirm other evidence in the accused's favour, by adding to its weight and credibility. We would not wish to change the law regarding prior admissions by the accused, but one option we have considered would be to declare that any prior exculpatory statement by an accused should not be admissible for any purpose. This option, however, would not deal with the fact that prior exculpatory statements made by accused persons who do not give testimony at trial are, as a matter of practice, heard by judges and juries.[2] Given that the evidence will have been heard, whether as part of an admission or not, we consider that to direct a jury to have no regard to that evidence is unrealistic.

4.22 Once evidence has been heard it will be very difficult to forget it. Moreover, if a statement in favour of an accused has any credibility, in the minds of a jury it is likely to cast some doubt on the prosecution's case. Given that an accused normally has no burden of proof to discharge, we agree with those commentators[3] who have concluded that a legal distinction

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[1] See paras 4.8-4.10 above.

[2] See para 4.11 above.

[3] See para 4.9 above.

between such a statement being, under the present law, at best supportive of the accused's defence, but never evidence of fact, is of little or no practical value. In other words, the law at present requires that complex, and in our view unrealistic, directions be given to juries regarding prior self-serving statements made by the accused. Such directions are unlikely in practice to be understood. We agree with and refer again to the Lord Chancellor's statement in the recent case of R v. Sharp[1] where he said:[2] "....The purpose of giving directions to a jury is that they may apply them in reaching their verdict in the particular case. ....the concepts to be put before them must in my opinion be capable of reasonably straightforward expression and application if that purpose is to be achieved." We consider that in Scots law the same rule should be adopted as that applied by the House of Lords in R v. Sharp so that at least in the case of statements led in evidence which are part admission and part exculpatory, the whole statement should be admissible as evidence of fact. Juries could then be directed simply to consider what weight should be attributed to particular statements, or parts of statements.

4.23 In R v. Sharp the House of Lords ruled on the law governing mixed statements which happened to have been admitted in evidence, but no ruling was necessary in that case on wholly exculpatory statements heard before a court. Following the ruling in Sharp, where an accused's prior statement is admitted in evidence and it states, for example: "Yes, I was in the bar at the time, but I didn't shoot the piano player", the whole

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[1] [1988] 1 All ER 65.

[2] At p 66. See also para 4.12 above.

statement would be admissible as evidence of fact[1], but the judge will be able to make appropriate directions to the jury as to the weight which they might wish to attach to the admission and the explanation respectively.[2] If an accused were to make a wholly exculpatory statement, such as: "I didn't shoot the piano player", and this statement were before the court, we see no reason why the statement should not be evidence of fact, for what it may be worth. As in the case of a mixed statement the judge would be able to direct the jury that in assessing what weight, if any, to attach to the statement it would have to be borne in mind that it was unsworn and, moreover, could not be tested by cross-examination if the accused chose not to give evidence in court.

4.24 We consider that a jury is far more likely to understand a direction which advises them as to the relevant considerations

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[1] See R. v. Sharp [1988] 1 All ER 65, at p 71, where Lord Havers states: "How can a jury fairly evaluate the facts in the admission unless they can evaluate the facts in the excuse or explanation? It is only if the jury think that the facts set out by way of excuse or explanation might be true that any doubt is cast on the admission, and it is surely only because the excuse or explanation might be true that it is thought fair that it should be considered by the jury."

[2] See Lord Havers, at p 68: "The view expressed in R v. Duncan is that the whole statement should be left to the jury as evidence of the facts but that attention should be drawn, when appropriate, to the different weight they might think it right to attach to the admission as opposed to the explanation or excuses."

regarding the weight and credibility to be attached to particular statements, than to understand a direction requiring them either to attempt to disregard what they have heard, or to have some regard to it, not as evidence of fact, but insofar as it confirms other evidence. We strongly doubt whether the latter, complex approach of the present law promotes understanding in the minds of juries or performs a useful function. In our view directions as to the relative weight which may be appropriate for particular statements should be understandable and compatible with the kind of reasoning which a jury might in any event apply. If a jury is considered capable of evaluating the weight to be attached to the component parts of a mixed statement, they should also in our opinion be capable of evaluating a statement which is wholly self-serving in content. We consider, therefore, that even an accused's prior statement which is wholly exculpatory should be admissible as evidence of fact, whether or not the accused gives evidence at his trial.

4.25 We accordingly seek views on the following proposition:

> 12. **The prior statement of an accused, other than a precognition, which has been given in evidence, and which has not been improperly obtained, should be admissible as evidence of fact in so far as it affects that accused, whether in whole or in part it incriminates or exculpates that accused, and whether or not he gives testimony at his trial.**

(e) Prior statements of co-accused

4.26 Under the present law, although an accused's statements in the witness box at his trial will be evidence of fact for or against the interests of a co-accused,[1] in respect of the **prior statements** of an accused the law is that:[2]

> "....A statement made by one accused incriminating a co-accused is not admissible against the latter unless made in his presence and hearing, and only if his attendance at the time of the making of the statement has not been improperly arranged for the purpose of making the statement evidence against him. Otherwise, apart from cases of concert, a confession of, or inferring, guilt by one is not evidence against another. If evidence of a confession by one accused is led as admissible against him, and its terms implicate another accused, the jury must be directed to disregard it as evidence against the other accused."

In considering the extent of potential reform of the rules affecting the prior statements of accused persons, however, a number of options present themselves: (i) the present law should be retained so that the prior statement of an accused should not be evidence in respect of a co-accused; or, (ii) the prior statement of an accused should be evidence in respect of a co-accused, provided the accused who made the statement gives testimony at his trial and is examined regarding that prior statement; or (iii) the prior statement of an accused should be admissible for or against the interests of a co-accused, whether or not that accused gives testimony at his trial.

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[1] See s 28 of the Criminal Justice (Scotland) Act 1980 and ss 141 and 346 of the Criminal Procedure (Scotland) Act 1975. See also Todd v. HMA 1984 SLT 123.

[2] See Macphail, para 20.33, and also para S20.33. See also Black v. HMA 1974 JC 43, at p 53, and Jones v. HMA 1981 SCCR 192.

4.27 Were the law to be changed so that the prior statement of an accused, who did not give evidence at his trial, could be admissible as evidence of fact against a co-accused, this could make an adequate defence for the co-accused difficult and we consider that the fairness of the co-accused's trial could be endangered. For example, if three men were charged with fraud, two in fact being guilty and one innocent, and the guilty two did not give evidence in court but instead prior statements by them were read to the court showing themselves in a very favourable light, whilst also falsely incriminating the third man, it could prove very difficult for the third accused to rebut those allegations. The jury may not believe prior exculpatory statements which have not been tested by cross-examination and indeed they may also disbelieve the incriminatory statement against the third accused, but there is at least a danger that they will be prejudiced by it. In other words, it may prove easier to give little or no weight to an untested self-serving statement which an accused has not been prepared to repeat in court, than to do so with a statement which incriminates a co-accused. In the example given the incriminated accused would not be able to cross-examine his co-accused without their consent, but in law their statements against him would be admissible as evidence of fact, could corroborate each other and, if believed, could lead to his conviction. In those circumstances it is likely that there would have been a breach of Article 6 of the European Convention on Human Rights.[1] We do not consider that this would be an acceptable result and, accordingly, we take this option no further.

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[1] See para 1.4 above and the Unterpertinger case.

4.28 The alternatives, however, also have their difficulties, particularly where a statement is admissible in respect of one accused but not another, as under the present law. The situation whereby a statement is heard in full, but in law is admissible only in respect of the maker of the statement and has to be disregarded in so far as it implicates other accused, clearly may present practical difficulties for juries, and indeed judges, in trying to avoid being influenced by what they have heard. This problem will be avoided only in the instance where there is otherwise a legal insufficiency of evidence and the jury is directed to acquit.

4.29 We are aware that in cases where a prior statement of an accused implicates a co-accused the prosecution in practice may edit that statement by substituting letters of the alphabet for any reference to co-accused made in the statement. This could bring with it the danger, however, that where there are several co-accused, but only one has been named in the prior statement, and a symbol has been substituted for that name, the jury might be tempted to infer that one of the co-accused was the person whose name had been deleted and might wrongly guess which one of the co-accused that was. We recognise this potential risk but consider that it is less certain to arise than the prejudice which would be sustained were a co-accused to be named in a statement which could not be challenged by cross-examination. A similar practice of editing the prior statements of the accused, by removing the names of implicated co-accused, has arisen also in England. In the words of Hodgson J in the recent case of <u>R.</u> v. <u>Silcott and Others:</u>[1]

> "If the names were not removed it would require mental gymnastics of Olympic standards for the jury to approach

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[1] [1987] Crim LR 765, at p 766.

> their task without prejudice. The prejudice could not be cured by a strong direction to the jury."

Although, therefore, the practice of editing statements might not be ideal, it may be preferable to the alternative of leaving the statement unaltered.

4.30 We consider that the editing of an accused's prior statement to remove the names of co-accused would normally be necessary to avoid potential prejudice to those accused. We would hope, however, that any editing of a prior statement could be dealt with by prosecution practice which sought to ensure a fair trial for all accused and, therefore, need not be directed by legal rules,[1] but this is a matter on which we would welcome consultees' opinions.

4.31 For those cases where the accused does give evidence at his trial and is examined regarding any prior statement made by him, it could be argued, given the opportunity any co-accused would then have to cross-examine him, that it would not be unreasonable for the accused's prior statement to be admissible as evidence of fact for or against the interests of any co-accused. This certainly appears attractive in theory, but there are some practical considerations which would also have to be taken into account. In particular, it would be strange if the evidential role of statements adduced by the Crown could change depending on whether, after the close of the Crown case, a particular accused chose to give

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[1] The prior statement may also have to be edited in other respects, for instance as regards the accused himself. For example, his statement may reveal that he has a criminal record, or part of the statement may have been obtained by improper questioning. At present this is dealt with as a matter of practice. On the editing of statements in those circumstances see Lord Justice-General Emslie in Lord Advocate's Reference (No 1 of 1983), 1984 SCCR 62, at p 70.

evidence or not. The Crown will not normally know in advance whether a particular accused will give evidence at his trial, and may have edited a prior statement of an accused, in respect of the names of implicated co-accused. If the accused later gave evidence, it would have to be considered whether the Crown should be able to re-introduce the accused's prior statement in an unedited form. Moreover, if there was otherwise an insufficiency of evidence against a co-accused and if at the close of the Crown case that co-accused had successfully pled that there was no case to answer, it would be academic whether at some later stage the prior statement of an accused, through his giving testimony at trial, could be admissible as evidence against any co-accused.

4.32 Overall, the certainty of the present law, which at least provides a clear general rule that a prior statement of an accused is not admissible as evidence for or against a co-accused, may be preferable to rules which could produce the practical uncertainties outlined above.

(f) Prior statements of co-accused - alternative

4.33 Were consultees to favour an approach whereby a prior statement of an accused could be evidence of fact for or against the interests of a co-accused, then one option, although we would have some reservation about it, would be to state a rule to that effect subject to the proviso that the co-accused should have a limited right to examine the accused who made the prior statement in question.

4.34 Under the present law a co-accused's right to examine or cross-examine an accused is limited by statute. A co-accused may call an accused as a witness on his behalf, if that accused consents, or he may cross-examine an accused who gives evidence, but he may not do both in relation to the same co-accused.[1] A co-accused may also call as a witness any accused who has pleaded guilty to all charges against him which remain before the court.[2] A change in the law would be required, therefore, if a co-accused were to be able to examine an accused under other circumstances. The idea would be that, where an accused did not give oral testimony at his trial, and the only objection to a prior statement by that accused being admissible as evidence of fact in respect of a co-accused was that the statement could not be tested by cross-examination, this objection could be overcome by giving the co-accused a limited right of examination of the accused in so far as the accused's prior statement is adverse to the co-accused's interests.

4.35 We consider the above suggestion could create practical difficulties, however, for instance in limiting a line of questioning by a co-accused to the function solely of challenging evidence against him in the prior statement of another accused. In practice this might extend to an attack on the accused who made the statement. It might also be unreasonable to exclude the Crown from any role in such circumstances. Taking these factors into account, a substantial dilution of an accused's right to remain silent could arise. We merely air the above alternative approach,

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[1] Subsection (2) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975. See also Renton and Brown at para 18-17.

[2] Subsection (3) of sections 141 and 346 of the 1975 Act. See also HMA v. Ferrie 1983 SCCR 1 and Monaghan v. HMA 1983 SCCR 524.

therefore, for evaluation by consultees and to point to the considerations which it raises.

4.36 In all the circumstances we seek the views of consultees on the following alternatives:

13. In considering the extent to which the prior statements of accused persons should be admissible as evidence in respect of co-accused -

(i) the present law should be retained, so that the prior statement of an accused is not evidence as regards any co-accused; or

(ii) the prior statement of an accused should be evidence as regards a co-accused, provided that the accused who made the statement gives evidence at his trial and is examined regarding his prior statement; or

(iii) the prior statement of an accused, who does not give evidence at his trial, should be admissible as evidence of fact for or against a co-accused, provided that if the co-accused is unable to make use of s 141 or s 346 of the Criminal Procedure (Scotland) Act 1975 to examine or cross-examine the accused regarding his prior statement, the co-accused should have a right to examine the accused in respect of that prior statement, but only in so far as it is adverse to the interests of that co-accused.

(g) Prior statement of accused made in presence of co-accused

4.37 As noted in Macphail's statement of the present law, referred to in paragraph 4.26 above, a prior statement of an accused can be admissible as evidence of fact against a co-accused if it was made within the presence of the co-accused and at that time he made no attempt to deny or refute allegations made against him in that statement. In those circumstances the silence of the co-accused is seen as an implied admission of what has been said against him in the statement.[1] On this point, in the course of the High Court's ruling on a Bill of Suspension in the case of Lewis v. Blair[2], Lord Ardmillan held:[3]

> "Lewis is proved to have stood within hearing of the questions put by the officer, and it is a settled rule that, valeat quantum, if one person answers a question, or makes a statement within the hearing of another party who is accused, and who does not say anything, or does not contradict; evidence of the statement, or of the question and answer, is competent, so far as it goes against the latter; that is to say, it cannot be shut out from the consideration of the jury."

The expectations imposed on a co-accused to refute allegations made against him by another accused can be contrasted, however, with what might be expected of an accused who has been charged by the police but who chooses to make no comment. In Robertson v. Maxwell[4], Lord Justice-General Cooper held:[5]

> "It has been stated in this Court more than once that no legitimate inference in favour of a prosecutor can be

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1 See Walkers, para 34.
2 1858, 3 Irv. 16.
3 At p 28.
4 1951 JC 11.
5 At p 14.

> drawn from the fact that a person, when charged with crime, either says nothing or says that he has nothing to say. He is entitled to reserve his defence, and he is usually wise if he does so."

4.38 The accused's right to remain silent has to some extent been affected by s 20A(5) of the Criminal Procedure (Scotland) Act 1975. Under that provision an accused may decline to answer a question at judicial examination but his having so declined may be commented on by the prosecutor, the judge or a co-accused, where the accused, or a witness called on his behalf in evidence avers something which could have been stated appropriately in answer to that question at the judicial examination. In Gilmour v. HMA[1], however, where an accused followed the advice given by his solicitor not to answer any questions about his statements to the police until the solicitor had had time to go into the case, Lord Dunpark directed the jury:[2]

> "So my advice to you, ladies and gentlemen, is to ignore the judicial examination altogether. You must assume that he refused to answer the questions on the advice of his solicitor, he had the right to remain silent, and the judicial examination is not evidence which you may consider as relevant evidence in relation to his guilt."

Moreover, it has also to be borne in mind that if the accused does not lead evidence of any matter which could have been appropriately supplied in answer to a question at judicial examination, his silence cannot later be commented on.[3] Section 20A(5) of the 1975 Act may be seen, therefore, to have had a minimal effect on an accused's right to remain silent.

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[1] 1982 SCCR 590.

[2] At p 604.

[3] See Walker v. HMA 1985 SCCR 150, at p 154. See also Macphail, at para S20.14H.

4.39 In reviewing the law on implied admissions, Dickson commented:[1]

> "In all matters of this nature, however, much more depends on the disposition of the individual affected by the statement than on the nature of the statement itself, or the circumstances under which it was made. Some persons will not hear any remark to their prejudice without being roused to an angry reply; while a far stronger statement would be received in haughty or indifferent silence by a man of cooler temper. Loquacity and reserve, courage and timidity, love of display and modesty of pride, lead to such opposite conduct under similar circumstances, that guilt cannot be safely inferred from a person's silence on hearing a statement to his prejudice; for the jury almost never have sufficient information regarding his disposition to enable them to judge what his conduct, if innocent or guilty, would likely be under the circumstances. In criminal cases, indeed, silence frequently proceeds from strong consciousness of innocence, while the most indignant and solemn denials are everyday heard from the lips of the guilty."

In view of this reasoning and considering the accused's general right to remain silent on being charged, it seems to us anomalous that if at that time another accused were present and made an allegation against him, the first accused would be obliged to deny or refute the statement to the authorities, or his silence could be treated as an implied admission. We consider, therefore, that in law no implied admission of guilt should arise through an accused remaining silent when faced with a statement made in his presence by another accused which incriminates him. We do not intend, however, in any way to affect the present law that the prior statement of one accused, who is alleged to have acted in concert with another, may be used in evidence against that other accused if the statement forms part of the res gestae of the

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[1] Dickson, (3rd ed, 1887), at para 372.

crime.[1]

4.40 We accordingly seek views on the following proposition:

14. A prior statement by one accused, which incriminates another accused and has been made in his presence, should not be evidence against that other accused solely because at that time he has not denied or refuted what has been said against him.

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[1] See HMA v. Docherty 1980 SLT (Notes) 33, at p 34, where Lord Stewart gives the example: "... if A and B are together charged with crimes of extortion committed against a number of victims I can see no reason why it should not be admissible evidence against both of them that they each separately threatened different victims, A saying that the money was wanted for himself and B, and B saying that it was wanted for himself and A." See also McIntosh v. HMA 1986 SCCR 496.

PART V

COMPUTER AND OTHER MACHINE GENERATED EVIDENCE

Introduction

5.1 Under Scots law at present there is no statutory provision which specifically governs the admissibility of computer evidence, as such, in criminal proceedings. We next examine how the present law operates in respect of computer and other machine generated evidence in criminal proceedings and consider whether any law reform is necessary, bearing in mind that special statutory rules have existed in Scotland since 1968 controlling the admission of computer evidence in civil proceedings and that statutory provision recently has been made for England and Wales governing the admission of computer evidence in criminal proceedings. First, the various forms of computer evidence are considered.

5.2 Evidence which is contained in a document produced by computer can have a variety of sources and may be classified in different ways. It may be original evidence in that it states the result of a calculation made by a computer, or records a particular transaction or event, such as the withdrawal of money from an automated teller machine by a bank's customer. It may be hearsay evidence in that it records information supplied from human sources, as would often be the case with business and administrative records. Computer evidence also may be a hybrid of original and hearsay evidence, given that computers may be programmed to conduct calculations or other processes on data which have been supplied from various sources.

5.3 Although there are no special rules in Scotland regarding the admission of computer evidence in criminal proceedings, a statement contained in a document which forms part of a "record" compiled in the course of a trade or business, and which has been produced by computer, would, however, be governed by the provisions of the Criminal Evidence Act 1965, if it otherwise satisfied its terms, as with any other business record.[1] If not within that category, the admissibility of computer evidence would be governed by the common law, as in the case of other machine generated evidence. A consideration of how that law operates in practice, and of possible statutory alternatives, may assist in explaining our provisional view that no new special rules to regulate the admission of computer evidence are required.

Machine generated evidence

5.4 Evidence produced by machines is admitted before Scottish courts at present provided its relevance to the case has been established. The quality of machine generated evidence may sometimes be in doubt, but that is a matter which goes to the weight to be attached to such evidence, which is a matter for assessment by the judge or jury and does not of itself determine the admissibility of the evidence. The case of Hopes & Lavery v. HM Advocate[2] illustrates this point. In that instance a man who was being blackmailed was fitted with a small radio transmitter and an incriminating conversation between him and one of the accused was tape-recorded from a radio receiver, which was also listened to by police officers. The tape-recording was indistinct, due in part to background noise and to the fact that both parties

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[1] See R v. Ewing [1983] 3 WLR 1.

[2] 1960 JC 104.

at times were speaking simultaneously, but was played to the jury at the trial. To present the Crown case more clearly, however, a typescript of the conversation which had been prepared by a stenographer, who had listened to the tape several times, was lodged in evidence. A police officer, who had heard the accused's statements over the radio receiver, also gave testimony as to what had been said. Objection was taken to the competency of both these methods of adducing evidence.

5.5 The presiding judge (Lord Justice-Clerk Thomson) first determined that there had been no irregularity or unfairness in the taking of the evidence in that case so as to affect its admissibility. In respect of the stenographer's transcription of the tape-recording he held the evidence to be admissible, although he commented that the woman's skill in reducing what she heard to writing could be open to comment and criticism, but that that was a matter for the jury to consider in determining what value to attach to her work.[1] As regards the police officer's statement as to what he heard from the radio receiver, the Lord Justice-Clerk stated:[2]

> "...the only point left is whether the evidence proposed to be led is rendered incompetent because instead of being heard directly by the witness's natural hearing it has been conveyed to him by a scientific instrument. I cannot see that this feature makes the slightest difference to the competency of the evidence. No doubt it makes what the police have staged much more elaborate but it does not seem to me to affect the principle of the thing. ...Of course, comments and criticisms can be made, and no doubt will be made, on the audibility or the intelligibility, or perhaps the interpretation, of the results of the use of a scientific method; but that is another matter, and that is a matter of value, not of competency. The same can be said of visual observation by a witness who says he

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[1] See p 108.

[2] At p 107.

> sees something; his evidence can be criticised because of his sight or because of the sort of glasses he is wearing, and so on; but all these matters are matters of value and not of competency."

On appeal the High Court upheld these rulings.[1]

5.6 Although machine assisted or generated evidence may be admissible for what it may be worth, the onus of proof in criminal proceedings remains with the Crown to prove its case beyond reasonable doubt. The extent to which the Crown will require to explain the workings of particular machines and the evidence they produce may vary, depending on the circumstances. Two relatively recent cases before Sheriff Younger illustrate the kind of considerations which may have to be borne in mind.

5.7 The first was the case of Tudhope v. Lee[2] where the licensee of a public house was prosecuted for a contravention of a notice under the Control of Pollution Act 1974, requiring that noise emanating from his premises should not exceed specified levels. Although the Sheriff repelled the submission made on behalf of the accused that there was no case to answer, he still had to consider whether the prosecution had proved to the necessary standard that the relevant machines had recorded levels of noise in excess of those specified in the Notice. He concluded that this had not been established, stating:[3]

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[1] On the over-heard radio transmission Lord Justice-General Clyde held (at p 110): "There may be, of course, questions as to the reliability of the transmission, but these are criticisms of the quality and not of the competency of his evidence of what he hears." Of the stenographer's transcript it was held that there was no rigid rule requiring technical experts only to explain their understanding of a particular piece of evidence.

[2] 1982 SCCR 409.

[3] At p 414.

"...my view is that we have not yet reached the stage when courts rely on the alleged workings of machines without evidence to show that their results are accurate or without statutory provisions rendering such evidence unnecessary. I am not therefore satisfied, on the evidence provided that the noise level meter or the calibrator have been proved to be accurate and reliable and I am therefore unable to rely on the readings allegedly obtained."

The Sheriff was also not satisfied that the readings taken from the noise level meter, even if it were accurate, necessarily showed that there had been a breach of the noise level notice, given the absence of evidence of what the normal background sound levels were when no sound was coming from the accused's premises.

5.8 In another case involving Sheriff Younger, that of HM Advocate v. Swift[1] he observed, obiter, in respect of a tape-recording of an interview between a suspect and the police, having also referred to photographic evidence:[2]

"...there is never in my experience evidence that the camera has been working correctly, presumably because the existence of the photograph does that; can the same be said as regards tapes? Does the existence of the tape or of three identical tapes produced by the same machine, prove that the machine was operating correctly, or is some proof of the accuracy of the machine required of a similar nature to that led as regards accurate equipment when a speeding charge goes to trial? The whole world knows as a result of ex-President Nixon's disaster that tapes can be most unreliable and I leave these questions open."

There may be rare cases, however, where an accused may challenge a photograph on the basis that it does not in fact

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[1] 1983 SCCR 204.

[2] At p 207.

represent what it appears to, there having been some alteration to the negative. In the English case of R. v. Maqsud Ali[1], Marshall J., delivering the opinion of the Court of Criminal Appeal and considering the admissibility of a tape-recording, noted that for many years photographs had been admissible evidence provided there was proof that they were relevant to the case and that they were taken from negatives that had been unretouched. He added that:[2] "We can see no difference in principle between a tape-recording and a photograph."

5.9 In the case of photographic, video or tape-recorded evidence a defect in the operation of a chemical, physical or mechanical process is likely to be apparent. At best this will affect the value of the evidence, at worst it will render it useless. Given that a witness will be required to speak to such evidence to identify its relevance and to describe how it was made, an opportunity is provided for him to assert that to the best of his knowledge the apparatus was working properly at the relevant time.[3] Moreover, if it is alleged that evidence has been falsified, it may also be necessary to show that a device has been used appropriately and that the integrity of the evidence in question has not been compromised. Such testimony may be relatively simple. In the case of sophisticated measuring devices, however, or indeed some complex operation carried out by a computer, where a defect in machine output may not be readily apparent, a court may require, depending to some extent on the materiality of the evidence in question, a fairly substantial amount of information regarding the working of a particular process in order to assess what value to attach to any evidence thereby produced.

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[1] [1965] 2 All ER 464.

[2] At p 469.

[3] See Macphail at para 13.09 where he says that: "In Scottish criminal practice no objection is taken to the production and playing in court of tape-recordings of 999 calls, telephone calls to newspaper offices and the like, supported by the evidence of witnesses who identify the voices and indicate how the recording was brought into existence."

5.10 Of course in some instances the Crown and the representatives of the accused may be prepared to agree that the evidence contained in the output of a machine is accurate and should be received in evidence without challenge on that point. An example of this can be seen in Bowie v. Tudhope[1] where the parties had entered a joint minute of admissions that a Crown production of a video-tape, in a complaint libelling assault and robbery in shop premises, was an accurate recording of the incident on the occasion in question and that it had not been tampered with.[2] Even if parties fail to agree to a joint minute of admissions, however, at least the informal process of discussing the use of particular machine generated evidence will forewarn the party seeking to adduce it that he should be prepared to establish its accuracy at the trial. Were that proof to be of a formal nature, and if our proposals contained in Part II above prove acceptable, a further alternative would be for the testimony of the witness to be presented by affidavit.

5.11 The above is an outline of the ways in which the Scottish courts have treated the admission and proof of machine generated evidence. We are not aware of any practical problems in this area of the law, but we would welcome the observations of consultees.

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[1] 1986 SCCR 205.

[2] The shop assistants concerned viewed the video-tape but failed to identify the accused at trial. Two police officers who knew the accused identified him from the video-tape, however, and the High Court upheld the trial judge's ruling that the evidence of the police officers was admissible. On the use of film and video evidence in Scotland see Macphail, at para S13.12, and for England and Canada see E. Goldstein, "Photographic and Videotape Evidence in the Criminal Courts in England and Canada", [1987] Crim. L.R. 384.

Computer evidence - statutory provisions

(a) Civil proceedings in Scotland

5.12 The admissibility in civil proceedings of evidence contained in documents produced by computers is presently subject to special regulation under ss 13 to 15 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968. These are very detailed, complex rules which set out preconditions for the admissibility of computer evidence of whatever kind. Similar rules were provided for England and Wales in s 5 of the Civil Evidence Act 1968.

5.13 The 1968 provisions were enacted at a time when computers were relatively rare, but there was concern that the evidence they produced should be accurate. This argument, however, in our opinion, could be applied to the output of any complex machine process. The 1968 rules require that for the admission of any computer evidence a number of conditions should be satisfied. A compulsory notice procedure has to be observed and, on a counter-notice being sent by another party, additional evidence may have to be led by certificate or by the attendance of a witness in court.

5.14 In our Report on Corroboration, Hearsay and Related Matters in Civil Proceedings[1] we were highly critical of the 1968 Act's provisions, noting that in some respects they were seriously defective.[2] We also understood that these provisions were rarely if ever used, albeit that computer evidence was being adduced

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[1] Scot Law Com No 100, at paras 3.63 to 3.66.

[2] For more detailed criticism of the identical provisions in the English Civil Evidence Act, 1968, see Tapper, "Computer Law" (2nd edn.) p 168 and following, and Kelman and Sizer, "The Computer in Court", p 21 and following.

before the courts.[1] Accordingly, we recommended that these provisions be repealed. Moreover, we did not recommend alternative statutory rules on the admissibility of computer evidence, which we considered should be treated no differently from other machine generated evidence. In the Civil Evidence (Scotland) Bill, which is currently before Parliament, the Government has adopted this recommendation.

(b) Criminal proceedings in England and Wales - s 69 of PACE and the preceding law

5.15 Until the enactment of the Police and Criminal Evidence Act 1934, the Criminal Evidence Act of 1965 applied to criminal proceedings in England and Wales. At one stage it was thought that the 1965 Act could be a significant barrier to the admission of computer evidence. In the case of R. v. Pettigrew[2] the Court of Criminal Appeal held computer evidence to be inadmissible in that it did not satisfy the provisions of s 1(1)(a) of the 1965 Act which required "personal knowledge" by "persons" who supplied the information contained in a business record. As the relevant information had been supplied and recorded solely by computer, the "personal knowledge" requirement had not been satisfied. In the later case of R. v. Wood[3], however, the Court of Criminal Appeal showed that computer and other machine evidence, even although it might not satisfy the requirements of the 1965 Act (which of course is concerned with hearsay evidence in business records), could be admitted under common law if it were real or

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[1] The experience seems to have been the same in England and Wales, see Style and Hollander, "Documentary Evidence", (1984), at para 11.2, p 136.

[2] (1930) 71 CR App R 39.

[3] (1933) 76 Cr App R 23.

primary evidence. Indeed the case in our view is very important in that it illustrates how computer evidence of that kind could be treated in the same way as any other machine evidence.

5.16 R. v. Wood was a prosecution for the handling of stolen goods. The original theft had been of a large quantity of special metal alloys. The prosecution had to prove, inter alia, that metals found in the accused's possession had formed part of the stolen consignment. It was sought to do this by establishing that the chemical composition of the metal stolen and that in the accused's possession was the same. Complex machinery including an X-Ray spectrometer and a neutron transmission monitor were used in the course of analysing retained and recovered samples of the metals, the results of both being compared with each other and with earlier records regarding the stolen stock. A computer also played a central role in calculating the exact percentages of each metal in a given sample by applying a mathematical formula to the figures obtained from the other machinery.

5.17 At the trial detailed evidence was given by the chemists who had used the various machines which produced the figures given to the computer, and by the computer programmer. The defence conceded that they had no criticism to make of these people, that the computer had been properly programmed and used, and even that the computer's answers were correct. The defence argued, however, that the evidence was inadmissible under both the 1965 Act and common law.

5.18 The Court of Criminal Appeal agreed with the first argument in that the "personal knowledge" requirement of the 1965 Act had not been satisfied, the relevant data having been

machine generated, and because the documents had not been "compiled in the course of a trade or business" but in the course of the preparation of the prosecution's case.

5.19 Under common law, however, the court held the computer evidence to be admissible, on the same basis as other machine evidence, stating:[1]

> "This computer was rightly described as a tool. It did not contribute its own knowledge. It merely did a sophisticated calculation which could have been done manually by the chemist."

The court drew analogies between the computer print-outs and film of radar traces, tape-recordings, litmus paper and the results produced by weighing machines or X-ray spectrometers. It was held that such tools and the computer in that particular case produced a species of "real evidence" which was admissible under the common law.[2]

5.20 Despite what appeared to have been a promising approach adopted by the court regarding computer evidence in R v. Wood, s 69 of PACE was enacted the full terms of which can be seen in Appendix IV below, to govern the admissibility of all computer evidence in criminal proceedings in England and Wales. It is a restrictive provision in that a statement contained in a document produced by a computer will not be admissible unless the requirements of section 69 are satisfied. This can be seen to implement the recommendation in the Eleventh Report of the Criminal Law Revision Committee[3], made in 1972, that similar

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[1] At p 28.

[2] See R v. Ewing [1983] 3 WLR 1, for an example of computer evidence which fell within the provisions of the 1965 Act.

[3] Cmnd 4991 (1972), para 259.

provisions on the admissibility of computer evidence to those seen in the Civil Evidence Act 1968 should be made for criminal proceedings. Fortunately the 1968 model has not been strictly followed, but rather considerably adapted so that s 69 of PACE, and its supplementary provisions[1], are relatively straightforward.

5.21 In England and Wales, for any statement in a document produced by computer to be admissible, the requirements of s 69 have to be satisfied, it at least having to be shown that there are no reasonable grounds for believing the statement to be inaccurate through improper use of the computer and that the accuracy of the statement has not been affected by any malfunction of the computer. Other information may be required by rules of court. Although this information, and that relating to the provenance of the document, may be given by certificate purporting to be signed by a person occupying a responsible position in relation to the operation of the computer, a notice/counter-notice procedure as such is not envisaged. The court may require oral evidence to be given on any matter, however, which could be covered by the certificate, (presumably when the court itself is so minded, or after application by the defence or prosecution for the hearing of oral evidence where the reliabilty of the computer evidence may be in doubt).

5.22 In the recent appeal of Sophocleous v. Ringer[2] a scientist had given testimony regarding the analysis she had made on a blood sample in a trial in which the appellant had been charged with driving a motor vehicle having consumed excess alcohol contrary to s 6 of the Road Traffic Act 1972. As part of her analysis she had used a computer. No document made by the

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[1] See PACE, section 70 and schedule 3, Parts II and III.

[2] Unreported, apart from a very brief, somewhat misleading report in "The Times", 10 February 1987.

computer was produced in evidence, but the scientist referred in the course of the trial to tabulated results and a graph produced by the computer which formed the basis of her report on the relevant blood/alcohol levels. At the trial the defence did not question the scientist as to the proper working of the computer and no evidence regarding that was led by the prosecution. On appeal the defence contended that, in the absence of any evidence as to the operation and accuracy of the computer as required by s 69 of PACE, the evidence as to what the graph and tables had shown should have been inadmissible.

5.23 The court rejected the defence argument, however. Macpherson J held:

> "In my judgment, that section is wholly reserved to cases in which the prosecution chooses to put before the magistrates, without any other evidence attached to it, a computer record or document which contains some statement.....
>
> If a document from a computer record had been put in under s 69, it would have been possible under Schedule 3 of the Act to have filed a certificate in respect of its operation. Alternatively, somebody would have had to have been called to say that the machine in general terms was acting properly. The reason for that is that if a document is put before the court under this section, there is nobody to cross-examine about the machine and no evidence is given about it. In the instant case, Miss Collinson gave evidence and Mr Ley forbore to ask her any questions as to the mechanism and the working of the machine. It must be right, in my judgment, that the justices can perfectly properly infer from the evidence given by the scientist that the machine is operating properly as a tool of her trade. Really there is no more to say about that part of the case. Section 69 is simply not apt in a case of this kind where the scientist gives evidence, as scientists have, in thousands of cases of this kind, up and down the country."

It strikes us, however, that if there were to be a dispute as to the accuracy of computer evidence, it may not necessarily be the person who happened to use the machine on the occasion in question who will be appropriately qualified to speak as to the accuracy and reliability of the computer hardware and software which have been used. A biologist, for example, although a scientist, may not be qualified to speak to the accuracy of computer output and may only be able to say that he happens to have relied on it and had no reason to believe that it was unreliable.

5.24 The present provisions of s 68 of PACE[1], governing the admissibility of documentary records, are made subject to s 69. A business record contained in a document produced by a computer will, therefore, have to satisfy both provisions in order to be admissible.

5.25 Although s 69 of PACE may be a possible model for consideration, should it be concluded that some statutory rules governing the admissibility of computer evidence in Scotland is either necessary or desirable, we would endorse the comments of the editor of the current edition of "Cross on Evidence" who states:[2]

> "The increasing use of computerised word-processing systems for the production of documents, and the widespread diffusion of personal computer systems does

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[1] This provision will be repealed when the current English Criminal Justice Bill is enacted and in force. Clauses 21 and 22 of that Bill, on documentary evidence (see discussion in Part III above), are also subject to section 69 of PACE, which will remain in force.

[2] (6th edn)(1985), at p 560.

however mean that more and more documents are going to become subject to s 69, and many of them will not bear on their face any indication of having been produced by a computer. It is suggested that this phenomenon also points in the direction of abandoning special provision for documents produced by computers, and towards that of subjecting them to exactly the same regime as any other documents."

Conclusions

5.26 We have discussed above how the common law at present should be able to cope in reasonable, flexible and fair ways with computer or other machine generated evidence which is adduced in the course of criminal proceedings. At present we are unpersuaded that there is any need for special rules on the admissibility of computer evidence. Thus if the evidence is relevant to the case, and is not to be excluded under the general law on grounds of hearsay or that its admission would be unfair to the accused etc, we see no reason why computer evidence should not be admitted for what it may be worth.

5.27 In some instances the accuracy of the computer will not be in question, in others it may be vigorously contested. In the latter case, whether or not there are special rules for the admission of computer evidence, it may be inevitable that the party adducing the evidence will have to go to some lengths to establish the reliability of both the computer software and hardware which produced the statement in question. How easy a task that may be will probably depend more on the design of the computer system itself than on any legal rules.

5.28 Many machines may be used in conjunction with a computer, or have a computer as an integral part of their function. We consider that it could be anomalous for a different legal approach to be adopted to the admissibility or use of evidence from one kind of machine, as opposed to another, when in reality similar issues of machine reliability or accuracy have to be determined. The case of R. v. Wood, discussed above[1], illustrates how several machines may be used to establish a particular fact. We see no reason in principle why a computer should be treated differently from any other machine. To do so is to add unnecessary complexity to the law. Nor do we see any need to establish new rules on the use or admissibility of machine generated evidence in general - ie we are not in favour of extending computer evidence rules, such as those in s 69 of PACE, to other machine generated evidence.

5.29 The diversity of size and function of modern computers, which are now used for personal as well as business and public administration, is already leading to a very large percentage of every day documents being the product of computers. Word processors are computers and hence even letters thereby produced, or documents such as this Discussion Paper are, strictly speaking, computer evidence, along with other computer produced items such as books and newspapers. To require that a large percentage of all documents should go through the kind of procedural steps specified under a provision such as s 69 of PACE is, in our opinion to go too far. To have a statutory rule which is neglected more than observed is also not desirable.

5.30 In the circumstances we seek views on the following proposition:

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[1] See paras 5.15-5.19.

15. No special rules should be introduced to govern the admissibility of statements contained in documents produced by computers. We consider that this evidence should be treated as with any other machine generated evidence under the common law. In respect of any new statutory provisions governing the admissibility of hearsay statements in business and other documents, however, we provisionally propose, in order to avoid any technical lacuna[1], that information contained in those documents need not have been supplied solely from human sources and that any definitions of "statement" and "document"[2] should be suitably wide to cover evidence produced from a computer or other machine or device.

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[1] See R v. Pettigrew and R v. Wood, at paras 5.15-5.19.

[2] Cf the definition of "document" in section 1(4) of the Criminal Evidence Act 1965.

PART VI
MISCELLANEOUS

Copies of documents

6.1 In general, copies of documents are not admissible in criminal proceedings, although in practice they may be used by agreement of the parties.[1] This rule may have been reasonable prior to the days of the widespread use of photocopiers and other modern copying devices, when a transcription from an original document carried with it the danger of omissions and other errors. In present everyday administrative practice, however, photocopies are now relied on as if they were originals. Moreover, with the advent of the widespread use of computers, where original records may be created and stored in an electronic medium, rather than on paper, the concept of an original document in that context may have little meaning. Information may be stored in a computer and its printer may produce any number of paper sets of the original information. Another consideration is that the originals of documents may often be required for purposes other than criminal proceedings and if copies could reasonably be used in the latter context, the inconvenience of losing the use of the originals for the duration of those criminal proceedings could be avoided. In light of these factors, and in particular the reliability of current methods of copying, we consider that it would be reasonable for copies of documents to be used in criminal proceedings. In circumstances where originals of documents would be admissible evidence, we consider that copies also should be admitted even if the original is no longer in existence. Microfilm records may often be kept by businesses to replace bulky paper records which are destroyed.[2]

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[1] See Macphail at paras 12.20 and S12.20.

[2] Eg <u>Myers</u> v. <u>DPP</u> [1965] AC 1001 and para 3.48 above.

6.2 There may be a few instances, however, where the original of a document should be produced in evidence. This could be where it is alleged that a document has at some time been altered or is a forgery. The original of a document may show that a passage has been typed on erasure, or that different colours of ink have been used in a document. A copy of a document probably would not indicate features of that kind. In those or other circumstances it may be reasonable for the court to require that the original document be produced in evidence and, therefore, we consider that the court should have a discretion to require this.

6.3 Where a copy or a duplicate of a document is to be used we consider that it should be authenticated by the person responsible for the making of that copy or duplicate. The overall approach outlined above for the admission of copies and duplicates of documents in criminal proceedings, would be in line with what we recommended in our Report on evidence in civil proceedings[1] and would also be consistent with what is in the current English Criminal Justice Bill.[2]

6.4 We therefore seek views on the following proposition:

16. For the purposes of any criminal proceedings, a copy or a duplicate of a document, prepared by any copying or duplicating process, and purporting to be authenticated by a person responsible for the making of the copy or duplicate, should, unless the court otherwise directs:

(a) be deemed a true copy; and

[1] See Scot Law Com No 100, at para 3.71,; and clause 6 of the Civil Evidence (Scotland) Bill.

[2] See clause 26, (text in Appendix II below).

(b) be treated for evidential purposes as if it were the original document itself (whether or not the original document is still in existence, and no matter how many removes there are between the copy and the original).

Mode of proof of business documents

6.5 Where a document would be admissible under the present Criminal Evidence Act 1965, or under our business documents exception to the hearsay rule proposed above, and whether the original or a copy was to be given in evidence, under the present law a witness would still be required to speak to that document by identifying it in court as being part of the records of a particular undertaking. Where the witness is required to speak to a document, his evidence will normally, of course, be of the most formal nature, yet the witness's attendance at court takes up his time and incurs expenditure. For the great majority of instances we consider that it would be sufficient if a business document were accompanied by a docquet in which it was certified by an officer of the relevant undertaking that the document originated from that source. For the minority of cases, where the authenticity of the document might be in dispute, we consider that the court should have a discretion to require the attendance of a witness to speak to it.[1]

6.6 We accordingly propose:

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[1] See also Scot Law Com No 100, at para 3.70; see also clause 5 of the Civil Evidence (Scotland) Bill.

17. Where a statement in a document of a business or other undertaking is admissible in exception to the hearsay rule, it should, unless the court otherwise directs, be taken to be a document of that business or undertaking, if it is certified as such by a docquet purporting to be signed by an officer of the business or undertaking; and a statement in a document certified in accordance with the above should be received in evidence without being spoken to by a witness.

<u>Bankers' books</u>

6.7 Under the Bankers' Books Evidence Act 1879, special provision was made to permit copies of bankers' books to be received in evidence in criminal and civil proceedings, subject to the origins and accuracy of the copy being proved either orally in court or by sworn affidavit. A banker or officer of a bank is not compellable to produce the originals of any banker's book, or to appear as a witness to speak to any matter recorded in bankers' books "unless by order of a judge made for special cause".[1]

6.8 In substance our provisional proposals above, regarding the use of copies of documents and the mode of proof of business documents, cover the same ground as that in the Bankers' Books Evidence Act. The difference would be with some of the formal requirements. For instance, under the 1879 Act the identity and accuracy of a copy of a document would have to be affirmed in a sworn affidavit, whereas under our proposals these matters simply could be certified by the relevant person. When the 1879 Act's

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[1] See section 6 of the 1879 Act.

provisions were enacted, bankers' books were placed in a privileged position and we consider it would be ironic if a reformed general law on the admissibility and use of business documents were to place bankers' books at a procedural disadvantage. We see no reason in principle why bankers' books should not now be equated with other business documents.

6.9 We therefore propose:

> 18. **In criminal proceedings the law on the use in evidence of copies of bankers' books and the mode of proof of bankers' books, and copies thereof, should be subject to the same rules as we have provisionally proposed above on those matters in respect of business and other documents.**

Evidence of the absence of a record

6.10 Occasionally in criminal proceedings it may be necessary to try to establish that a business or undertaking has no record of a particular person, statement, event, transaction etc. For instance where it is alleged that a car has been stolen from a car-hire company it may be necessary to show that the accused had no legitimate reason for having had possession of the car in question - for example that he had not taken the car out under a contract of hire. Part of the evidence, which might tend to establish that the accused had not possessed the car legitimately, would be the absence of any record in the car-hire firm's business documents of a contract of hire having been undertaken with the accused at the relevant time. The status in law of that kind of evidence, in particular whether it is hearsay, and how the evidence might be presented to the court may be open to doubt, although we are not aware of Scottish authority on this point.

6.11 Conflicting opinions have emerged regarding the English law on the legal status of evidence as to the absence of a record. In some circumstances evidence of this kind has been recognised as hearsay, as in R v. Patel[1]. The case involved a question of illegal entry into the UK. Evidence led by the prosecution to prove that a particular individual was an illegal immigrant was given by the Chief Immigration Officer at Manchester Airport who said he had examined Home Office records which showed, through the absence of the appearance of his name, that a particular individual was not entitled to a certificate of registration in the UK and was, therefore, an illegal entrant. The court held:[2]

> "In the judgment of this court, the Home Office records relied on by the prosecution in this case are hearsay, just as were the commercial records in question in Myers v. Director of Public Prosecutions [1965] AC 1001."

Bearing in mind the ruling in Myers, Cross had also observed:[3]

> "If it were sought to establish that A was not employed by B, the production of a list of B's employees, not containing A's name, would infringe the hearsay rule just as much as that rule would be infringed by the production of such a list containing A's name as evidence that A was employed by B."

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[1] (1981) 73 Cr App R 117.

[2] At p 120.

[3] "Cross on Evidence" (5th ed.), p 466. In the US Court of Appeals (Ninth Circuit), in the case of U.S. v. DeGeorgia 420 F 2d 889 (1969), the court observed (at p 891) that Professor Wigmore supported the view that this kind of evidence was hearsay and had "expressed the view that the absence of an entry concerning a particular transaction in a regularly-maintained business record of such transactions, is equivalent to an assertion by the person maintaining the record that no such transaction occurred. 5 Wigmore, Evidence (3rd Ed) paras 1531, 1556, pages 392, 410.

6.12 In two subsequent cases involving the absence of records, those of R v. Shone[1] and R v. Muir[2], the Court of Appeal did not find that there was a hearsay problem. Of these cases, however, one commentator observed that they had:[3]

> "...Provided interesting recent examples of the tendency of the Court of Appeal, as of its predecessor, the Court of Criminal Appeal, to abandon the logical application of the rule against hearsay in a desperate attempt to circumvent the hopeless rigidity imposed on the rule by the House of Lords in Myers v. DPP. The result in each case, despite its practical convenience, is necessarily unconvincing."

Apart from controversy regarding the potential hearsay character of evidence as to the absence of a record, there may also be doubt as to the appropriate mode of proof of this kind of evidence. On one view it is necessary that, in order to establish that there is no record of a particular kind, all the relevant records of an undertaking should be produced in court and laboriously examined.

6.13 In order to avoid potential difficulties and uncertainties in Scots law regarding the mode of proof of the absence of a record and any hearsay character which that evidence might possess, we consider that statutory provision should be made to enable an officer of a business or undertaking to give testimony on such matters without having to produce the whole or part of the

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[1] (1982) 76 Cr App R 72.

[2] [1984] Crim L R 101.

[3] T R S Allan, "Inferences from the Absence of Evidence and the Rule Against Hearsay", 1984 LQR 175. See also Cross, (6th ed), at p 559: "Shone seems to be one more example of failure to appreciate that the hearsay rule is undermined by circumstantial inference."

business records concerned.[1]. Moreover, if this evidence were purely formal and uncontentious, we envisage that the affidavit procedure we have proposed in Part II above could be used. What inference should be drawn from this evidence, or indeed what weight should be attached to it, would of course depend on the circumstances; and of course a party against whom such evidence was introduced could, if he wished, apply to the High Court for production of the original records. We would not propose any change in the present law whereby, under Schedule 1 of the Criminal Justice (Scotland) Act 1980, certificate evidence may be given by an authorised person as to whether at a certain time and in respect of a particular address there were official records of a television receiving licence being in force.[2].

6.14 We therefore propose:

> 19. **In any criminal proceedings the testimony of an officer of a business or undertaking that any particular statement is not contained in the records of the business or undertaking should be admissible as evidence of that fact, whether or not the whole or any part of the records have been produced in the proceedings.**

6.15 In conclusion we should mention two other clauses in the current Criminal Justice Bill, namely clauses 29 and 30. Clause

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[1] This would also be in accordance with our Report on evidence in civil proceedings. See Scot Law Com No 100 at paras 3.72-3.73 and clause 7 of the Civil Evidence (Scotland) Bill.

[2] See Schedule 1, para 18 of the Criminal Justice (Scotland) Act 1987 where the provision to the above effect was inserted.

29 permits an expert report to be given in evidence whether or not its maker gives oral evidence, and clause 30 makes provision, for the assistance of juries, for evidence to be furnished in any form, and for the preparation of glossaries for specified purposes. We make no proposals in relation to either of those matters. The substance of clause 29 could, we think, be achieved under our proposals regarding affidavits, made in Part II of this Paper; and the substance of clause 30 could, we believe, be achieved under existing practice in Scotland.

PART VII

SUMMARY OF PROVISIONAL PROPOSALS

1.(a) Provision should be made to enable the evidence of a witness to be given in court in the form of a written statement, signed by the witness.

(b) Such a statement should be served on all other parties not less than a specified number of days prior to a trial taking place; and, if no counter notice requiring the attendance of the witness in court is served within a specified number of days thereafter, the statement should be admissible to the like extent as oral evidence.

(c) Any party on whom such a statement is served should be entitled, by giving a counter notice within the prescribed time limit, to require the attendance as a witness of the maker of the written statement.

(d) Even where no counter notice has been given, the court should have a discretion to declare a written statement inadmissible in the absence of its maker giving evidence in person.

(e) Where a written statement is admitted in the absence of a counter notice, it should nonetheless be permissible for a party against whom the written statement has been used to give or lead evidence which is inconsistent with the evidence contained in the written statement.

(f) Where that happens, the party who tendered the written statement should be entitled to lead additional evidence. Should that be restricted to the maker of the written statement, or should other evidence in replication be permitted?

(Paragraph 2.23)

2. The general rule against the admission of hearsay evidence in criminal proceedings should not be abolished. However, the existing exceptions to that rule should be examined to see whether they can be clarified, extended or improved.

(Paragraph 3.9)

3.(1) Should a statement made by a person otherwise than in the course of criminal proceedings be admissible as evidence of fact, in exception to the hearsay rule, in any or all of the following circumstances (on the assumption that the evidence in other respects would be relevant and admissible and subject to the proposals below which could qualify the admissibility of hearsay statements):

(a) the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness or give evidence on commission, (NB, a provision based on this item alone would be a restatement and rationalisation of the present law);

(b) the person who made the statement is outside the United Kingdom (or, as an alternative, furth of Scotland) and it is not reasonable and practicable (or, as an alternative, it is not practicable) to secure his attendance, or to secure his evidence by means of a letter of request to a foreign jurisdiction;

(c) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement;

(d) all reasonable steps have been taken to find the person who made the statement, but he cannot be found?

(2) Should any or all of the above exceptions, if selected, be restricted to situations where the maker of the statement has recorded his words in a "document" (including a tape, video tape, film etc), or where his words have been recorded verbatim by someone else,

<u>or</u>

with any or all of the above exceptions, should it be provided that the statement may be reported orally by a witness, provided that witness has direct, personal knowledge of what the maker of the statement said?

(3) Alternatively, should the present common law on hearsay evidence in criminal proceedings be retained?

(Paragraph 3.27)

4.(a) It should be expressly declared by statute that, where hearsay evidence would otherwise be admissible in criminal proceedings, there should be no judicial discretion to exclude it on any ground.

(b) Alternatively, it should be expressly declared by statute that, where hearsay evidence would otherwise be admissible in criminal proceedings, the judge should nonetheless have a discretion to exclude that evidence if its terms, or the circumstances in which the statement was made, give rise to a reasonable suspicion either that the statement was not in accordance with the truth, or was a distorted, one-sided version of the truth.

(Paragraph 3.44)

5. In any statutory provisions governing the admissibility in evidence of hearsay statements, precognitions should remain excluded as evidence.

(Paragraph 3.46)

6.(1) The provisions of the Criminal Evidence Act 1965, on the admissibility of business records, should be repealed and replaced by more widely phrased hearsay

exceptions to the effect that a statement in a document should be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible if: the document was created or received by a person in the course of any trade, business, profession or other occupation, or as the holder of any paid or unpaid office; and the information in the document was supplied by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

(2) Where the information in a document within the above category has passed through a chain of intermediaries, for the statement to be admissible should it be necessary that each person in the chain who supplied the information should have received it in the course of a trade, business, profession or other occupation, or as the holder of any paid or unpaid office? (See clause 23(2) of the English Criminal Justice Bill).

(Paragraph 3.59)

7. Should an up-dated version of the additional criteria of section 1(1)(b) of the Criminal Evidence Act 1965 be stated in any reformed version of the statutory rules on the admissibility of business documents? If thought necessary these criteria could be any or all of the following:

(a) the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness or give evidence on commission;

(b) the person who made the statement is outside the United Kingdom (or, as an alternative, furth of Scotland) and it is not reasonable and practicable (or, as an alternative, it is not practicable) to secure his attendance, or to secure his evidence by means of a letter of request to a foreign jurisdiction;

(c) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement;

(d) all reasonable steps have been taken to find the person who made the statement, but he cannot be found.

(Paragraph 3.63)

8. Any new business documents exception to the hearsay rule should expressly exclude the admission, under that exception, not only of precognitions but also of any other document prepared in the course of a criminal investigation or for the purposes of pending or contemplated criminal proceedings against a particular person or persons.

(Paragaraph 3.66)

9.(a) Judges should be empowered to exclude a statement in a document, which would otherwise be admissible in

terms of a business documents exception to the hearsay rule, where the terms of the statement itself, or the circumstances in which it was made, give rise to a reasonable suspicion either that the statement was not in accordance with the truth, or that it was a distorted, one-sided version of the truth.

(b) Alternatively, it should be expressly declared by statute that, where such a statement would otherwise be admissible as in (a) above, there should be no judicial discretion to exclude it.

(Paragaraph 3.67)

10.(a) In criminal proceedings where a person has been examined as to a prior statement made by him, that prior statement should be admissible as evidence of the facts contained in it and to support or attack the credibility of that person;

(b) A 'prior statement' for these purposes should not include a precognition.

(Paragraph 4.17)

11. Without prejudice to the current legal rules which qualify the admission in evidence of statements made against interest by an accused, it should be competent for objection to be taken to the admission of a prior statement of a witness on the ground that it has been

obtained illegally; and the court should consider the objection and make a determination as it would have done had the admission of real evidence been objected to on those grounds.

(Paragraph 4.20)

12. The prior statement of an accused, other than a precognition, which has been given in evidence, and which has not been improperly obtained, should be admissible as evidence of fact in so far as it affects that accused, whether in whole or in part it incriminates or exculpates that accused, and whether or not he gives testimony at his trial.

(Paragaraph 4.25)

13. In considering the extent to which the prior statements of accused persons should be admissible as evidence in respect of co-accused -

(i) the present law should be retained, so that the prior statement of an accused is not evidence as regards any co-accused; or

(ii) the prior statement of an accused should be evidence as regards a co-accused, provided that the accused who made the statement gives evidence at his trial and is examined regarding his prior statement; or

(iii) the prior statement of an accused, who does not give evidence at his trial, should be admissible as evidence

of fact for or against a co-accused, provided that if the co-accused is unable to make use of s 141 or s 346 of the Criminal Procedure (Scotland) Act 1975 to examine or cross-examine the accused regarding his prior statement, the co-accused should have a right to examine the accused in respect of that prior statement, but only in so far as it is adverse to the interests of that co-accused.

(Paragraph 4.36)

14. A prior statement by one accused, which incriminates another accused and has been made in his presence, should not be evidence against that other accused solely because at that time he has not denied or refuted what has been said against him.

(Paragraph 4.40)

15. No special rules should be introduced to govern the admissibility of statements contained in documents produced by computers. We consider that this evidence should be treated as with any other machine generated evidence under the common law. In respect of any new statutory provisions governing the admissibility of hearsay statements in business and other documents, however, we provisionally propose, in order to avoid any technical lacuna, that information contained in those documents need not have been supplied solely from human sources and that

any definitions of "statement" and "document" should be suitably wide to cover evidence produced from a computer or other machine or device.
(Paragraph 5.30)

16. For the purposes of any criminal proceedings, a copy or a duplicate of a document, prepared by any copying or duplicating process, and purporting to be authenticated by a person responsible for the making of the copy or duplicate, should, unless the court otherwise directs:

(a) be deemed a true copy; and

(b) be treated for evidential purposes as if it were the original document itself (whether or not the original document is still in existence, and no matter how many removes there are between the copy and the original).

(Paragraph 6.4)

17. Where a statement in a document of a business or other undertaking is admissible in exception to the hearsay rule, it should, unless the court otherwise directs, be taken to be a document of that business or undertaking, if it is certified as such by a docquet purporting to be signed by an officer of the business or undertaking; and a statement in a document certified in accordance with the above should be received in evidence without being spoken to by a witness.

(Paragraph 6.6)

18. In criminal proceedings the law on the use in evidence of copies of bankers' books and the mode of proof of bankers' books, and copies thereof, should be subject to the same rules as we have provisionally proposed above on those matters in respect of business and other documents.

(Paragraph 6.9)

19. In any criminal proceedings the testimony of an officer of a business or undertaking that any particular statement is not contained in the records of the business or undertaking should be admissible as evidence of that fact, whether or not the whole or any part of the records have been produced in the proceedings.

(Paragraph 6.14)

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Proof by written statement.

9.—(1) In any criminal proceedings, other than committal proceedings, a written statement by any person shall, if such of the conditions mentioned in the next following subsection as are applicable are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person.

(2) The said conditions are—

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(c) before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and

(d) none of the other parties or their solicitors, within seven days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section:

Provided that the conditions mentioned in paragraphs (c) and (d) of this subsection shall not apply if the parties agree before or during the hearing that the statement shall be so tendered.

(3) The following provisions shall also have effect in relation to any written statement tendered in evidence under this section, that is to say—

(a) if the statement is made by a person under the age of twenty-one, it shall give his age;

(b) if it is made by a person who cannot read it, it shall be read to him before he signs it and shall be accompanied by a declaration by the person who so read the statement to the effect that it was so read; and

(*c*) if it refers to any other document as an exhibit, the copy served on any other party to the proceedings under paragraph (*c*) of the last foregoing subsection shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy thereof.

[[1](3A) In the case of a statement which indicates in pursuance of subsection (3)(*a*) of this section that the person making it has not attained the age of fourteen, subsection (2)(*b*) of this section shall have effect as if the words from "made" onwards there were substituted the words "understands the importance of telling the truth in it".]

(4) Notwithstanding that a written statement made by any person may be admissible as evidence by virtue of this section—

(*a*) the party by whom or on whose behalf a copy of the statement was served may call that person to give evidence; and

(*b*) the court may, of its own motion or on the application of any party to the proceedings, require that person to attend before the court and give evidence.

(5) An application under paragraph (*b*) of the last foregoing subsection to a court other than a magistrates' court may be made before the hearing and on any such application the powers of the court shall be exercisable [[2]by a puisne judge of the High Court, a Circuit judge or Recorder sitting alone.]

(6) So much of any statement as is admitted in evidence by virtue of this section shall, unless the court otherwise directs, be read aloud at the hearing and where the court so directs an account shall be given orally of so much of any statement as is not read aloud.

(7) Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this section shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement.

(8) A document required by this section to be served on any person may be served—

(*a*) by delivering it to him or to his solicitor; or

(*b*) by addressing it to him and leaving it at his usual or last known place of abode or place of business or by addressing it to his solicitor and leaving it at his office; or

[1]S. 9(3A) inserted (*prosp.*) by Children and Young Persons Act 1969 (c. 54), s. 73(2), Sch. 5 para. 55

[2]Words substituted for s. 9(5)(*a*)(*b*) by Courts Act 1971 (c. 23), Sch. 8 para. 49

(*c*) by sending it in a registered letter or by the recorded delivery service addressed to him at his usual or last known place of abode or place of business or addressed to his solicitor at his office; or

(*d*) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or sending it in a registered letter or by the recorded delivery service addressed to the secretary or clerk of that body at that office.

S. 9 excluded by Medicines Act 1968 (c. 67), Sch. 3 para. 26; extended by Criminal Justice Act 1972 (c. 71), s. 46(1); extended with modifications by Army Act 1955 (c. 18), s. 99A and Air Force Act 1955 (c. 19), s. 99A

Proof by formal admission.

10.—(1) Subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or defendant, and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.

(2) An admission under this section—

(*a*) may be made before or at the proceedings;

(*b*) if made otherwise than in court, shall be in writing;

(*c*) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;

(*d*) if made on behalf of a defendant who is an individual, shall be made by his counsel or solicitor;

(*e*) if made at any stage before the trial by a defendant who is an individual, must be approved by his counsel or solicitor (whether at the time it was made or subsequently) before or at the proceedings in question.

(3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or retrial).

(4) An admission under this section may with the leave of the court be withdrawn in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter.

Notice of alibi.

11.—(1) On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless,

Suppression of terrorism

Suppression of terrorism. 1978 c. 26.

21.—(1) Schedule 1 to the Suppression of Terrorism Act 1978 shall be amended as follows.

(2) The following sub-paragraph shall be inserted before paragraph 8(a)— 5

"(za) section 4 (soliciting etc. to commit murder);".

(3) The following shall be inserted after paragraph 13—

"Nuclear material

13A. An offence under any provision of the Nuclear Material (Offences) Act 1983.". 10

(4) The following shall be added at the end—

"Conspiracy

21. An offence of conspiring to commit any offence mentioned in a preceding paragraph of this Schedule.".

PART II 15

DOCUMENTARY EVIDENCE IN CRIMINAL PROCEEDINGS

First-hand hearsay.

22.—(1) Subject—

(a) to subsection (4) below;

1968 c. 60.

(b) to paragraph 1A of Schedule 2 to the Criminal Appeal 1968 (evidence given orally at original trial to be given orally at 20 retrial); and

1984 c. 60.

(c) to section 69 of the Police and Criminal Evidence Act 1984 (evidence from computer records),

a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence 25 by him would be admissible if—

(i) the requirements of one of the paragraphs of subsection (2) below are satisfied; or

(ii) the requirements of subsection (3) below are satisfied.

(2) The requirements mentioned in subsection (1)(i) above are— 30

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;

(b) that—

(i) the person who made the statement is outside the United Kingdom; and 35

(ii) it is not reasonably practicable to secure his attendance;

(c) that the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any 40 recollection of the matters dealt with in the statement; or

(d) that, all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.

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(3) The requirements mentioned in subsection (1)(ii) above are—

(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and

5 (b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.

(4) Subsection (1) above does not render admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984.

1984 c. 60.

Business etc. documents.

10 **23.**—(1) Subject—

(a) to subsections (3) and (4) below;

(b) to paragraph 1A of Schedule 2 to the Criminal Appeal Act 1968; and

1968 c. 19.

(c) to section 69 of the Police and Criminal Evidence Act 1984,

15 a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied—

(i) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the

20 holder of a paid or unpaid office; and

(ii) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

25 (2) Subsection (1) above applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied received it—

(a) in the course of a trade, business, profession or other occupation; or

30 (b) as the holder of a paid or unpaid office.

(3) Subsection (1) above does not render admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984.

(4) A statement prepared otherwise than under section 28, 29 or 30

35 below for the purposes—

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

shall not be admissible by virtue of subsection (1) above unless—

(i) the requirements of one of the paragraphs of subsection (2) of

40 section 22 above are satisfied; or

(ii) the requirements of subsection (3) of that section are satisfied.

Principles to be followed by court.

24.—(1) If, having regard to all the circumstances—

(a) the Crown Court—

(i) on a trial on indictment;

45 (ii) on an appeal from a magistrates' court; or

PART II

1987 c. 38.

(iii) on the hearing of an application under section 6 of the Criminal Justice Act 1987 (applications for dismissal of charges of fraud transferred from magistrates' court to Crown Court); or

(b) the criminal division of the Court of Appeal; or

(c) a magistrates' court on a trial of an information,

is of the opinion that in the interests of justice a statement which is admissible by virtue of section 22 or 23 above nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.

(2) Without prejudice to the generality of subsection (1) above, it shall be the duty of the court to have regard—

(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;

(b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;

(c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and

(d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.

Statements in documents that appear to have been prepared for purposes of criminal proceedings or investigations.

25. Where a statement which is admissible in criminal proceedings by virtue of section 22 or 23 above appears to the court to have been prepared, otherwise than under section 28, 29 or 30 below, for the purposes—

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard—

(i) to the contents of the statement;

(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

(iii) to any other circumstances that appear to the court to be relevant.

Proof of statements contained in documents.

26. Where a statement contained in a document is admissible as evidence in criminal proceedings, it may be proved—

(a) by the production of that document; or

(b) (whether or not that document is still in existence) by the production of a copy of that document, or of the material part of it,

authenticated in such manner as the court may approve; and it is immaterial for the purposes of this subsection how many removes there are between a copy and the original.

Documentary evidence—supplementary.

27.—(1) Nothing in this Part of this Act shall prejudice—

(a) the admissibility of a statement not made by a person while giving oral evidence in court which is admissible otherwise than by virtue of this Part of this Act; or

(b) any power of a court to exclude at its discretion a statement admissible by virtue of this Part of this Act.

(2) Schedule 2 to this Act shall have effect for the purpose of supplementing this Part of this Act.

PART III

OTHER PROVISIONS ABOUT EVIDENCE IN CRIMINAL PROCEEDINGS

Issue of letters of request.

28.—(1) Where on an application made in accordance with the following provisions of this section it appears to a justice of the peace or judge that criminal proceedings—

(a) have been instituted; or

(b) are likely to be instituted if evidence is obtained for the purpose,

he may order that a letter of request shall be issued to a court or tribunal or appropriate authority specified in the order and exercising jurisdiction in a place outside the United Kingdom, requesting it to assist in obtaining for the purposes of the proceedings evidence specified in the letter.

(2) In subsection (1) above "appropriate authority" means any central authority designated by a state to receive requests for assistance in legal matters.

(3) An application for an order under this section may be made by a prosecuting authority.

(4) If proceedings have already been instituted, a person charged with an offence in the proceedings may make such an application.

(5) Without prejudice to the generality of any enactment conferring power to make them—

(a) Crown Court Rules;

(b) Criminal Appeal Rules; and

(c) rules under section 144 of the Magistrates' Courts Act 1980,

1980 c. 43.

may make such provision as appears to the authority making any of them to be necessary or expedient for the purposes of this section and in particular for the appointment of a person before whom evidence may be taken in pursuance of a letter of request.

(6) In exercising the discretion conferred by section 24 above in relation to a statement contained in evidence taken in pursuance of a letter of request, the court shall have regard—

(a) to whether it was possible to challenge the statement by questioning the person who made it; and

Section 27.

SCHEDULE 2

Documentary Evidence—Supplementary

1. Where a statement is admitted as evidence in criminal proceedings by virtue of Part II of this Act—

(a) any evidence which, if the person making the statement had been called as a witness, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings; 5

(b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party; and 10

(c) evidence tending to prove that that person, whether before or after making the statement, made (whether orally or not) some other statement which is inconsistent with it shall be admissible for the purpose of showing that he has contradicted himself. 15

2. A statement which is given in evidence by virtue of Part II of this Act shall not be capable of corroborating evidence given by the person making it.

3. In estimating the weight, if any, to be attached to such a statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise. 20

4. Without prejudice to the generality of any enactment conferring power to make them—

(a) Crown Court Rules;

(b) Criminal Appeal Rules; and 25

1980 c. 43.

(c) rules under section 144 of the Magistrates' Courts Act 1980,

may make such provision as appears to the authority making any of them to be necessary or expedient for the purposes of Part II of this Act.

1968 c. 64.

5. Expressions used in Part II of this Act and in Part I of the Civil Evidence Act 1968 are to be construed in Part II of this Act in accordance with section 10 of that Act. 30

1984 c. 60.

6. In Part II of this Act "confession" has the meaning assigned to it by section 82 of the Police and Criminal Evidence Act 1984.

Section 35.

SCHEDULE 3

Questions as to Sentencing—Supplementary 35

1981 c. 54.

1. Subject to rules of court made under section 53(1) of the Supreme Court Act 1981, the jurisdiction of the Court of Appeal under section 35 above shall be exercised by the criminal division of the Court, and references to the Court of Appeal in Part IV of this Act (including references in this Schedule) shall be construed as references to that division. 40

2. Notice of an application for leave to refer a case to the Court of Appeal under section 35 above shall be given within 28 days from the day on which the sentence, or the last of the sentences, in the case was passed.

3. If the registrar of criminal appeals is given notice of a reference or application to the Court of Appeal under section 35 above, he shall— 45

(a) take all necessary steps for obtaining a hearing of the reference or application; and

An Act to make certain trade or business records admissible as evidence in criminal proceedings.

[2nd June 1965]

Admissibility of certain trade or business records.

1.—(1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if—

(a) the document is, or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and

(b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.

(2) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a fully registered medical practitioner.

(3) In estimating the weight, if any, to be attached to a statement admissible as evidence by virtue of this section regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person, or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(4) In this section "statement" includes any representation of fact, whether made in words or otherwise, "document" includes any device by means of which information is recorded or stored and "business" includes any public transport, public utility or similar undertaking carried on by a local authority and the activities of the Post Office.

S. 1 extended by Post Office Act 1969 (c. 48), s. 93(4), Sch. 4 para. 77

Short title, saving and extent.

2.—(1) This Act may be cited as the Criminal Evidence Act 1965.

(2) Nothing in this Act shall prejudice the admissibility of any evidence which would be admissible apart from the provisions of this Act.

(3) This Act shall not extend to Northern Ireland.

(2) The conditions mentioned in subsection (1)(*b*) above are—

(*a*) that the person who supplied the information—

(i) is dead or by reason of his bodily or mental condition unfit to attend as a witness;

(ii) is outside the United Kingdom and it is not reasonably practicable to secure his attendance; or

(iii) cannot reasonably be expected (having regard to the time which has elapsed since he supplied or acquired the information and to all the circumstances) to have any recollection of the matters dealt with in that information;

(*b*) that all reasonable steps have been taken to identify the person who supplied the information but that he cannot be identified; and

(*c*) that, the identity of the person who supplied the information being known, all reasonable steps have been taken to find him, but that he cannot be found.

(3) Nothing in this section shall prejudice the admissibility of any evidence that would be admissible apart from this section.

Evidence from computer records.

69.—(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown—

(*a*) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;

(*b*) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and

(*c*) that any relevant conditions specified in rules of court under subsection (2) below are satisfied.

(2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required.

Provisions supplementary to sections 68 and 69.

70.—(1) Part I of Schedule 3 to this Act shall have effect for the purpose of supplementing section 68 above.

(2) Part II of that Schedule shall have effect for the purpose of supplementing section 69 above.

(3) Part III of that Schedule shall have effect for the purpose of supplementing both sections.

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