SCOTTISH LAW COMMISSION

MEMORANDUM NO: 46
LAW OF EVIDENCE
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This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

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CONTENTS

REFERENCES AND ABBREVIATIONS

AS	- Act of Sederunt
BC	- "Evidence in Criminal Cases", a memorandum adopted by the General Council of the Bar of England and Wales (1973)
Clive and Wilson	- E M Clive and J G Wilson, The Law of Husband and Wife in Scotland (1974)
CLRC	- Criminal Law Revision Committee, Eleventh Report: (Evidence (General) (1972 Cmnd 4991))
Crim LR	- Criminal Law Review
Cross	- Evidence (5th ed, 1979)
Cross and Wilkins	- Outline of the Law of Evidence (3rd ed, 1971)
Dickson	- W G Dickson, A treatise on the Law of Evidence in Scotland (3rd ed, 1887)
Draft Code	- Draft Evidence Code (First Part), Scottish Law Commission memorandum No. 8 (1968)
Grant, Grant Committee	- The Sheriff Court (1967, Cmnd 3248)
Heydon	- J D Heydon, Cases and Materials on Evidence (1976)
JCL	- Journal of Criminal Law
JLSSc	- Journal of the Law Society of Scotland
Lewis	- W J Lewis, Manual of the Law of Evidence in Scotland (1925)
LJ	- The Law Journal
LQR	- Law Quarterly Review
LRC Canada	- Law Reform Commission of Canada, Report on Evidence (1975)
LRC 13	- Law Reform Committee, 13th Report: Hearsay Evidence in Civil Proceedings (1966, Cmnd 2964)

LRC 15	- Law Reform Committee, 15th Report: The Rule in Hollington v. Hewthorn (1967, Cmnd 3391)
LRC 16	- Law Reform Committee, 16th Report: Privilege in Civil Proceedings (1967, Cmnd 3472)
LRC 17	- Law Reform Committee, 17th Report: Evidence of Opinion and Expert Evidence (1970, Cmnd 4489)
Macdonald	- J H A Macdonald, A Practical Treatise on the Criminal Law of Scotland (5th ed, 1948)
Model Code	- American Law Institute, Model Code of Evidence (1942)
NLJ	- New Law Journal
Phipson	- Phipson on Evidence (12th ed, 1976)
RC	- Rules of the Court of Session, 1965, as amended
Renton and Brown (R & B)	- Criminal Procedure according to the Law of Scotland (4th ed, 1972)
Sc L Rev	- Scottish Law Review
Taylor	- A Treatise on the Law of Evidence (12th ed, 1931)
Thomson, Thomson Committee	- Departmental Committee on Criminal Procedure in Scotland (Second Report), (1975, Cmnd 6218)
Walkers	- A G Walker and N M L Walker, The Law of Evidence in Scotland (1964)
Wigmore	- J H Wigmore, A Treatise on the Anglo-American System of Evidence (3rd ed, 1940)
Williams	- Glanville Williams, The Proof of Guilt (3rd ed, 1963)
1840 Act	- Evidence (Scotland) Act, 1840 (3 and 4 Vict cap 59)

1852 Act	- Evidence (Scotland) Act, 1852 (15 Vict cap 27)
1853 Act	- Evidence (Scotland) Act, 1853 (16 Vict cap 20)
1874 Act	- Evidence Further Amendment (Scotland) Act, 1874 (37 and 38 Vict cap 64)
1887 Act	- Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict cap 35)
1898 Act	- Criminal Evidence Act, 1898 (61 and 62 Vict cap 36)
1954 Act	- Summary Jurisdiction (Scotland) Act, 1954 (2 and 3 Eliz II, cap 48)
1975 Act	- Criminal Procedure (Scotland) Act, 1975, cap 21

LAW OF EVIDENCE

Introduction

A.01 This Memorandum is intended to be read along with the Research Paper on the Law of Evidence written by Sheriff Macphail under the auspices of the Commission. The Research Paper gives a detailed exposition of the law of Scotland and much comparative material in addition. The Commission believes that it is a work which will commend itself to the student of the law of evidence and the academic lawyer as well as providing a great deal of practical information for the general practitioner. The Commission left the selection of topics for discussion in the Research Paper entirely to Sheriff Macphail, and it has come to the conclusion that certain of the topics discussed in the Research Paper fall more appropriately within other aspects of the law (for example, procedure). This Memorandum therefore does not follow entirely the same scheme as the Research Paper. Certain parts of the Research Paper have no counterpart in this Memorandum, and vice versa, and the order of treatment of topics is not always the same. In general, however, the Memorandum follows the same order of topics as does the Research Paper. Where appropriate references are made to passages in the Research Paper which contain a fuller discussion of the matter being considered.[1] In the section containing the propositions for consideration at the end of the Memorandum references are made in parenthesis, where appropriate, to recommendations in the reports of the Thomson Committee.[2]

A.02 In presenting this Memorandum the Commission has in mind that the reception of part of a draft Code of Evidence issued by the Commission in 1968 was not such as to suggest that the time is yet ripe for a Code of Evidence. Moreover it is doubtful whether suitable legislative machinery exists at present

[1] In the introduction to the Research Paper it was proposed to include a table of statutes in this Memorandum. However, the publication of the Evidence section of the Official Revised Edition of Statutes in Force has rendered this unnecessary, and it has therefore been omitted.

[2] Criminal Procedure in Scotland (Second Report) Cmnd. 6218 (1975), Criminal Appeals in Scotland (Third Report) Cmnd. 7005 (1977).

for the enactment of such a code. Accordingly, although codification of the law of evidence remains an eventual objective, the present Memorandum is more limited in its immediate aims. It proceeds upon the basis that the procedural framework within which evidence is elicited in the Scottish Courts will remain largely as at present. The Commission has sought to identify particular areas of the law of evidence where reform may be appropriate and to suggest possible bases for such reform.

A.03 The object of all reform in this area of law, whether in the long or the short term, must be to make the law of evidence, so far as possible, an intelligible and coherent whole. To that end, the Commission has tried to bring to bear certain guiding principles, which in its opinion should govern any discussion of the law of evidence, on its consideration of that law in its present state. These principles may be stated in the following terms:

(1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.

(2) As a general rule all evidence should be admissible unless there is a good reason for it to be treated as inadmissible.

(3) Where a report of an event has been committed contemporaneously to writing in the ordinary course of a person's work, that writing should be given evidential value.

(4) Every person should be both a competent and compellable witness unless there is some good reason to the contrary.

(5) The rules of evidence in civil and criminal proceedings should be identical unless there is good reason to the contrary.

A.04 It is hoped that this Memorandum and the Research Paper will excite comment and discussion from practitioners and academics alike, and that the views thus obtained will lead to a rationalisation and improvement of the law of evidence.

Chapter B

Judicial knowledge (2.02 - 2.03)

B.01 This chapter is concerned with two classes of facts about which evidence need not, or may not, be given: (1) facts within judicial knowledge and (2) facts which are judicially admitted.

B.02 In general, the classes of facts which are held to fall within judicial knowledge appear to be fairly well defined e.g. the ordinary meaning of English words and Acts of Parliament. Problems have arisen regarding the taking of judicial notice of statutory instruments, although Scottish writers have tended to assume that statutory instruments need not be produced in court, citing MacMillan v. M'Connell.[1] In any event, many of the problems which have arisen in England have probably been circumvented in Scottish summary criminal courts by application of section 353 of the Criminal Procedure (Scotland) Act 1975,[2] which provides for proof of official documents in summary criminal procedure. Proof of statutory instruments is more fully considered in paragraph K.02 and in the Research Paper at paragraph 11.02.

Application of English law (2.04 - 2.05)

B.03 English law is held to be within judicial knowledge where, by an Act of Parliament, it has been made part of the law of Scotland, as for example the English law of treason, which was imposed on Scotland by the Treason Act 1708,[3] or when the English law of charities has, in consequence of decisions by the House of Lords, been applied in various contexts such as income tax legislation. Codes of English criminal law, evidence and procedure must be taken notice of by Scottish judges sitting as the Courts Martial Appeal Court. Lastly where an inferior court is asked to vary a maintenance order issued by a court in another part of the United Kingdom, it may take notice of the law in force in any part of the United Kingdom.

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[1] 1917 J.C. 43.

[2] Formerly s.35 Summary Jurisdiction (Scotland) Act 1954. See para. K.26.

[3] c.21.

Any amendment of the law on these three matters does not however fall within the scope of this Memorandum, since they do not arise from the Scots law of evidence.

Judicial notice of foreign law (2.06 - 2.08)

B.04 A Scottish judge cannot normally take judicial notice of foreign law,[4] and if the same point of foreign law arises in subsequent actions between different parties the foreign law must be proved afresh in each case. Exceptions to this rule arise in various proceedings under the Maintenance Orders (Reciprocal Enforcement) Act 1972.[5] Also, where the court is interpreting an international convention to which legislative effect has been given, it may have regard to how foreign courts have interpreted that convention.[6]

B.05 The British Law Ascertainment Act 1859[7] authorises a court in one part of Her Majesty's Dominions to prepare a case setting out questions of law on which they desire to have the opinion of another such court, and remit it there for such opinion. There are different schools of thought as to whether the remitting court must apply the opinion to the facts of the case,[8] but the question is to some extent academic, in that the House of Lords or Judicial Committee of the Privy Council may reject the opinion. One practical drawback to the use of this procedure is the cost to litigants. It may be noted that in relation to foreign countries the Foreign Law Ascertainment Act 1861[9] enacted provisions substantially similar to those of the 1859 Act. This Act is only to apply in relation to foreign states with which a convention for that purpose has been made, and as no such conventions have been made the Act is valueless.

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[4] Scottish Burial Reform and Cremation Society v. Glasgow Corporation 1966 S.C. 215, Lord Strachan at p.228.

[5] 1972 c.18.

[6] See James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (UK) Ltd [1978] A.C.141.

[7] c.63. Extended by Foreign Jurisdiction Act 1890.

[8] See British Law Ascertainment Act 1859, s.3.

[9] c.11.

B.06 In addition to the foregoing statutes there are Council of Europe Conventions to assist a court of one member state to ascertain the law of another member state. The European Convention of Information on Foreign Law,[10] which was ratified by Britain in 1968, provides for the contracting parties to supply one another with information on their law and procedure in civil and commercial fields, as well as on their judicial organisation. The Convention was extended to include questions relating to criminal law and procedure by the Additional Protocol to the foregoing Convention of 15 March 1978,[11] and there is a further convention to facilitate the means of obtaining information and evidence in administrative matters, also of 15 March 1978.[12] Neither the Protocol nor the last mentioned Convention has been ratified by the United Kingdom, and it would appear that litle advantage has been taken of the facilities afforded by the 1968 Convention.

B.07 One possibility for reform of the law is the scheme proposed by the Law Reform Commission of Canada, whereby a judge may take judicial notice of foreign law, and must do so if a party requests it. In the latter case, the party making the request must give the other party sufficient notice to enable him to prepare to meet the request, and furnish the judge with sufficient information to enable him to comply with it.[13] If the information the judge is given is insufficient to enable him to determine the foreign law, he will not comply with the request, and may apply local law or dismiss the action.[14]

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[10] European Treaty Series No. 62 June 1968.

[11] Additional Protocol to the European Convention on Information on Foreign Law (15 March 1978) European Treaty Series No. 97.

[12] European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (15 March 1978) European Treaty Series No. 100.

[13] L.R.C. Canada, Evidence Code, s.85(1).

[14] s.84(3).

B.08 An alternative scheme, which could perhaps effect some saving of inconvenience and expense in a rare case, is a provision on the lines of section 4(2)-(5) of the Civil Evidence Act 1972,[15] which permits the reception as evidence of foreign law of any previous determination by an English court on the point in question, provided it is in citable form, and provided notice of intention to rely upon it has been given to the other parties to the proceedings. In these circumstances the foreign law is taken to be in accordance with the determination unless the contrary is proved.

B.09 We would welcome comment on the foregoing possible reforms. We are of the opinion, however, that any innovation in this area of the law should not eliminate the present system, but should be complementary to it.

Judicial notice of matters of fact (2.09 - 2.10)

B.10 What amounts to judicial notice of matters of fact varies so much from time to time and place to place that at first glance it might seem difficult to resolve problems in this field by legislation. The proposed Canadian scheme directs that judicial notice shall be taken of facts that are so generally known that they cannot be the subject of reasonable dispute.[16] There is provision for a judicial discretion to take notice of facts which are not necessarily common knowledge, but which are nevertheless well known within the territorial jurisdiction of the court or are capable of accurate and ready determination, provided that a party specifically requests the judge to take notice of any such matter, gives notice of the request to the other party, and furnishes the necessary information and sources (as in the case of foreign law).[17] Provision is made for each party to be heard regarding the propriety of taking judicial notice of a fact or facts. If the proposed

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[15] 1972 c.30.

[16] L.R.C. Canada, Evidence Code, s.83(1).

[17] ss.83(2) & 85(1).

Canadian scheme were adopted, it might be advantageous to dispense with the restriction regarding the territorial jurisdiction of the court.

B.11 Another possibility for reform is the practice embodied in the American model code, rule 804(1), which provides that a judge can state that he proposes to take notice of the existence of certain facts within his personal knowledge, subject to anything urged upon him to the contrary. Rule 201(e) of the Federal Rules of Evidence for United States Courts and Magistrates is in similar terms. We are of the opinion that the law should be changed in order to resolve the boundary of judicial notice of matters of fact, and invite readers' comments on the schemes outlined.

Judicial Admissions

Judicial Admissions in Civil Causes

Admissions on Record (2.11 - 2.13)

B.12 The general rules about facts which are admitted on record are well understood, but difficulties have arisen about implied admissions. Both the Court of Session and Sheriff Court Rules[18] enact that a party is held as admitting any averment of fact within his knowledge which he does not deny, and the rule has been judicially affirmed frequently. It seems that a fact is held to be within a party's knowledge only if the fact is his state of knowledge, or the existence of a simple legal relationship with another, or any other matters about which he does not have to make enquiries in order to ascertain the truth.[19] The Outer House case of O'Connor v. W.G. Auld & Co. (Engineering) Limited[20] appears to decide that a party is not held to have admitted a fact averred by his opponent, which he does not deny, merely on the ground that it was readily ascertainable by him, and had in fact been ascertained on his behalf before the proof.

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[18] Act of Sederunt, 11 February 1828, s.105 Sheriff Court Rules 1907, Rule 44.

[19] See Research Paper para. 2.12.

[20] 1970 S.L.T. (Notes) 16.

B.13 In Dobson v. Colvilles Limited[21] Lord Sorn expressed the view that in practice, cases occurred in which it was right to treat an averment in answer as equivalent to an admission. Lord Sorn's view was followed by the sheriff in Lord Advocate v. Gillespie,[22] but did not commend itself to the Second Division in Wilson v. Clyde Rigging and Boiler Scaling Co.[23] It now seems clear, however, that generally an averment has no evidential value unless it is expressly framed as an admission.[24] If the rule about facts within a party's knowledge was extended to matters about which a party might readily obtain information, it could be difficult to predict whether a judge would regard a particular fact as falling within such an extended rule or not. We consider therefore that it would be preferable to extend the "demand for admission" procedure under rule 99 of the Court of Session Rules, and propose accordingly.

Admission by Minute (2.14 - 2.17)

B.14 The use of minutes of admission has been encouraged by the courts and by the Grant and Thomson Committees. Provision is made for joint minutes of admission in jury trials in the Court of Session by Rule 122 of the Rules of Court, and the practice there prescribed is also followed in Court of Session proofs, and in proofs and civil jury trials in the Sheriff Court. In order to put the matter on a proper footing, we propose that similar rules be enacted for these forms of enquiry.

B.15 Rule 167(g) of the Rules of Court provides that in actions of divorce, nullity of marriage or separation, where the parties are agreed as to the custody of, aliment for or access to any child of the marriage they may embody such agreement in a joint minute. Joint minutes are also commonly used to express agreement as to the

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[21] 1958 S.L.T. (Notes) 30. Lord Sorn's opinion is printed with Lord Wheatley's opinion in Wilson, see n.23.

[22] 1969 S.L.T. (Sh.Ct.) 10.

[23] 1959 S.C. 328.

[24] See also Stewart v. Glasgow Corporation 1958 S.C. 28.

payment of a capital sum or periodical allowance under section 5 of the Divorce (Scotland) Act 1976,[25] although rule 165, which deals with actions defended on financial conclusions only, does not make provision therefor. There has been judicial disagreement in the Outer House (see Lothian v. Lothian[26] and Robson v. Robson[27]) as to how far joint minutes in consistorial actions are binding on the parties, and we are of the opinion that legislative clarification would be beneficial. Our tentative view is that a joint minute relating to the custody of, aliment for or access to any child should not be binding on the court, but that joint minutes relating to financial rights and obligations inter se of the parties should be binding. The distinction seems to be justified by the nature of the duties imposed on the court in actions which involve the custody and upbringing of children.[28]

Demand for admission (2.18 - 2.23)

B.16 Rule 99 of the Rules of Court provides that either party may by letter call on the other party to admit without prejudice the date, signature, transmission or receipt of any relevant document, or the verbal accuracy of any copy thereof within such time as the court may appoint, with a sanction by way of expenses for a party who does not comply. A similar provision in the Rules of the Scottish Land Court provides for a party to call on the opposing party by written notice to admit any specific fact or facts. If the opposing party unnecessarily refuses or delays to admit such fact or facts, he may be found liable in the expenses incurred in proving the same.[29] We have previously suggested that Rule 99 should apply to facts which could be ascertained, or have been ascertained, by a party as well as documents, and the extended rule could also be enacted for civil causes in the sheriff court.

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[25] 1976 c.39.

[26] 1965 S.L.T. (Notes) 60.

[27] 1973 S.L.T. (Notes) 4.

[28] Matrimonial Proceedings (Children) Act 1958, ss.8(1) and 8(2).

[29] Rules of the Scottish Land Court 1979, Rule 39(1).

The proposed extension would seem justified in that it would meet the present situation in which a defender may properly withhold an admission in his pleadings of a fact readily ascertainable or indeed ascertained by him.

B.17 On the other hand, it may be thought that section 1 of the Administration of Justice (Scotland) Act 1972,[30] and the rules made thereunder,[31] provide parties with adequate facilities for investigation, and that it would be an undesirable inconsistency that a party should be required to admit a fact under notice but not in his pleadings. We would welcome views on this.

Judicial admissions in criminal cases (2.24)

B.18 Judicial admissions in criminal cases fall into two categories, these being (a) the plea of guilty to a charge, which if accepted excludes all enquiry into the accused's guilt of that charge and (b) admission by minute, which limits the scope of the enquiry.

Plea of guilty - probative value (2.25 - 2.29)

B.19 At present neither a plea of guilty which has been tendered and rejected, nor a plea which has been tendered and withdrawn, may be founded on by the prosecutor.[32] Further, no reference may be made in the course of a trial on any charge to any other charge in the same indictment or complaint to which the accused has pleaded guilty.[33]

B.20 It may be argued that the present rules are too inflexible to be fair to the prosecutor in all circumstances. Theoretically, the accused should be allowed to withdraw his plea only if, in the High Court, the terms of section 122 of the Criminal Procedure

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[30] 1972 c.59.

[31] A.S. (Rules of Court Amendment No.7) 1972
A.S. (Sheriff Court Procedure Amendment) 1973.

[32] Strathern v. Sloan 1937 J.C. 76.

[33] Walsh v. H.M. Advocate 1961 J.C. 11.

(Scotland) Act 1975 are satisfied, or in summary procedure the circumstances are very special,[34] but the reasons given in court for a proposed withdrawal may differ radically from the real reasons behind the request, and in many cases it will not be possible for the court to ascertain whether the circumstances are genuine or not. In addition circumstances may arise where jurors, prior to being empanelled, have heard a plea of guilty being tendered to one or more of a series of charges.

B.21 The counter arguments are that in all cases it is for the prosecution to prove the guilt of the accused, and in ordinary cases they cannot utilise the accused himself. A plea of guilty may be a mere technical exercise, or may be made solely because the accused's legal representative so advised. Often an accused is advised to plead guilty to a lesser offence in the hope that the prosecution will accept such a plea and drop a more serious charge. There may, therefore, be a variety of circumstances in which an accused may plead guilty without it being appropriate to draw an inference if the plea is later withdrawn.

B.22 Whilst it may be thought by some that the present law is satisfactory and should be retained, one alternative is to treat a plea of guilty as a confession which would be admissible against the accused unless there was some element of unfairness in obtaining it. A further possibility is to make the admission of evidence of a plea of guilty a matter for the discretion of the presiding judge, bearing in mind that the judge is already endowed with such a discretion when questions arise as to the admissibility of evidence of the accused's previous convictions or bad character under sections 141(f) and 346(f) of the Criminal Procedure (Scotland) Act 1975. We do not consider it necessary that a trial within a trial procedure should be employed in eliciting the relevant circumstances, nor that any probative value

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[34] R & B, para. 14-29; McClung v Cruickshank 1964 J.C.64.

should be attached to an intimation to the procurator fiscal of an intention to plead guilty, or to an attempt to negotiate a partial plea or to a departure from a section 102 letter. We would appreciate the views of readers on the foregoing proposals.

Plea of Guilty by Letter (2.30)

B.23 The Thomson Committee recommended[35] that there should be a rule in summary proceedings that an accused who pleads guilty by letter should be deemed to admit any previous convictions which have been libelled against him, unless he expressly denies them. At present, in solemn procedure, any conviction set forth in the notice of previous convictions attached to the indictment is held to apply to the accused unless he gives written intimation to the contrary in accordance with the prescribed procedure. We subscribe to the Committee's views, and make the same recommendation.

Admissions by Minute (2.31 - 2.33)

B.24 Facts and documents may be admitted in both solemn[36] and summary[37] procedure where the accused is legally represented. While section 354 of the Criminal Procedure (Scotland) Act 1975 uses the expression "has legal assistance in his defence", section 150 of that Act, which relates to solemn procedure, uses the words "is legally represented". A further distinction between the sections is that the word "may" is used in section 354, whereas "shall" appears in section 150, and this would seem to indicate that admissions may be made orally in summary proceedings. Yet another difference in procedure is that an accused may sign the minute in summary proceedings, but not in solemn proceedings. While this is more a matter of procedure rather than evidence, we think it would be desirable that one mode of procedure be followed in each type of proceedings.

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[35] Thomson paras. 19.01 - 19.04.

[36] Criminal Procedure (Scotland) Act 1975, s.150.

[37] Criminal Procedure (Scotland) Act 1975, s.354.

B.25 The Thomson Committee pointed out[38] that it may not be absolutely clear from the wording of the statutory provisions that any fact admitted in a minute by an accused is not to be held proved unless the prosecutor accepts it as proved, and recommended that the law should be more clearly stated. We agree with the Committee's recommendations, and propose accordingly.

B.26 There is no provision in either solemn or summary procedure that an admission may be withdrawn, though this can be done in English criminal trials and court martial procedure with the leave of the court. We are doubtful whether such a provision would be desirable in Scotland, bearing in mind that if withdrawal of admissions were to be permitted in the course of a trial, it would be too late for the prosecutor to cite witnesses.

B.27 Both the Thomson and Grant Committees thought that more use might be made of minutes of admission on matters where no dispute is possible. The overriding difficulty is, however, in providing any formal means of encouraging their use which does not conflict with the accused's right to put the prosecution to the proof of its case. The Thomson Committee suggested[39] that the initiative for reaching agreement should be with the Crown, and that in solemn procedure there should be an informal discussion between prosecution and defence on the subject before the first diet. We are of the opinion that this is not a topic which lends itself to a legislative solution, and we propose, subject to views expressed on consultation, no specific recommendation.

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[38] Thomson para. 36.05.

[39] Thomson para. 36.04.

Chapter C

Competence and Compellability of Witnesses (3.03)

C.01 From comments received on the Draft Evidence Code[1] it appears that there is general agreement that the present statute law relative to the competence and compellability of witnesses could usefully be consolidated and amended. Although there are differences of opinion about the way in which the law should be changed (particularly in criminal cases), it at least now seems possible to contemplate the introduction of statutory provisions to the effect that all persons are competent and compellable witnesses, except as otherwise provided in such a statute. Below are a number of possible exceptions to the general rule.

Heads of State (3.04-3.06)

C.02 There is no Scottish authority to the effect that the Sovereign is an incompetent witness, and although the Attorney General in R v. Mylius[2] stated otherwise, modern English writers[3] assume that the Sovereign and foreign heads of state are competent, but not compellable. As far as the latter are concerned that assumption was fortified by Section 20 of the State Immunity Act 1978[4], which makes the provisions of the Diplomatic Privileges Act 1964[5] applicable to Heads of State. Article 31 of the 1964 Act provides that a diplomatic agent is immune in criminal cases, and in some civil cases is not obliged to give evidence. We propose that the Sovereign and foreign heads of state should be competent, but not compellable witnesses. This rule would extend only to heads of state recognised by the Crown, either de facto or de jure, and certified as such to the court by one of Her Majesty's Secretaries of State.

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[1] Scottish Law Commission Memorandum No. 8.

[2] The Times, February 2nd, 1911.

[3] Cross, p. 184; Phipson, para. 1471.

[4] 1978 c.33.

[5] 1964 c.81.

Members of Diplomatic Missions and International Organisations (3.07)

C.03 It seems possible to propose a rule that members of these classes are competent, but not compellable witnesses, except insofar as (a) otherwise provided by statute or order in council[6] or (b) immunity is waived by the State or organisation which the proposed witness represents. We propose accordingly.

Judges (3.08-3.13, 24.40)

C.04 (a) Supreme Courts - While there is no actual decision, it is plain from the opinions in Muckarsie v. Wilson[7] that it is incompetent to call a judge as a witness to judicial proceedings which took place before him, though he might be a witness as to an extraordinary event such as a riot or possibly an assault.

(b) Inferior Courts - Judges of inferior courts are competent witnesses to the proceedings before them, and they are frequently called in trials for perjury to testify as to the evidence given in their courts.

C.05 The distinction between judges of the Supreme Courts and others appears to be based on the fact that it is inconsistent with the dignity of high judicial office that a judge of the Supreme Court should be cross-examined and contradicted by other evidence as to judicial proceedings which have taken place before him, and secondly, that in summary courts the judge is the best witness of the evidence given. A distinction between judges of the Supreme Courts and those of the inferior courts is also drawn in the field of liability for judicial acts, although in England this distinction has recently been held to be no longer tenable.[8]

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[6] e.g. Diplomatic Privileges Act 1964
International Organisations Act 1968 c.48.
International Monetary Fund (Immunities and Privileges) Order 1977 No. 825.
Commonwealth Countries and Republic of Ireland (Immunities and Privileges) Order 1971 No. 1237.

[7] 1834 Bell's Notes 99.

[8] Sirros v. Moore [1975] Q.B. 118, Lord Denning, M.R. at pp. 132-136.

C.06 There is a risk that if judges were to be treated as competent and compellable witnesses to judicial proceedings before them they would be subject to frivolous citation. Provision could be made to prevent their unnecessary attendance, or indeed that of any other witness. There appears to be English precedent for this in the Criminal Procedure (Attendance of Witnesses) Act 1965.[9] If such procedural provision were to be made, it may be unnecessary to enact a special rule. If, however, it is thought necessary to except judges from the general rule that all persons are competent and compellable witnesses, it is arguable that the exception should extend to all judges and to all occurrences in court. If any such rule were enacted, the question would arise whether provision had to be made for exceptional situations in which a judge's evidence would be necessary or valuable, as when an accused person attempted to impugn his judicial declaration. It would also be advisable to declare that a sheriff would remain liable to speak to precognitions on oath and to dying depositions.

C.07 In England, Cross states[10] that judges do not appear to object to giving evidence, at least from the well of the court, concerning that which occurred in cases tried by them, when they can assist subsequent litigation by doing so. In Scotland, cases have arisen where such evidence might have been helpful,[11] and we invite readers' views on whether there should be such a rule in this country. If so, we consider that the rule should apply to members of tribunals, and comment is invited on what tribunals it should extend to. In addition, we propose a general rule that judges and members of tribunals may not testify in the proceedings in which they are acting.

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[9] s.2(2).

[10] Cross p. 317.

[11] e.g. Plasticisers Ltd v. Wm. R. Stewart & Sons (Hacklemakers) Ltd 1972 S.C. 268.

Jurors (3.14)

C.08 It is settled that jurors in both civil[12] and criminal[13] cases may not give evidence of discussions which took place in the jury box or jury room, though they may immediately correct the verdict announced by the foreman.[13] We consider that this rule may be readily expressed as an exception to the general rule, that all persons are competent and compellable witnesses, and for completeness the fact that a juror may not testify in the trial in which he is serving as a juror could be included. There would be an exception in relation to criminal interference or attempted criminal interference with the function of the jury.

Arbiters (3.15)

C.09 A decree arbitral must be construed by itself,[14] although in an action for enforcement or reduction of his award the arbiter's evidence is competent on any matter which would entitle the court to interfere with his award. We do not propose any change in the law in this respect.

Presence in Court (3.16-3.18)

C.10 General - A witness to fact should not be in court before giving evidence, and it is for the court to control witnesses accordingly. There are occasions when witnesses stray into court by accident, and we consider that it is desirable to revise the present law affecting such witnesses. While the common law excluded all but expert witnesses from being present in court when witnesses to fact were giving their evidence, this was modified by section 3 of the 1840 Act, which in turn has been repealed so far as relating to criminal proceedings by Schedule 10, Part I of the 1975 Act. The statutory rule as to civil proceedings is accordingly section 3 of the 1840 Act which reads as follows:

> "In any trial before any judge of the Court of Session ... or before any sheriff in Scotland, it shall not be

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[12] Pirie v. Caledonian Railway Co. (1890) 17R 1157.

[13] Hume, ii, 429-430.

[14] Dickson, para. 1023.

> imperative on the court to reject any witness against whom it is objected that he or she has, without the permission of the court, and without the consent of the party objecting, been present in court during all or any part of the proceedings; but it shall be competent for the court, in its discretion, to admit the witness, where it shall appear to the court that the presence of the witness was not the consequence of culpable negligence or criminal intent and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination."

In criminal proceedings the relevant provisions are s.140 and s.343 of the 1975 Act.

C.11 In the commentary to the Draft Evidence Code we stated that the present statute law on this matter exhibits a rigidity of outlook in the admission of evidence which, while characteristic of its date (i.e. 1840), is not in accordance with modern ideas and practice;[15] a view to which we still adhere. We consider that any restatement of the law of Scotland should take into account the following matters, some of which have created difficulties.

Procedure (3.19)

C.12 There has been no judicial guidance as to whose "culpable negligence" or "criminal intent" is involved or as to how the court is to be satisfied on the points mentioned in the 1840 Act. We suggest that it would be sufficient to provide that if a person who ought not to have been in court is presented as a witness it should be competent for the court in its discretion to admit him. This discretion, it is suggested, should be in general terms, and it would not appear to be necessary to add a provision to the effect that if the person is admitted his evidence is to be scrutinized with exceptional care. Whether a jury need to be directed on this matter could be left to the discretion of the judge.

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[15] Scottish Law Commission Memorandum No. 8, Draft Evidence Code, p.56.

Section 3 of the Evidence (Scotland) Act 1852 (3.20)

C.13 The present provisions can cause difficulty when it is sought to recall a witness who has been present in court during the evidence of another witness, in order to prove the previous statement of that witness under section 3 of the 1852 Act (civil procedure), or sections 147 and 349 of the 1975 Act (criminal procedure). The question was raised but not decided in Dyet v. NCB.[16] If the general discretion referred to in paragraph C.12 were accepted this difficulty would not arise.

Parties and their Advocates (3.21)

C.14 While we consider that it should be made clear that any exclusionary rule does not apply to parties and their advocates, the fact that a party has listened to the evidence of witnesses before giving evidence himself should remain a matter for comment by the judge and other parties.

Company Directors etc (3.22)

C.15 There is a need for a rule on the question of whether or not a director or other representative of a party, corporate or unincorporate, may be present in court before giving evidence. We suggest that if a party to a litigation is not a natural person, that party should be entitled to designate as having the right to be present in the court room throughout the case, an officer or employee of the party, provided that notice that such a representative is to be present has been given before the trial, whether or not it is intended that the officer or employee give evidence.

Expert Witnesses (3.23)

C.16 In practice an expert witness is normally allowed to hear the evidence of the witnesses to fact unless objection is taken. In the High Court this course on occasions has not been permitted, both when opposed by[17] and sought by[18] the accused, and a distinct rule as to the presence of expert witnesses would be helpful.[19]

[16] 1957 S.L.T. (Notes) 18.

[17] Dingwall (1867) 5 Irv. 466.

[18] Granger (1878) 4 Coup. 86.

[19] See post, paragraphs R.06 and R.07.

Pars judicis (3.24)

C.17 If it is to remain possible for a witness to be rendered inadmissible by reason of his prior presence in court, it should be made clear that any question as to the admissibility as a witness, of a person who ought not to have been present in court, is a matter that the judge may raise ex proprio motu.

Trials and Proofs (3.25)

C.18 Section 3 of the 1840 Act applies to trials and not in terms to proofs. It has apparently been assumed in practice that section 3 applies to proofs, and we propose that any new provision should cover all modes of judicial enquiry.

Children and Persons of Defective Physical or Mental Capacity (3.27-3.29)

C.19 It is thought that the first sentence of Article 6.2 of the Draft Evidence Code, quoted below, could be a useful model for any statutory provision which did not involve procedural innovation:

> "A person is incompetent as a witness if from non age or from any physical or mental incapacity he is incapable of either (a) understanding the obligation to tell the truth or (b) giving evidence in a manner in which the same is or can be rendered intelligible to the court".

Alternatively, children and persons of defective physical or mental capacity could be deemed competent witnesses, subject to comment like any other witness, on the extent to which their evidence is reliable. This would obviate the present difficulty of the judge having to try and evaluate a witness's competence without hearing at least some part of the witness's evidence. It would, however, be necessary to restrict the class of competent witnesses in the case of persons of defective capacity, to those whose evidence could be led in court without causing undue disturbance. We invite comment on the alternatives. In the case of children who have been the victims of sexual offences we share the view of the Thomson Committee[20] that they be required to give evidence in court. There is no satisfactory alternative procedure.

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[20] Thomson, paras. 43.31-43.32.

Bankers (3.30)

C.20 The limited immunity conferred on bankers under section of the Bankers' Books Evidence Act 1879[21] was also considered in the Draft Code,[22] and it seemed to be generally accepted that that immunity should be preserved. We consider that the provisions for proof of the conditions to be satisfied before a copy may be received could be simplified.[23]

Person not Cited as Witness (3.31)

C.21 Section 1 of the Evidence (Scotland) Act 1852 provides that no person adduced as a witness shall be excluded from giving evidence by reason of having appeared without citation, and that every such person, who is not otherwise disqualified by law from giving evidence, shall be admissible as a witness. That section, as far as criminal proceedings are concerned, has been replaced by sections 138 and 341 of the 1975 Act which are in similar terms. There have been cases in which it appears that one party has called as witnesses people who had only been cited to attend as witnesses for the other party, or who had not been cited at all, but who were present in the court precincts. In McDonnell v. McShane[24] an action for affiliation and aliment, the pursuer called a defender as a witness, and objection was taken on the ground that he had not been cited to attend as a witness for the pursuer. The Sheriff Principal, Sir Allan G Walker QC, in rejecting that submission, made it clear that citation and compellability were entirely different matters, and that if a competent witness was present in court (whether a party to the action or not) there could be no inherent objection to his being compelled to give evidence. These views were expressed obiter and we consider that it would be desirable to enact an express provision that if a competent and compellable witness is present within the precincts of the court, whether a party to the action or not, there can be no objection to his being compelled to give evidence although not cited.

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[21] c.11.

[22] Article 6.11.

[23] See post, L.21.

[24] 1967 S.L.T. (Sh. Ct.) 61.

Chapter D

Competence and compellability of witnesses - civil cases

Spouses (4.01-4.02)

D.01 The common law that a spouse of a party was not in general a competent witness was altered by section 3 of the Evidence (Scotland) Act 1853, which provided that the husband or wife of a party would be a competent witness, but that no husband or wife would be competent or compellable to give evidence against the other party on any matter communicated by him or her during the marriage.

Compellability (4.03-4.05)

D.02 The question whether one spouse is, as a general rule, a compellable witness against the other does not appear to have been decided, but it is thought that section 3 makes the spouse of the party compellable as well as competent. The provision would then be in line with the corresponding English statute, the Evidence Amendment Act 1853[1], even although the decision in Leach v. R.[2] makes it clear that any alteration of the law relating to the compellability of spouses must be made only by definite and certain language, not by implication.

D.03 We propose that in order to clarify matters, there should be a new statutory provision enacting that the spouses of parties are both competent and compellable, the English rule to this effect having already been in operation for over 100 years without attracting criticism. If such a proposal is not acceptable, we consider that it should be enacted that the spouse adduced as a witness should be warned by the judge that he need not answer the questions put to him, if they relate to a matter communicated to him during the marriage. It would also have to be made clear whether this privilege survived the spouses judicial separation or divorce.[3]

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[1] c.83.

[2] [1912] A.C. 305.

[3] See post, paras. S.14 and S.18.

Confidential communications etc.

D.04 Confidential communications and the privilege concerning marital intercourse are dealt with in Chapter S.

Compellability of defender in consistorial cause (4.16-4.17)

D.05 Although the pursuer in a consistorial cause may adduce the defender as a witness, and not infrequently does so in undefended actions of divorce in order to lay before the court evidence as to the welfare of the children in the defender's care, difficulties have sometimes arisen in defended actions where the pursuer has closed his proof and the defender has led no evidence. The practice has been judicially deprecated,[4] and it is thought that a rule should be introduced to the effect that failure by a party to give evidence in a defended action of status, or in a defended consistorial cause, should result in the most favourable construction being put on the evidence for the other party. We would welcome comment.

Party allegedly in breach of order of court (4.18)

D.06 It is not altogether clear whether a party who denies his opponent's allegation that he is in breach of interdict, interim interdict or other order of the court, is a compellable witness at a proof on the matter. When such an allegation of breach of an order is made, the party against whom it is made is liable upon proof of it to judicial censure, fine or imprisonment, and the standard of proof in any event in a case of breach of interdict, is proof beyond reasonable doubt.[5] We propose, therefore, that the party allegedly acting in breach of an order should not be a compellable witness. Comment on this proposal is invited.

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[4] See e.g. Bird v. Bird 1931 S.C. 731.

[5] Gribben v. Gribben 1976 S.L.T. 266.

D.07 The evidence of a party and the party's solicitors is rendered admissible by statute,[6] even in a case which the solicitor is conducting, except in regard to the proof of a promise of marriage in any action of declarator of marriage founded upon such a promise cum copula subsequente.[7] We propose the repeal of this exceptional provision, which seems to have no continuing justification.

D.08 Sir Rupert Cross is of the opinion[8] that while there are obvious objections to a party's advocate acting as a witness in a case in which he is professionally engaged, it would probably be going too far to say that he is not a competent witness in such circumstances. We agree that a party's advocate should continue to be a competent witness in such a case.[9]

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[6] Evidence (Scotland) Act 1852, s.1.
Evidence (Scotland) Act 1853, s.3.
Evidence Further Amendment (Scotland) Act 1874, ss. 2 and 3.

[7] Evidence Further Amendment (Scotland) Act 1874, s.3.

[8] Cross, p.188 n.2.

[9] See para. F.17.

Chapter E

Competence and Compellability of Witnesses

Criminal Cases: The Accused (5.01)

E.01 This Chapter is concerned with the accused as a witness and considers his position (1) as a witness for the prosecution, (2) as a witness for himself (a) when he is being tried alone and (b) when being tried with a co-accused, and (3) as a witness for a co-accused. The restrictions placed on the cross-examination of the accused by sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975 are then examined.[1]

The accused as a witness for the prosecution (5.02-5.03)

E.02 The effect of sections 141(a) and 346(a) of the 1975 Act is that the accused is not a competent witness for the prosecution until he has been acquitted or convicted, or the charge against him withdrawn, at which point he becomes both a competent and compellable witness for the prosecution in the trial of a co-accused for the same and other offences. In summary procedure, a co-accused who has pleaded guilty and whose plea has been accepted, may competently be called as a witness for the prosecution at the trial of his co-accused, even where he has not yet been sentenced.[2] The Thomson Committee recommended[3] that the same procedure should apply in both summary and solemn cases, and that in solemn cases a co-accused who has already pleaded guilty may be called for the Crown or the defence, despite the fact that he is not on the Crown or the defence list of witnesses; although when the procedure was invoked the defence would be entitled to ask for an adjournment in order to precognosce the co-accused.[1] We would welcome views.

E.03 In M'Ginley and Dowds v. MacLeod[4] the accused B anc C, who were tried on a charge of assaulting A, had been adduced as

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[1] See Criminal Justice (Scotland) Bill cl. 28. This Bill may reach the statute book before publication of this Memorandum.

[2] Copeland v. Gillies 1973 S.L.T. 74, R & B para. 18-55.

[3] Thomson para. 50.28.

[4] 1963 J.C. 11.

Crown witnesses in the previous trial of A on a charge of assaulting B in the same brawl. The court held by a majority that B and C were not exempt from prosecution, on the ground that the exemption only applied to a socius criminis, and covered only the libel in support of which he was called to give evidence. Lord Guthrie, who dissented, considered the procedure had violated two principles, since B and C could not have absolute security as to the effect of their evidence on themselves, and since they were prevented from reserving completely their defence until their own trial. The Commission considers that any innovation in this matter would be liable to create further problems.

The accused as witness for himself when being tried alone: Compellability (5.04-5.12)

E.04 The question of whether an accused should be compelled to give evidence at his own trial raises issues of fundamental importance to the rights of the individual, and the assumptions underlying the administration of criminal justice. These matters are fully discussed in the Research Paper,[5] and here we merely put forward a number of possible alternatives for consideration.

E.05 The simplest answer to the question is an absolute negative, which may be justified on traditional principles, such as that no person should be compelled to incriminate himself, or that the compellability of the accused would lead in practice to some imperceptible but definite shift in the onus of proof, because the accused in the eyes of the jury would then apparently be required to prove his innocence.

E.06 An alternative is that the accused should be a compellable witness only if he leads evidence in his own defence, although an exception would have to be made for expert evidence of insanity or perhaps some other mental or physical condition being relied on by way of defence.

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[5]Paras. 5.04-5.12.

E.07 A further possible answer, put forward by the Criminal Law Revision Committee[6], is that when a prima facie case has been made against the accused, it should be regarded as incumbent upon him to give evidence in all ordinary cases. If he refuses without good cause to answer any questions, the court or jury may draw such inferences as appear proper, and may treat his refusal or such inferences as corroboration or as capable of being corroboration of any evidence against the accused. On the issue of corroboration we refer to paragraph E.11.

E.08 While we tend to support the view of the Thomson Committee[7] that the accused should not be compelled to give evidence, we are of the opinion that the question merits full consideration, and invite comment on the point. The question of the compellability of the accused cannot be considered in isolation from other proposals for the reform of the law. We fully endorse the Committee's suggestions that the right to comment on the accused's failure to testify should be extended to the prosecutor, and that the judge or jury may draw an adverse inference from such failure,[8] whether or not the "no case to answer" procedure is adopted. We further propose that the right of comment should be extended to any co-accused.

Consequences of decision to testify (5.13-5.19)

E.09 If the accused decides to give evidence on his own behalf three procedural considerations arise. First, in solemn procedure his name need not be included in the list of witnesses and secondly, he gives his evidence on oath or affirmation and is not entitled to make an unsworn statement from the dock[9], as is the case in England. Thirdly, sections 142 and 347 of the 1975 Act provide that if the only witness to the facts of the case called by the defence is the accused, he must be called immediately after the close of the evidence for the prosecution. One difficulty is that the only method of enforcing the rule if he has already called, for example, an expert witness, is to refuse to allow the accused to give evidence. This seems a penalty which is drastically

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[6] CLRC para. 110, 113.

[7] Thomson, para. 50.09.

[8] Thomson, para. 50.15.

[9] Gilmour v. H.M. Advocate 1965 J.C. 45.

disproportionate to the gravity of the fault and we, like the Thomson Committee,[10] propose the repeal of sections 142 and 347.

E.10 Although in practice an accused usually gives evidence before any other witnesses as to fact there is no statutory rule to this effect. We do not consider that the present practice should be elevated to a rule of law, but propose that if the accused does give evidence after calling a witness to the facts it should be open to the judge, the prosecution and any co-accused to comment. This introduces a degree of flexibility.

Corroboration by failure to testify (5.28)

E.11 In England, the Criminal Law Revision Committee has recommended that the refusal of an accused to give evidence may be treated as corroboration of any evidence given against him.[11] Moreover, Cross submits that the distinction between a matter which can properly be taken into account by the jury, and something which corroborates other evidence, is a distinction without a difference.[12] We do not agree with these views, and are in agreement with the Thomson Committee's proposal that in no case should the accused's failure to give evidence be treated as corroboration.[13] In effect, this would mean that the accused's failure to give evidence would only be a factor giving weight to evidence otherwise sufficient in law to justify a conviction.

Accused as witness for himself when there is a co-accused

Consequences of decision to testify (5.29-5.30)

E.12 The learned editor of Renton and Brown points out[14] that whatever the common law rule may be, the situation in practice is that when one of two or more co-accused gives evidence, his evidence is evidence in the case available like any other

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[10] Thomson, para. 50.20.

[11] CLRC, para. 111, pp. 177, 216.

[12] Cross p. 416.

[13] Thomson, paras. 8.25, 8.27.

[14] Para. 18.17, n.81.

evidence for or against all the accused. This was embodied in our draft Evidence Code by Article 6.3(b) which provided as follows:

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

This sub-clause was approved and accepted by the Thomson Committee,[15] and generally received no adverse comment. We consider that for the sake of clarity a provision to this effect should be enacted.

Cross-examination by co-accused (5.31-5.32)

E.13 Article 6.3(c) of the draft Code was in the following terms:

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

This sub-clause was also accepted by the Thomson Committee and is now the law of England[16]. We propose its adoption in Scots law.[17]

Cross-examination by the prosecutor (5.33)

E.14 It is not "regarded as proper for the prosecution to use their right to cross-examine one accused as a way of turning him into a witness against another accused."[18] If the prosecution were granted an unrestricted right of cross-examination of this kind, or even a right subject to the discretionary control of the judge, it could cause great difficulties,[19] and we do not propose any change in the present law.

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[15] Para. 38.22.

[16] Thomson para. 38.22; R. v. Hilton [1972] 1Q.B.421.

[17] See Criminal Justice (Scotland) Bill cl. 28.

[18] R. & B., para. 18.17.

[19] See Research Paper para. 5.33.

Comment by co-accused on accused's failure to testify (5.34)

E.15 Neither the 1975 Act nor any Scottish authority prohibits comment by the co-accused on the failure of the accused to give evidence, and the question remains open in Scotland. We have, however, proposed elsewhere[20] that the right of comment should be extended to a co-accused.

Incriminating evidence by subsequent co-accused (5.35)

E.16 If, by virtue of the order in which they appear in the complaint or indictment,[21] any other accused is entitled to lead evidence after a co-accused who has elected not to give evidence, there is nothing to prevent such other accused from giving evidence incriminating him. If the earlier co-accused had given evidence, such other co-accused would have been bound to cross-examine him in order to give him an opportunity to deal with the allegation of incrimination. We do not propose any change.

Accused as witness for co-accused

Compellability (5.36)

E.17 The present law is that a person charged with an offence may not be called as a witness in relation to that offence, except upon his own application,[22] and that one co-accused cannot call another co-accused to give evidence for him[23]. Our proposal in E.13 envisages that if an accused is willing to give evidence on behalf of his co-accused, the co-accused should be entitled to call him.

E.18 Sheriff Gordon has suggested[24] that the court should be allowed to dismiss an accused, against whom the Crown have not made out a prima facie case. This suggestion would reduce the number of cases in which the evidence of one co-accused is not available to the other, and we would welcome views on it.

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[20] Para. E.08 ante.

[21] See para. G.19, post.

[22] Criminal Procedure (Scotland) Act 1975 ss. 141(a) and 346(a).

[23] Dickson para. 1564, Macdonald, Criminal Law (5th ed.) p.291, Morrison v. Adair 1943 J.C.25.

[24] (1974) J.L.S. Sc. 33 at p.34.

When charge against accused withdrawn (5.37)

E.19 In summary procedure an accused person who has pleaded guilty is a competent witness for both the prosecution and the defence in the subsequent trial of a co-accused.[25] The same is probably true of an accused who has pleaded not guilty, and has been discharged after the prosecutor has accepted his plea, but we propose that this be made clear. We further propose that it be made clear that one co-accused may without leave call another, the charge against whom has been withdrawn.

Presence in court (5.38)

E.20 At present it is open to the court not to permit a co-accused, who has pleaded guilty, to be called as a witness if he has remained in court during the trial.[26] We propose that his presence in court should go merely to the weight or value which should be attached to his evidence, and should accordingly be open to comment.

Cross-examination under sections 141(e) and (f) and 346(e) and (f) of the Criminal Procedure (Scotland) Act 1975 (5.39-5.40)

E.21 Sections 141 and 346 of the 1975 Act, as amended by the Criminal Evidence Act 1979,[27] read as follows:

> "The accused and the spouse of the accused shall be competent witnesses for the defence at every stage of the case, whether the accused is on trial alone or along with a co-accused:
>
> Provided that - ...
>
> (e) the accused who gives evidence on his own behalf in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged;
>
> (f) the accused who gives evidence on his own behalf in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless -

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[25] Copeland v. Gillies 1973 S.L.T. 74.

[26] Ryan v. Paterson (1972) 36 J.C.L. See also Criminal Justice (Scotland) Bill cl. 28(3).

[27] c.16.

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or

(ii) the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establish the accused's good character, or the accused has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution; or

(iii) the accused has given evidence against any other person charged in the same proceedings."[28]

These provisions replaced s.1 of the 1898 Act and have thus formed part of Scots law for a considerable time. Similar provisions in England and elsewhere have given rise to numerous judicial decisions and much academic controversy, but in Scotland there have been few reported decisions.[29] It has been suggested that the reason for this is that the prosecutor in Scotland rarely attempts to insist on the magnitude of his rights. Nevertheless, various parts of the statutory provisions appear to be open to criticism. Before discussing these, however, it seems to us desirable to obtain views on the general principles which should govern the admission or exclusion of evidence on these matters.

E.22 There appear to us to be three main ways in which this matter can be approached. We do not favour, and do not regard it as an option to be considered, that the accused's own character should be open to attack, although no attack has been made by him on the character of any witness. First, there could be an absolute rule. The accused should be entitled to attack the character of any witness, but he should be immune from attack on his own character by any other party, whether prosecutor or co-accused. Secondly, if any attack was made by the accused on the character of any witness, whether for the Crown or a co-accused, that fact would render him liable to

[28] See Research Paper, para. 5.39.

[29] See O'Hara v. H.M. Advocate 1948 J.C.90; Fielding v. H.M. Advocate 1959 J.C.101; McCourtney v. H.M. Advocate 1977 J.C. 68.

cross-examination about his own character by any other party. Thirdly, a more limited breach of the accused's immunity might be expressed to the effect that an accused might put relevant questions only to the witnesses for the prosecution or the co-accused without rendering his own character liable to attack, but that any other questions which attacked the character of such witnesses would render him liable to cross-examination about his own character. If the second-mentioned of these options was favoured, it would be necessary to consider whether that rule should be subject to any limitation on its application, for example where the attack on the character of a witness was essential for the proper conduct of the defence. We invite comment on these general questions. In any event, the statutory provisions require to be considered. Several criticisms can be made of them, and we now examine these in detail.

Terminology of proviso (e) (5.41-5.42)

E.23 When this paragraph was consolidated the opening words were significantly altered from "a person charged and being a witness in pursuance of this Act" to "the accused who gives evidence on his own behalf in pursuance of this section". It is thought that if one accused confined his evidence to statements exculpating his co-accused, he would then be able to claim the common law privilege against self-incrimination. We are of the opinion that the accused should not be allowed to do so. Further, if the law is altered to make an accused person a competent but not a compellable witness for a co-accused, and if it is accepted that such an accused should not be entitled to claim the privilege, it will be necessary to reword paragraph (e).

"Tend to incriminate him as to the offence charged"

E.24 These words could mean "tend to convince or persuade the jury that he is guilty", or they could have the narrower meaning, "tend to connect him with the commission of the offence charged". In Jones v. DPP[30] Lord Reid expressed the opinion that they had

[30] [1962] A.C. 635 at pp. 662-663.

the narrower meaning, while the Criminal Law Revision Committee[31] thought the accused should have no privilege against self-incrimination in the case of questions about the offence charged, or about any other offence, which is admissible as tending directly or indirectly to show that he committed the offence charged, but should have the privilege in respect of other offences which are relevant to his credibility as a witness. We propose that it should be made clear that subsections 141(e) and 346(e) of the 1975 Act give the accused no privilege against self incrimination in the case of questions about the offence charged, which are admissible as tending directly or indirectly to show that he committed that offence, merely on the ground that they may indirectly lead to disclosure that he committed a different offence.

The relation between provisos (e) and (f) (5.43)

E.25 The relationship between the above two subsections has caused much judicial controversy and figured in Jones v. DPP[32] All five members of the House of Lords held that the disputed question was admissible, but for different reasons, and this led the Criminal Law Revision Committee to the conclusion that a new provision was desirable.[33] The Committee proposed that the accused, if he gives evidence, should be open to cross-examination about any misconduct of which evidence would have been admissible during the case for the prosecution. On the question of "tending to show", the Committee thought that cross-examination of the accused about his misconduct should not be forbidden, if the misconduct had already been mentioned at the trial. We would appreciate views on whether a similar provision should be enacted for Scotland.

Proviso (f)

Inapplicable to examination-in-chief and re-examination (5.45)

E.26 Proviso (f) contains an absolute prohibition on certain questions, but we agree with Lord Reid in Jones,[34] that the

[31] CLRC paras. 170, 171.

[32] [1962] A.C.635.

[33] CLRC para. 171.

[34] [1962] A.C. 635 at p.663.

prohibition is quite inappropriate to questions put in examination-in-chief. We propose that it should be made clear that this is the case.

"Charged" (5.47)

E.27 We propose that any new provision should make it clear that "charged" as used in proviso (f) means "charged in court". This would incorporate the decision of the House of Lords in Stirland v. DPP.[35]

Acquittals (5.48)

E.28 The decision in Maxwell v. DPP[36] made it clear that where the accused "foregoes the protection" provided by the first part part of proviso (f) it does not always follow that he can be asked questions tending to show that he has committed, been convicted of, or charged with other offences, or is of bad character; these questions should only be permitted if they are relevant to the issue before the jury, or to the credibility of the accused. The terminology of proviso (f) suggests, however, that any questions about charges in court are permissible, whatever the result of the charge may have been, and we propose that the effect of the decision in Maxwell should be incorporated in any restatement of the law.

Application to judge and judicial discretion (5.49)

E.29 We further propose that any restatement should enact the rule laid down in O'Hara,[37] that a party intending to cross-examine an accused by virtue of proviso (f) must apply to the judge for leave to do so, and that it is in the discretion of the judge to grant or refuse leave. We are of the opinion that the discretion should be in general terms, leaving it to the courts to lay down any relevant general principles.

Cross-examination under proviso (f)(i) (5.50)

E.30 In Jones[38] it was stated that when evidence that the accused has committed or been convicted of another offence is

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[35] [1944] A.C.315.

[36] [1935] A.C. 309.

[37] 1948 J.C. 90, L.J-C. Thomson at p.99.

[38] [1962] A.C. 635 at pp. 646 and 668.

justified by proviso (f)(i), it is generally undesirable that it should be first adduced in cross-examination. We consider it inadvisable to express this proposition in legislative form.

The first limb of proviso (f)(ii) (5.51)

"Character"

E.31 While the Criminal Law Revision Committee have recommended that the word "character" in this subsection should be replaced,[39] we agree with the Thomson Committee's view that there is no justification for the change.[40]

Witnesses for the accused (5.52)

E.32 The phraseology of the first limb does not in terms cover the case where the accused has led evidence of witnesses to his good character, but does not cross-examine on the subject or allude to it in his own evidence in chief. We are of the opinion that this operates reasonably satisfactorily, and that the disadvantages of recalling the accused would be greater than any disadvantages of the present situation, where the witness or witnesses for the accused can be cross-examined. We do not propose any change in subsection (f)(ii).

Witnesses for co-accused (5.53)

E.33 Under the present law one accused, seeking to show that the offence was committed by his co-accused, may ask questions of the co-accused, or the co-accused's witnesses, with a view to establishing his own good character, without foregoing the protection provided by the first part of proviso (f). We propose that imputations on the character of the witnesses for the co-accused should result in the protection not being available.

Co-accused's right to rebut claim of good character (5.54)

E.34 We invite comment on the proposal[41] that a co-accused, as well as the prosecutor, may examine the accused to rebut his claim to be of good character, and may adduce evidence for this purpose.

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[39] CLRC paras. 118, 133, 136.

[40] Thomson, para. 50.26.

[41] CLRC para. 136.

Imputations on the character of the prosecutor or prosecution witnesses (5.55-5.57)

E.35 The last part of proviso (f)(ii) permits cross-examination of the accused tending to show that he has committed, been convicted of, or charged with other offences, or is of bad character, if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor, or of the witnesses for the prosecution. This is the only part of the provisions which has been the subject of a reported decision in the Scottish courts,[42] and they have interpreted it differently from the House of Lords.[43] In O'Hara,[42] it was decided that imputations which are necessary to enable the accused fairly to establish his defence do not deprive the accused of the protection of the prohibition, while imputations on the general character of witnesses do, in the judge's discretion, so deprive the accused. The Thomson Committee endorsed the decision in O'Hara, and pointed out that if the recommendations of the Criminal Law Revision Committee are adopted, the law of England will be brought into line with the law of Scotland.[44] However, we do not consider that the distinction in O'Hara follows from the ordinary and natural interpretation of the words in the section, and therefore propose that in any restatement of the law the word "unnecessary" or "unjustifiably" be inserted, so that the principle of O'Hara is incorporated. We recognise that the present law is far from perfect,[45] and would welcome any suggestions for its improvement.

Co-accused's right to cross-examine (5.58)

E.36 We propose that when one of two or more accused casts imputations on any witness for the prosecution, including anyone who has been granted criminal letters, the court should have a discretion to allow his co-accused to cross-examine him under proviso (f)(ii).

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[42] O'Hara v. H.M. Advocate 1948 J.C. 90.

[43] R. v. Selvey [1970] A.C. 304.

[44] CLRC, paras. 119-130.

[45] See Research Paper, para. 5.57.

Imputation against witness for co-accused (5.59)

E.37 A further question is whether the rule in O'Hara[46] should be extended to cover the case where the imputation is made against a witness for a co-accused. The Criminal Law Revision Committee have suggested that whether the imputation is made by the accused A, against a witness for the prosecution, or against a witness for the co-accused B, both the prosecution and B will be able to cross-examine the accused A who makes the imputation.[47] We are in favour of this proposal, but would appreciate comment on the same.

Proviso (f)(iii) (5.61, 5.65)

E.38 Proviso f(iii) was recently amended by the Criminal Evidence Act 1979, and now permits cross-examination on the prohibited matters if "the accused has given evidence against any other person charged in the same proceedings." Previously the final words of the subsection were "charged with the same offence", and the change in the law was made to cure the defect brought out in the House of Lords decision in R. v. Hills[48]. While we suggest the repeal of the subsection, if this is not acceptable, we propose that it should be made clear that it applies where the accused witness has given evidence against a person other than the person seeking to bring out his character.

"Evidence against" (5.62-5.64)

E.39 In Murdoch v. Taylor,[49] an English appeal, a majority of the House of Lords held that "evidence against" means evidence which supports the prosecution case in a material respect, or which undermines the defence of the co-accused. This decision also established that what an accused person says in cross-examination is just as much a part of his evidence as what he says in examination in chief. The result of Murdoch is that in England, where a crime must have been committed by one or other of two accused, either of them necessarily exposes his character to cross-examination by merely denying that he is a

[46] O'Hara v. H.M. Advocate 1948 J.C. 90.

[47] CLRC, para. 131.

[48] [1980] A.C.26.

[49] [1965] A.C. 574.

criminal.[50] The judge has no discretion to exclude the cross-examination. This we consider is an undesirable result, which should be avoided in the law of Scotland.

E.40 The construction laid down in Murdoch caused some difficulty in R. v. Bruce,[51] and emphasises the need to adhere to the natural meaning of "against". We propose that it should be made clear that an accused does not give evidence against a co-accused where his evidence, if believed, would tend to result in the acquittal of the co-accused.

Discretion - Cross-examination by co-accused (5.66-5.67)

E.41 In Murdoch, it was held that if an accused A gives evidence against his co-accused B, the court has no discretion to prevent B from cross-examining A under proviso (f)(iii), although it has a discretion to prevent the prosecution from doing so. This can lead to unfairness in the case where A has only one relevant conviction and B has many, and B proposes to question A about his single conviction, and to call witnesses to say that A committed the offence, but not to give evidence himself. Unfairness could also arise in cases where the connection between the charge against one accused and that against his co-accused is tenuous.[52] The majority of the Criminal Law Revision Committee decided that it was unacceptable to prevent an accused person from bringing out the misconduct of another accused who has given evidence against him, and that it would be unwise to make the matter one for the judge's discretion. We invite comment on the former suggestion, but agree that the matter should not be one for the judge's discretion.

Discretion - Cross-examination by prosecutor (5.68)

E.42 In England, a prosecutor may cross-examine under proviso (f)(iii), subject to the discretion of the court, although it may be supposed that an application for this purpose would be granted only in exceptional circumstances. Scots law appears to be the same.[53]

[50] R. v. Davis [1975] 1 W.L.R. 345.

[51] [1975] 1 W.L.R.1252, and see Research Paper para. 5.64.

[52] See Research Paper, para. 5.66. See also McCourtney v. H.M. Advocate 1977 J.C. 68.

[53] Young v. H.M. Advocate 1932 J.C.63.

Other problems

The silent accused (5.69)

E.43 The rule in proviso (f) applies only where the accused gives evidence, and this gives rise to abuses, such as where two accused A and B, A having a bad record and B none, B gives evidence and attacks witnesses for the benefit of A and himself, while A remains in the dock and cannot be cross-examined on his record. This situation illustrates the shortcomings of the present provisions, but there appears to be no satisfactory way of preventing such occurrences. We would welcome any suggestions.

Direction to jury (5.70)

E.44 In England, where an accused has been cross-examined as to his previous convictions, the judge must direct the jury that these convictions go only to his credibility. It seems likely that a jury would take the accused's record into account when deciding whether or not he committed the crime, regardless of the direction. We invite views on whether there should be expressly laid down in Scotland a rule similar to the English one.

Chapter F

COMPETENCE AND COMPELLABILITY OF WITNESSES CRIMINAL CASES: THE ACCUSED'S SPOUSE AND OTHERS

The accused's spouse as a witness for the prosecution (6.01 - 6.04)

F.01 At common law, a spouse is both competent and compellable against the accused only where the accused is charged with a crime injurious to the person or property of the spouse. There are, however, a variety of statutory provisions which render the accused's spouse a competent, though not compellable, witness for the prosecution. The most important of these provisions are sections 143 and 348 of the 1975 Act, which provide that a spouse is competent, but not compellable, where the other spouse is charged with (a) bigamy, (b) any offence mentioned in schedule 1 to the Act (which is concerned with offences against children under 17 years of age), and (c) any offence under any enactment mentioned in schedule 4 to the Act, these relating mainly to social security offences. It will be clear from the foregoing that the present law is complex, and in the following paragraphs we put forward for consideration various possible reforms.

Competence (6.05 - 6.07)

F.02 We wholly agree with the Thomson Committee's views on competence,[1] and propose that a spouse be a competent witness for the Crown in all cases.[2]

Compellability (6.08 - 6.17)

F.03 Whereas in Scotland at common law when a spouse is the alleged victim of a crime charged against the accused she is both competent and compellable for the Crown, in England the injured spouse is competent, but not compellable. The English law was only recently stated by the House of Lords in Hoskyn v. Metropolitan Police Commissioner.[3]

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[1] Thomson para. 43.20.

[2] See Criminal Justice (Scotland) Bill cl.29.

[3] [1979] A.C. 474.

F.04 Some will be of the opinion that the present law of Scotland as to compellability is satisfactory, and that it should not be changed. Various possibilities for reform include the following:

1) In each case the judge should decide whether the spouse is to be compellable or not.

2) The spouse should be compellable in all cases in which she is competent.

3) The spouse should be compellable only where the offence is serious, or cannot be proved without the spouse's evidence.

4) The present areas of compellability should be extended with a view to the protection of the interests of the children.

Each of these alternatives is discussed in the Research Paper.[4] We invite comment on these options, and also on the consequential question whether, if a spouse is not entitled to decline to answer any questions, there should be any sanction against failure to answer a relevant question.

The accused's spouse as a witness for the accused.

Compellability (6.18)

F.05 Sections 141(c) and 346(c) of the 1975 Act provide that the accused's spouse shall be a competent witness for the defence at every stage of the case, whether the accused is on trial alone or along with a co-accused, but shall not, save as mentioned in sections 143 and 348, be called except upon the application of the accused. We would appreciate comment on the proposal[5] that the spouse should be a compellable witness for the accused in all cases, unless she is charged and tried with him.[6]

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[4] Paras. 6.11 to 6.19.

[5] CLRC para. 153 pp. 180, 222.

[6] See Criminal Justice (Scotland) Bill cl.29.

Effect of evidence (6.19)

F.06 The present law is that the evidence of a spouse called by one accused is not evidence for or against another.[7] In our draft Code, we proposed that the evidence of any witness called on behalf of one accused should be competent evidence for or against another accused.[8] This did not attract undue criticism and seems to us right.[9] We propose accordingly.

The spouse of an accused as a witness for a co-accused. (6.20-6.21)

F.07 Generally, one co-accused may not call the spouse of another accused as a witness, and it does not seem possible in Scotland for an accused to "apply" for his spouse to be called as a witness for another accused. In England, the spouse of an accused is a competent witness for a co-accused with the spouse accused's consent in every criminal case.[10] We invite comment on whether this should also be the law in Scotland.[11]

F.08 An exception to the general rule that the spouse of a co-accused may not be called as a witness arises in exceptional statutory cases, in which the spouse is a competent witness for the prosecution and may be called as a defence witness without the accused's consent. This anomalous situation arises because of the wording of sections 143(1) and 348(1) of the 1975 Act, and we propose that the position be clarified.[12]

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[7] Alison ii 621 - 622.

[8] Article 6.3(d).

[9] See Criminal Justice (Scotland) Bill cl.27.

[10] Cross, p. 159.

[11] See Criminal Justice (Scotland) Bill cl.29.

[12] See Gordon, "The Evidence of Spouses in Criminal Trials", 1956 SLT (News) 145. Also Criminal Justice (Scotland) Bill cl.29.

Competence (6.22)

F.09 There does not seem to be any objection to amending the present law so that a spouse is a competent witness for the co-accused, providing the accused spouse consents. Should the spouse of an accused be competent to give evidence on behalf of a co-accused whether or not the accused spouse consents?[13] We invite comment.

Compellability (6.23)

F.10 The extent to which the spouse of accused A should be compellable as a witness for his co-accused B was considered by the Criminal Law Revision Committee,[14] and their views are noted in the Research Paper.[15] The alternatives are to make Mrs A compellable for B in all circumstances, or to make her compellable for B only in cases where she would be compellable on behalf of the prosecution, the latter being the proposal of the Committee, with which we agree. We would however appreciate views on the alternatives.

Comment on failure to testify (6.25)

F.11 Sections 141(b) and 346(b) of the 1975 Act provide that the failure of the accused's spouse to give evidence shall not be the subject of any comment by the prosecution. We have previously proposed that a co-accused should be entitled to comment on the failure of the accused to give evidence,[16] and we consider that this should apply equally to the accused's spouse. We also support the view that the prosecution should be entitled to comment.[17]

Confidential Communications and Privilege Concerning Marital Intercourse.

F.12 The topics of confidential communications and privilege concerning marital intercourse are dealt with in the Chapter on Privilege, Chapter S.

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[13] See Criminal Justice (Scotland) Bill cl.29.

[14] CLRC para. 155.

[15] Para. 6.23.

[16] Ante, para. E.08.

[17] Ante, para. E.08.

Accomplices (6.31)

F.13 At present, the evidence of an accomplice is received with suspicion, and a jury must be specifically directed to apply to it "a special scrutiny over and above the general examination which a jury has to apply to all the material evidence in every case".[18] Three questions which arise in this connection are discussed below.

Necessity for direction (6.32)

F.14 It can be argued that there is no need for an invariable warning about the evidence of accomplices, and that it should be left to the judge's discretion whether to give such warning or not. When considering the similar rule in England, the Criminal Law Revision Committee favoured leaving the matter to the judge's discretion,[19] while the Bar Council thought that this would lead to judges varying widely in whether they gave a warning or not, and favoured no change.[20] We are of the opinion that in the vast majority of cases a warning should be given, but that this rule should not be enshrined in a statutory provision. We therefore propose no change in the present law, but invite comment.

Cum nota warning in respect of defence witness? (6.34)

F.15 The rule requiring the jury to be directed to apply a special scrutiny to the evidence of an accomplice applies only to witnesses for the prosecution. We would welcome comment on whether the rule should be extended, perhaps at the discretion of the trial judge, to defence witnesses.

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[18] Wallace v. H.M. Advocate 1952 J.C. 78 L.J-G. Cooper at p.82.

[19] CLRC, para. 185.

[20] BC, para. 165.

Who is an accomplice? (6.33)

F.16 It is not settled whether the term "accomplice" applies to a person, other than an accused, who has neither admitted nor been convicted of the charge, but to whom the evidence points as an associate. The definition given by Lord Keith in Wallace v. H.M.Advocate[21] was criticised by Lord Justice-General Clyde in Slowey v. H.M. Advocate,[22] and his Lordship stated that in some cases in the past the term "socius criminis" had been applied to co-accused when it was not accurate to do so. More recent cases suggest that the term "socius criminis" is reserved to a co-accused who has already pled guilty or been convicted, or who has decided to give evidence for the prosecution.[23] Views are invited on whether any alteration is required in the present law on this matter.

Public prosecutors and defence advocates (6.35)

F.17 The present law excludes as witnesses the legal representatives of the prosecution, but not the defence, although the justification for the distinction can be equally applied to both sides.[24] The alternatives for reform appear to be either that both prosecution and defence advocates are made competent witnesses, or that both are made incompetent. A variation on the latter would be to make both the prosecutor and a person actually conducting the case for the defence incompetent. In our draft Code,[25] we questioned whether the present rule could be dispensed with, and while we would not wish to encourage in any way advocates or solicitors for either side in criminal proceedings to give evidence, we propose that it should nevertheless be made clear that in principle both are competent witnesses in the case in which they are engaged.

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[21] 1952 J.C. 78 at p.83.

[22] 1965 S.L.T. 309 at p.311.

[23] McCourt v. H.M.Advocate 1977 S.L.T. (Notes) 22; McGuinness v. H.M. Advocate 1971 S.L.T. (Notes) 7.

[24] See Research Paper, para. 6.35.

[25] Article 6.8, Commentary.

Chapter G

The examination of witnesses in court

Opening statement in solemn procedure (8.01)

G.01 The Thomson Committee thought it should become general practice for judges to make a short statement to the jury prior to the evidence being led, outlining broadly the procedure to be followed and the functions of the judge, counsel and jury, although they considered that the making of any such statement should be left to the judge's discretion. If such a practice, with which we agree, is adopted, we concur in the view that opening speeches by counsel are unecessary and undesirable.[1]

Oath and affirmation

Present law (8.02 - 8.04)

G.02 It would appear that there is some dissatisfaction with the present law. The general rule is that all judicial evidence must be given on oath, although there are several common law and statutory exceptions to this rule. The form of oath in civil proceedings is "I swear by Almighty God [and as I shall answer to God at the great Day of Judgment] that I will tell the truth, the whole truth and nothing but the truth", but the words in square brackets may be omitted. In criminal proceedings the words in square brackets are omitted.[2] At common law, if a witness states that the manner of taking the oath is not appropriate to his religious beliefs the oath is administered in the appropriate manner. Children under twelve are admonished to tell the truth, those between twelve and fourteen are sworn or admonished at the judge's discretion,[3] and those over fourteen are usually sworn. A witness of defective mental capacity is sworn or admonished at the judge's discretion.[4]

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[1] Thomson, Chapter 41.

[2] Act of Adjournal (Forms of Oath) 1976, para. 2(a) and Sched. Part 3.

[3] See Research Paper, Chap. 8 note 13.

[4] Black (1887) 1 White 365, Lord M'Laren at pp.367-8.

G.03 The first major statutory exception is provided by section 5(1) of the Oaths act 1978,[5] which provides for any person who objects to being sworn being permitted to affirm. By section 5(2) of that Act, a witness may be required to affirm if it is not reasonably practicable for him to be sworn according to his religious belief. A further statutory exception is enacted in section 345 of the 1975 Act, covering the case where the same witness appears in more than one summary prosecution under a particular statute. The judge here merely has to remind the witness in each case that he is on oath.

Proposals to abolish the oath (8.05 - 8.07)

G.04 The arguments for the replacement of the oath in criminal proceedings by a form of declaration were canvassed by the Thomson Committee, who concluded that the requirement should not be abolished.[6] Their proposals were that oaths should be in the form:

> "I swear by Almighty God that I will tell the truth, the whole truth and nothing but the truth"

and the affirmation in the form

> "I solemnly, sincerely and truly declare and affirm that I will tell the truth, the whole truth and nothing but the truth",

and these recommendations were implemented by the Act of Adjournal (Form of Oaths) 1976. They also recommend that the citation form for witnesses, and notices in witnesses' waiting rooms, should explain that they will be offered the straight alternative of taking the oath or affirming, and that the penalties for perjury are the same in either case. In view of their recent consideration of the matter, we do not propose to re-open the debate in the context of this Memorandum. We consider it right, however, that the oath and affirmation in civil proceedings should take the same form as the oath and affirmation in criminal proceedings, and we so propose.

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[5] c.19.

[6] Thomson, para. 42.11.

Reticent religious witness (8.08)

G.05 It has been pointed out that if the proposed witness has a religious belief which is not opposed to the taking of oaths, but declines to say what form of oath binds him, he would still appear to be incompetent.[7] Such a witness should, therefore, be required to affirm.

Repeated administration to the same witness (8.09)

G.06 We are of the opinion that the provision dispensing with the repeated administration of the oath to the same witness in summary criminal procedure[8] could usefully be extended to repeated administration of the affirmation and to other proceedings, such as expert witnesses in High Court circuits.

Interrogation before affirmation (8.10)

G.07 The recommendation by the Thomson Committee[9] that the affirmation should be administered by the judge without enquiry into the witness's reasons for his claim to affirm was implemented by section 8(1) of the Administration of Justice Act 1977,[10] as repealed and re-enacted by section 5 of the Oaths Act 1978.[11]

Forms and ceremonies in administration of affirmation (8.11 - 8.13)

G.08 In civil cases the form of affirmation is:

> "I [A.B. ...] solemnly, sincerely and truly declare and affirm that I will tell the truth, the whole truth and nothing but the truth".[12]

In criminal trials the form is the same except that the words in square brackets are omitted. We suggest that the simpler form should now be used in all proceedings, and also that the rule that a witness must use the precise words of the statutory form[13] is unnecessary.

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[7] Cross, Evidence 4th. Edition p.164.

[8] Criminal Procedure (Scotland) Act 1975 s.345.

[9] Thomson, para. 42.14.

[10] c.38.

[11] c.19.

[12] Oaths Act, 1978, s.6.

[13] M'Cubbin v. Turnbull (1850) 12D 1123.

G.09 It has been suggested that the judge should ask each witness whether he will take the oath or affirm, but the Thomson Committee recommended that in order to avoid embarrassment, the court macer or attendant should ascertain before a witness enters the court which course the witness wishes to adopt, and the information should then be discreetly conveyed to the judge.[14] We agree with this suggestion.

G.10 Some judges stand with the right hand upraised when administering the affirmation, while others remain seated and neither raise their hands nor require the witness to do so. It is thought that the latter practice is strictly correct and is implied in the Act of Adjournal (Forms of Oath) 1976.

Order and manner of examination of witnesses

(a) Discretion (8.16)

G.11 If it were accepted that the accused is not obliged to give evidence, and that if he chooses to do so he is not obliged to give it at any particular stage of the defence case, there is the possibility of enacting a general rule to the effect that a party or his advocate has a discretion to call such witnesses as he pleases and in the order that he chooses. The Commission proposes that such should be the general rule. It is for consideration whether that rule would have to be modified to take account of such questions as the compellability of the defender in a defended consistorial cause and of a party allegedly in breach of an order of court, and the question of whether there should be any statutory rule that the defender in an action of affiliation and aliment must not be called as the first witness for the pursuer. Any provisions on these matters would have to be stated as exceptions to the general rule. We invite comment.

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[14] Thomson, para. 42.14.

(b) "Hostile" witness (8.17)

G.12 A further possible general rule on which we invite comment is that it is for a party or his advocate to make up his mind, subject to the court's seeing that the witness is fairly treated, how he will examine his witness. The rule that a party may treat as hostile a witness unfavourable to him whom he is examining in chief, with the consequence that leading questions may be asked, applies to both civil and criminal proceedings. It does not appear to be necessary or desirable to formulate any rules as to the circumstances in which he is entitled to do so, but we should welcome comments.

(c) In cross and in causa (8.18)

G.13 It would be necessary to take account of the effect of section 4 of the 1840 Act, which provides "in any action, cause, prosecution or other judicial proceeding civil or criminal where proof shall be taken, whether by the judge or a person acting as commissioner, it shall be competent for the party against whom a witness is produced and sworn in causa to examine such witness not in cross only, but in causa". Section 4 has been repealed so far as relating to criminal proceedings by Schedule 10 part 1 of the 1975 Act, which provides by ss. 148 and 340

> "In any trial it shall be competent for the party against whom a witness is produced and sworn in causa to examine such witness not in cross only but also in causa."

The Thomson Committee, extending our proposed Article 6.3 of the Draft Evidence Code, recommended that the evidence of every witness, whether an accused or not should, be evidence in causa and subject to general cross-examination.[15] It is suggested that for the avoidance of doubt a similar rule should be enacted for civil cases. We would welcome views.

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[15] Thomson 38.22.

(d) Calling of witnesses by judge (8.19)

G.14 Should a judge be entitled to call and question witnesses on his own initiative? One argument is that under our present rules neither party needs to call a witness who could give relevant evidence, and litigation can therefore be decided by an advocate's skill rather than on the true merits of the case. The counter argument is that to confer on a judge even a qualified right to call witnesses would be inconsistent with the primary obligation of the parties to present the evidence and with the judge's obligation to be impartial. We invite comment, as it may be that different rules on this matter would be appropriate for different situations. For example, in small claims it is often suggested that the judge requires to have such a power.

Questions

Forms of question (8.20)

G.15 The present law and practice relating to forms of question which may be put to witnesses seems to be well understood and generally accepted, and we do not consider it an appropriate topic for rules in conventional statutory form.

Refusal to answer (8.21)

G.16 We consider that any comprehensive enactment should restate the present law, that any witness who declines to answer a competent and relevant question in court, which that witness is compellable to answer, is in contempt.

Interpreter (8.22)

G.17 In order to avoid confusion and misunderstandings, we are of the opinion that where an interpreter is required, it would be useful to provide that the advocate's questions ought to be directed to the witness as though there was no interpreter there, in the form of words which would be used to a witness who was going to answer in English, and that the witness's answer should be given by the interpreter fully and directly, as given by the witness.

Cross-examination

(a) Right to cross-examine and examine following judicial questioning (8.23 - 8.24)

G.18 On evidence elicited by the court, it would be useful to enact a provision to the effect that where the presiding judge puts questions to a witness, and thereby elicits new evidence, the parties should be entitled to question the witness thereon. The rule has been laid down for criminal trials,[16] and we consider it should be specifically applied to civil cases also.

(b) Order of cross-examination[17] (8.25)

G.19 In criminal cases, where there are separately represented co-accused, their advocates cross-examine in order, and the prosecutor examines the defence witnesses last. "The order in which the accused give or lead evidence is determined by the order in which they appear in the indictment, and this is determined by the Crown on what may be alphabetical, chronological or tactical grounds; or it may be simply a matter of chance".[18] We would welcome comment on the view that it should be in the discretion of the judge to change the order in which the accused give or lead evidence, and also the order of giving evidence or the cross-examination of any particular witness. Such a discretion would have avoided the problem which arose in Lee v. H.M. Advocate.[19]

(c) Where apparent inconsistency in witness's statement (8.26)

G.20 When there is an apparent inconsistency in the evidence of a witness, is the cross-examiner entitled to leave the inconsistency and found on it, or must he give the witness an opportunity to explain it? The Commission consider that the cross-examiner should be able to do either at his option, but that there should be no fixed rule. This seems to accord with present practice.

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[16] McLeod v. H.M. Advocate 1939 J.C. 68.

[17] See Research Paper, para. 8.25.

[18] G.H. Gordon, "Lindie v. H.M. Advocate" (1974) J.L.S.Sc., 5, 33, at p.37, n.70.

[19] 1968 S.L.T. 155.

(d) Negative general answer (8.27)

G.21 If a cross-examiner receives a general answer negativing his case, must he proceed to put further detailed questions, which can only be answered in the negative? There may be room for a rule distinguishing between civil cases, where the cross-examiner's case is explicitly set forth on record and others, such a rule providing that the duty to put the additional questions exists only in cases of the latter class. We should be glad to have comments of readers on this suggestion.

(e) Failure to cross-examine in civil cases (8.28 - 8.31)

G.22 It is clear that in civil cases failure to cross-examine a single witness on an essential point does not supersede the necessity for corroboration of his evidence on that point.[20] But does the failure (a) imply that the witness is accepted by the cross-examiner as a truthful and credible witness on that point and/or (b) preclude the cross-examiner from leading evidence to contradict the witness?

G.23 On the first question, it does not seem to be possible to propose an absolute rule, as the tenor of the cross-examination and considerations of prejudice may be relevant. In Stewart Lord Russell said (at p.46)

> "It seems to me that where a witness in chief has deponed to (a) (b) and (c) and he is challenged in cross-examination on (a) (b) but not on (c) the proper inference is that quoad (c) he is to be accepted as a truthful and credible witness ..."

Lord Stott, however, rejected a submission that in the absence of such cross-examination he was bound to believe the witness in Walker v. McGruther and Marshall Ltd.[21]

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[20] Stewart v. Glasgow Corporation 1958 S.C. 28.

[21] O.H. 12 May 1972 unreported.

G.24 As to the second question, Lord President Clyde observed obiter in Stewart (at p.38)

> "Failure to cross-examine a witness on a material point may preclude the cross-examiner from leading evidence to contradict the witness".

This drastic course does not seem to be adopted in modern practice, no doubt because the court is able to prevent prejudice to the other party by various means e.g. possible award of expenses, proof in replication, or evidence in contradiction admitted, but subject to comment. In criminal cases, the failure by the defence to cross-examine a prosecution witness on a material point may be the subject of comment, but does not prevent the cross-examination of other prosecution witnesses on the same point. Similarly, other witnesses may be cross-examined in civil cases, notwithstanding failure to cross-examine a prior witness. Views are invited on whether detailed rules on the consequences of failure to cross-examine are desirable, and if so what they should be.

Lodging of documents (8.32)

G.25 Differing views are held on the question whether documents used in cross-examination of a witness must have been lodged as productions. The Sheriffs Walker state that the rules relating to the lodging of documents are not applied to documents written by a witness who is not a party, and used merely to test the credibility of that witness; such a document may be produced at the diet or the witness may be cited to produce it.[22] Some take the view, however, that a witness may not be cross-examined on an unlodged document, and that Rules of Court 107 and 121, which provide that all productions which are intended to be used or put in evidence shall be lodged before the enquiry, are designed to exclude the element of surprise in cross-examination. There is a strong argument that surprise is a legitimate and valuable weapon in cross-examination, and that the Rules of Court were not designed to exclude it. If this view, on which we would welcome comment, is accepted, we suggest to the relevant authority that it should be made clear that

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[22] Walkers, para. 300(b).

the Rules of Court do not apply to documents used in cross-examination, with a provision that any such documents should be exhibited to the court, the witness and the opponent's advocate, and thereafter normally lodged. We make no proposal regarding the practice that a production may be used in cross-examination before it has been proved. Although the rule has only been explicitly recognised in relation to summary prosecutions,[23] it is well understood to be of general application.

Re-examination (8.33 - 8.35)

G.26 Asking leading questions in re-examination is not generally considered good practice. It is, however, in the control of the judge.

G.27 We are of the opinion that a party should have a right to a second cross-examination, on new matter which has been elicited by questions on matters not arising out of cross-examination, which the judge has permitted in re-examination, or which the judge himself has elicited by questioning. Further cross-examination on such matter is usually allowed in practice, but there does not appear to be any reported decision or statutory provision on this point. We propose such a rule.

G.28 It is usually thought that once the re-examination is closed any question which either party or a jury man wishes to ask must be put through the court. This is sometimes cumbersome and unnecessary, and we suggest that the judge should be given an express discretion to allow direct question and answer, as is sometimes done in practice.

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[23] Hogg v. Clark 1959 J.C. 7.

G.29 It is now apparent that a duty to re-examine may be incumbent on the defender's advocate in certain cases, such as where the pursuer founds on sections 28 or 29 of the Factories Act 1961, or other statutory provisions or regulations in similar terms, which impose on the defenders a duty to take certain steps "so far as is reasonably practicable". As Lord Dunpark observed in Whyte v. Smith Anderson & Co Ltd[24]

> "Since Gibson v. BICC Co Ltd[25] it appears that a pursuer, whose counsel may have examined and rejected as 'not reasonably practicable' a particular method of making the place safe, may yet found successfully on that same method by extracting from the defender's witnesses in cross-examination, without any notice whatsoever an admission that it would have been 'possible' to adopt it. This decision is no doubt a logical development of Nimmo v. Alexander Cowan & Sons Ltd,[26] but it is wholly disruptive of what I have always found to be a sensible system of pleading".

The counter argument is that where a party requires to establish certain facts to verify a position, it is always open to his opponent, without notice, to cross-examine his witnesses with suggestions destructive of that position, and to found on any success he may achieve as showing that the position is not established. While advocates must obviously be alert to such a situation arising, we do not consider that this particular matter requires a special rule.

Final general question (8.36 - 8.38)

G.30 The Committee of Justice, in the Report entitled False Witness,[27] considered the question "whether at the conclusion of every witness's evidence the judge should formally ask him whether he had any further information which he thought might help the court". The Committee rejected the idea, expressing the view that it was "impracticable". and that to "invite a witness to say

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[24] 1974 S.L.T. (Notes) 75.

[25] 1973 S.C. (H.L.) 15.

[26] 1967 S.C. (H.L.) 79.

[27] Stevens & Sons, 1973 paras. 75, 76.

something without specifying the exact nature of the information required would be to invite the irrelevant and inadmissible". However, such a practice would be no great innovation in Scottish practice, because where a witness is examined on interrogatories, it is competent for the commissioner to put such additional questions, or require such additions or explanations to the answers he receives, as he thinks necessary. It might also be thought appropriate that he should be asked whether he has anything to say in expansion or clarification of answers he had given. It may be argued, on the other hand, that procedure on interrogatories is not an impressive precedent, and that the proposal carried out in ordinary judicial proceedings would be an anomalous infringement of the adversary principle. While we see undesirable practical difficulties in such a proposal, we would welcome comment on it.

Objections to Evidence (8.39)

G.31 Two matters are noticed here: (a) failure to take timeous objection; and (b) the recording of objections in civil cases in the sheriff court. The trial within a trial is considered in the context of extrajudicial confessions in chapter T.

Failure to take timeous objection (8.40 - 8.42)

G.32 Some doubt has arisen in recent years as to the consequences of failure to take timeous objection to evidence in civil cases. In M'Glone v. British Railways Board,[28] the House of Lords held that the pursuer was entitled to found on a ground of fault not averred on record, which had been put in evidence by questions put to the pursuer's witnesses, no objection having been taken on behalf of the defenders until their own witness was cross-examined to the same effect. Shortly afterwards, in O'Donnell v. Murdoch M'Kenzie & Co.[29] evidence for a pursuer, which was materially different from his record, was reluctantly treated by the Second

[28] 1966 S.C. (H.L.) 1.

[29] 1966 S.C. 58.

Division as competent evidence in the case, in the absence of timeous objection. But in Hamilton v. John Brown & Co (Clydebank) Ltd,[30] the First Division, founding on Lord Reid's statement in McGrath v. National Coal Board,[31] that a defender has to meet the case made against him on record and nothing more, held that the pursuer was not entitled to found on any ground of fault which had not been averred, although here a timeous objection had apparently been taken. The decision of the House of Lords in Gibson[32] has raised fresh doubts, but it is nevertheless thought that the rule now generally observed in practice in the courts in Scotland, is that a pursuer may not found on a ground of liability which has not been averred, although it has been the subject of evidence to which timeous objection has not been taken. In order to clarify the position, we are of the opinion that it would be useful to establish a general rule that a party is not entitled to found upon a ground of claim which has not been averred, and has been the subject of evidence to which no timeous objection has taken. Comment is invited.

G.33 A related question, on which we also invite comment, is whether the judge should be entitled to intervene ex proprio motu to reject inadmissible evidence when a party who is present or represented has failed to take objection to it. It may be noted that in McCallum v. Paterson,[33] Lord Guthrie expressed the view that objection could be taken by a party to evidence elicited by a judge.

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[30] 1969 S.L.T. (Notes) 18.

[31] 4 May 1954, unreported.

[32] 1973 S.C. (H.L.) 15.

[33] 1969 S.C. 85 at p.92.

Recording of submissions in civil cases in the sheriff court (8.43)

G.34 The Court of Session Practice Note of 2 March 1972 directs shorthand writers to record submissions as to competency and relevancy. Rules 65 and 66 of the Sheriff Court Rules make provision only for the recording of evidence, and although Rule 173 requires that there should be a record of "the proceedings" in a civil jury trial notes are, in practice, taken only of the evidence and the charge. In order to have uniformity, we suggest to the relevant authority that the Sheriff Court Rules should make provision for the recording of submissions as to competency and relevancy.

Use of documents to refresh memory

(a) Lodging of documents in civil causes (8.44)

G.35 There appears to be some difference of opinion on the question whether a document must be lodged before it may be used by a witness to refresh his memory. The rule stated by the Sheriffs Walker, that lodging of such documents is not required,[34] has been understood to apply to documents used to refresh the memory of a witness who is not a party. We do not consider, however, that this matter merits formal regulation and make no proposal thereon except in relation to expert's reports and notes in the following paragraph.

(b) Lodging of documents in criminal trials (8.45 - 8.46)

G.36 Where the witness is wholly dependent on a note which is proved to have been accurately made, the note apparently need not be a production in a summary trial, but perhaps ought to be a production in a jury trial. In summary trials, documents used by a witness to refresh his memory do not require to be noted as documentary evidence in terms of section 359 of the Criminal Procedure (Scotland) Act 1975. It is arguable that a note on which a witness is wholly dependent, so that it is a substitute for his recollection, should be made a production in all civil and criminal

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[34] Walkers para. 300(b) and n.42.

cases, since it is difficult to draw a satisfactory distinction between notes which revive recollection and those which replace it. We can see no easy solution to this difficulty, although we suggest that experts' reports and notes on which they are examined, or which they read as part of their evidence, should be productions, since they contain matters "generally so minute and detailed that they cannot with safety be entrusted to the memory of the witness."[35]

Policemen's notebooks (8.47)

G.37 In devising any new rules it would be necessary to keep in view the special considerations applicable to the policemen's notebook; firstly, since it normally contains details of several cases, and secondly, as it may contain confidential information. In solemn procedure, a practice has grown up of lodging notebooks when they contain replies to a charge which are both lengthy and incriminating,[36] while in summary criminal procedure it is thought that notebooks are very seldom lodged. In both solemn and summary procedure it may be necessary to lodge a notebook containing a statement given to the police by a witness who has subsequently died, and it may be desirable to lodge a statement made to the police by a witness during the early stages of their enquiry. Such specialities apart, normally a police constable is allowed to refer to any entry which he made contemporaneously with the events to which he is speaking, and the defence advocate may inspect the entry if he so wishes.

Nature of document

Admissiblity (8.48)

G.38 A further question is whether the document used by a witness to refresh his memory must be admissible in evidence. The Sheriffs Walker state it need not be admissible, citing Dickson v. Taylor.[37] However, this would mean that the adverse party would be unable to

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[35] Alison, ii, 541, cit. Dickson, para. 1779.

[36] See Newlands and Others v. H.M. Advocate 1980 S.L.T. (Notes) 25.

[37] (1816) 1 Mur. 142.

see it, and to lodge it if there was any provision generally entitling him to do so. We consider that this would be a most inequitable situation, and propose that a witness should not be allowed to refresh his memory from a document which is privileged from production, with a proviso that if a document is privileged in part, the judge should be entitled to excise and preserve any privileged part, and order exhibition of the remainder of the material to the adverse party.

Originality (8.49)

G.39 It appears that in Scotland a witness, or in any event an expert witness, is allowed to refresh his memory from a statement or report prepared from his original notes, even though it is not an exact copy, but if it bears little relation to the original note the judge may refuse to allow it.[38]

Refreshment of memory from precognition (8.50 - 8.51)

G.40 There is also the question of whether it would be desirable or possible to introduce an effective rule defining the circumstances in which the witness may or may not refresh his memory before he appears in the witness box. It may be suggested that it is objectionable to give a witness in any proceedings a copy of any statement or precognition taken from him earlier, on the ground that to do so involves at least a substantial risk of interference with the witnesses' natural recollection, and that an element of tutoring might be involved. There is the counter argument that some period of time may have elapsed between the event in question and the court proceedings, and it may be positively advantageous for the eliciting of the truth to allow a witness to refresh his memory from his statement.[39] In England a witness can request a copy of his statement to the police,[40] which will be forthcoming unless it is thought to be

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[38] Horne v. MacKenzie (1839) 6.C. & F.628.

[39] Lua Pak Ngam v. The Queen 1966 Crim. L.R. 443.

[40] See Home Office Circular 82/1969.

required for a "sinister or improper purpose which might prejudice the course of justice". The current English view is that, in general, a witness at a criminal trial should be allowed before giving evidence to refresh his memory by looking at his written statement, particularly when there has been delay; that it is desirable that the prosecution should inform the defence that the witnesses have so refreshed their memories, and that the time for informing the defence is before the witnesses come into the box. We were somewhat doubtful about the Thomson Committee's recommendation that a witness, before the commencement of a trial, should have a right to see any statement he gave to the police, or any precognition given to the procurator fiscal or defence solicitor.[41] Comment is invited on this proposed procedure, and the necessary accompanying rules regarding disclosure to the other party. We would also welcome views on whether a similar procedure should be adopted in civil cases.

Documents etc. used by way of illustration (8.52)

G.41 It seems well understood, both in civil and criminal cases, that anything produced by a witness in the box for the sake of illustration does not make it a production in the case.[42]

Recall of Witnesses, Fresh Evidence and Evidence in Replication[43] (8.53)

G.42 We are of the view that the law on the power of the court to recall a witness, and the question of the rights of the prosecution and defence to adduce new evidence after closing their respective cases could with advantage be restated in certain respects, and we make proposals to this effect in the following paragraphs. It does not appear to be necessary to make any new provision as to evidence in replication in civil cases.

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[41] Thomson para. 43.04.

[42] See e.g. Slater v. H.M. Advocate, 3 Adam 73.

[43] The phrase "evidence in replication" is used in the following paragraphs to mean evidence in rebuttal.

Recall of witness by judge

Common law (8.54)

G.43 At common law, a witness may be recalled only by the judge. This power may be exercised even after both cases have been closed, but then only for the limited purpose of clearing up obscurities. In this situation the witness is the judge's witness, and the judge should question the witness himself.[44] A question arises whether, in such a case, the parties should be entitled to question the witness further as a result of the answers given to the judge.[45] It would be convenient when restating the judge's power in this regard to overrule various dicta to the effect that the judge's power is wider than above stated,[46] and which have been doubted.[47]

Evidence (Scotland) Act 1852 (8.55)

G.44 Section 4 of this Act provides "it shall be competent to the presiding judge or other person before whom any trial or proof shall proceed on the motion of either party to permit any witness who shall have been examined in the courts of such trial or proof to be recalled". As far as criminal proceedings are concerned section 4 has been repealed and replaced by sections 149 and 350 of the 1975 Act, which are worded in similar terms. It is thought that misconception of the effect of the section has been brought about by Lord Young's statement in Wilkie,[48] and that it should be made clear that the section is not limited to recall of a witness to rectify some accidental omission, but may be invoked whenever the interest of justice requires it.[49]

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[44] Todd v. MacDonald 1960 J.C. 93 Lord Sorn at p.96

[45] See para. G.18.

[46] Collison v. Mitchell (1897) 24 R. (J.) 52.

[47] Davidson v. McFadyean 1942 J.C. 95.

[48] (1886) 1 White 242.

[49] See Criminal Justice (Scotland) Bill cl.30.

Right of prosecutor to adduce new evidence after his case has closed (8.56 - 8.58)

G.45 Once a prosecutor has closed his case sections 149 and 350 of the 1975 Act are no longer open to him. It has been suggested by Sheriff G.H. Gordon[50] that "after their case has been closed" is too dogmatic a formula, and that what is really meant is "after the defence case has been opened". We agree with the author that there can be little harm in giving the judge a discretion to break the magic spell cast by the words "my case is closed".

G.46 On the more general qeustion of whether the prosecutor should be permitted to call further evidence after the closing of his case, or after the defence case has opened, it has been held in England[51] that such a course is open in exceptional circumstances, even where the evidence is not strictly of a rebutting character, although the court must be vigilant to prevent injustice to the accused. In M'Neilie v. H.M.Advocate[52] it was held incompetent for a prosecutor to recall a witness to speak to a statement alleged to have been made by a defence witness and denied by him. We recommend, in agreement with the Thomson Committee,[53] that the rule flowing from this case should be changed. This would avoid the elaborate procedure which the prosecutor has to adopt for the purpose at present, and would make fully effective the provisions of sections 147 and 349 of the 1975 Act.[54]

Right of defence to adduce new evidence after the defence case has closed (8.59 - 8.60)

G.47 It is now clear that the judge has no power to admit additional evidence for the defence after the case for the defence has been closed, where the Crown has not consented to this being done.[55] As Sheriff Gordon has pointed out, the course adopted in

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[50] 1974 J.L.S. Sc.5.

[51] R v. Doran (1972) 56 Cr.App.R. 429.

[52] 1929 J.C. 50.

[53] Thomson, para. 43.10.

[54] See Criminal Justice (Scotland) Bill, cl.30.

[55] Lindie v. H.M. Advocate 1974 J.C. 1.

Jeannie Donald,[56] where the defence called a new witness after closing their case, with the leave of the judge and by consent of the parties, was sensible, and the Thomson Committee recommended[57] that at any time prior to the commencement of speeches to the jury, in exceptional circumstances on the motion of either the prosecution or the defence, the court should have the power in the exercise of its discretion, and on cause shown, to allow fresh evidence which has just come to notice, whether from a new or recalled witness.[58] We agree with this recommendation, and propose accordingly.

G.48 We also agree with the Thomson Committee recommendations[59] concerning evidence in replication being led by the Crown, and the leading of evidence from witnesses whose names are not included in the respective list of witnesses,[58] and propose accordingly.

Recalcitrant witnesses (8.61)

G.49 A practice has grown up whereby a recalcitrant witness, who has been detained for prevarication, is allowed to purge his contempt by returning to the witness box to contradict his earlier protestations of ignorance. Problems arise where the witness makes his offer to return to the box after the party who called the witness has closed his case, for there then appears to be no way of taking advantage of the offer. We invite comment on whether the law should be changed, and if so how best can the position be rectified?[58]

Comment on failure to call witness (8.62)

G.50 If comment is to be allowed by the judge or advocates on the failure of the accused or his spouse to give evidence, the logical step would be to make provision for comment on the failure by any party to call witnesses, or to adduce any evidence from any witness

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[56] High Court July 1934.

[57] Para. 43.10.

[58] See Criminal Justice (Scotland) Bill, cl.30.

[59] Thomson, recs. 121(a) and 122.

on any particular topic. In practice, such comment is sometimes made by the presiding judge,[60] and we propose that it should be made clear that such comment may be made not only by the judge, but also by the Crown and by the defence. It is not thought that a similar provision is required for civil jury trials.

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[60] See McGregor v. H.M. Advocate 25 October 1973 unreported - Research Paper, para. 8.62 n. 58.

Chapter H

The recording of evidence (9.01)

H.01 There are several comparatively minor difficulties and anomalies in the law relating to the recording of evidence. The statutory provisions bearing on the matter are listed, and various problems are considered in relation to the types of proceeding in which they arise. A general point is that some statutes provide for the recording of evidence only by shorthand. We are of the view that there should be a new provision permitting the recording of evidence by other methods in such cases, a change authorising the adoption of another method or methods being effected by means of statutory instrument, Act of Sederunt or Act of Adjournal. We propose accordingly.

Statutory provisions

Civil causes - Court of Session (9.02-9.03)

H.02 Several methods of recording oral evidence at a proof are set forth in the Conjugal Rights (Scotland) Amendment Act 1861[1], and the Evidence (Scotland) Act 1866.[2] We propose that these provisions should be consolidated, preserving the other methods of recording evidence mentioned in these statutes in addition to that of a shorthand writer.

Civil causes - Sheriff Court (9.04)

H.03 The relevant provisions are rules 65, 66 and 137 of the Sheriff Court Rules. In the new summary cause evidence,[3] other than evidence taken to lie in retentis, is recorded in the notes made by the Sheriff for his own use.

Generally (9.05)

H.04 It is suggested that it is no longer necessary to make provision for the recording of evidence in narrative form, as provided in rule 65 of the Sheriff Court Rules. We also propose that it should be made clear by a provision in general terms, that the Lord Ordinary or sheriff may take evidence of

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[1] c.86, s.13.

[2] c.112, s.1.

[3] Sheriff Court (Scotland) Act 1971 c.58, s.36(3); Act of Sederunt (Summary Cause Rules, Sheriff Court), 1976, Sched. rules 34, 43.

new where the extended notes of evidence are destroyed, or are found to be inaccurate or incomplete, or where the notes cannot be extended due to the illness of the shorthand writer or for any other cause. At present rule 66 of the Sheriff Court Rules provides that if the correctness of the notes of evidence be questioned, the Sheriff may satisfy himself in regard thereto by the examination of witnesses otherwise, and may amend the record of evidence.

Criminal trials on indictment (9.06-9.08)

H.05 Section 274(1) of the 1975 Act requires that in all trials on indictment shorthand notes of the proceedings must be taken. Sections 3 and 4 of the Justiciary and Circuit Courts (Scotland) Act 1783 may now be repealed, and we propose accordingly.

H.06 We are of the opinion that if the presiding judge is to continue to be obliged to take and preserve a note of the evidence or proceedings it would be desirable to enact a provision expressly to that effect. We also propose that the present provisions whereby a sheriff must authenticate and preserve his notes of evidence,[4] and the presiding judge or sheriff must furnish his notes to the Clerk of Justiciary in the event of an appeal,[5] should be reconsidered. The Thomson Committee in their Third Report recommended that the latter provision should be repealed, and replaced by a provision giving the High Court express power to call for the judge's notes at any time,[6] a recommendation with which we concur. We invite views on section 146 of the 1975 Act, which the Thomson Committee did not consider.

H.07 Section 276 of the 1975 Act implies that the declaration de fideli administratione officii should be administered to the shorthand writer at the beginning of each trial. The declaration is never administered in civil causes, except to a newly

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[4] See Circuit Courts (Scotland) Act, 1828, c.24 s.17, also Criminal Procedure (Scotland) Act 1975 s.146.

[5] 1975 Act, s.237(1).

[6] Cmnd. 7005, para. 2.27. See Criminal Justice (Scotland) Bill cl. 32 and Sch. 2.

fledged shorthand writer embarking on his duties for the first time, and we propose no more should be necessary in criminal cases.

Summary criminal procedure (9.09-9.11)

H.08 Section 359 of the 1975 Act details the matters which require to be recorded in summary proceedings. Normally, there is no official shorthand note of the evidence in a summary criminal trial, and both the Grant[7] and Thomson Committee[8] concluded that the recording of evidence in such trials was not practicable. While generally accepting this conclusion, there are summary cases involving a degree of complexity, or an important point of law, where it appears to us that a full record of the evidence would be useful. We invite comment on whether there should be a provision that the services of a shorthand writer should be made available at public expense if the accused or the Crown so require on cause shown, or the Sheriff ex proprio motu. Should it also be possible for an accused person, at his own expense, to procure an official shorthand note of the evidence? Whether or not the foregoing suggestion is acceptable, we propose that section 359 of the 1975 Act be amended to provide that the names and designations of the witnesses be recorded, which would alleviate problems which can arise at present if a case is appealed. Further, the phrase "documentary evidence" in that section has caused some difficulty, and in order to secure uniformity of practice we propose that all documents produced or referred to should be noted in the minutes.

Civil jury trials (9.12)

H.09 We consider that it would be useful to provide that the judge's charge in a civil jury trial should be recorded, and in the case of an appeal, printed for the use of the appeal court. In any event, the practice of making no part of the judge's charge available to higher courts, other than that quoted in a note of exceptions, has been criticised,[9] and we propose a

[7] Paras. 757-760.

[8] Cmnd. 7005, paras. 6.01-6.08.

[9] Douglas v. Cunningham 1963 S.C. 564 per Lord Guthrie at p.570.

provision to the effect that the charge in a civil jury trial be recorded, and in the case of an appeal printed for the use of an appeal court. At present it appears to be the practice in the sheriff court to record the charge.

Sheriff Court - General (9.13)

H.10 The Grant Committee recommended that in an ordinary action in the sheriff court it should be competent, with the consent of the parties, to dispense with the recording of evidence, any appeal then being on law only.[10] It may be that if such a provision were introduced it would be little used, but we would welcome views on the question.

Consistorial causes in the sheriff court (9.14-9.15)

H.11 At present, there is no statutory provision that decree in an undefended consistorial case cannot be pronounced until the grounds of action are substantiated by sufficient evidence, even although the Court of Session rule to that effect is applied in practice. We propose that the position be regulated by enacting the appropriate statutory rule for the sheriff court.

H.12 In the Court of Session evidence in consistorial cases must be recorded in full.[11] In the sheriff court, while this is done in practice, there is no rule to this effect. We invite views as to whether such a rule be enacted for the sheriff court.

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[10] Grant, para. 597, rec. 238.

[11] Conjugal Rights (Scotland) Amendment Act 1861, c.86, s.13, Rule 65 of the Sheriff Court Rules is permissive.

Chapter J

Written statements in lieu of oral evidence

General (10.01)

J.01 It is a well known general rule that any facts required to be proved in proceedings, both civil and criminal, must be proved by the examination of witnesses in open court. There are many exceptions to this rule, e.g. evidence in a civil case which has been taken on commission may be lodged and referred to, or read out. In this Chapter, we consider the admissibility of written statements in lieu of oral evidence in both civil and criminal proceedings.

Civil causes (10.02 - 10.03)

J.02 Until very recently the statutory provisions providing for the admission of affidavits in lieu of parole evidence were contained in the Administration of Justice (Scotland) Act 1933,[1] and the Sheriff Courts (Scotland) Act 1971,[2] both of these Acts enabling the Court of Session by Act of Sederunt to regulate the procedure. These statutes related to any issue not involving status, but section 29 of the Administration of Justice Act 1977[3] enables the Court of Session

> "to provide in any category of cases before the court, for the admission in lieu of parole evidence of written statements (including affidavits) and reports, on such conditions as may be prescribed."

J.03 Section 29(2) of the 1977 Act also amends the Sheriff Courts (Scotland) Act 1971, to provide for the admission of written statements and reports as well as affidavits. The documentary evidence for which these amendments make provision might be usefully employed in applications for provisional remedies, such as interim interdict or interim custody. The amendment of section 16 of the Administration of Justice (Scotland) Act 1933

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[1] c.41.

[2] c.58.

[3] c.38.

has already enabled provision to be made for the consideration of undefended divorces in the Court of Session by a wholly documentary procedure.[4]

Criminal trials (10.04)

J.04 In England, section 9(1) of the Criminal Justice Act 1967[5] provides that a written statement by any person is admissible in criminal proceedings, other than committal proceedings, to the like extent as oral evidence to the like effect by that person,[6] if the conditions set out in section 9(2) are satisfied. The most important of these conditions is that all parties should consent to the admission of the statement. We think it doubtful whether a provision on these lines is necessary in Scotland, in view of the nature of the Scottish provisions as to minutes of admission and agreement,[7] but invite readers' comments.

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[4] Act of Sederunt (Rules of Court Amendment No.1) (Consistorial Causes) 1978.

[5] c.80.

[6] See Ellis v. Jones [1973] 2 All E.R. 893.

[7] Ante paras. B.18 et. seq.

Chapter K

Public documents

Governmental documents (11.01)

K.01 Proof of governmental documents such as statutes, Orders in Council and the like is governed by a large number of decisions, and by the practice of the courts. While the present law does not appear to cause much difficulty in practice, particular attention is paid in this chapter to statutory instruments, ancient records, foreign statutes and similar governmental documents.

Statutory instruments (11.02)

K.02 Doubts about the proof of statutory instruments have already been noted,[1] and in view of the difficulties mentioned,[2] we propose a statutory provision that judicial notice shall be taken of all statutory instruments, and that in case of doubt as to their terms they may be established by reference to a Stationery Office copy.

Ancient records (11.03)

K.03 By the term "ancient records" we mean private Acts of the Scottish Parliament, Orders in Council before 1948, pre-1708 Scottish subordinate legislation and Acts of Sederunt and Acts of Adjournal before 1893. Difficulties have arisen in the past as to whether it is necessary to prove such documents, and if so by what method, and also in relation to their evidential value. We would welcome readers' views on whether judicial notice should be taken of such documents if appearing in a publication or form purporting to have been issued by public authority, without prejudice to the question of the reliability of any statement of fact in private Acts of the Scottish Parliament making grants or ratifications *salvo jure cujuslibet*.

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[1] Para. B.02.

[2] See Research Paper, para. 2.03.

Foreign governmental documents and decrees of foreign courts (11.04, 11.31)

K.04 While the Evidence Act 1851 (which makes provision for the proof in England of foreign and colonial governmental documents and judicial records) does not extend to Scotland,[3] the Evidence (Foreign, Dominion and Colonial Documents) Act 1933[4] was an attempt to simplify proof of facts in foreign public registers. It may be provided by Order in Council that official copies of entries in certain public registers of the country to which the Order relates may be received in Scotland as evidence that the registers contain such entries without any further proof,[5] and it may also provide that official certificates of certain classes issued in that country may be received as evidence of the facts stated in the certificate.[6] The Act has so far been applied by Orders in Council to Belgium, France and to many Commonwealth territories, and extends to registers of births, marriages and deaths.

K.05 The Hague Convention of 5 October 1961 constituted a further attempt to simplify the mode of certifying the authenticity of foreign documents, and makes provision for a system whereby an authority of the country from which the document emanates certifies its authenticity by an "Apostille". While the United Kingdom has ratified this Convention, it was open for signature only by states attending the Ninth Conference on International Private Law, and in addition Iceland, Ireland, Liechtenstein and Turkey.

K.06 In view of the various limitations of the foregoing provisions, we propose for consideration the enactment of a general rule applicable independent of the Hague Convention. We note that the Law Reform Commission of Canada has proposed that a foreign public document will be presumed to be authentic, if it purports to be executed or attested in his official capacity by a person authorised

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[3] 1851 c.99, s.18.

[4] 1933, c.4.

[5] s.1(2)(c) as amended by section 5 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 c.27.

[6] s.1(2)(d) as amended by section 5 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 c.27.

by the laws of a foreign country to make the execution or attestation.[7] The document must be accompanied by a certification by a diplomatic or consular official of Canada, or by a diplomatic or consular official of the foreign country who is assigned or accredited to Canada, as to the genuineness of the signature and official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation. Such an enactment has the advantage that it would apply both to foreign documents and decrees of foreign courts, and we invite comment on whether it is thought that a similar provision should be adopted in this country.

Judicial records

Convictions as evidence in civil proceedings (11.05 - 11.06)

K.07 Sections 10-12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968[8] provide in essence that where a person has been convicted of an offence in a United Kingdom court, and an extract conviction is produced in subsequent civil proceedings, the person shall be taken as having committed that offence unless the contrary is proved. Various questions have arisen with regard to the provisions and these are discussed in the following paragraphs.

Standard of proof (11.08)

K.08 Although it has not been authoritatively decided in Scotland, it is thought that the standard of proof facing the party who wishes to disprove the verdict of a criminal court is proof on a balance of probabilities,[9] and that this should be made clear.

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[7] L.R.C. Canada, Evidence Code, s.47(h).

[8] c.70.

[9] King v. Paterson 1971 S.L.T. (Notes) 40
Public Prosecutor v. Yarancj [1970] A.C. 913.

Corroboration (11.09)

K.09 It is not clear whether the statutory restriction of the rule requiring corroboration in personal injuries cases[10] is applicable to a party who, in such a case, is in effect seeking to disprove the verdict of a criminal court.[11] However, the question may be more of hypothetical rather than practical importance, since the evidence of one witness would generally not be sufficient to satisfy a civil court on a balance of probabilities that the party had not committed the offence.

Weight (11.10)

K.10 The Law Reform Commission of Canada's Evidence Code provides[12] that evidence of a final judgment adjudging a person guilty of a crime is admissible to prove any fact essential to sustain the judgment, except when tendered by the prosecution in a criminal proceeding against any one other than the person adjudged guilty. The weight to be attached to a conviction produced in evidence in civil proceedings has caused a division of opinion in England.[13] A possibility for reform and clarification would be to extend section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 along the lines of the Canadian proposal, with the proviso that the production of a conviction would give rise to a presumption that the facts constituting the offence had occurred, which presumption would give way to evidence establishing the contrary on a balance of probabilities, without itself affording any evidential weight to be taken into account in determining whether that onus had been discharged. We would welcome comment on this proposal.

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[10] Law Reform (Miscellaneous Provisons) (Scotland) Act 1968 s.9.

[11] Caldwell v. Wright 1970 S.C. 24.

[12] L.R.C. Canada, Evidence Code, s.31(h).

[13] See Research Paper, para. 11.10.

Unsafe or unjustifiable convictions (11.11)

K.11 Unlike England, Scotland has never had as a ground of appeal in criminal cases that a conviction is "unsafe or unsatisfactory", and the Thomson Committee were of the unanimous opinion that because of the stricter requirements of corroboration in Scotland such a ground of appeal should not be introduced.[14] If this ground of appeal is not open in criminal proceedings, we do not consider it appropriate that it should be possible to classify a criminal conviction as unsafe or unsatisfactory in subsequent civil proceedings. A further consideration is that in the period between the civil action and the criminal trial an important witness for the prosecution might have died, or become unavailable to give evidence, which would assist the defender to overcome the statutory presumption. On the other hand, some readers may consider that it should be possible in civil proceedings to show that a conviction is unsafe or unsatisfactory, and that if this is achieved then the statutory presumption that the person committed the offence should not apply. We would welcome comments.

Averment (11.07)

K.12 We consider that it should be made clear that a person seeking to found on a conviction in civil proceedings should specifically refer to the conviction in his pleadings, and that a party who seeks to prove that the offence was not committed should aver specifically that the person convicted did not commit the offence.[15]

Mode of Inquiry (11.12)

K.13 We consider it appropriate that, in order to save time and expense, cases where a party seeks to prove that an offence was not committed should go to proof rather than jury trial. We do not think, however, that this merits formal regulation.

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[14] Thomson Committee, First Report, para. 16.

[15] Fardy v. SMT Co. Ltd. 1971 S.L.T. 232.

Identity of Issues (11.13 - 11.16)

K.14 In some cases it may be difficult to ascertain whether or not there is an identity of issues between the civil and criminal proceedings.[16] If there is no such identity, it seems clear that the conviction is irrelevant. It may be noted that in certain cases the defender may, notwithstanding his admission in the civil proceedings of the commission of the crime for which he was convicted, escape liability by establishing defences such as volenti non fit injuria or contributory negligence, which could not have been open to him in the criminal proceedings.[17]

K.15 Section 12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provides that a conviction of a criminal offence is conclusive evidence that the person concerned committed it in an action for defamation in which a question is whether or not he committed that offence. Here again the question of identity of issues between the two proceedings may cause difficulty.[18] Such difficulties might largely be resolved if procedural provisions were made for the availability of the transcript of the evidence and charge in the criminal proceedings, as is suggested by Sheriff Macphail.[19]

Identification of Person to whom Conviction Refers. (11.17)

K.16 In an undefended action of divorce for cruelty, in addition to the pursuer's evidence, it is necessary for some third party to identify the person to whom the conviction refers to as the defender in the action.[20] The same rule applies in criminal procedure to previous convictions.[21]

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[16] See e.g. Caldwell v. Wright 1970 S.C. 24.

[17] Murphy v. Culhane [1977] Q.B. 94.

[18] See e.g. Levene v. Roxhan [1970] 1 W.L.R. 1322.

[19] See Research Paper paras. 25.16-25.18.

[20] Andrews v. Andrews 1971 S.L.T. (Notes) 44.

[21] Heron v. Nelson 1976 S.L.T. (Sh.Ct.) 42. See also Q.09.

Verdict of acquittal as evidence in civil proceedings. (11.18-11.19)

K.17 Apart from the statutory exception provided by the 1968 Act, and other limited exceptions, the decree or verdict in an earlier cause is not admissible as evidence in another cause. The only case impossible to reconcile with this general principle is Shaw v. Craig.[22] It seems unlikely, however, that this case would be followed today, as it is now generally accepted that a verdict of acquittal is not admissible in evidence. In this context, it does not seem justifiable to distinguish between verdicts of not guilty and of not proven.

Rehabilitation of Offenders Act 1974.[23] (11.20 - 11.21)

K.18 The Rehabilitation of Offenders Act 1974 provides that after a rehabilitation period (the length of which depends on the sentence imposed) a conviction resulting in a non-custodial sentence, or a custodial sentence of not more than 30 months, must be treated in law as spent, and evidence of spent convictions is inadmissible in judicial proceedings, other than criminal proceedings, and proceedings concerning minors and pupils. Further excepted classes of proceedings are provided by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.[24] Section 7(2) of the Act provides that nothing in section 4(1), which states the effect of becoming a rehabilitated person

> "shall affect the determination of any issue, or prevent the admission or requirement of any evidence relating to a person's previous convictions or to circumstances ancillary thereto - (f) in any proceedings in which he is a party or a witness, provided that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, he consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section 4(1)".

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[22](1916) 1 S.L.T. 116.

[23]c.53.

[24]S.I. 1975, No. 1023.

K.19 It is not clear how far a party to an action is protected by this provision, but we consider that the defender would not be held "to consent to the determination of the issue" simply by defending the action or by failing to defend it.[25] If this is the case, the pursuer might have to persuade the court to exercise the discretion conferred on it by section 7(3) to admit the evidence.

K.20 It is too early to predict how the Act will operate in practice, although a decision in an English magistrates court[26] has already had the effect of effectively nullifying sections 5(3) and (4) if its decision is followed. The Act will affect the availability of evidence in damages for personal injuries cases unless time limits are observed, and we would welcome views on the operation of the Act from any practitioners who have had experience of the same.

Convictions and acquittals as evidence in criminal proceedings. (11.22 - 11.24)

K.21 In cases in which the guilt of the accused depends on another person's having committed an offence, the prosecution may have to prove again the guilt of the person concerned. The offences in this class include reset and the harbouring of thieves. We propose that there should be a provision for the admissibility of convictions, analogous to section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, whereby if the accused wished to dispute the correctness of another person's conviction, he would have to prove it wrong on a balance of probabilities.

K.22 In the case of an accused who has been tried on one charge, and is then tried on what is likely to be a more serious charge (e.g. initial charge of assault and later charge of murder) there is the question of whether the verdict in the first trial should be admissible in the second trial. In England the issue had been

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[25] See Duke of Argyll v. Duchess of Argyll 1962 S.C. (H.L.) 88.

[26] R. v. Kitt 1977 Crim. L.R. 220.

debated as one of estoppel, although the House of Lords recently held that estoppel did not apply in criminal cases.[27] We put forward for consideration the question whether a previous conviction in such circumstances should be admissible in the second trial. We would also welcome views on whether an accused should be permitted to rely on a verdict of not guilty or not proven in the first trial, even though it is virtually impossible to determine what was actually decided by such verdicts.

Judgments and findings in civil cases as evidence in civil proceedings
Findings of adultery and paternity (11.25 - 11.27)

K.23 Section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provides that a person who has been found guilty of adultery in certain matrimonial proceedings in the United Kingdom, or who has been found to be the father of a child in affiliation proceedings in the United Kingdom, will in any subsequent civil proceedings be taken to have committed adultery, or to be the father of the child in question, unless the contrary is proved. The same questions as to the necessity for averment and as to the weight to be attached to the finding which were raised above in connection with convictions as evidence in civil proceedings[28] also arise here. The section can be useful to a co-defender's wife in a later action of divorce at her instance, and it has been suggested that the utility of the Act would be further increased if paramours were named in decrees of divorce. We invite comment.

Other findings (11.28)

K.24 Where there are two civil actions by different pursuers against the same defender, or by the same pursuer against the different defenders, which raise the same issue of fact, the finding of the court in the first action is not admissible in the second action i.e. a plea of res judicata cannot be successfully maintained. In many instances this can have considerable practical

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[27] R. v. Humphrys [1977] A.C. 1.

[28] Ante paras. K.10 and K.12.

significance as there is a risk that different courts will reach different decisions on the same issues of fact and the same evidence. While it is arguable[29] that this risk should be eliminated by extending the principle of res judicata, we do not favour such an extension. The first case could be unsuccessful for a variety of reasons, e.g. bad preparation or lack of evidence, and this could deprive other litigants of the chance of success. Indeed, in some instances the publicity generated by the first litigation could have the affect of previously unknown and important witnesses coming forward for second or subsequent cases. A further consideration is that the finding in the first of a multiplicity of actions might well be relevant from the point of view of expenses. We would welcome views on whether it is thought that the principle of res judicata should be extended in the above circumstances.

Transcripts of proceedings (11.30)

K.25 It is discussed elsewhere whether notes or transcripts of evidence in other proceedings should be admissible,[30] and there is raised also the question of whether they should be admissible both as evidence of the statements made by the witnesses, and as evidence of the facts spoken to by them.

Administrative documents (11.33)

K.26 Section 353 of the Criminal Procedure (Scotland) Act 1975 (which relates to summary criminal proceedings) provides inter alia that any letter, minute or other official document issuing from or in the custody of any government department or any certified copy of such documents, shall be received as prima facie evidence of the matters contained therein without being produced or sworn to by any witness. This is a useful provision, and we propose its extension to all proceedings, both civil and criminal.

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[29] See Research Paper, paras. 11.28 - 11.29.

[30] See Research Paper, Para. 11.30.

Chapter L

Records (12.01)

L.01 We recognise that in many instances records are agreed between the parties to a litigation, notwithstanding the fact that the record in question does not fall within the ambit of any statutory provision. Thus, information from weather records supplied by the Meteorological Office would generally be agreed even though that Office is under no duty to keep records as such. Similar considerations would apply to stock or share prices when quoted from the Stock Exchange Official Daily List. Although in practice savings in time and expense can be made by agreeing facts such as the foregoing, we are of the opinion that the present statutory rules could usefully be extended and rationalised.

Criminal Evidence Act 1965[1] (12.02 - 12.05)

L.02 This Act was passed as a result of the House of Lords decision in Myers v. DPP,[2] and makes certain trade and business records admissible in criminal proceedings. The records must have been compiled in the course of a trade or business from information supplied by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply. Section 1(3) of the Act endeavours to assist the court in estimating the weight to be attached to a record admissible by virtue of the Act.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1966,[3] section 7 (12.06 - 12.08)

L.03 In civil proceedings the counterpart of section 1 of the Criminal Evidence Act 1965 is section 7 of the above Act, as amended by section 16 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.[4] Sections 13 to 15 of the 1968 Act deal with statements produced by computers as evidence in civil proceedings.

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[1] c.20.

[2] [1965] A.C. 1001.

[3] c.19.

[4] c.70.

L.04 Section 7 of the 1966 Act, as amended, is substantially similar to section 1 of the 1965 Act, except that (i) the document is not "a record relating to any trade or business and compiled in the course of that trade or business", but is "a record compiled in the performance of a duty to record information" and (ii) the statement contained in the document may be proved by the production of the document or (whether or not the document is still in existence) by the production of a copy of the document, purporting to be certified or otherwise authenticated by a person responsible for the making of the copy, or in such other manner as the court may approve; and any such copy shall be taken to be a true copy unless the contrary is shown.

Other Jurisdictions (12.10 - 12.12)

L.05 In the USA, the Federal Rules of Evidence provide basically that a record in any form made by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, provided it was the regular practice of that business activity to make such reports, is admissible unless the sources of information, or the method or circumstances of preparation, indicate lack of trustworthiness. While this rule is drafted in broad terms, and in addition to records of acts, events and conditions includes both diagnoses and opinions, it is also restrictive in that it requires personal knowledge and gives the court a power to exclude the record.

L.06 The Evidence Code of the Law Reform Commission of Canada allows, as one of the exceptions to the rule against hearsay, admission of a record of a fact or opinion, if the record was made in the course of a regularly conducted activity at or near the time the fact occurred or existed, or the opinion was formed, or at a subsequent time if compiled from a record so made at or near such time.[5]

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[5]L.R.C. Canada, Evidence Code s.31(a).

L.07 In England, the relevant provisions are contained in Part I of the Civil Evidence Act 1968[6] section 4(1), which generally provides that a statement contained in a document is admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had personal knowledge of the matters dealt with in that information, and which if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries, each acting under a duty. The person who originally supplies the information must be called as a witness if required by the opponent of the party adducing the statement unless he is dead, beyond the seas, unfit bodily or mentally or cannot with reasonable diligence be identified or found, or cannot reasonably be expected to have any recollection of matters relevant to the accuracy of the statement. If he is called as a witness, the record cannot be given in evidence without the leave of the court, and section 7 provides that when the original supplier is not called as a witness, any evidence which would, had he been called, have been admissible for the purpose of destroying or supporting his credibility may be adduced; but evidence may not be given on matters as to which the maker's denials in cross-examination as to credit would have been final.

Reform of the Law (12.09)

L.08 Before considering more detailed reforms of this branch of the law there are four general principles which we consider should be incorporated in any new legislation. These are as follows:-

(i) The same rules of admissibility should apply in both civil and criminal cases. In our view the scope of the Criminal Evidence Act 1965 is too narrow,[7] and it would be logical if any new provision applied to both types of proceedings. It may be noted that the Criminal Law Revision Commission has made a similar recommendation in England, and that this proposal has been accepted by the English Bar Council.[8]

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[6] c.64.

[7] See Research Paper, para. 12.04.

[8] C.L.R.C., para. 258 pp.194-5, 243-4.

(ii) Records which are compiled either in the course of regular performance or under a duty should be admissible, subject to the proviso contained in (iv) below.

(iii) Records of diagnoses and opinion should be admissible. It would be useful if an expert was unavailable for any of the reasons specified in the present legislation that his report could be admitted, provided that it was confined to relevant matters of expert opinion, and to statements of fact known to the maker as a result either of his own observation, or of his general professional knowledge or experience.

(iv) Records should be inadmissible when the primary source of the information is available, and is required to appear by the opponent of the party who adduces the record or by the court.

L.09 We would welcome readers' views on the foregoing propositions, and also on the question as to whether there should be a requirement that the record must have been made at or about the time that the fact occurred or existed, or the opinion was formed. We propose that there should be no such requirement, but if it is thought to be advisable, then it would be necessary to include a provision enabling the production of permanent records made a considerable time after the event from temporary contemporaneous records which are destroyed once the permanent record is made.

Information indirectly supplied. (12.15)

L.10 A further question for consideration is the extent to which a statement containing information which has been indirectly supplied to the recorder of the statement should be admissible as evidence of that information. Section 4(1) of the Civil Evidence Act 1968 embodied the views of the Law Reform Committee,[9] to the effect that provided information originates from a person with personal knowledge of the matters dealt with, and there is a duty to pass on that information, all the way down the chain from him to the person who made the record of it that record should be admissible. We propose that this concept should be embodied in any new provision in Scots law.

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[9] L.R.C., 13, para. 16(c).

Document (12.19 - 12.21)

L.11 Section 10(1) of the Civil Evidence Act 1968 provides a far wider definition of the word "document" than the present Scottish provisions, and we recommend that a wide definition be adopted in any new Scottish enactments. Section 10(2) of the Act deals with references to a copy of a document, and at present copies of documents are admissible in civil cases in Scotland, by virtue of section 7(3A) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, but not in criminal cases. We have previously indicated[10] our view that the same rules should apply in both civil and criminal cases, and consequently propose that copies of documents be admissible in all cases, provided that they are certified as correct copies.

L.12 There is the further question of whether any classes of document should be excluded from the statutory provisions, or should be the subject of special rules. In particular, we consider precognitions, statements to the police in criminal cases, statements made to investigators after accidents and transcripts of evidence.

Precognitions (12.22)

L.13 Precognitions may be regarded as a record of a witness's statement compiled by the precognoscer, in the performance of a duty to record the information given by the witness which he owes to his client or to the prosecutor. The weight of comment given in response to Article 3.7 of our draft Code of Evidence was very much against the admission of precognitions, with the possible exception of signed precognitions, precognitions recorded on tape, or in writing in question and answer form (the answer being in the writing of the witness) or precognitions on oath.[11] We think that the latter types should be admissible, and there should be a further category where a precognition has been taken, and the maker of the statement has died or become unable by reason of health to give evidence either in court or on commission. Here, the production of the precognition should be allowed, together with the evidence of the precognoscer. We would welcome views on these suggestions.

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[10] See para. L.08.

[11] See para. T.21.

Statements to police (12.23)

L.14 What amounts to a precognition is a difficult question, and a distinction has been drawn between on the one hand, precognitions taken in civil cases, precognitions taken by the defence in criminal cases and statements taken in criminal cases after apprehension on the authority of the Procurator Fiscal for the purposes of the trial; and on the other hand, statements to the police in the course of their investigations before apprehension. The latter are admissible but the former are not, although it is questionable whether the distinction is convincing.

Statements to investigators (12.24)

L.15 It may also be possible to draw a distinction between precognitions on the one hand, and on the other, statements made to persons under a duty to record information, other than for the purposes of a trial. In McNeill v. Richard Costain (Civil Engineering Ltd,[12] Lord Leechman held to be admissible, under section 7 of the 1966 Act, statements taken after an accident by an employee of the defenders in the course of his duties from employees who subsequently could not be traced. We propose that such statements should continue to be admissible.

Transcripts of evidence. (12.25)

L.16 If it is thought that statements made in other proceedings could usefully be made admissible, it would be desirable to make special provision for the admissibility of notes or transcripts of evidence. We consider that the whole transcript should be produced, together with any judgment dealing with credibility, and propose accordingly.

"Unfit" (12.28)

L.17 We propose that it should be made clear that unfitness to attend as a witness means inability to give evidence, either in court or on commission.

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[12] 27 November 1970 unreported.

Procedure (12.29)

L.18 The present Scottish legislation on the admissibility of records appears to have operated successfully without detailed procedural rules. We would, however, welcome the views of practitioners on whether the present rules on computer evidence are satisfactory or otherwise.

Statements produced by computers (12.33 - 12.35)

L.19 The admissibility as evidence in civil proceedings of statements produced by computers is provided for by sections 13, 14 and 15 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, and the various rules made thereunder.[13] The above sections are based on the corresponding English provisions of the Civil Evidence Act 1968, as it was thought necessary to have the same provisions for the whole of the United Kingdom; but we agree with Sheriff Macphail that both the elaborate conditions and procedural requirements could with advantage be simplified. The sole condition of admissibility could be made that the computer should have been operating properly at all material times, or adopting a similar provision to that of the South Australian Evidence Act, that the court be satisfied that the data from which the output is produced by the computer is systematically prepared, on the basis of information that would normally be acceptable in a court of law as evidence of the statements or representations contained in or constituted by the output. Either of these suggestions would eliminate many of the present potential difficulties, and would also obviate the requirements of notice and counter notice. However, we favour the view that there should be only one provision for the admission of statements in records, expressed in terms which include records kept by the use of a computer, and we propose accordingly.

Criminal Trials (12.36)

L.20 We propose that statements produced by computers should be admissible in criminal proceedings.

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[13] See Research Paper, para. 12.33 n.48.

Business books etc (12.37 - 12.38)

L.21 We are of the opinion that any new general provision should enact that business books, minutes of meetings, including draft minutes and minutes of meetings in sequestration proceedings, and the trustees Sederunt Book, are admissible as evidence of the facts stated therein without the support of a witness. If such a general provision is not thought to be acceptable, and the Banker's Books Evidence Act 1879[14] were to be unaffected by any other provisions as to the admissibility of records or of statements produced by computers, we propose that copies of entries in such books should be received, if they are certified as true copies by the signature of an officer of the bank. A further question on which we would appreciate comment is whether such a provision should be extended to other financial institutions, or even to documents used for recording the financial transactions of a wide variety of undertakings?

L.22 A minor reform which we consider could save in time and expense is for it to be made possible to prove by the affidavit of a prescribed official, that a person does not have an account with a bank or financial institution of the type with which people commonly have accounts. We would appreciate comment.

Maps and plans (12.39 - 12.41)

L.23 If the statutory provisions as to the admissibility of records were consolidated as suggested above, a map or plan would be admissible as evidence of boundaries and natural and other features if it could be inferred that it had been compiled from information supplied by persons who had, or might reasonably be supposed to have had, personal knowledge of the matters dealt with. We are of the opinion that Ordnance Survey Maps should be sufficient evidence of boundaries and other features as at the date of the map, making elaborate proof of the composition of the maps unnecessary in the absence of challenge. In addition, if there were to be no general provision on the lines suggested

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[14] c.11.

as to the admissibility of documents, we propose that other maps, plans and histories be admissible as evidence of boundaries and other features, such weight to be given as the court considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom, and the purpose for which, it was made or compiled, and the custody in which it has been kept and from which it is produced.

Chapter M

Real evidence (13.01)

M.01 While there have been in recent years a number of novel and scientific means of proof[1], we consider only medical examinations and blood tests in civil proceedings, evidence of physical resemblance and recording devices.

Medical examinations in civil proceedings

General (17.17)

M.02 Medical examinations, and the evidence derived therefrom, can play an important part in many types of litigation, although it is most commonly thought of in connection with personal injuries cases. The court may order a party, but not a witness, to submit himself for medical examination, although in consistorial causes such an order would not normally be granted.[2] In the latter classification, the question of medical examination occurs most acutely in actions of declarator of nullity of marriage, albeit that these actions are something of a rarity.

M.03 An important question is what constitutes the most appropriate sanction that the court can impose for refusal to consent to a medical examination. We propose that in the case of a pursuer refusing, the action should be sisted, and in the event of a defender refusing, an adverse inference might be drawn. Comment is invited.

Blood tests (13.02-13.06)

M.04 Since the decisions in Whitehall v. Whitehall[3] and Imre v. Mitchell[4] the reliability of blood group evidence has become widely recognised, and it is thought that now is an opportune time to formulate rules for the production of such evidence. We subscribe to the statement of Ormrod J. that "there is nothing more shocking than that injustice should be done on the basis of a legal presumption when justice can be done on the basis of fact."[5]

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[1] See Research Paper, Chap. 13.

[2] Clive and Wilson, Husband and Wife, p.50.

[3] 1958 S.C. 252.

[4] 1958 S.C. 439.

[5] Holmes v. Holmes [1966] 1 W.L.R.187 at p.188.

M.05 The limitations on the use of blood tests in Scotland at present briefly stated are (i) the court will not ordain an adult to submit to a blood test against his will; (ii) there is difficulty in relation to consent on behalf of a pupil child[6], and (iii) there is no procedural machinery to ensure that blood tests are properly conducted, and that the parties are properly identified.

M.06 The English Law Commission proposals on the subject were implemented by the Family Law Reform Act 1969[7], Parts III and IV, whereby the court is in effect provided with an interdict means of obliging adults to submit to a blood test. Regulations made under the Act prescribe the procedure for taking and testing blood samples, and providing a report for the court.

M.07 Whilst recognising that a blood test may produce a result adverse to a child[8], we consider that provisions for Scotland on the lines of the English Act are overdue, and would have considerable practical value in actions of affiliation and aliment. In our view the sanction for a party refusing to submit to a blood test should be on similar lines to the proposition in paragraph M.03 above. We would welcome readers' comments.

Physical resemblance (13.07)

M.08 In Scotland, unlike England, it is not except in highly exceptional cases permissible to adduce evidence of physical resemblance between a child and its supposed parents.[9] Equally, or more important, the same strict rule applies to want of resemblance between such parties, which can lead to apparent injustice, especially where differences in skin colour arise.[10] We consider that this rule should be relaxed, and that such

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[6] See Allardyce v. Johnston 1979 S.L.T. (Sh. Ct.) 54.

[7] c.46.

[8] See para. V.

[9] Grant v. Countess of Seafield 1926 S.C.274.

[10] See e.g. S v. S 1977 S.L.T. (Notes) 65.

facts should be admitted as evidence, although in many cases it may be very weak evidence, for the purpose of proving or disproving parentage.

Recording devices (13.08-13.12)

M.09 Although in Hopes v. HMA[11] a tape recording of a conversation was played over to the jury in the course of evidence, no objection was taken to the competency of that evidence, and it is not entirely clear what procedure would be adopted if the defence were to challenge the authenticity of a tape or a transcript. In England, the procedure is that of a trial within a trial, and we later indicate our agreement with the recommendations of the Thomson Committee on this procedure.[12] Questions of the authenticity or accuracy of tapes or transcripts appear, in our view, to be essentially jury questions. In the event of the authenticity of a recording being challenged, it would no doubt be for the prosecutor as the party seeking to put forward the recording to prove it to be authentic. The standard appears to be on the balance of probabilities, although this is not entirely clear. In civil cases it would be for the party founding on the recording to prove it to be authentic on a balance of probabilities.

M.10 A further question relating to the issue of authenticity is the admissibility of copies of recordings, such as a re-recording of a tape. Tape recordings appear to be included in the definition of "document" in section 1 of the Criminal Evidence Act 1965 and section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966. Copies of documents to which section 7 applies are admissible in civil cases by virtue of section 7(3A). It has already been submitted that in any new legislation the word "document" should be defined in the widest terms, and that copies of documents should be admissible in both civil and criminal cases.[13] It would, of course, be necessary for a trier of fact to keep in view, when assessing the weight of a copy of a tape recording, the consideration that it is possible by re-recording to disguise interference with an allegedly original tape.

[11] 1960 J.C.104.

[12] See paras. T.54-55.

[13] Para. L.11.

Chapter N

Reference to Oath (14.01-14.04)

N.01 Reference of a cause or disputed question of fact to the oath of the other party is always an alternative to proof by his writ, since reference to oath is competent in any civil action, except in the case of an obligatio literis or a consistorial cause. A description of the procedure invoked when a claim or part of a claim is referred to an opponent's oath is given in our Memorandum on the Constitution and Proof of Voluntary Obligations - Formalities of Constitution and Restrictions on Proof,[1] and defects in the procedure are detailed in our Report entitled Reform of the Law relating to Prescription and Limitation of Actions.[2]

N.02 In the above mentioned Report, we expressed the view that reference to oath was not a satisfactory mode of proof, and we recommended that the special requirements as to proof of the constitution, or constitution and resting owing, of obligations imposed by the triennial, quinquennial, sexennial and vicennial prescriptions should be abolished. Our recommendations were largely implemented by the passing of the Prescription and Limitation (Scotland) Act 1973[3], which dispensed with reference to writ or oath in cases to which the new 5-year prescription period apply.

N.03 Reference to oath excludes the testimony of independent witnesses, and restricts the evidence to that of the least independent witness, the debtor himself, which must be accepted. There are also numerous technical procedural questions which have caused difficulty, as well as the rule that references to oaths may be refused by the court if it considers that such a reference would be inequitable. In view of the restrictive, technical and discretionary character of the procedure, it is difficult to justify its retention as a mode of proof.

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[1] Scottish Law Commission Memorandum No. 39.

[2] Scot Law Com. No. 15 (1970) Appendix B.

[3] c.52.

N.04 As it seems the procedure is nowadays invoked only in cases where the law requires proof by writ, the practical consequences of abolition are more aptly considered under the heading of proof of voluntary obligations. Various schemes for alternative modes of proof were put forward in Memorandum No. 39 and comments received on this paper suggest general support for the abolition of proof by reference to oath. We propose accordingly.