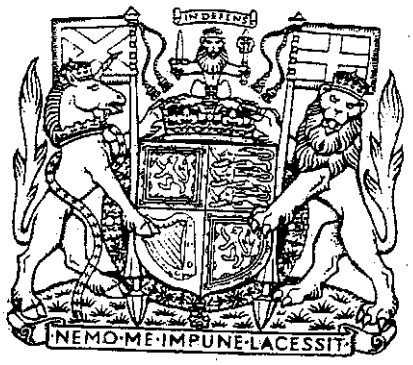


# SCOTTISH LAW COMMISSION

MEMORANDUM NO: 46
LAW OF EVIDENCE
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## Chapter P

## The Admissibility of Extrinsic Evidence in Relation to Documents. (15.01 - 15.02)

P.01 This chapter examines the general rule that it is incompetent to contradict, modify or explain writings by evidence extrinsic to the writings themselves. The rule applies to any transaction which has been reduced to or recorded in writing, either by requirement of law or agreement of the parties, including writings which discharge obligations. A major problem is that the general rule is qualified by so many exceptions, some of which have now developed rules of their own, that it makes the present law difficult to state with certainty.

P.02 As we stated in our Memorandum on the Constitution and Proof of Voluntary Obligations (Formalities of Constitution and Restrictions on Proof)[1] the parole evidence rule applies to attempts to establish that the terms of a written contract do not truly reflect the intention of the parties as it existed when they entered into the agreement, or have a meaning different from that which the words used would ordinarily bear. The rule applies equally, however, to situations where it is alleged that the written terms of the obligation, although perhaps an accurate representation of the parties intention at the time of conclusion of their agreement, have in fact been subsequently modified or varied by agreement between them.[2] The memorandum concentrated on the latter situation, which we consider to be more a matter of contract law, and we therefore do not further consider it in the present memorandum.

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[1] Scottish Law Commission Memorandum No. 39.

[2] cf. How Group Northern Limited v. Sun Ventilating Company Ltd 1979 S.L.T. 277.

P.03 Both the Research Paper[3] and the Sheriffs Walker[4] deal comprehensively with the numerous exceptions to the general rule stated in the opening paragraph of this chapter, and we do not propose to recite these exceptions here. Nor do we think it would serve any useful purpose to concern ourselves with piecemeal reforms of the law in areas which have caused difficulty. Such a course, would we think, only be likely to add to the present complications.

Justification of the rule (15.33 - 15.36)

P.04 Various reasons have been advanced in justification of the rule. Sheriff Macphail identified from the decisions, two grounds on which it has been justified:[5]

(1) that it gives effect to the presumed intention of the parties and

(2) that it achieves certainty and finality.

As to the first of these reasons there are occasions on which the rule operates in such a way as to exclude consideration of the true factual situation, and further, there are cases where evidence of intention of the parties is admitted notwithstanding the rule. It has also been pointed out that it would be impossible to interpret most documents if some extrinsic matter were not allowed to be proved.[6] As to the "certainty and finality" argument an examination of the Research Paper or standard works demonstrates that it cannot be upheld.

Reform of the law (15.37 - 15.39)

P.05 The English Law Commission have tentatively recommended the abolition of the corresponding rule in England,[7] and concluded that the abolition would produce the same result in many cases, but that in some cases it would lead to different and more just results.

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[3]Chapter 15.

[4]Walkers 240-279.

[5]Research Paper paras. 15.34-15.36.

[6]Cross p.616.

[7]Working Paper No.70 The Parol Evidence Rule para. 43.

P.06 One view is that the rule prohibiting the admission of extrinsic evidence has so many exceptions, and has become so full of subtleties, that any efficacy which it formerly had has now been destroyed. As to the general exceptions to the rule, it can be argued that their effect is to reduce the rule to the proposition that when the writing is the whole contract the parties are bound by it and extrinsic evidence is excluded, but when it is not, evidence of its real nature or of other or more accurate terms must be admitted. If this is accepted, it must be questioned whether the rule serves any useful purpose at all. If abolition is favoured, special provisions would be required in relation to testamentary writings, and possibly also in relation to proof of trust, since in these cases the risk of fraud is obviously great.

P.07 Rather than complete abolition, it has been suggested that the rule should be expressed and operated as a presumption that when the terms of an agreement have been reduced to writing by the parties it contains with exactness and completeness all those terms, although the presumption could be overcome by clear and convincing proof to the contrary.[8] We invite readers' comments.

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[8]W.G. Hale "The Parole Evidence Rule" (1925) 4 Oregon Law Review 91.

Chapter Q

## The Admissibility of Evidence on Collateral Issues (16.01)

Q.01 Generally, evidence on collateral issues is inadmissible. The rule has been stated thus:-

> "Where the issues are truly collateral, evidence is excluded because it is irrelevant and because it is inexpedient to spend time and money on proving facts which have no direct bearing on the matter in hand, and which could at the most only lend some probability to the case".[1]

An additional reason has been given that consideration of such collateral issues could confuse juries.[2] Accordingly, when the question is whether a person did a particular thing at a particular time, evidence that he did a similar thing on some other occasion is generally inadmissible as being evidence on collateral issue. In some exceptional cases, however, evidence on such collateral issues is admissible,[3] and these cases are considered below.

## Evidence of similar acts when adultery is in issue. (16.02-16.05)

Q.02 Whilst the rule against the admissibility of evidence on collateral issues is strictly applied in criminal proceedings, in civil proceedings it has been relaxed in actions of divorce for adultery in what appears to be an illogical manner. It is of interest to note that no such relaxation appears to have been made in other actions where adultery may be in issue, such as actions for defamation,[4] or actions relating to legitimacy.

Q.3 At present a pursuer in an action of divorce who founds on an act or course of adultery between the defender and a particular

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[1] W Alexander & Sons v. Dundee Corporation 1950 S.C.123, Lord Strachan at p.128; Hart v. Royal London Mutual Insurance Co. Ltd. 1956 S.L.T. (N) 55.

[2] A v. B (1895) 22R 402.

[3] See e.g. McWilliams v. Sir William Arrol & Co 1962 S.C. (H.L.)70. It is permissible to draw an inference from what has been done in the past.

[4] C v. M 1923 S.C. 1.

paramour may prove in order to support the probability of the adulterous conduct founded upon:-

(1) sexual intercourse before the parties' marriage between the defender and the paramour but not between the defender and any other person;
(2) the defender's attempted adultery or indecent conduct after the parties' marriage with a person or persons other than the paramour; and
(3) the defender's condoned adultery, whether with the paramour or any other person.

We are of the opinion that the above exceptions are anomalous and propose their abolition. We would, however, welcome readers' comments as to whether it is thought that the general rule that evidence on collateral issues is inadmissible should be maintained, or whether such evidence should be allowed more widely.

Q.04 At present there is doubt as to what is necessary to give fair notice to a party, in order that that party may be cross-examined on acts of unchastity about which it has been held incompetent to present substantive evidence. Such cross-examination has been held competent where notice has been given by means of inserting irrelevant averments which have been excluded from probation after debate. This practice seems undesirable, and in any event the value of the cross-examination is limited because if the party denies the charge his denial cannot be contradicted.[5] We propose that the rule which permits such cross-examination be abolished.

Character, credibility and previous convictions.

Victim or Complainer (16.06-16.10)

Q.05 In cases of murder or assault the accused may prove that the injured person was of a violent or quarrelsome disposition, but not generally the commission of specific acts of violence.[6] We do not see how an accused can readily prove that the victim

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[5] H v. P (1905) 8F 232 at p.234.

[6] Walkers para. 20(a).

was a violent person unless he is permitted to cite specific violent actings on the part of that person. A further difficulty in the path of an accused is that while the Crown can libel and prove previous ill-will by the accused, the accused generally is not permitted to prove such previous ill-will by other persons. In the two recent cases of H.M. Advocate v. Kay[7] and H.M. Advocate v. Cunningham[8] the Court departed from the general rule, and allowed the accused to prove specific previous acts of violence on the part of the victim. The arguments against allowing such evidence are that it prolongs criminal trials and can also confuse juries. We do not consider either of these arguments sufficiently weighty to justify the status quo, and propose that in cases of murder or assault the accused should be entitled by citing specific acts of violence to prove that the injured person was of a violent or quarrelsome disposition.

Q.06 The law relating to evidence of the character, credibility and previous convictions of the victim of rape or a similar assault is set out fully in Sheriff Macphail's Research Paper.[9] Evidence of previous intercourse with the accused is admissible as being relevant to the issue of consent, but evidence of specific acts of intercourse with other men is excluded unless these are so closely connected with the alleged rape as to form part of the res gestae.[10] What facts form part of the res gestae is very much dependent on the circumstances of each particular case, and we do recognise that the rule which generally excludes evidence of sexual behaviour with other men both before and after the alleged offence may be too rigid to be entirely fair to the accused in cases of unusual circumstances.[11] At present it is unlikely that an accused would be permitted to prove that the victim had intercourse half an hour before she claimed she was raped, and this could mean the exclusion of highly material evidence. We would appreciate readers' views on whether, apart from evidence which is admissible as being part of the res gestae, there should be

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[7] 1970 J.C. 68.

[8] High Court, Glasgow: Glasgow Herald 14 February 1974.

[9] See paras. 16.08-16.10.

[10] Dickie v. H.M. Advocate (1897) 24R (J) 82.

[11] See e.g. R v. Krausz (1973) 57 Cr App. R.466.

a discretion in the High Court to admit evidence of the sexual behaviour of the victim with other men both before and after the alleged offence. If such a discretion was favoured, we propose that pre-trial notice of intention to examine the victim on this point should be required.

Q.07 In cases of rape and similar assaults it is permissible to introduce evidence that the complainer or victim was reputedly of bad moral character, or that she associated with prostitutes. Such evidence is admitted on the ground of its relevance to credibility, though the reasoning behind this would appear to relate to the moral standards of the nineteenth century. We do not think that sexual morality can generally be regarded as a yardstick of credibility, and the present admissibility of evidence of bad reputation can have the result that victims of sexual offences who are of bad character are reluctant to report the offences to the police. This we regard as an unsatisfactory state of affairs, and would accordingly propose that evidence that the complainer was of bad moral character, or that she associated with prostitutes, should no longer be admissible as being relevant to credibility.

Witnesses

Prostitutes (16.11)

Q.08 If it is accepted that sexual morality should not be a yardstick of credibility then it should no longer be competent to ask a woman if she is a prostitute for the purpose of casting doubt on her veracity. It is thought however that if the question whether or not a woman was a prostitute was not relevant to the issues of a case the court would discourage the question, and that the matter is not important enough to merit formal regulation.

Previous convictions (16.12-16.13)

Q.09 A person who has been convicted of a crime is competent to give evidence, and may be examined on any point tending to affect his credibility,[12] but if the witness denies that he

[12] 1975 Act ss. 138(1) and (3) and 341(1) and (3).

has been previously convicted his denial must be accepted and cannot be contradicted by parole evidence. Thus while a prosecutor might have a listed conviction or an extract in his possession, it would not be possible to prove this conviction by the evidence of witnesses. The point may not be of great practical importance, since it is rare for a witness to deny a previous conviction, and if he does deny it there is the sanction of perjury available. The Thomson Committee were of the opinion that legislation on this topic was not necessary for Scotland,[13] but we would appreciate readers' views on whether a provision should be introduced allowing proof of previous convictions when they relate to credibility, perhaps providing for production of a certified list of previous convictions or an extract and this being spoken to by one witness. If such a provision were introduced, there would require to be an amendment to the present law on the lines of Clause 30 of the Criminal Justice (Scotland) Bill as far as solemn procedure is concerned, in that the witness to speak to the previous confiction would in some cases at least not be on the Crown list of witnesses.

The accused apart from sections 141(f) and 346(f) of the Criminal Procedure (Scotland) Act 1975[14] (16.14-16.17)

Q.10 The law as to evidence of the accused's previous convictions which is led as evidence in causa in support of a substantive charge, or which is given by accident or incidentally, is straightforward. A more difficult question is whether the rule that the accused's previous convictions should not be disclosed to the court before the verdict should be amended. The Thomson Committee considered that while a relaxation might be appropriate in some cases it was impossible to draft a rule which would satisfactorily cover only those cases.[15] Other studies have shown that disclosure of previous convictions can significantly increase the chance of conviction,

[13] Thomson paras. 43.14-43.15.

[14] Formerly Criminal Evidence Act 1898, s.1(f).

[15] Thomson para. 54.07.

and over all we do not think any such disclosure would be fair to the accused. We also agree with the Thomson Committee's proposal[16] that the law should be amended to allow previous convictions outside the United Kingdom to be libelled against the accused, and that when libelling such convictions the nearest United Kingdom analogue should be listed, where necessary, for clarification.

Evidence in rebuttal (16.18)

Q.11 If it is accepted that proof of a witness's previous convictions should be admitted, there will be two exceptions to what seems to be a general rule that a witness's credibility cannot be assailed by the evidence of other witnesses: (a) in the case of proof of a previous conviction and (b) in the case of proof of a previous inconsistent statement[17]. If the facts affecting credibility are also relevant to the questions at issue then, of course, evidence relating to them may be led from other witnesses. We are of the opinion that if the proposal made in paragraph Q.09 is accepted, it should also as a third exception be competent in both civil and criminal cases for a party to lead evidence in rebuttal of evidence given by a witness called by his opponent, which is relevant to that witness's character or credibility. The argument for admitting such evidence is that the court's decision is based on what credibility it ascribes to the witnesses, while the counter-argument is, as previously stated, that the introduction of such "collateral issues" could lead to protracted proceedings and cloud the true issue. In one Scottish case[18] evidence of a witness's prejudice against the defender was admitted, and in England it has always been permissible to call evidence to contradict a witness's denial of bias or partiality towards one of the parties in the case being tried. We request readers' comments on our proposal that the law should be amended to allow such evidence, and if so whether the amendment should apply to both civil and criminal cases.

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[16] Thomson para. 54.08.

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

[18] King v. King (1841) 4D 124.

Evidence as to the reliability of a witness (16.19-16.21)

Q.12 A further question is whether evidence should be admissible to show that a witness suffers from some mental or physical condition which affects the reliability of his evidence. This is a separate question from that whether a witness is of such mental incapacity that he is unfit to be a witness at all. In England Toohey v. Metropolitan Police Commissioner[19] established that evidence could be given about the condition of a witness, and more recent English and Commonwealth cases have considered the extent to which psychiatric evidence may be admitted in relation to the character of the accused.[20] We consider that it should be made clear that evidence of a witness's mental or physical condition, which could affect the reliability of his evidence, should be admissible, even in cases where there is no suggestion of mental illness. Comment is invited on this suggestion. Opinion evidence, including that of a psychiatric nature, is discussed in the next chapter.

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[19][1965] A.C. 595.

[20]See Research Paper, Para. 16.21.

Chapter R

Evidence of opinion and expert evidence

R.01 The term "expert evidence" is used in this Chapter to denote the evidence of persons of skill on matters involving scientific knowledge or acquaintance with the rules of any trade, manufacture or business which are not likely to be familiar to ordinary people.

Ordinary witness (17.02)

R.02 The modern general rule that a witness must state facts and not opinions is only laxly applied, and what is obviously opinion evidence may be admissible from an ordinary witness e.g. identification of handwriting. An ordinary witness can rarely communicate his knowledge of an event except in terms which include expressions of opinions which he himself formed by applying his previously acquired knowledge and experience to what he actually perceived with his physical senses at the time of the event. This, however, does not detract from the general rule regarding opinion evidence, and the position in practice appears to be that evidence which is partially based on inference is admitted where the witness cannot otherwise tell his story. We suggest that it should be made clear that in such circumstances an ordinary witness may give evidence in the form of an expression of opinion.

Opinion on the issue (17.03-17.10)

R.03 The rule that a witness may not state an opinion on the issue before the court is of doubtful utility as regards ordinary witnesses, and it is frequently and necessarily broken in practice by expert witnesses. Expressions such as "it was entirely X's own fault" may be the most vivid and natural way a witness can express the event he is describing. Further, the rule is disregarded in criminal cases where doctors testify as to the sanity of the accused, and as to whether he was unfit to drive through drink. One justification for the rule against evidence of opinion on the issue before the court is that a witness may not encroach on the province of the jury. An expert does not usurp the function of the

tribunal of fact because it is the function of the tribunal to decide whether or not to accept his evidence, even although some expert medical evidence will leave the tribunal little choice as to how to decide.

R.04 England, Canada and the USA all have rules, or proposed rules,[1] which permit non-experts to state their opinions, and permit all witnesses to state opinions on the issues before the court, although these provisions are generally subject to certain qualifications e.g. that a non-expert would be allowed to state an opinion only if it was an intrinsic part of his testimony. It can be argued that such provisions could lead to the coaching of intelligent witnesses, although Sheriff Macphail suggests[2] that the high standards of the courts and legal profession as well as the very nature of the adversary system would preclude this.

Any opinion given which had been formed from inadequate data or irrationality of inference should be exposed by competent cross-examination. A double safeguard would be a general provision to the effect that the court could, in its discretion, exclude evidence of opinion either generally, as in England, or where the probative value of the opinion is outweighed by the danger of misleading the tribunal of fact or unduly delaying the proceedings.

R.05 We propose that all witnesses should be entitled to state opinions on the issues before the court, subject to the qualification that a non-expert should be allowed to state an opinion only if it is an intrinsic part of his evidence. We would welcome views on this proposal.

Specialities of expert evidence

Presence in court (17.11-17.13)

R.06 An expert witness is not allowed to be present in court while other experts are giving evidence, but as a general rule

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[1] Research Paper paras. 17.08-17.10 and L.R.C. Canada, Evidence Code ss. 67-71.

[2] Research Paper para. 17.10.

he is allowed to hear the evidence of the witnesses to fact unless objection is taken, or unless he himself is to speak to facts as well as opinion. If an expert who is to speak to facts and opinion has heard other witnesses speaking to these facts the court has a discretion to hear him.[3]

R.07 A possible reform is that the law could be altered to the extent of making provision for a formal application for permission for the expert to be present because (a) a party may be unaware that the other party's expert is in court, and thus have no opportunity of taking objection before the witness hears evidence; and (b) there are difficulties in the application of sections 140 and 343 of the 1975 Act, and if the question of the witness's presence were to be raised at the outset resort to these sections would be unnecessary. However, we favour permitting an expert witness to be present in court while both witnesses to opinion and witnesses to fact are giving evidence whether or not the expert witness himself is to give evidence to fact, and propose accordingly.

Corroboration (17.14)

R.08 It is now clear that there is no general rule that a skilled witness does not require to be corroborated.[4] Proposed reforms of the law of corroboration generally are discussed in chapter X.

Deceased expert (17.15)

R.09 In Laidlaw v. Paterson's Trustees[5] the judge admitted as evidence a report made on behalf of the pursuer by a builder who had died before the proof. Lord Hill-Watson did state, however, that in considering its value he would have to take into account that the builder was not available for cross-examination. In England, such a report would apparently have been admissible by section 2 of the Civil Evidence Act 1968 and section 1 of the Civil Evidence Act 1972. The law in Scotland is considered in chapter T on Hearsay.

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[3]Criminal Procedure (Scotland) Act 1975, ss. 140, 343.

[4]McKillen v. Barclay Curle & Co. Ltd. 1967 S.L.T.41.

[5]1954 S.L.T. (Notes) 5.

Handwriting (17.18)

R.10 Whilst it is clear that corroborated expert evidence of the comparison of handwriting can be sufficient to entitle a court to convict,[6] we are of the opinion that the matters detailed below require clarification.

Date of allegedly genuine document (17.19)

R.11 There is old authority[7] for the view that documents tendered as genuine for the purpose of comparison must be dated before the one in issue, where they are in the handwriting of the person leading the proof or someone he is in concert with. It is doubted whether this authority would now be followed, although the post-dated document would require close scrutiny.

Admissibility of allegedly genuine document (17.20)

R.12 In a criminal trial it seems an allegedly genuine document is admissible for the purpose of comparatio literarum,[8] although it may be inadmissible for any other purpose. The Sheriffs Walker, referring to the rules as to the stamping of deeds, suggest this may not be so in civil cases.[9] We propose that it be made clear that the same rule is applicable in civil cases.

Opinion of jury and judges (17.21)

R.13 We are of the opinion that neither a judge nor a jury should arrive at a decision on the question of the authenticity of a writing upon their own impression of its genuineness without the aid of evidence, the evidence being either that of persons familiar with the writing, or expert evidence of comparison. The judge and jury are, of course, allowed to examine the writings along with the other evidence in the case. It is for consideration whether there should be a rule in the above terms.

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[6] Campbell v. Mackenzie 1974 S.L.T. (Notes) 46.

[7] Cameron v. Fraser & Co. (1830) 9 S. 141.

[8] HM Advocate v. Walsh 1922 J.C. 82.

[9] Walkers, para. 414(b).

Assessors, men of skill and court experts (17.23-17.24)

R.14 The Court does have a power of remitting a particular problem for the report of a man of business or man of skill. This power, which is inherent in the Court, but is also specified in particular statutes, seems to have been more widely used in the nineteenth rather than the twentieth century. Thus in cases which involved the erection of march fences under the Act 1661 c.41, it was normal for the court to appoint a man of skill to consider the question,[10] and a similar practice was adopted when salmon fishing boundaries were in dispute.[11] Another example arose under section 33 of the Entailed Estates Improvement (Scotland) Act 1770,[12] which provided that a sheriff had to appoint two or more skilful persons to value entailed land which was to form the subject of an excambion. In modern practice there is provision in the Patent Act 1977[13], and the Rules of Court[14] for the appointment of an assessor in patent actions, and the court does not authorise a reduction in the capital of a limited company under section 66 of the Companies Act 1948 in normal circumstances without remitting the matter to a man of skill to report. For example, in the case of Westburn Sugar Refineries[15] the House of Lords proceeded on the opinion of the solicitor appointed to report to the court. There is provision for the Court of Session to summon an assessor at the joint request of the parties,[16] although this procedure is very seldom used, and it is not thought that it need be extended to the sheriff court.

Admiralty actions (17.25)

R.15 There is a prohibition against leading expert evidence when a nautical assessor is sitting in the Court of Session,[17]

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[10] See e.g. Pollock v. Ewing (1869) 7 M 815

[11] See e.g. Keith v. Smyth (1884) 12 R 66

[12] c.51.

[13] c.37 s.98(2).

[14] RC 39-45.

[15] 1951 S.C. (H.L.) 57, [1951] A.C.625.

[16] Administration of Justice (Scotland) Act 1933, s.13, R.C. 38, 39, 41, 45.

[17] R.C. 146.

while in England the court has a discretion whether or not to admit expert evidence. We propose that the court should have such a discretion in Scotland in any action where a nautical assessor is sitting.

Court experts (17.27-17.28)

R.16 The system in adversary procedure whereby each side produces its own expert has been criticised on the grounds that the expert tends to display partisanship in favour of the party calling him, and secondly, that a disagreement between experts may present a seemingly insoluble problem for the court. In practice, however, there are numerous instances of parties coming to an agreement regarding expert evidence, often where medical evidence is concerned. There are also many instances where parties either agree to remit to an expert and his findings settle that part of the case, or where the parties agree on one expert's report being accepted as evidence in the case, although each party might draw different conclusions from the report. In civil law countries, there is a practice whereby courts appoint their own experts, and recently in countries whose practice is based on an adversary rather than an inquisitorial system, the question of whether or not to adopt the court expert procedure has been widely discussed. The Law Reform Committee have concluded that a general court expert system is not desirable except perhaps in custody cases,[18] and although there is provision under the Rules of the Supreme Court for appointment of experts the process has been little used. A similar provision in the Federal Rules of Evidence of the USA has also been little used. We are of the opinion that the present use of assessors and men of skill supplants any need for a "general court expert system" in Scotland, but we would welcome views on the matter.

Disclosure and exchange of experts' reports (17.29-17.42)

R.17 With a view to reducing to a minimum the matters of expertise which are in issue at a trial, and eliminating as far as possible the element of surprise, the Grant Committee stated

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[18] LRC 17, paras. 13-16.

that matters not in dispute should be identified by minute of admission, by certificates or in pleadings,[19] and the Thomson Committee recommended that in criminal proceedings the Crown should take the initiative in reaching agreement on matters to be covered by minutes of admissions and agreement.[20] The Scottish Courts have also encouraged the savings in time and expense which result from the use of joint minutes of admissions.[21] The question is whether the courts should go further and require the disclosure and exchange of experts' reports. In criminal proceedings the Thomson Committee, while not dealing specifically with experts' reports, recommended that generally Crown precognitions should not be available to the defence and defence precognitions should not be available to the Crown.

R.18 As long ago as 1953 the Evershed Committee recommended for England and Wales the compulsory exchange of experts' reports,[22] but it was only by virtue of section 2 of the Civil Evidence Act 1972 and rules of court introduced in 1974 that similar recommendations by the Law Reform Committee[23] were implemented. There has also been a trend in recent years in the USA and Canada to require by statute mutual disclosure of expert evidence prior to trial, although judicial and professional opinion has not been entirely favourable. A note of dissent annexed to the Law Reform Committee's 17th Report[24] pointed out that (apart from medical reports in personal injuries cases) compulsory disclosure and exchange could add more time and cost to trials, and also remove to a large extent the spontaneity of an expert's evidence. Further, the defendant would no longer have the right to decide only at the close of the plaintiff's case whether he would call any, and if so what, evidence: in order to preserve his right to call evidence on a matter of expertise he would have to disclose his expert's report and the plaintiff's expert would then be

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[19] Grant, paras. 532-533.

[20] Thomson, para. 36.04.

[21] See Ayton v. NCB 1965 S.L.T. (Notes) 24.

[22] 1953 Cmnd. 8878, paras. 289-290.

[23] LRC 17, pp. 31-32.

[24] LRC 17, pp. 41-47.

forewarned to meet the cross-examination. We would welcome views on the extent to which such reports should be made available, and for purposes of consultation we invite views as to whether;

(a) in civil proceedings the parties should be obliged to disclose to each other in advance of any proof reports which they intend to found upon

(i) by all experts or

(ii) by some experts only, such as medical experts, or

(iii) by some experts only in certain types of litigation only, such as personal injuries claims?

and (b) in criminal proceedings the parties should be obliged to disclose to each other in advance of the trial reports which they intend to found upon

(i) by all experts or

(ii) by some experts only?

## Chapter S

### Privilege (18.01)

S.01 The word "privilege", although not a term of art in Scots law, is used in this Chapter to denote the right of a person to insist on there being withheld from a judicial tribunal information which might assist it to ascertain facts relevant to an issue upon which it is adjudicating. The subject matter of the Chapter therefore embraces such diverse topics as the confidentiality of communications between spouses, and what was formerly known as Crown privilege, but is now known under the wider heading of public interest immunity. The admission of this privilege or immunity constitutes a fetter on the court in the achievement of one of its most important functions, the investigation of the truth, and its justification is, therefore, that there is some interest protected by the privilege which is more important than the investigation of the truth. While privilege may be conferred and overridden by United Kingdom Statutes, the impact of European Community law must also be taken into account.[1]

### Privileges against self-incrimination

#### General (18.04 - 18.07)

S.02 A witness is entitled to refuse to answer a question if a true answer may lead to his conviction for a crime or involve an admission of adultery.[2] At common law there is nothing to prevent the question being asked, while the statutory provisions in section 2 of the Evidence (Further Amendment) (Scotland) Act 1874 and sections 141(f) and 346(f) of the Criminal Procedure (Scotland) Act 1975 state respectively that "no witness ... shall be liable to be asked or bound to answer", and "shall not be asked and if asked shall not be required to answer ...". We think it would be impossible in practice to place on the judge the duty of preventing an offending question being asked. If a new general rule is not to be adopted,[3] we propose that it should be incumbent on

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[1] See e.g. Taxes Management Act 1970 s.13, Finance Act 1975 Sch.4, EEC Council Regulation No. 17/62 6 Feb. 1962.

[2] Walkers, para. 354(a).

[3] See para. S.05.

the judge to require the question to be withdrawn and expunged from the record of proceedings, either ex proprio motu or at the request of the witness or his legal adviser. If a party or his counsel take objection, they should merely be required to state that the question is an improper one and request the judge to have it withdrawn. A difficulty could arise as to how, when a witness takes objection himself, he satisfies the court that the question is of an incriminating nature. Dickson states[4] that the court will generally be satisfied with a statement from the witness to the effect that the question falls within the rule against self-incrimination, but he quotes no strong authority to support this proposition. It is for the court to decide such a matter, but the witness might have to disclose some matters of a damning nature to convince the court. Professor Cross has suggested that in an extreme case the witness could make his submission wholly or partially in camera, or alternatively under an undertaking that the statement would not be used outside the proceedings in which they were given.[5] The latter alternative would have attendant problems in practice and it may be that the problem is not sufficiently great to merit such proposals. We would welcome views on these alternatives.

Admissibility of answer (18.07)

S.03 There appears to be no reported authority on the admissibility of an incriminating answer which is given where a claim of privilege has been wrongly rejected, or where the witness could have claimed the privilege, but failed to do so. In England, in the former case the answer is treated as inadmissible in subsequent criminal proceedings against the witness,[6] and in the latter case it is admissible in the instant and later proceedings.[7] It is thought the same rule would apply in Scotland in the former case, and in the latter case at least where the witness had been warned by the presiding judge.

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[4] Dickson Para. 1789.

[5] Cross, Evidence 4th.ed. 1974, p.247.

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

[7] R. v. Sloggett (1856) Dears 656.

Statutory restrictions on the privilege (18.08)

S.04 A large number of statutes remove for certain purposes the privilege against self-incrimination in regard to criminal offences, some providing that incriminating answers may be used against the person who gives them,[8] others providing that they may not[9] and others again having no express provision on the matter.[10] In the latter case the position appears to be that if the information has been lawfully obtained, and the statute does not restrict the use of it, it is admissible in subsequent proceedings.[11] This was the rule applied in Foster v. Farrell[11] and if it is accepted as satisfactory, there is no reason to make statutory provision on these matters. Many of the statutes involved are United Kingdom measures, and the question of their proper construction is best left to the courts.

Possible new general rule (18.09 - 18.11)

S.05 A possible reform which appears of considerable merit is to be found in section 5 of the Canada Evidence Act 1970 which abolished the common law privilege against self-incrimination, but substituted a statutory protection which provides that a witness may be compelled to answer a question, although the answer cannot be used in subsequent criminal or civil proceedings if he claims protection under the Act. While Ontario has a similar provision, the Ontario Law Commission have proposed the removal of the rule requiring the witness to object to answer in order to obtain the protection of the section.[12] If such a provision were adopted for Scotland exceptions to the section would have to be taken into account e.g. perjury of a witness in proceedings under the

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[8] Companies Act 1948, s.167(4), Companies Act 1967, s.50.

[9] Explosive Substances Act 1883, s.6(2).

[10] Bankers' Books Evidence Act 1879, s.7.

[11] Foster v. Farrell 1963 J.C. 46.

[12] See Research Paper para. 18.09.

Explosive Substances Act 1883. A distinction would also have to be made between statements made in legal proceedings and extra judicial statements, and provision would have to be made also for the case of witnesses who feared prosecution in a foreign jurisdiction to which or in which such immunities did not apply.[13]

S.06 An alternative mode of reform is to provide immunity in a limited number of cases, such as has been done in section 31(1) of the Theft Act 1968 and a fairly large number of other English Acts. Section 31(1) provides that a person shall not be excused on the ground of incrimination of himself or his spouse from answering any question put to him in any proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property; but no statement or admission is admissible against him or his spouse (unless they were married after it was made) in proceedings for an offence under the Act. The underlying principle is that the possibility that persons entitled to property or payment of money may recover it would be greatly reduced if in such civil proceedings witnesses could rely on the privilege against self-incrimination, and it is therefore desirable to encourage full disclosure. We would appreciate comment on these two possible alternatives, and if the latter is favoured whether such a provision should extend to offences committed in the United Kingdom.

Criminal offences

Incrimination of spouse (18.12)

S.07 In England section 14(1)(b) of the Civil Evidence Act 1968 extended the privilege against self-incrimination to privilege against the incrimination of a spouse, with the right to waive the privilege being that of the witness, not his spouse. The Criminal Law Revision Committee in their draft Bill allow the accused no privilege against incriminating his wife except in relation to an offence going to his credibility as a witness.[14] The matter would not appear at present to be of great practical importance as far as Scotland is concerned, and we make no proposal thereon, although we would welcome comment.

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[13] See para. S.08.

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

Liability to prosecution furth of Scotland (18.13)

S.08 There is no reported authority in Scotland as to whether a person may claim privilege to refuse to answer questions or produce documents which might incriminate him under foreign law, although the difficulties which may arise in this area are illustrated by the recent House of Lords decision in Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation.[15] A practical difficulty may be the judge's knowledge or lack of knowledge of the foreign law (it must be borne in mind that European Community law is national law). We invite comment on whether it is thought there should be a privilege against incrimination under foreign law. If opinion favours this, two further important questions arise. Firstly, should the privilege be restricted territorially, and if so should the territorial extent be that of the EEC? (At present in England in civil proceedings the Civil Evidence Act 1968[16] restricts the territorial extent to the United Kingdom). Secondly, should there be a qualification that there must be a distinct possibility of the party claiming privilege being prosecuted in the foreign country before the privilege can be invoked? We would welcome readers' comments on these questions.

Confidential Communications between husband and wife

Civil cases (4.06 - 4.08)

S.09 Section 3 of the Evidence (Scotland) Act 1853 makes the husband or wife of any party a competent witness in any action or proceeding in Scotland with the proviso that no spouse is competent or compellable to give evidence against the other spouse of any matter communicated by him or her during the marriage. The question whether one spouse is, as a general rule, a compellable witness against the other has been discussed previously.[17]

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[15] [1978] A.C. 547.

[16] s.14(1)(c).

[17] See paras. D.02 - D.03 and Research Paper para. 4.03.

S.10 We are of the opinion that the privilege afforded to communications between spouses is today of no great importance. Other very close family relationships are not protected in a similar manner, and there would appear to have been no untoward effects caused by the repeal of the English provision corresponding to section 3 of the 1853 Act by the Civil Evidence Act 1968. We invite comment on whether section 3 of the Evidence (Scotland) Act 1853 should be repealed.

S.11 If opinion does not favour the repeal of section 3 a number of matters would require consideration. The first is whether the privilege should be conferred on one or other of the spouses. It is difficult to see why the spouse who reposed the confidence should not be at liberty to disclose it, and we consider that if a privilege for communications between spouses were to be retained, it should be that of the communicator alone, and should be waivable by the communicator alone, as in the Model Code and the Uniform Rules of Evidence in the United States. We do not favour making the privilege a joint one, requring waiver by both spouses as practical disadvantages would arise therefrom.

S.12 If spouses were to remain neither competent nor compellable regarding marital communications, or if the privilege were attached to the communicator and not waived by him, we are of the opinion that it should be provided that the other spouse should not be asked and, if asked, should not be required to answer, any question tending to elicit information about any matter communicated to her, and that the presiding judge should give the appropriate warning.

S.13 If section 3 of the 1853 Act was not repealed it would be necessary to take account of the fact that, under the present law, communications between husband and wife that have been intercepted or overheard may be proved by evidence other than that of the spouse.[18] If the policy of the law is to be the protection

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[18] Walkers para. 355(b). See also Research Paper para. 4.09.

of the marital communications, consistency might seem to suggest that such evidence should be inadmissible. We, however, are of the tentative view that communications which have been intercepted or overheard should be admissible, but would welcome comment.

Confidentiality after dissolution of marriage or separation (4.10)

S.14 There appears to be no reported decision on the question of whether section 3 permits the examination of a divorced or a widowed spouse as to communications from the other spouse during the marriage. The issue depends, as the Research Paper explains,[19] on the view taken as to the basis of the privilege. We provisionally recommend that the privilege should cease to apply after the marriage has been dissolved by death or divorce. We would also welcome readers' views on whether the privilege should cease if the parties have been judicially separated or are no longer cohabiting.

Excepted proceedings (4.11)

S.15 Any new provision would also have to take account of the fact that despite the generality of the words "any proceedings" in section 3 of the Evidence (Scotland) Act 1853 the rule has not in practice been applied to divorce proceedings, examinations in bankruptcy,[20] or according to the Sheriffs Walker in other cases "where the action is concerned with the conduct of the spouses towards each other."[21] The Law Reform Committee were of the opinion that if a privilege were to be retained, there would have to be a provision that it should not apply in proceedings between spouses.[22] We would welcome views on this question.

Privilege concerning marital intercourse (4.12 - 4.15)

S.16 This privilege was enacted by section 7 of the Law Reform (Miscellaneous Provisions) Act 1949.[23] Section 7(1) was designed to abolish the rule in Russell v. Russell,[24] although this had not

[19] Para. 4.10.

[20] Sawers v. Balgarnie (1858) 21D, 153, Bankruptcy (Scotland) Act 1913, ss. 86, 87.

[21] Walkers para. 355(b).

[22] LRC 16. para. 43.

[23] c.100.

[24] [1924] A.C. 687.

been adopted by the law of Scotland, and section 7(2) created an entirely new privilege whereby each spouse is entitled to decline to give evidence that marital intercourse did or did not take place between them during any period. The privilege applies to any proceedings, not only consistorial causes, and whether or not the evidence would tend to bastardise a child. Section 7(2) does not appear to have been judicially considered in the Scottish courts. In England the privilege was repealed in 1968 except in relation to criminal proceedings, and the Criminal Law Revision Committee had no doubt that it should be abolished in criminal proceedings.[25] We can see no convincing justification for the existence of the privilege, and propose that it should be abolished both in relation to civil and criminal cases. It should be noted that it may not in any event have been intended that the privilege extend to criminal causes.[26]

Confidential communications between husband and wife

Criminal cases (6.26 - 6.28)

S.17 Sections 141(d) and 346(d) of the 1975 Act provide that no husband or wife is compellable to disclose any communication made during the marriage. These sections differ from section 3 of the Evidence (Scotland) Act 1853 in that the words "competent or" do not appear, which means that the objection is only open to the witness. Evidence of third parties to such communications is competent. We have raised the question elsewhere[27] whether the privilege should be abolished in civil cases, and if opinion favours that change we do not consider that witnesses in criminal cases should enjoy a privilege which is not available in the civil courts. We therefore put forward for consideration whether sections 141(d) and 346(d) of the 1975 Act should be repealed.

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[25] CLRC, para. 173.

[26] See Research Paper para. 4.13.

[27] Para. S.10.

Privilege after dissolution of marriage or separation? (6.30)

S.18 This question has already been discussed in the context of civil proceedings,[28] and the question of whether a divorced spouse of an accused is in the same position as a spouse seems never to have been decided in Scotland. We are of the opinion that a divorced spouse of an accused should be competent and compellable on all matters for all parties, and would appreciate comment on whether it is thought separated spouses should be similarly classified.

Bankrupt (18.14)

S.19 Although it has been decided in England that a bankrupt must at his public examination answer all questions relating to his affairs whether they incriminate him or not[29] the point has not been directly decided in Scotland and the writers vary in their views. Our view is that the bankrupt should be required to answer all questions at his public examination, although his answers would not be available against him in any subsequent civil or criminal proceedings, other than in relation to perjury in respect of such answers. This question is, however, dealt with in our forthcoming Report on Bankruptcy.

Adultery (18.17 - 18.18)

S.20 At common law a witness is not bound to answer a question tending to show that he has committed adultery - this rule applying to both civil and criminal cases, and not being confined to cases where adultery is the ground of action. Section 2 of the Evidence (Further Amendment) (Scotland) Act 1874 confirms the privilege in respect of the parties to any proceeding instituted in consequence of adultery, although a peculiarity in the drafting in practice appears to make the section merely a restatement of the common law. The privilege refers to bygone days when adultery was a crime and we can see no logical reason for retaining it. We therefore propose the abolition of the privilege.

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[28] Para. S.14.

[29] Re Paget ex p. Official Receiver (1927) 2 Ch. 85.

Privileges in aid of litigation - Solicitor and client (18.19 - 18.20)

S.21 The justification of the privileges examined in this section is that without them the administration of justice would be impossible. Professional communications between a client and his legal advisers are protected at common law, even where the client does not contemplate litigation because, in the words of the Law Reform Committee, "what distinguishes legal advice from other kinds of professional advice is that it is concerned exclusively with rights and liabilities enforceable in law".[30] In this context the term "legal adviser" includes counsel, law agents and their clerks. This privilege does not apply to questions put to a solicitor in the course of the public examination of a bankrupt.[31] The privilege may however be overridden by statute, and recent legislation provides several examples of this.[32] Regard must also be had to the very wide investigative powers of the European Commission under Regulation 17/62,[33] which contains no protection for legal professional privilege. Cases have occurred where a document containing the advice of a lawyer to his client was used by the Commission as evidence of intentional infringement of Articles 85 and 86 of the Treaty of Rome.[34] While solicitor/client privilege is reasonably well-defined and works satisfactorily in practice two questions merit consideration: whether the privilege extends to a statement made by an accused person to a solicitor who declines to act for him, and whether evidence is admissible about a professional communication between a client and his legal adviser which has been improperly obtained.

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[30] LRC 16, para. 19.

[31] Mackenzie v. Mackersey 1 March 1823 F.C. 193; Rankin v. Jamieson (1868) 6 S.L.R. 108.

[32] See e.g. Taxes Management Act 1970, s.13, Finance Act 1975, Sch. 4. Companies Act 1948, s.167.

[33] Council Regulation No. 17/62 6 Feb. 1962.

[34] See e.g. Re Quinine Cartel 69/240/EEC - J.O.L. 192/5 5 Aug. 1969.

Statement by accused to solicitor who declines to act (18.21)

S.22 Although the point has not been conclusively established it may be that a statement made by an accused to a solicitor who declines to act is not confidential.[35] In England, the legal privilege applies to communications made with the object of obtaining a solicitor's services even if these are not in fact retained, provided that the relationship of solicitor and client is at least in contemplation, and the communications are fairly referable to that relationship.[36] We consider it desirable that a similar rule be enacted for Scotland, and would propose accordingly.

Communications improperly obtained (18.22 - 18.23)

S.23 If a communication made between a client and his legal adviser when made orally is overheard, or when made in writing is stolen, or otherwise wrongfully obtained, by the client's opponent or a third party, can the client still claim privilege for it or can the third party give evidence about it? There is no reported authority on this in Scotland, although in England it is the law that the party who would otherwise have been entitled to claim privilege for the communication can no longer do so. It is of interest to note that in the United States, over the last 30 years, the law has moved from a position which was close to the present English position to a situation where the client's right to prevent a third party testifying is unqualified. A fuller discussion of this topic is contained in chapter U on admissibility of evidence improperly obtained.

Communications made post litem motam (18.24)

S.24 Communications to or by a litigant in connection with his investigations into an accident, an alleged breach of contract or any other event giving rise to an action are, generally speaking, confidential.[37] The general rule is that no party can recover from another material which that other party has made in preparing his own case, the rationale of the rule already having been explained.[38]

[35] HM Advocate v. Davie (1881) 4 Coup. 450.

[36] Minter v. Priest [1930] A.C. 558.

[37] See Research Paper, para. 18.24 n.72.

[38] See para. S.21, Research Paper paras. 18.20, 18.24.

Reports by servants (18.25 - 18.27)

S.25 One exception to the general rule is that a report by a servant, present at the time of an accident, made to his employer at or about the time of the accident, is not confidential.[39] An anomalous consequence is that one party may by chance recover a list of the other party's witnesses. One justification has been said to be that such reports enable the employer to improve his methods, and another is that they may well contain an unvarnished account of what happened, and be equivalent to the reception of de recenti statements in criminal law. The Sheriffs Walker have commented on the first of these justifications to the effect that in present times a principal purpose of the report is to enable the employer's insurance company to decide on their attitude to any possible damages claim.[40] As to the second justification, it may be noticed that de recenti statements are not recovered in practice (although it is competent to do so), and it seems arbitrary to permit recovery of a special class of statement in one category of cases. A counter-argument is that such reports may contain untrue information in order to protect the employee supplying the same.

S.26 One option would be to abolish the exception to the general rule. Alternatively, the general rule that communications between a client and his legal advisers are irrecoverable could be restated in terms which would permit the recovery of any relevant documents or other material, other than any prepared solely, or perhaps predominantly, for the purposes of consideration by professional advisers in anticipation or in connection with litigation, and place upon the party from whom recovery is sought the onus of establishing that the material sought falls within that exception. The employer would therefore have to establish in each case that the employees' de recenti reports were prepared solely (or predominantly) for that purpose. Such a rule would also permit the recovery of statutory reports and records such as accident books (unless these were irrecoverable for other reasons), but would

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[39] See e.g. Dobbie v. Forth Ports Authority 1975 S.L.T. 142.

[40] Walkers, para. 395(b).

not permit the recovery of precognitions. The recent decision of the House of Lords in Waugh v. British Railways Board[41] (reversing previous long standing English authority to the contrary) held that a document such as an internal inquiry report which was contemporary, contained statements by witnesses on the spot, and would almost certainly be the best evidence of the cause of the accident should be recoverable unless the dominant purpose for which the report was prepared was for submission to the party's legal advisers in anticipation of litigation. We favour this dominant purpose test, and propose that the general rule that communications between a client and his legal advisers are irrecoverable should be restated in terms which would permit the recovery of any relevant documents or other material, other than any prepared predominantly for the purpose of consideration by professional advisers in anticipation or in connection with litigation. If this is not acceptable we would not propose that the privilege be extended to reports made by a servant present at the time of an accident to his employer.

Privileges in aid of settlement and conciliation (18.28)

S.27 It is well understood that admissions made by a party in the course of abortive negotiations for the settlement of a dispute are not admissible in evidence, and the same applies more widely to "without prejudice" communications. This privilege appears to be well justified by the public interest in the settlement of disputes, either without litigation, or where litigation has ensued, with as little expenditure of time and money as possible.

Matrimonial disputes, Spouses privilege (18.29 - 18.31)

S.28 It is now settled law in England that a third party called in by one or other spouse to act as a mediator in a matrimonial dispute cannot, without the consent of both spouses, disclose any communications with either of them, if made while he was acting as such mediator in connection with pending or contemplated matrimonial proceedings. This principle has been extended to cover

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[41] [1970] 3 W.L.R. 150.

direct negotiations between the spouses where no third party intervenes.[42] While there are no reported decisions on the question in Scotland, it can be argued that the reason for the rule seems equally strong here, especially as the practice works well in England. The counter-argument is that such a privilege might have the effect of concealing the whole truth regarding the history of the marriage, and the court should be in possession of all available information when considering such important questions as custody. We would welcome views on whether it is thought that such a privilege should be introduced into Scots law.

A conciliator's privilege? (18.32)

S.29 Although a privilege for marriage guidance counsellors was recommended as long ago as 1956 by the Royal Commission on Marriage and Divorce,[43] this recommendation was not acted upon. There are difficulties in conferring such a privilege,[44] and we agree with the conclusions of the Law Reform Committee that a privilege for conciliators would either be ineffective or cause injustice, unless the spouses were deprived of their right of waiver, a right of which the Committee did not think they should be deprived.[45] Accordingly, we propose that no privilege should be conferred on marriage guidance counsellors.

Privileges in protection of confidential relationships (18.33-18.34)

S.30 In the course of many different types of relationship communications are made in confidence that they will not be disclosed, and if the confidant thereafter makes disclosure to a third person, he may be liable in damages for breach of contract

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[42] Theodoropoulas v. Theodoropoulas [1964] P.311.

[43] Morton Report Cmnd. 9678 para. 358-359.

[44] See Research Paper para. 18.32.

[45] LRC 16, para. 40.

or confidence, or may be held to have acted in breach of his professional code of ethics.[46] However, apart from the solicitor/client relationship, and possibly those involving clergymen, the confidant cannot refuse to testify in court. The court does have a residual power to excuse a witness from answering on the grounds of conscience, but the circumstances in which such a situation would arise are hard to visualise.[47] In England, however, the courts have a wider discretionary power to permit witnesses not to answer.[48] Assuming the continued recognition of the privilege in the solicitor/client relationship, two alternatives for reform would be to recognise a discretionary judicial power to confer privilege in other circumstances, or to identify particular relationships and confer on these a privilege similar to that existing in the solicitor/client relationship.

Ratification of privilege for other relationships (18.37)

S.31 Wigmore identified four requirements for the establishment of what is known in the common law world as a "professional privilege",[49] and using this test we find that only clergymen and doctors appear to meet it. Although they do not satisfy Wigmore's test the position of journalists and partners (inter se) is also discussed below. For a discussion on wider issues of confidentiality readers are referred to our Memorandum on Confidential Information.[50]

Clergymen (18.38 - 18.44)

S.32 The authorities in Scotland are few and inconclusive as to whether any privilege is conferred on communications to clergymen. In England the authorities are against the existence of any such

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[46] See generally Scottish Law Commission Memorandum No. 40, Confidential Information.

[47] H.M. Advocate v. Airs 1975 J.C. 64 at p.70.

[48] See D. v. N.S.P.C.C. [1978] A.C. 171.

[49] Wigmore, Evidence in Trials at Common Law, (1961 ed) vol. 8, No. 2285, p.527. See Research Paper para. 18.37.

[50] Scottish Law Commission Memorandum No. 40.

privilege and both the Law Reform Committee[51] and the Criminal Law Revision Committee[52] were opposed to any change in the law. The question would not seem to be of great practical importance in Scotland. If it was decided that a statutory privilege should be conferred, it would be necessary to formulate an acceptable definition of the communications to which the privilege attached, and also to identify the clergymen to whom the privilege applied (as perhaps is provided for by section 8 Marriage (Scotland) Act 1977). We consider that no such privilege should be granted, and that any problems arising can be resolved by the exercise of the present judicial discretion.

Doctors (18.45 - 18.50)

S.33 A doctor, if called upon, must give in evidence information he has obtained from his patient, or about his patient, from observation. The position is the same in England, subject to the overriding discretion the presiding judge has, and once again the Law Reform Committee[53] and Criminal Law Revision Committee[54] recommended that the law should not be altered, although several countries have some form of privilege for doctors. It may be argued more strongly that there should at least be a privilege conferred in the case of psychiatrists, but we are not of the opinion that the present law creates any significant practical problem and therefore propose no change.

Journalists (18.51)

S.34 A journalist does not enjoy any privilege either in Scotland or in England. In Scotland, the court might in the exercise of its discretion excuse him from answering a relevant question which was judged to be unnecessary or not useful, but such circumstances would be quite exceptional.[55] It may be noted in

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[51] LRC paras. 46-47.

[52] CLRC paras. 272-275.

[53] LRC paras. 48-52.

[54] CLRC para. 276.

[55] H.M. Advocate v. Airs 1975 J.C. 64 at p.70.

contrast that Austria, Germany, Norway, Sweden and many States in the USA have some form of journalistic privilege. One important point is that, unlike doctors and clergymen, journalists do not receive confidences in order to provide professional assistance. Our provisional view is that no special privilege should be conferred on journalists.[56] The Law Reform Committee of Western Australia is presently examining the matter,[57] and the questions posed by them illustrate the practical difficulties there would be in creating a statutory privilege for journalists, even if it were thought desirable.

Partners (18.52)

S.35 Despite a statement to the contrary by the Sheriffs Walker[58] it seems generally understood that privilege does not attach to communications between partners, nor would there seem to be any grounds for granting such privilege. It may be desirable to make it clear that no question of privilege arises in such cases.

Other relationships (18.53)

S.36 There are many other cases in which the recipient of a communication owes to a communicator a duty of non-disclosure e.g. insurance companies and banks. They do not enjoy the privilege of withholding in court the information they receive if it is relevant to the issue upon which the court is adjudicating, unless in highly exceptional circumstances they are excused by the court.[59]

S.37 We do not consider that privilege should be granted in any of these cases. However, we would welcome comment on whether privilege should be conferred on any of the groups mentioned in paragraph S.32 and following, or on any other groups.

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[56] See British Steel Corporation v. Granada Television Ltd. The Times May 8, 1980 (C.A.)

[57] Working Paper Project No. 53.

[58] Walkers, para. 391.

[59] H.M. Advocate v. Airs 1975 J.C. 64 at p.70.

Recognition of a discretionary judicial power (18.35)

S.38 If a discretionary judicial power to confer privilege in any particular circumstances were introduced, guidelines would have to be introduced also, such as that the privilege would apply only to facts revealed to the confidant for the purpose of obtaining professional assistance. In addition, the circumstances in which the court would be entitled to grant the privilege would have to be decided. The test could be that privilege would be granted where disclosure would be more harmful than helpful to the public interest. One serious difficulty of such a reform would be that no matter how clearly the legislation was drafted there would be a risk of inconsistent decisions. We invite comment.

Public policy (18.54)

S.39 Evidence may be excluded on the grounds of public policy under the doctrine of what was formerly known as Crown privilege, but as far as England at least is concerned, now appears to be termed public interest immunity.[60] While the Scottish courts have always claimed the right to overrule a ministerial certificate objecting to a call for production of documents, it was not until Glasgow Corporation v. Central Land Board[61] that it was clarified that the law as stated in the House of Lords decision of Duncan v. Cammell Laird & Co.[62] was not the law of Scotland. The further House of Lords decision in Conway v. Rimmer[63] brought English law into line with Scots law. It was there stated that the test to be applied was whether the public interest in the administration of justice not being frustrated outweighed a ministerial objection to production of documents. Although this power to overrule ministerial objections is now recognised in both jurisdictions, courts on both sides of the Border have been slow to exercise it.

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[60] See Burmah Oil Co. Ltd. v. Bank of England [1979] 3 All E.R. 700, Lord Salmon at p.715, Lord Keith of Kinkel at p.722.

[61] 1956 S.C. (H.L.) 1.

[62] [1942] A.C. 624.

[63] [1968] A.C. 910.

S.40 Objections to the production of documents in this sphere fall into two categories, these being first, that it is against the public interest to disclose the contents of particular documents, and secondly, the documents belong to a class which should be withheld irrespective of their contents. A claim for non-production based on the ground that the documents fall within the second category is perhaps stronger than that of documents falling within the first, but the House of Lords have made it clear that they will not regard any particular class of documents as sacrosanct.[64]

S.41 A further recent decision of the House of Lords which requires notice is that of the Science Research Council v. Nasse (conjoined with BL Cars Limited v. Vyas),[65] where their Lordships made it clear that public interest immunity does not extend to confidential reports relating to an employee, and that discovery should be ordered whenever it was necessary for fairly disposing of proceedings. It was stated that before ordering production of documents the tribunal should inspect them in order to verify whether (a) they should be produced and (b) if so, whether steps could be taken to limit exposure only to the relevant parts of a document. It may be that this decision is more in line with Scottish decisions such as Higgins v. Burton,[66] where the Lord Ordinary questioned whether there was such a thing as public interest except in the national area, when put forward by either a minister of the Crown or the Lord Advocate. While, therefore, the law in Scotland and England has been rationalised to a certain extent there may remain differences. We do not, however, think it appropriate to make any proposals in this area of the law.

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[64] Burmah Oil Co. Ltd. v. Bank of England [1979] 3 All E.R. 700.
[65] [1979] 3 All E.R. 673.
[66] 1968 S.L.T. (Notes) 52.

Chapter T

Hearsay (19.01-19.21)

T.01 In this chapter we consider various aspects of the present law in relation to hearsay. We employ the terminology used by the Sheriffs Walker -

> "Hearsay evidence is evidence of what another person has said. So defined it includes both secondary hearsay, which may be admissible as indirect evidence of the facts alleged in the statement and primary hearsay, which may be admissible as direct evidence that the statement was made, irrespective of its truth or falsehood."[1]

Primary hearsay is in general admissible, provided that the mere fact that the statement was made - irrespective of the truth or falsehood of its contents - is relevant. But secondary hearsay is usually inadmissible as evidence of the facts alleged in the statement.

T.02 This restrictive view taken by the law as regards secondary hearsay has been justified on a number of grounds.[2] One reason, but not the main reason, is that hearsay evidence may be simply superfluous: and it can be predicated of many instances where secondary hearsay is in fact admitted, that the non-availability of the maker of the statement at least means that a non-hearsay statement is impossible. The main reasons given are - that secondary hearsay is not the "best evidence", that there is a danger of inaccuracy, and that the statement was made by a person not under oath and not under scrutiny by the Court. All these appear to the Commission to be reasons why it is desirable to scrutinise hearsay evidence very closely: it is a different question whether they are separately or in conjunction sufficient to outweigh the general rule that all relevant evidence should be admissible. The present law results in certain disadvantages to the litigant, which include the exclusion of reliable evidence, the impossibility or expense of adducing admissible direct evidence, and the adoption of

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[1] Walkers chapter 29.

[2] See Research Paper paras. 19.03-19.16.

devices to evade the exclusion. In addition, courts now proceed upon a basis as to the adduction of facts which are not necessarily applied in tribunals, inquiries, arbitrations and the like. Many of these bodies determine issues of great importance without being limited by the hearsay rule. Against that background, while we have no concluded view on the question, we invite readers' comments on whether the rule against hearsay evidence should be abolished, and if so in what circumstances.

T.03 Apart from the general question posed above, there appear to be two possible modes of reform open in relation to the law on hearsay, these being (a) a series of statutory reforms to cover particular difficulties,[3] or (b) to devise a code containing a general rule as to the inadmissibility of hearsay and a number of specific exceptions.[4] We do not favour the approach adopted in the Civil Evidence Act 1968, which is an amalgam of (a) and (b) above. This Act which has attracted considerable criticism and controversy, has created important and anomalous differences between the rules of evidence in civil and criminal cases. We adopt method (a) in this Chapter, and consider various aspects of the present law which have caused or which seem likely to cause difficulty in practice.

Secondary hearsay (19.22)

Maker of statement

T.04 Apart from the statutory exceptions relating to documentary hearsay the only recognised exceptions to the rule that hearsay is inadmissible as evidence of the facts alleged in the statement occur when the maker of the statement is dead or permanently insane, and at least in a civil case, a prisoner of war.[5] Questions have arisen as to the recognition of any further exceptions and the date on which the competency of the maker of the statement as a witness falls to be tested.

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[3] e.g. Bankers' Books Evidence Act 1879, c.11.

[4] Scottish Law Commission Memorandum No. 8 - Draft Evidence Code Chapter 1.

[5] Walkers para. 371.

Unfitness by reason of bodily or mental condition (19.23-19.25)

T.05 The exception of permanent insanity has now been firmly established, but we consider the category should be extended to the case where the maker of the statement is permanently unfit by reason of bodily or mental condition either to give evidence in court or on commission, and we propose accordingly. A further possibility is that temporary bodily or mental disability should also form a recognised exception, and in order to prevent abuse it could be provided that certificates by two medical practitioners would be required, and that the court would have a discretion to accept the certificates. We invite comment on the proposal above, and also on whether the exception should be extended to temporary disability.

T.06 A further reform which we favour is that hearsay evidence of an oral statement should be admitted, subject to appropriate safeguards, where the maker is abroad and cannot reasonably be expected to return, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected, due to lapse of time, to have any recollection of the matter; these categories being provided for in statutes relating to the admissibility of records. If the person is abroad we recognise that his evidence could be taken on commission, at least in civil cases, and the exception that he cannot with reasonable diligence be identified or found would, if applied to oral statements, be open to abuse especially in criminal cases. One possible safeguard could be that notice to lead evidence of such a statement would be required, with particulars of the statement and the reason why the maker could not be called. As for loss of recollection, a statement may be made in good faith by a witness who then genuinely forgets the matters dealt with. The circumstances of making and forgetting such statements should be evaluated in an assessment of their weight rather than that they should all be excluded on the ground of possible abuse. We welcome views on our proposal that the three foregoing cases should be recognised as exceptions to the hearsay rule.

Prisoner of war (19.26)

T.07 Where the maker of the statement is a prisoner of war we think, that provided the court is satisfied as to this fact, the statement should be admissible in criminal as well as civil cases. We propose accordingly.

Competency of maker of statement as witness (19.27)

T.08 The maker of the statement must be a person who would have been a competent witness. We propose that the date on which his competency should be tested is the time when the statement is tendered in evidence.

Double hearsay (19.28)

T.09 According to the Sheriffs Walker hearsay of hearsay is probably admissible, provided that each statement fulfils the necessary conditions as to the makers and the nature of the statement, although two of the authorities supporting this proposition are pedigree cases and are probably unsafe guides in other actions.[6] We propose that it should be made clear that such double hearsay is admissible.

Nature of statement

Statement by way of precognition (19.29-19.31)

T.10 Although the maker of a statement is proved to be dead, permanently insane or a prisoner of war, and would have been a competent witness at the material date, evidence of the statement is inadmissible if it was made by way of precognition or in a similar manner. The argument against admitting precognitions in such circumstances is that statements made post litem motam at the instigation of a party are best excluded. Arguments in favour of some relaxation of the rule are that interest, having been abolished as a ground of exclusion of witnesses in the nineteenth century, should no longer be a ground for exclusion of statements by persons deceased, and also that statements made in evidence in prior proceedings by a person now deceased may, in certain circumstances, be admissible despite his interest in the subject matter.[7] Such

[6] Walkers para. 371.

[7] Hogg v. Frew 1951 S.L.T. 397 cf. Campbell v. Cook 1948 S.L.T. (Notes) 44.

statements may be distinguished from those made on precognition in that they are subject to cross-examination, but on the other hand dying depositions are admissible although they may be tendentious and unreliable. It is difficult to see why precognitions are excluded when such other statements are admitted. We invite comment on whether evidence of a statement by way of precognition by someone who would have been a competent witness should be admissible, and if so in what circumstances. We propose that any new rule should apply to oral statements as well as to written statements by persons who are dead or who are unable to give evidence through unfitness by reason of bodily or mental condition.

Evidence given in prior proceedings (19.32)

T.11 Should the evidence of a witness now deceased, given in prior proceedings between different parties be admissible in proceedings when there has been no cross-examination on behalf of a party to the later action? We propose that such evidence should be admissible, but that the latter fact should have a bearing upon its weight. In H.M. Advocate v. Waddell[8] a transcript of the evidence of the victim's husband at the trial seven years before of another man for the ame murder was read to the jury, the husband having died in the interval between the trials.

Dying depositions

Admissibility in event of deponent's recovery (19.33-19.34)

T.12 At present a dying deposition is not used unless the deponent dies. If he is unable to give evidence through unfitness by reason of his bodily or mental condition there are strong grounds for arguing that his dying deposition should be admissible, in the same way as has been proposed in relation to other types of secondary hearsay.[9] We propose accordingly, and invite comment on this question. Dying

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[8] The Scotsman, 20 November 1976. Reported on another point 1976 S.L.T. (Notes) 61.

[9] Para. T.05, ante.

depositions appear to be admissible only in trials for the murder or culpable homicide of the deponent, and not in any other criminal or civil proceedings. It seems logical to provide that they should be admissible in trials on other charges and in civil cases, and we so propose.

Proof of deposition (19.35)

T.13 When the deponent dies before the trial and his deposition is put in evidence, two witnesses, one of whom is the sheriff, prove the deposition and establish that the deponent realised what he was doing. It has been suggested that the sheriff should make a statement to the court indicating the circumstances attending the taking of the deposition.[10] While we do not consider this would be appropriate if the deponent survived and gave evidence, we agree with the suggestion when the deponent dies and propose that such a rule be enacted.

Privilege (19.36)

T.14 It is thought that privilege attaches to statements contained in dying depositions,[11] although this is not clear. If no privilege did attach the deceased's estate could be sued in defamation, a possibility which we regard as undesirable. We therefore propose that these statements should be privileged in the same way as statements contained in precognitions.

Affirmation (19.37)

T.15 Although it is stated[12] that the deposition is taken on oath we understand that in practice deponents have been allowed to affirm, and we consider it entirely proper that deponents should be offered the alternative.

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[10] See Research Paper para. 19.35.

[11] D.M. Walker, Delict II, p.809.

[12] Walkers, para. 410, R & B paras. 7.31-7.33.

Primary hearsay

Previous consistent statements

To rebut attack on credibility (19.38-19.40)

T.16 There is a general rule that evidence may not be led that a witness has previously made a statement which is consistent with his evidence in the witness box. Exceptions to this rule include statements forming part of the res gestae and statements made de recenti. It is not clear, however, whether such evidence may be led when the witness's credibility is impugned, as the decisions on the subject are inconclusive.[13] The clearest case is Burns v. Colin McAndrew & Partners Ltd[14] where the pursuer's wife was asked about statements which he had made to her relating to working conditions averred to have caused dermatitis, although it was not argued that the statements had been made de recenti. While we welcome views on the question, we are of the opinion that if the credit of a witness is impugned on a material fact on the ground that his account is a late invention, an earlier statement by the witness to the same effect as that impugned should be admissible. The argument that this may lead to the raising of collateral issues is no more valid in this case than when the question is whether the witness has told a different story, and that question may be investigated by virtue of section 3 of the Evidence (Scotland) Act 1852.

Admissibility for other purposes (19.41-19.44)

T.17 Should previous consistent statements be admissible for other purposes besides rebutting a challenge of fabrication? The arguments in the affirmative are fully set out in the Research Paper[15] together with an examination of the position in other legal systems. In England, all previous statements of witnesses, both consistent and inconsistent, are now admissible with the leave of the court under the Civil Evidence Act 1968, and if admitted they are evidence of the facts stated, not simply circumstantial evidence negativing the suggestion of afterthought or fabrication. The Criminal Law

[13] See Research Paper paras. 19.39-19.40.

[14] 1963 S.L.T. (Notes) 71.

[15] Para. 19.20.

Revision Committee have proposed that there should be a similar provision for criminal cases.[16] We consider that such previous consistent statements should be admissible of the facts stated therein, but invite comment on whether there should be any restriction on their admissibility. For instance, it could be provided that they should not be admitted until the maker has first given direct evidence in the witness box, without reference to the statement, of the facts to which it relates, and also that a statement which was made for the purpose of setting out the evidence which a person could be expected to give as a witness in pending or contemplative legal proceedings should not be admissible.

De recenti statements (19.45)

T.18 The principle that de recenti statements are not corroborative but support the credibility of the witness has been criticised, although the proposal by the Criminal Law Revision Committee to abandon it[17] was opposed by the Bar Council.[18] We do not propose any change in the present law.

Previous inconsistent statements (19.46)

T.19 The Evidence (Scotland) Act, 1852, enacts by section 3:

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

Section 3 has been repealed so far as relating to criminal proceedings by Schedule 10, Part I, of the Criminal Procedure (Scotland) Act 1975,[19] which provides by sections 147 and 349:

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

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[16] CLRC, para. 257.

[17] CLRC, paras. 232, 257.

[18] BC, para. 185.

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

evidence may be led to prove that such witness has made such different statements on the occasion specified."

The following points arise in connection with the foregoing provisions.

Nature of statement

Statements by way of precognition (19.47-19.49)

T.20 Despite the unqualified terms of section 3 of the 1852 Act there is in modern practice a rule that a witness cannot be contradicted by what he said on precognition, although the question of the validity of the rule does not appear to have been fully argued in the courts. We consider that the present position is unsatisfactory, and that one of two courses should be adopted: either section 3 of the 1852 Act and sections 147 and 349 of the 1975 Act should be amended so that they correspond with modern practice, or the law should be restored to the state originally intended by Parliament by making it clear that these sections do not admit of any exceptions. We favour the latter course, but invite comment on this proposal. Here it may be noted that in view of the unqualified terms of sections 147 and 349 of the 1975 Act it could be argued that it is not permissible to qualify them by having recourse to decisions bearing on the corresponding provisions of the Act of 1852 or the practice of the criminal courts prior to the 1975 Act. It seems unlikely, however, that such an argument would be successful.

Precognitions on oath etc (19.50)

T.21 We have already suggested that a distinction can be drawn between precognitions in normal form and signed precognitions, precognitions recorded on tape or in writing in question and answer form (the answer being in the writing of the witness) and precognitions on oath, and that at least precognitions in these special classes should be generally admissible.[20] Indeed it has recently been held that a precognition on oath will normally be competent as a basis for challenging the evidence of a witness under section 3 of the

[20] See para. L.13.

1852 Act,[21] and the Thomson Committee recommended that it should be competent to use a statement made on precognition on oath to test the witness's credibility.[22]

Evidence on Commission (19.52)

T.22 The Act of Sederunt of 16 February 1841 regulating proceedings in jury causes enacts by section 17 that depositions taken on commission may not be used if the witnesses so examined are brought forward at the trial,[23] and this section has been held to apply to proofs as well as jury trials. There is a similar provision for the Sheriff Court.[24] Although cases where witnesses give evidence on commission and also appear in court will be few, we think it is important that the court should be aware of discrepancies in evidence and propose that depositions be admissible for this purpose.

Admissibility as Evidence of the Facts Stated (19.53-19.57)

T.23 Where the witness is a party his previous inconsistent statement may be admissible as evidence of the facts stated therein on the ground that it is an admission, but in the case of an ordinary witness his previous inconsistent statement is admissible only for the purpose of indicating that his evidence is unreliable. The question arises whether a previous inconsistent statement should be admitted as evidence of the facts stated therein, and the arguments for and against this proposition are set out in the Research Paper.[25] Although such statements are admitted in England under Section 3 of the Civil Evidence Act 1968 the Thomson Committee, considering the question in the context of witnesses precognitions, felt that to make a precognition competent evidence would be a fundamental change in the law which they could not support.[26] However, apart from the question of precognitions, which may raise special issues, we

[21] Coll, Petitioner 1977 J.C.29.

[22] Thomson, para. 44.07.

[23] McLean & Hope v. Fleming (1867) 5 Macph. 579.

[24] Sheriff Courts (Scotland) Act 1907, Schedule 1 Rule 138.

[25] Paras. 19.54 and 19.55.

[26] Thomson, para. 44.04.

invite comment on whether previous inconsistent statements of ordinary witnesses, not being precognitions, should be admitted as evidence of facts stated therein.

Procedure (19.58)

T.24 If it is sought to discredit a witness in terms of section 3 of the 1852 Act or sections 147 or 349 of the 1975 Act the witness must be specifically asked whether he made the statement, and if he denies doing so evidence of the statement may be led. It appears that if a prosecutor or party leading in a civil case wishes to take advantage of the provisions he must call the witness himself and put the statement to him. We have already dealt with the situation which arose in M'Neilie v. HM Advocate[27] both from the civil and criminal point of view.[28] In addition to the proposal relating thereto,[29] we further propose that both in civil and criminal proceedings the fact that the witness whom it is sought to call has been present in court during the evidence of the witness whom it is sought to discredit should not render the witness incompetent.

Evidence of previous identification (19.59-19.68)

T.25 Various situations which may arise in connection with evidence of previous identification are discussed in the Research Paper.[30] The matter has been reported on by a Working Party under the Chairmanship of Sheriff Principal W J Bryden QC,[31] and we make no proposals at this time.

Statements forming part of the res gestae (19.69)

T.26 It has been pointed out that the expression "res gestae" may be used in at least three different ways.[32] The first is when a situation of fact (e.g. a killing) is being considered, and the question may arise when does the situation begin and

[27] 1929 J.C. 50.

[28] See para. G.46. Also Criminal Justice (Scotland) Bill Cl. 30.

[29] Proposition 81.

[30] Paras. 19.59-19.68.

[31] Identification Procedure under Scottish Criminal Law (1978 Cmnd. 7096). See also Criminal Justice (Scotland) Bill cl. 10.

[32] Ratten v. R [1972] A.C. 378 per Lord Wilberforce at pp. 388-389.

when does it end.[33] Secondly, the evidence may be concerned with words spoken as such (apart from the truth of what they convey) and the words themselves are then the res gestae or part of the res gestae. Thirdly, a hearsay statement is made either by the victim of an attack, or by a bystander, indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae. In order to minimise the confusion to which the term res gestae gives rise it may be desirable to abandon its use entirely or to confine it to the third category mentioned above. Indeed, statements in this category could be labelled as falling within the "spontaneous exclamation" or "contemporaneous statement" exception to the rule, thus avoiding the use of the expression "res gestae" completely. The term res gestae is however used in the following paragraphs in the way indicated in the third category. Here the rule that evidence of statements may be admitted on the ground that they form part of the res gestae gives rise to problems which are discussed below.

Whether primary or secondary hearsay (19.70)

T.27 In cases where the making of the statement is relevant, but its truth or falsehood is irrelevant, it is thought that evidence that the statement was made should be admitted solely on the ground of its relevance, as evidence of state of mind, knowledge or the basis of an expert opinion or the like. Here it is unnecessary to justify its admission on the ground that it forms part of the res gestae. Statements which are admitted although they do not fall into the categories of primary hearsay appear to be properly regarded as statements forming part of the res gestae and to be admitted as truth of the matter stated. While the Sheriffs Walker call such statements "real evidence", it is thought they are admissible secondary hearsay evidence. Such statements made in circumstances where the possibility of concoction can be disregarded are more likely to be true than untrue, and the view that statements forming part of the res

[33] It appears to be used in this sense by Lord Stewart in H.M. Advocate v. Docherty 1980 S.L.T. (Notes) 33.

gestae are admissible as evidence of the truth of the facts stated in them is supported by Ratten v. R.[34]

Criterion of admissibility (19.71-19.74)

T.28 Judges have differed on the basis of the admissibility of words forming part of the res gestae[35] and in order to avoid confusion the rule as to the admissibility of statements forming part of the res gestae could be restated to provide that such statements will be admissible as evidence of the facts stated. Clause 37 of the Criminal Law Revision Committee's draft Bill[36] might provide a suitable model, but is itself open to criticism.[37] Further possibilities for reform are found in many jurisdictions in the United States and Canada, where various proposals have been made as to the admissibility not only of excited utterances, but also of contemporaneous statements not made under the stress of nervous excitement. It may be thought that statements of the latter type, made while the speaker is perceiving an event or immediately thereafter, should be admissible because they are likely to be reliable there being no time for reflection or fabrication. If readers do not favour our proposal that previous consistent statements should be admissible of the facts stated therein,[38] we invite comment on the question of whether the rule as to res gestae statements should be restated, and provision made for the fact that they should be admissible evidence of the facts stated.

Extrajudicial admissions: statements by suspects and accused persons (20.01-20.02)

T.29 Extrajudicial admissions, confessions and other statements by suspects and accused persons may be regarded as being admissible in evidence as exceptions to the hearsay rule. The

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[34] Ratten v. R [1972] A.C. 378 per Lord Wilberforce at pp. 389, 391.

[35] See Research Paper para. 19.71.

[36] CLRC para. 261, pp. 199, 246.

[37] See Research Paper para. 19.73.

[38] See para. T.17.

The areas of the law selected for consideration are (1) admissions in judicial proceedings (2) admissions contained in writing, (3) admissions made vicariously by co-defenders and employees and (4) admissions improperly obtained. Admissions made in the course of precognition[39] and negotiation[40] have been discussed previously.

Admissions in judicial proceedings (20.03)

T.30 There are conflicting decisions as to the admissibility of a judicial declaration emitted by an accused as evidence against him in a subsequent civil cause to which he is a party. The most recent decision[41] is over 100 years old, and it was against admitting such evidence. The question is of little practical importance at present as such admissions are now rarely made. We make no proposal thereon.

T.31 Although there is no Scottish authority on the point, it is thought that a document which is knowingly advanced as true in earlier judicial proceedings for the purpose of proving a particular point should be admissible against the party in subsequent proceedings to prove the same point, and we propose a rule to this effect.

Admissions contained in writing (20.05)

T.32 There is dispute as to whether a document which has not been uttered is receivable as an admission.[42] The Sheriffs Walker state that if a document has not been uttered it is not evidence of concluded intention, but it may be evidence of the writer's knowledge or state of mind, or it may bear on some disputed collateral issue. We are of the opinion that the law should be clarified and invite comment on this question.

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[39] Paras. T.20-T.21.

[40] Paras. S.27-S.29.

[41] Little v. Smith (1847) 9D 737.

[42] See Dickson, para. 303, Watson v. Watson 1934 S.C. 374.

Admissions made vicariously - Co-defenders etc (20.06)

T.33 The general rule that an extrajudicial admission by one defender is not evidence against another is difficult to justify, and can lead to such artificial results as it having been proved that A committed adultery with B, but not that B committed adultery with A.[43] As Sir Rupert Cross has observed[44], the trouble stems from the fact that the law has not changed since the time when parties were made competent and compellable. Thus the person against whom it is sought to use the evidence is entitled to deny or explain it, and may also cross-examine the maker of the statement if he gives evidence. In these circumstances we see no reason why admissions which involve a party other than the maker should not be admissible against that other party as well as against the maker, and we propose accordingly.

Employees (20.07)

T.34 When an employer is sued in respect of the negligence of his employee an extrajudicial admission by the employee regarding his alleged act of negligence is not admissible in evidence against the employer, on the ground that the employee has no implied authority to make it.[45] In England, the employee's statement can be rendered admissible against the employer by virtue of section 2 of the Civil Evidence Act 1968. We are of the opinion that the position of agents and employees in Scotland should be assimilated, and that a statement by an agent or employee should be admissible against his principal or employer if it concerns a matter within the scope of or relating to the agency or employment. Comments on this proposal are invited.

Admissions improperly obtained (20.08)

T.35 The admissibility of evidence in civil causes which has been illegally or irregularly obtained is considered in Chapter U.

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[43] Creasey v. Creasey 1931 S.C.9.

[44] [1973] Crim. L.R. 329 at p.334.

[45] Scott v. Cormack Heating Engineers Ltd. 1942 S.C. 159.

Statements by suspects and accused persons

Police questioning - Confessions (20.09-20.14)

T.36 The present law relating to questioning and confessions has recently been expounded in the fourth edition of Renton and Brown,[46] and considered in the Second Report of the Thomson Committee. A summary of the Committee's proposals is set out in the Research Paper[47], and here we merely comment on some of the proposals. We welcome the proposal recommending that it should be competent for the Crown to lead evidence of statements made by a suspect before arrest in answer to police questioning, although we have reservations about the introduction of different rules of evidence for summary and solemn procedure which the relevant procedure proposed by the Committee would seem to involve.[48] We also agree that police questioning must be subject to certain controls, and that the general criterion of fairness is to be observed, thus enabling the courts to exert influence in determining from time to time what methods of obtaining incriminating statements are fair and what unfair. Tape recording of police questioning is, we understand, at present the subject of a pilot scheme.

T.37 As the Thomson Committee's proposal for the revival of the judicial examination system[49] is the subject of legislation at present before Parliament we make no comment thereon.[50]

Other statements by persons accused (20.15)

T.38 The following paragraphs are concerned with a number of difficulties which have arisen in relation to various categories of incriminating statements by accused persons, other than statements made to the police, legal advisers and clergymen.

Averment of previous malice (20.16)

T.39 There are conflicting authorities as to whether it is necessary in a charge of murder to libel previous malice in the

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[46] R & B paras. 18.24 to 18.29.

[47] Paras. 20.09-20.14.

[48] Thomson para. 7.22.

[49] Thomson para. 8.22.

[50] Criminal Justice (Scotland) Bill cl. 6.

indictment. In HM Advocate v. Kennedy[51] Lord Salvesen stated it was not necessary, while Lord Cameron in HM Advocate v. Flanders[52] declined to follow Kennedy and supported the statement in Macdonald's Criminal Law,[53] that previous malice must be libelled as a matter of fair notice. We propose that it be made clear that the latter view is the law of Scotland.

Admissibility of statements in relation to one charge in trial relating to different charge (20.17)

T.40 Where an accused makes a statement in relation to a serious charge, that statement may be used in relation to a less serious charge arising out of the same species facti, but where the less serious charge precedes the more serious charge the position regarding his admission is not so clear. In M'Adam v. HM Advocate[54] Lord Justice General Clyde stated that evidence of the reply to the less serious charge may be admitted if each of the crimes charged falls into the same category, such as dishonesty or personal violence, and substantially covers the same species facti. We propose that a rule to this effect should be enacted.

Statement to prison officers (20.18)

T.41 It appears that statements made to prison officers are regarded as in the same category as statements made to the police, although it may be questioned whether these officers should receive confessions at all. If the Thomson Committee's recommendations[55] on statements to the police are accepted, we think it should be made clear that if a person wishes to make a statement when he is in prison the police should be sent for.

Statements to investigators other than the police and to private persons (20.19-20.20)

T.42 The present law as stated in Renton and Brown[56] is that the rules relating to investigations by the police do not apply to the same extent to investigations made by or on behalf

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[51](1907) 5 Adam 347.

[52]1962 J.C. 25.

[53]Macdonald p.306.

[54]1960 J.C. 1 at p.4.

[55]Thomson 7.14-7.23.

[56]R & B para. 18.41.

of employers, this statement being based on Waddell v. Kinnaird[57] and Morrison v. Burrell.[58] We agree with the Sheriffs Walker[59] that the evidence admitted in Waddell would not now be admitted, and consider that the correct view of the law was stated by Lord Cooper in Morrison, when he said that evidence of the accused's voluntary replies was admissible when there was no trace of impropriety, unfairness or misuse by the investigators of their position. The test of fairness was recently applied by Lord Ross in H.M. Advocate v. Friel,[60] a case which related to statements made to investigating customs and excise officers. As for statements to private persons, both Alison[61] and Dickson[62] suggest that confessions to private persons are admissible even if made as a result of threats, undue influence or inducements. The decisions however do not uniformly support this view,[63] and Lord Cameron stated recently[64] that the test of admissibility should be one of whether the statement was obtained fairly or not. We propose that it be made clear that the test of admissibility of statements made to persons other than the police, by the person to whom that statement is addressed, should be whether the statement was obtained fairly or not.

Expressions uttered during sleep etc. (20.21)

T.43 Although there is authority to the contrary[65], both Macdonald and Renton and Brown[66] state that the propriety of admitting expressions uttered during sleep "is open to very serious question". Macdonald adds, however, that if real or circumstantial evidence is obtained in consequence of what has

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[57] 1922 J.C.40.

[58] 1947 J.C.43.

[59] Walkers para. 40 n.1.

[60] 1978 S.L.T. (Notes) 64.

[61] Alison, ii, 581.

[62] Dickson, para. 345.

[63] Walkers para. 40.

[64] Lord Cameron, "Scottish Practice in relation to Admissions and Confessions by Persons Suspected or Accused of Crime", 1975 S.L.T. (News) 265.

[65] See Research Paper para. 20.21.

[66] Macdonald p.315, R & B para. 18-43.

been said it might be admissible to prove them as explaining and leading up to its discovery. We are of the opinion that expressions uttered while a person was unconscious e.g. during sleep, anaesthesia or a coma should not be admitted as evidence of their truth, and invite comment on whether if real or circumstantial evidence is obtained in consequence of such expressions they should be admissible to explain the discovery of that evidence.

Statements overheard (20.20-20.23)

T.44 The doubt whether a police or prison officer may give evidence of a statement made by a person in custody which he has overheard arises from the decision in H.M. Advocate v. Keen[67] where such a statement was not admitted. In Welsh and Breen v. H.M. Advocate[68] the court, while admitting evidence of a statement overheard, did not express any disapproval of Keen, and did not lay down exact limits of when such evidence is admissible. The Thomson Committee supported the decision in Welsh and Breen, and thought that evidence of anything said by an accused person to or in the hearing of the police should be admitted, whether or not the accused was aware that a police officer was listening.[69] We would agree with this view.

T.45 The decision in Welsh and Breen is consistent with earlier authorities,[70] and we propose that it be made clear that evidence of statements overheard is admissible. We invite comment on the extent to which such a provision should be qualified by the requirement that it be fairly obtained, to prevent hidden microphones and the like being employed.

Statements in intercepted letters (20.24)

T.46 The question of whether or not intercepted letters may be admitted in evidence is the subject of doubt due to the decisions in H.M. Advocate v. Fawcett[71] and H.M. Advocate v. Walsh.[72] Provided such letters are written voluntarily and not

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[67] 1926 J.C.1.

[68] November 1973, unreported except in (1974) 38 J.C.L. 151.

[69] Thomson para. 7.20.

[70] See e.g. Johnston (1845) 2 Broun 401.

[71] (1869) 1 Coup. 183.

[72] 1922 J.C. 82.

as the result of any inducement or trap we propose that they should be admissible, subject always to considerations of fairness as regards the method of interception[73].

Implied confessions (20.25-20.29)

T.47 At present no inference of guilt may legitimately be drawn from the fact that the accused, when charged, either says nothing or states he has nothing to say. The Thomson Committee did not recommend any change, but did make recommendations regarding the silence of the accused and judicial examination.[74] The inferences which may be drawn from silence on other occasions seem well understood, and it is clear from Lord Justice General Cooper's opinion in Chalmers v. H.M. Advocate[75] that the law relating to confessions is fully applicable to non-verbal assertive actions.

T.48 Where an accused who is charged on indictment has failed to appear at an earlier diet of trial, words to this effect are sometimes inserted in the indictment, and the Crown then leads evidence in support of them and the jury is invited to draw an inference of guilt from the accused's failure to appear. Due to the abolition of the sentence of outlawry or fugitation by section 15(2) of the Criminal Justice (Scotland) Act 1949[76] there may be doubt as to whether such an averment is now competent.[77] We propose that such an averment should be competent in both the solemn and summary courts.

Statements in judicial proceedings (20.30)

T.49 There is doubt as to the admissibility of statements made on declaration due to an old decision of Lord M'Laren's[78] in which he held that a deposition made by an accused in another's sequestration was inadmissible. We consider that the

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[73] See para. U.03.

[74] Thomson paras. 8.25, 8.27. See also Criminal Justice (Scotland) Bill cl. 6.

[75] 1954 J.C. 66 at p.76.

[76] c.94.

[77] See Research Paper para. 20.28.

[78] Fleming (1885) 5 Coup. 552 at p.581.

question of admissibility of such a statement would now depend on the proper construction of the statute by virtue of which the statement was elicited.

Self-serving statements (20.31-20.32)

T.50 The general law as to the admissibility of previous consistent statements has already been considered in this chapter, the general rule in criminal cases being that statements by the accused are not evidence in his favour.[79] One exception is that statements made by an accused may be admissible as part of the res gestae, in the second sense in which that expression is used,[80] and statements made by him in his own favour in a judicial declaration or in a statement under caution may, if led by the Crown, be founded on by the accused to show that he has told a consistent story throughout.[81] It may be thought that the accused should not be accorded any further opportunities to found on statements made by himself in his own favour, but the present law can sometimes operate unfairly when it excludes exculpatory statements made by the accused before the crime was committed.[82] We propose that such statements, written or oral, should be admissible for the purpose of showing that the statement was made.

Statements by co-accused

Statement incriminating the accused (20.33-20.34)

T.51 A statement made by one accused incriminatory of a co-accused is not admissible against the latter unless made in his presence and hearing, and only if his attendance at the time of making the statement has not been improperly arranged for the purpose of making the statement evidence against him. Thus, if evidence of a confession by one accused is led as admissible against him and its terms implicate another accused,

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[79] See para. T.17.

[80] See para. T.26 ante.

[81] Brown v. H.M. Advocate 1964 J.C.10.

[82] See e.g. H.M. Advocate v. Macleod (1888) 1 White 554.

the jury must be directed to disregard it as evidence against the other accused. This rather artificial position led the Criminal Law Revision Committee to recommend that where A and B are tried jointly a statement made by A implicating B should be admissible against B.[83] A similar provision is contained in the American Model Code, Uniform Rules and Federal Rules. We are of the opinion that a statement made by one accused incriminatory of a co-accused should be admissible against that co-accused. Comment is invited.

Statement exculpating the accused

T.52 Despite the decision in Lyall and Ramsay[84] it is not clear whether, if one accused A makes a statement in favour of his co-accused B, B is entitled to found on it. We propose that the accused should be entitled to found on any statement made in his favour by a co-accused.

The trial within a trial (20.37-20.52)

T.53 It is questionable whether the trial within a trial procedure laid down in Chalmers v. H.M. Advocate[85] should be retained in any form. The procedure appears to have been an innovation in Scottish practice and may have been suggested by a consideration of English practice, but it may also be seen as a development of a Scottish practice whereby argument on objections to the admissibility of confessions was heard in the absence of jury before the critical evidence was led.

T.54 The trial within a trial procedure has been much criticised. In Thompson v. H.M. Advocate,[86] Lord Justice General Clyde pointed out that apart from the repetition of evidence, it affords an opportunity for the reconstruction of evidence for the second trial, and moreover the jury in the second trial have no opportunity of testing the consistency of

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[83] CLRC paras. 251-252 pp. 190, 237.

[84] (1853) 1 Irv. 189. See Research Paper para. 20.35.

[85] 1954 J.C. 66 at p.76.

[86] 1968 J.C. 61.

the evidence in the two trials. More detailed criticisms are set out in the Research Paper,[87] and it is not thought necessary to repeat these here. In view of the criticisms and difficulties it may be that if the question is whether a confession has been freely and voluntarily given, the evidence should be led before the jury once and for all, with the proviso that the judge could at the end of the day direct the jury to disregard the evidence as suggested by Lord Justice General Clyde in Thompson. Such a course could involve disclosure to the jury of a confession which the judge might ultimately hold to be inadmissible, and in such circumstances it might be difficult for the jury to disregard the confession, notwithstanding a direction from the judge to do so. However, this difficulty would not arise if the Crown sought to adduce challengeable confessions only in cases where the confession was essential for conviction; in these cases if the judge were to conclude that the confession was not voluntary, there would be insufficient evidence for conviction and he would direct the jury to return a verdict of "not guilty".

T.55 The Thomson Committee considered the trial within a trial procedure,[88] and if their recommendations are accepted we hope that the use of the procedure will be very rare. Its retention for limited use in exceptional cases may perhaps be justified, but on the whole we think its introduction into Scottish practice was ill-advised.

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[87] Paras. 20.37-20.48.

[88] Thomson paras. 47.01-47.07.

Chapter U

## The admissibility of evidence illegally or irregularly obtained

### Introduction (21.01)

U.01 The major problem in this field is that the present law of Scotland appears to recognise a distinction between civil and criminal cases as far as the question of admissibility of relevant evidence obtained by illegal or irregular means is concerned. In civil cases the sole test of admissibility is relevance, however that evidence has been obtained, whereas in criminal cases evidence illegally or irregularly obtained is inadmissible, unless the illegality or irregularity associated with its procurement can be excused by the court. A further problem is that in criminal cases there is some uncertainty about the admissibility of evidence discovered as a result of a confession, which is itself inadmissible.

### Criminal cases

### Evidence obtained as a result of an inadmissible confession (21.02 -21.04)

U.02 If an accused person makes a confession which is inadmissible, but contains information as a result of which relevant facts are discovered, two questions arise. First, to what extent is evidence of these facts admissible? Second, if consequently discovered facts confirm the truth of the confession or part of it, is the confession to any extent admissible? The leading case of Chalmers v. HMA[1] makes it clear that the discovery of the fact does not render any party of the confession admissible. This case did not, however, give a clear answer to the first question raised above. Logically, when a confession is inadmissible, evidence of facts consequently discovered should also be inadmissible. We consider that this would lead to unwelcome rigidity in the law, and that the views expressed by the Thomson Committee[2] should be declared to be the law, if indeed they are not already the law. These views were to the/

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[1] 1954 J.C. 66.

[2] Thomson Para. 7.27.

the effect that evidence of facts obtained as a result of an inadmissible confession should be admitted, with the riders that this would only be the case where (a) the prosecution did not disclose the source of the information and (b) the information was not obtained by methods which the court decides are unfair in the circumstances.

Evidence obtained by other illegal or irregular means (21.05 - 21.06)

U.03 The principal authority here is Lawrie v. Muir[3] in which Lord Justice General Cooper pointed out that there could be no absolute rule as far as obtaining evidence by irregular means was concerened - the question was one of circumstances. Lawrie, and the long line of cases following it,[4] have been influential in other jurisdictions. Although not strictly logical, Scotland has adopted a half way house between "the fruit of the poisoned tree" theory, to the effect that evidence improperly obtained is in all circumstances inadmissible, prevalent in the United States, and a general rule that the impropriety of the method of obtaining evidence is irrelevant as to its admissibility. We consider that the present law of Scotland achieves a reasonable balance between protecting on the one hand, the interests of the individual, and on the other hand those of society in the effective administration of justice.[5]

Warrant to Search (21.07)

U.04 It is convenient to note here that the Thomson Committee were satisfied with the present law as to the power of the police to seize articles which are not specified in a warrant to search, and which relate to crime other than that for which the warrant was granted. They did recommend, however, that a sheriff should/

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[3] 1950 J.C. 19.

[4] See Research Paper, Para. 21.06 n.11.

[5] See New South Wales L.R.C. Working Paper on Illegally and Improperly Obtained Evidence (1979). Their draft Bill incorporates several principles of Scots law.

should have power to grant a warrant to search the premises of a third party, but that unless the sheriff is satisfied that there is a real risk of the evidence being destroyed or tampered with, the third party should be given an opportunity of being heard before the warrant is granted.[6] We would agree.

Civil causes (21.08 - 21.15)

U.05 There has been no authoritative statement of the law as to the admissibility of evidence illegally or irregularly obtained in civil cases. The leading case of Rattray v. Rattray[7] and subsequent decisions are examined in some detail in the Research Paper,[8] and it is pointed out that only two of the four judges sitting favoured admitting as evidence a letter from the defender to the co-defender which was stolen from the Post Office by the pursuer. Although evidence illegally or irregularly obtained has been admitted in a number of civil cases since Rattray the general question of admissibility of such evidence has never been discussed in the Inner House. In Duke of Argyll v. Duchess of Argyll[9] Lord Wheatley, in admitting as evidence diaries which had been stolen by the pursuer from the house in which his wife was living, based his decision on Lawrie v. Muir,[10] and stated that as adultery was historically a quasi-criminal offence and required to be proved beyond reasonable doubt, the principle stated in Lawrie could be applied. His Lordship's reasoning has now been superseded by the Divorce (Scotland) Act 1976, to the extent that adultery now need only be proved on a balance of probability.[11]

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[6] Thomson, paras. 4.19-4.24.

[7] (1897) 25 R 315.

[8] Paras. 21.08-21.14.

[9] 1962 S.C. 140.

[10] 1950 J.C. 19.

[11] Divorce (Scotland) Act 1976, s.1(6).

U.06 Lord Wheatley pointed out in the Argyll case that the application of Lawrie to civil litigation would mean that a person who obtains evidence by illegal means to further his own ends in a civil process, would be less likely to succeed in having that evidence admitted than police officers who had obtained evidence by irregular methods in a criminal case. We can see no reason why there should be any differentiation between civil and criminal proceedings as far as admissibility of such evidence is concerned. We accordingly propose that in civil cases, as in criminal cases, the court should be entitled to exclude evidence obtained by illegal or irregular means.

## Chapter V
## The burden and standard of proof

### The burden of proof (22.01-22.03)

V.01 Terminology - Various writers have maintained that the words "burden of proof" are used in two senses.[1] In Scots law, however, there is no explicit statement of the differences between the two principal burdens apart from the speech of Lord Denning in Brown v. Rolls Royce Ltd,[2] where his Lordship emphasised the importance of distinguishing between the legal burden, which is imposed by the law itself, and a provisional burden which is raised by the state of the evidence. The first is the burden on the party who will lose the issue unless he establishes a proposition to the satisfaction of the trier of fact on the appropriate standard of proof, while the second is the burden of adducing sufficient evidence to require an issue to be considered by the trier of fact when he comes to decide whether the legal burden has been discharged. Thus, in a civil case, the pursuer will lose unless he establishes the negligence of the defender on a balance of probabilities, but if he proves facts which raise a prima facie inference of negligence, the defender would require by evidence to provide an answer adequate to displace that prima facie inference. In such a case the legal burden remains on the pursuer throughout, but a provisional burden is imposed on the defender by the state of the evidence.[3] While there are differences of opinion about the terminology which can be employed, in this Memorandum the first burden is called "the persuasive burden", and the second is referred to as "the evidential burden".

### Criminal trials

#### Burden on Crown to exclude defence (22.05)

V.02 It is clearly the law that the onus on a prosecutor in a criminal case is to establish the guilt of the accused beyond reasonable doubt, and that if evidence is given or elicited by or on behalf of the defence which creates reasonable doubt as

[1] See Research Paper para. 22.01.

[2] 1960 S.C. (H.L.) 22 at pp. 27-29.

[3] Henderson v. Henry E Jenkins & Sons [1970] A.C. 282.

to the guilt of the accused, the Crown case must fail. Apart from insanity and diminished responsibility, which are dealt with below, there are certain defences which are known as special defences.[4] In summary proceedings no notice of such special defences need be given by an accused, but he must do so under solemn procedure. It was established in Lambie v. H.M. Advocate[5] that the only purpose of such notice is to give fair notice to the Crown, and that the onus on the prosecutor is not affected. These special defences are therefore no different from any other type of defence. The only issue is whether evidence in support of the special defence, taken along with all the other evidence, creates a reasonable doubt in the minds of the jury as to the guilt of the accused.

Burden on the Crown - Insanity (22.06)

V.03 We consider that it would be desirable to clarify the position where the issue of insanity is raised by the Crown, and agree with the suggestion that where the Crown assert insanity against a defence assertion of diminished responsibility, the jury should be directed that they cannot find for the Crown, unless they are satisfied beyond reasonable doubt that the accused was insane rather than of diminished responsibility.[6]

Burden on the accused

Special defences - General (22.07-22.08)

V.04 It is now clear that in relation to the special defences of alibi, self-defence and incrimination, the legal or persuasive burden of proof nevertheless remains on the Crown throughout.[7] All that the defence requires to do is to elicit evidence to bring the matter before the jury as a factor negativing guilt. Where the defence is able to elicit from the Crown witnesses sufficient evidence to raise the issue, the accused need not go into the witness box, and it seems clear that the courts would not now adhere to what has been said to be the "principle" that a defence of self-defence can only succeed when the accused himself gives evidence.

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[4] These are self-defence, alibi and incrimination.

[5] 1973 J.C.53. See also "The Burden of Proof on the Accused" 1968 S.L.T. (News) 29.

[6] H.M. Advocate v. Harrison (1968) 32 J.C.L. 119, Commentary. See also Gordon, Criminal Law, 2nd Ed. p.72 footnote 66.

[7] Lambie v. H.M. Advocate 1973 J.C. 53.

Insanity (22.09-22.10)

V.05 If a special defence of insanity, or the question of diminished responsibility, is raised by the accused, he must satisfy the jury on a balance of probabilities that he was insane, or of diminished responsibility.[8] Thus the persuasive burden lies on the accused. The rationale of the imposition of a persuasive burden has been stated to rest on the fact that proof of insanity is required to displace the general presumption of sanity.[9] Since the capacity in law of the accused to commit the crime is a fact which is essential to guilt, the imposition of this persuasive burden on the accused may appear anomalous. However, there are weighty considerations favouring the present system. At present if an accused overcomes the persuasive burden, a special verdict is brought in by a jury to the effect that he was insane at the time, and he is acquitted on the ground of insanity: nevertheless the court orders his detention in a hospital. An element of public protection is however involved. Certain aspects of the present practice were considered by the Thomson Committee, and they recommended a change in the procedure to enable a judge to set free an accused if he was not suffering from mental disorder at the time of the trial, and the mental condition which existed at the time of commission of the act was unlikely to recur[10]. If the burden on the defence of proving insanity were altered to an evidential one, procedural changes would be necessary if it were thought desirable to retain the power to commit to hospital, notwithstanding a verdict of not guilty. We would welcome views on whether the burden on the defence of proving insanity or diminished responsibility should be reduced to an evidential one.

Proof or disproof of criminal intent (22.11-22.12)

V.06 Sheriff Gordon argues that while there are dicta of considerable authority to the effect that the Crown need prove

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[8] H.M. Advocate v. Kidd 1960 J.C. 61.

[9] Lambie v. H.M. Advocate 1973 J.C. 53.

[10] Thomson para. 53.07-53.09, Rec.160.

only the objective facts, and that it is for the defence to displace a legal presumption of mens rea, these dicta can now be read as referring only to inferences of fact, and that any burden that lies on the defence is at most an evidential one.[11] As far as the defence of mistake is concerned, it is thought that since the Crown must prove both actus reus and mens rea it is for the Crown to exclude mistake beyond reasonable doubt where it is an evidential burden on the accused in this case, on the view that he is under no burden of denying the mental element, although considerations of prudence may require the accused to give evidence in support of his defence. However, if he fails to do so, it is thought that the judge cannot withdraw the defence from the jury's consideration, as he would be entitled to if an evidential burden rested on the accused.[12] In view of the recent decision in H.M. Advocate v. McGregor[13] we think it desirable that the law should be clarified on this point to the effect that the onus is on the Crown to exclude mistake beyond reasonable doubt, and that the burden on the accused is evidential.[14]

The "doctrine" of recent possession (22.13)

V.07 According to Sheriff Gordon,[15] the clearest example of the tendency to discuss an evidential burden in terms which suggest that it is a legal or persuasive burden can be seen in the so-called doctrine of recent possession of recently stolen property. The modern law appears to accept that this "doctrine" transfers the burden of proof to the accused.[16] There would seem to be no need for such a doctrine, and no room for any rule that places the burden of proving innocence on the accused, when all that is needed is a rule that guilt can be proved by

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[11] "The Burden of Proof on the Accused" 1968 S.L.T. (News) 29.

[12] Glanville Williams, "The Evidential Burden: Some Common Misapprehensions" (1977) 127 New L.J. 156 at p.158.

[13] (1974) 38 J.C.L. 146.

[14] See Research Paper para. 22.12 footnote 29.

[15] "The Burden of Proof on the Accused" 1968 S.L.T. (News) 29.

[16] See e.g. Cameron v. H.M. Advocate 1959 J.C. 59.

circumstantial evidence, and that in cases of theft or reset the nature and circumstances of the accused's possession of stolen property may be sufficient evidence of guilt. We are of the opinion therefore that in any restatement of the law the rule stated in the previous sentence should be adopted, although we would welcome readers' views on this question.

Facts peculiarly within the knowledge of the accused (22.14-22.18)

V.08 The Sheriffs Walker state that when the facts proved by the Crown raise a presumption of the guilt of the accused person, unless other facts or another explanation of the facts are put forward, the onus of establishing these other matters rests upon the accused. They further state that this is especially the case where the facts are peculiarly within the accused's own knowledge.[17] The authors cite Cruickshank v. Smith, where Lord Jamieson appeared to approve the view stated in Taylor on Evidence to the effect that where facts lie peculiarly within the knowledge of one of the parties very slight evidence may be sufficient to discharge the burden of proof resting on the opposite party[18]. It is thought that this is a correct statement of the present law, and that Scots law does not impose a legal burden of proof upon an accused where a fact constituting exculpation is peculiarly within his own knowledge. There can be an evidential burden on the accused in such circumstances however, where he is required to produce evidence of that fact, although not to substantiate it by full legal proof. We propose that it should be made clear in any restatement of the law that this is the case, as the trend in English authority, including cases on United Kingdom legislation, is in the direction of imposing a persuasive burden on the accused[19].

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[17] Walkers para. 83(c).

[18] 1949 J.C. 134 at p.152.

[19] See Research Paper paras. 22.16-22.18.

## The effect of statutory provisions on the burden of proof

### Provisions expressly casting burden on the accused (22.19.22-20)

V.09 Many statutes provide that the burden of proving matters such as lawful authority or reasonable excuse shall be on the defence. While there are decisions which support the rule that in such cases the accused bears a persuasive burden of proof which will be discharged if the defence is established on a balance of probabilities[20], this rule is open to the objection previously mentioned, that it is wrong in principle that an accused should be convicted when the court is left in reasonable doubt whether or not he acted with blameworthy intent. It may be that this requirement of the law is not scrupulously attended to in practice, which is perhaps a further reason for altering the rule. Counter-arguments are that the rule is designed to prevent the accused, in a case where his proved conduct calls, as a matter of common sense, for an explanation, from submitting that he should be acquitted because the Crown have not adduced evidence to negative the possibility of an innocent explanation. Secondly, the rule can be said to prevent the accused from securing his acquittal by putting forward a defence which is specious, but nevertheless raises a reasonable doubt in the minds of the jury.

### Criminal Procedure (Scotland) Act 1975, sections 66 and 312(v) (22.21-22.22)

V.10 Section 66 of the Criminal Procedure (Scotland) Act 1975 provides:

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

Section 312(v) lays down the same rule for summary procedure. The history of this section is set out in the Research Paper[21]. It is sufficient to state here that, from the authorities on

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[20] e.g. Neish v. Stevenson 1969 S.L.T. 229.

[21] Research Paper para. 23.21.

the predecessors of the section, it is clear that the accused bears a persuasive burden of proving that he comes within the exception, exemption, proviso, excuse or qualification on which he relies, on a balance of probabilities, and does not bear merely the evidential burden of adducing evidence to that effect[22].

Reform of the law (22.23-22.27)

V.11 Reform of the law as to burdens on the defence has been discussed recently in other jurisdictions. In England, the Criminal Law Revision Committee proposed that the burden on the defence should be evidential only,[23] and this proposal was generally welcomed. The Canadian Law Reform Commission came to the similar view that as a rule the burden should be evidential, but that in rare cases where it may be thought proper to impose a persuasive burden on the accused, this should be done clearly and expressly by legislation[24].

V.12 We are of the opinion that for the reasons stated above, and for convenience and clarity in practice, burdens on the defence should be evidential only, although as previously stated we would appreciate comments on the question. Our proposal is subject to one exception which relates to the admissibility of convictions as evidence in criminal proceedings. In chapter L it is proposed that when the fact that a person other than the accused has committed an offence is relevant, the fact that the person has been convicted of it shall be admissible in order to prove that he committed it, and he shall be taken to have done so unless the contrary is proved. In this case, we think there should be a persuasive burden on the defence of disproving the guilt of the other person on a balance of probabilities[25]. This would seem justifiable on the ground that the guilt of the other person having been

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[22] See e.g. Gatland v. Metropolitan Police Commissioner [1968] 2 Q.B.279.

[23] CLRC paras. 137-142 pp 179-180, 221-223.

[24] L.R.C. Canada, Report on Evidence p. 59, Evidence Code ss. 12, 13.

[25] Para. L.21.

established by a court, it would be inappropriate that the accused, merely by adducing evidence tending to show that the conviction was wrong, should cast on the Crown the burden of proving beyond reasonable doubt that the conviction was right.

Civil cases

Onus of proof of statutory exception (22.28)

V.13 The Sheriffs Walker point out that when a right is given by statute subject to a qualification or an exception, it is not clear whether the onus of showing the qualification or exception does not apply rests on the party seeking the right, or whether his opponent must prove that it is applicable[26]. We are not of the opinion that this question could be usefully regulated by any new statutory general rule. It must be decided in each case as a matter of statutory construction.

The standard of proof and terminology (22.29-22.30)

V.14 It is now clear that the only standards of proof known to the law of Scotland are proof beyond reasonable doubt and proof on a balance of probabilities on the evidence[27]. As far as terminology is concerned, we can see no need for change, in that it seems well understood by the average person and has not caused difficulties in practice.

The standard in civil causes (22.31)

V.15 We do not contemplate any alteration of the rule in criminal cases that the standard of proof required of the Crown is proof beyond reasonable doubt, but are of the view that consideration should be given to the question of what exceptions should be made to the general rule in civil cases, that the standard of proof needed to discharge an onus or rebut a presumption is proof upon balance of probabilities. The cases considered are (a) civil cases where the commission of a crime is a matter in issue (b) civil cases where a party seeks to have illegitimacy proved (c) proceedings for contempt of court and (d) action for contravention of lawburrows.

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[26] Para. 75(d).

[27] Dingwall v. J Wharton (Shipping) Ltd (H.L.(Sc.)) [1961] 2 Lloyd's Rep. 213. Brown v. Brown 1972 S.C. 123.

Allegation of crime (22.32-22.35)

V.16 The question whether in a civil cause the commission of a crime such as fraud must be proved by the standard of proof appropriate to criminal proceedings, or whether proof on a balance of probabilities is sufficient, has not received much consideration in Scotland, although it has been said that the criminal standard applies.[28] However, the only Scottish judge who has referred to the criminal standard in terms is Lord Neaves in Arnott v. Burt[29], and the older Scottish cases and current practice are more consistent with the standard of proof being on a balance of probabilities.[30] We propose therefore that it should be made clear that where any criminal conduct is in issue in a civil case, the standard of proof should be on a balance of probabilities.

V.17 Illegitimacy (22.36)

At present the rebuttal of the presumption against illegitimacy may only be achieved by proof beyond reasonable doubt. The Commission intends to examine the present law relating to illegitimacy. Assuming that the present distinction in status between legitimate and illegitimate remains, we would propose that the presumption of legitimacy be preserved, but could be rebutted on a balance of probabilities.[31]

Contempt of court (22.37)

V.18 While it is now clear that the standard of proof in respect of breach of interdict is proof beyond reasonable doubt,[32] we propose that it be made clear that the same standard applies to proceedings for contempt of court.

Action for contravention of lawburrows (22.38)

V.19 Although the question very rarely arises, it is for consideration whether in actions for contravention of lawburrows the standard of proof should be proof beyond reasonable doubt, since if the action succeeds a penalty is exigible from the defender and he may be imprisoned.

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[28] Walkers para. 85.

[29] (1872) 11 Macph. 62 at p.74.

[30] See e.g. Andrew v. Penny and another 1964 S.L.T. (Notes) 24.

[31] See Family Law Reform Act 1969, s.26.

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

CHAPTER X

CORROBORATION (23.01 - 23.03)

X.01. From the point of view of considering the sufficiency of evidence facts fall into three classes, these being crucial facts, evidential facts and procedural facts. Unless by statute a single witness is sufficient, crucial facts (sometimes referred to as essential facts or facta probanda) require to be proved either by the direct evidence of two witnesses (or two or more evidential facts spoken to by separate witnesses from which a crucial fact may be inferred), or of a combination of the direct evidence of one witness and of one or more evidential facts spoken to by other witnesses which support it. Evidential facts are facts which individually establish nothing essential, but from which in conjunction with other evidential facts, a crucial fact may be inferred, and the evidence of a single witness is sufficient proof of each fact which is used in this way. Lastly, the term "procedural facts" is used to mean incidental facts, or matters of procedure in a criminal trial, and although proof of these may be essential the evidence of a single witness is sufficient.

X.02. The objective of the requirement of corroboration is to reduce the risk of the acceptance by the tribunal of untrue or unreliable testimony, the risk of error being a consideration which is relevant in civil as well as criminal cases. Two major problems appear to have arisen in recent years, these being as to the nature of the facts which have to be corroborated, and as to what evidence of facts and circumstances will be sufficient to amount to corroboration of the direct evidence of a single witness. Other problems which are discussed relate to corroboration by false denial, and to the Moorov doctrine.[1]

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[1]See Moorov v. H.M.A. 1930 J.C. 68.

The facts to be corroborated (23.04 - 23.05)

X.03. Confusion appears to have arisen from dicta by Lord Justice-Clerk Macdonald and Lord M'Laren in Lees v. Macdonald,[2] which if applied to proof of facta probanda, would be destructive of the principle of corroboration. It seems clear that these dicta were not intended to be so applied, the case being concerned with proof of a procedural fact, but they were cited nevertheless by Lord Justice-General Clyde in Gillespie v. MacMillan,[3] which followed Scott v. Jameson.[4] These two cases propound a doctrine that so long as facts proving a criminal charge emanate from two separate and independent sources, not every essential fact requires to be proved by two witnesses. Such a doctrine is not in accordance with the general principle of corroboration. It is thought, however, that Gillespie has only been followed in cases where the facts are virtually identical to those with which it dealt, and it seems the police now rarely employ the method of calculating speed which caused the controversy. Accordingly there may be no necessity to legislate on this topic.

Evidence sufficient to amount to corroboration (23.06 - 23.10)

X.04. Before the enactment of section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968,[5] it was maintained that difficulty in applying the law relating to corroboration arose in actions of damages for personal injuries, in which it was contended that the direct evidence of a single witness (normally the pursuer) was corroborated by facts and circumstances spoken to by one or more other witnesses. The common law is that the pursuer is not sufficiently corroborated by the fact that his story is more

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[2](1893) 20R (J) 55.

[3]1957 J.C. 31.

[4]1914 S.C. (J) 187.

[5]c.70.

probable than any other account; he can secure corroboration only if he leads other evidence than his own of facts more consistent with his account of the matter in issue than any other account of it.[6] The question whether such evidence fulfils the test is determined by the drawing of inferences, and in a small number of borderline cases different views have been expressed on the question of whether a particular inference may be drawn from particular circumstantial facts.[7] In our Paper entitled "Proposal for Reform of the Law of Evidence Relating to Corroboration",[8] we pointed out that there were many cases where pursuers, having sustained injuries when working alone or in darkness, were unable to pursue a claim through absence of corroboration, and our proposals resulted in the passing of section 9 mentioned above. The section does not apply to any civil cause, not being a consistorial cause or action of affiliation, as proposed by us, but only to actions for damages for personal injuries. As section 9 was merely an interim measure we consider that the time has now come for reconsideration of the section as part of the general review of the law of evidence.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.9

(23.11 - 23.24)

X.05. The section came into force on 25 November 1968 and sub-section 2 provides:

> " ... any rule or law whereby in any proceedings evidence tending to establish any fact unless it is corroborated by other evidence, is not to be taken as sufficient proof of that fact shall cease to have effect in relation to any action to which this section applies, and accordingly, subject as aforesaid, in any such action the court shall be entitled, if they are satisfied that any fact has been established by evidence which has been given in that action to find that fact proved by that evidence, notwithstanding that the evidence is not corroborated."

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[6] Hughes v. Stewart 1964 S.C. 155 L.P. Clyde at p.159.

[7] See Research Paper, para. 23.08, n.17.

[8] Scot. Law Com. Paper No. 4.

The reported case law on the operation of section 9 is fully discussed in the Research Paper,[9] and although there has been some judicial disagreement on the effect of the section certain principles have emerged. It appears, firstly, that although when corroborative evidence is available, the failure to adduce it is of importance in deciding whether a fact has been established, a pursuer is not obliged to call a person who, he avers, was responsible for his injuries: the evidence of the single witness must however be evaluated with special care.[10] Secondly, it now seems clear that the section was intended to apply to all actions where the damages claimed consist of, or include, damages or solatium in respect of personal injuries, and not merely to cases where the pursuer was alone at the time of the accident. Thirdly, it is possible for an uncorroborated pursuer to be found entitled to damages but nevertheless contributarily negligent.[11]

X.06. In order fully to ascertain the effect of s.9 in practice it would be necessary to consider unreported cases, and also actions which were settled and cases where claims were comprised without resort to litigation. As Sheriff Macphail points out,[12] without access to such information it may be hazardous to formulate proposals for the reform of the law. Three options for reform would appear to be open, namely to repeal section 9 if it is thought that any benefit conferred by that section has been outweighted by the disadvantage of the loss of corroboration as a mandatory safeguard. The second alternative, if it is thought that the section has worked well in practice, is simply to leave the section as it is and not to reform the law in any other respect. Thirdly, it may be felt that section 9 has demonstrated that the legal requirement

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[9] Paras. 23.13.-23.18.

[10] McLaren v. Caldwell's Paper Mill Co. Ltd. 1973 S.L.T. 158.

[11] Ward v. Upper Clyde Shipbuilders Ltd 1973 S.L.T. 182.

[12] Research Paper, para. 23.20.

of corroboration may be safely dispensed with in other areas of civil litigation, although this would not mean that corroborative evidence if available would be unnecessary as a matter of practice. On the contrary, the absence of corroborative evidence would mean that the evaluation and assessment of a single witness's evidence would require special care and attention. We previously expressed the view[13] that the requirement of corroboration could be abolished in all civil actions except consistorial causes or actions of affiliation. However, since consistorial causes are mainly based on affidavit procedure, and since we have previously submitted in this Memorandum that the presumption of legitimacy could be rebutted on a balance of probabilities,[14] we see no reason why an exception should be maintained for consistorial causes or actions of affiliation. Others may feel that corroboration could be dispensed with in certain limited classes of civil cause. The question is one of some importance and we invite comment.

Corroboration by false denial.[15] (23.25 - 23.27)

X.07. The rule of corroboration by contradiction applies only in actions of affiliation and aliment and has been judicially described as "at best a doubtful doctrine".[16] If a pursuer in such an action has difficulty in obtaining corroboration, it is for consideration whether to deal with the problem by the abolition of the requirement of corroboration, rather than invoke the doctrine of false denial. Further, we have suggested in Chapter M that the court should have power to direct the taking of blood tests of parties, which we think may be of greater assitance in ascertaining the truth than resort to the doctrine.

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[13] Scot. Law Com. Paper No. 4.

[14] Ante, paras. M.07, V.17

[15] See Walkers, para. 174(a).

[16] Davies v. Hunter 1934 S.C. 10, LJ-C Aitchison at p.17.

X.08. If the doctrine is to remain two matters require clarification. Firstly, it has recently been pointed out that there are different views about the ratio on which false denial may be treated as providing corroboration. One view is that the defender's false denial is an implied admission of guilt which corroborates the pursuer's evidence. The other view is that the doctrine leaves evidence of a corroborating witness standing uncontradicted or gives a sinister complexion to evidence, otherwise neutral, from a corroborative witness so that the evidence so regarded confirms the pursuer's evidence.[17] Secondly, it seems still to be an open question whether one independent credible witness who contradicts the defender on one material fact is sufficient in law to establish a false denial.

X.09. Comment is invited on whether, if corroboration is to remain as a general requiremnt of the law, the requirement should be abolished in cases of affiliation and aliment and the doctrine of corroboration by false denial dispensed with. If the latter doctrine should remain the points raised in the preceding paragraph should be clarified.

Criminal Trials (23.28 - 23.33)

X.10. In their treatment of the rule often referred to as "the Moorov doctrine", the Sheriffs Walker, under the heading of "Similar Criminal Acts", divide their treatment into two paragraphs (a) interrelation of character, circumstances and time and (b) common purpose.[18] The Sheriffs appear to have some difficulty in reconciling Dickson's statement that the principle would not apply where the acts charged are uttering forged notes to several persons at different times and places, although we

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[17] Clarke v. Halpin 1977 S.L.T. (Sh.Ct.) 50, Sheriff Principal Reid at p.51.

[18] Walkers, para. 388.

are of the opinion that such acts would now attract the application of the doctrine, provided that they were so interrelated as to lead to the incidence of the existence of an underlying "unity of intent, project, campaign or adventure."[19] It may be noted that the doctrine cannot be applied to the evidence of an occasion where there is no identification of the accused,[20] and that it may be applied in appropriate civil cases.[21]

X.11. Although the abolition or relaxation of the requirement of corroboration in criminal cases has seldom been suggested, we posed the question whether the uncorroborated testimony of a wife should be accepted in cases of "wife battering", and also in breach of interdict cases relating thereto.[22] Now that comments have been received on this proposal, and having given the question further consideration, we have come to the conclusion that it would be unwise to dispense with the requirement of corroboration in these cases.[23] There is a certain class of statutory offence in which, by its nature, there is liable to be a paucity of evidence, and Parliament has dispensed with the requirement of corroboration. Offences against the game and freshwater fisheries laws fall into this category.[24] Views have been expressed, however, that in certain types of offence of a regulatory character, the requirement of corroboration requires an extravagant use of resources, particularly police resources. It appears to us that it is for this reason that corroboration has been dispensed with by statute in relation to certain road traffic offences,[25] and the Criminal Justice (Scotland) Bill makes

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[19] Moorov v. H.M.A. 1930 J.C. 68 LJ-G Clyde at p.73.

[20] McRae v. H.M.A. 1975 J.C. 34.

[21] Michlek v. Michlek 1971 S.L.T. (Notes) 50.

[22] Scottish Law Commission Memorandum No.41 "Occupancy Rights in the Matrimonial Home and Domestic Violence".

[23] Scot. Law Com. No.60 (1980) Report on Occupancy Rights in the Matrimonial Home and Domestic Violence.

[24] See e.g. Game (Scotland) Act 1772, s.8, Game (Scotland) Act 1832, ss.1, 2, Salmon and Freshwater Fisheries (Protection)(Scotland) Act 1951, s.7(3).

[25] See e.g. Road Traffic Act 1972, s.22, Road Traffic Act 1974 s.6. See also Railway Clauses Consolidation (Scotland) Act 1845, c.33, s.137.

provision for the number of traffic offences falling into this category to be increased.[26] We do not consider that corroboration should be dispensed with in criminal cases in general. The justification for the requirement of corroboration as set out in the Research Paper[27] applies more forcibly to criminal cases in general than to civil cases, and may afford sufficient reason for different requirements as to corroboration in the two types of case. It is however for consideration whether the requirement of corroboration should be dispensed with more generally in cases relating to regulatory offences. For the purposes of consultation, we invite comment on the question of whether the requirement of corroboration should be dispensed with in a wider category of criminal cases involving regulatory offences, and if so to what extent and under what circumstances should that dispensation apply.

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[26]Criminal Justice (Scotland) Bill, cl. 31.

[27]Para. 23.02.

PROPOSITIONS FOR CONSIDERATION

(1) Should there be a provision introduced on the lines of sections 84 and 85 of the Law Reform Commission of Canada's Evidence Code, whereby a judge may take judicial notice of foreign law, and must do so if a party requests it. 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, otherwise the judge may apply local law or dismiss the action. In addition, or alternatively, should there be a provision permitting the reception as evidence of foreign law of any previous determination by a Scottish or United Kingdom 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? (paras. B.07 and B.08)

(2) Should the law on judicial notice of matters of fact

(a) be reformed so that judicial notice is taken of facts that are generally known, or are matters of general knowledge within the territorial jurisdiction of the court, or are capable of accurate and ready determination by resort to sources whose accuracy respecting such facts cannot reasonably be questioned

(b) be reformed to the extent 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 or

(c) left as it is at present? (paras. B.10 and B.11)

(3) We propose that the "demand for admission" procedure provided for under rule 99 of the Court of Session rules should be extended to facts which could be ascertained or have been ascertained by a party. (para. B.13)

(4) We propose that the relevant authorities should be asked to extend rule 122 of the rules of court, so that its terms include Court of Session proofs, and that a sheriff court rule should be enacted on similar lines for both proofs and civil jury trials in the sheriff court. (para. B.14)

(5) Would it be advantageous to provide 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? (para. B.15)

(6) Should the amended version of rule 99 of the Court of Session rules suggested in (3) above be applied also in civil causes in the sheriff court? (para. B.16)

(7) Should the law on the admission of evidence of a plea of guilty which has either been withdrawn or not accepted

(a) be retained as it is at present
(b) be amended to treat the plea as a confession or
(c) be amended to provide that the admissibility of evidence of such a plea is in the discretion of the presiding judge? (para. B.22)

(8) There should be a rule in summary criminal 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. (para. B.23) (Thomson 84)

(9) There should be one mode of procedure for the signing of a minute of admission by an accused both in summary and solemn proceedings, and it should be made clear that any fact admitted in a minute by an accused is not to be held proved unless the prosecutor accepts it as proved. (paras. B.24 and B.25) (Thomson 104)

(10) Should there be a provision in solemn and summary criminal procedure permitting the withdrawal of admissions, and if so, should such withdrawal only be permitted with the leave of the court? (para. B.26)

(11) Should any formal provision be made to encourage the use of minutes of admission in criminal trials? If so, what should these provisions be? (para. B.27)

(12) The Sovereign and foreign heads of state recognised as such by the Crown either de facto or de jure should be competent, but not compellable, witnesses. (para. C.02)

(13) Members of diplomatic missions and international organisations should be competent but not compellable witnesses except insofar as otherwise provided by statute, or when immunity is waived by the state or organisation which the proposed witness represents. (para. C.03)

(14) If a rule is enacted that no judges are competent and compellable witnesses, should there be any exceptions to this rule, apart from providing that a sheriff would remain liable to speak to precognitions on oath and dying depositions? (para. C.06)

(15) Should there in any event be a rule that judges can be competent witnesses as to that which occurred in cases tried by them when they can assist subsequent litigation by giving such evidence? If so, the rule should apply to members of tribunals. To what tribunals should the rule apply? (para. C.07)

(16) There should be a general rule that judges and members of tribunals may not testify in the proceedings in which they are acting. (para. C.07)

(17) There should be a general rule that a juror may not testify in the trial in which he is serving as a juror, and may not give evidence of discussions which took place in the jury box or jury room except in relation to attempted criminal interference with the jury's functions. (para. C.08)

(18) If a witness is present in court without the judge's permission, before giving evidence, should there be a general discretion in the judge to admit his evidence? (para. C.12)

(19) 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. (para. C.14)

(20) We propose that if a party to a litigation is not a natural person that party should be entitled to designate an officer or employee of the party to be present in the court room throughout the case, whether or not it is intended that the officer or employee give evidence, provided that permission for such a representative to be present is sought before the trial or proof. (para. C.15)

(21) 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 such person is a matter that the judge may raise. (para. C.17)

(22) Any provision replacing section 3 of the Evidence (Scotland) Act 1840 should be specifically made to apply to all modes of judicial enquiry. (para. C.18)

(23) Should the present law on the competence of children as witnesses be retained, or should children be admitted whatever their age? (para. C.19)

(24) Should persons of defective physical or mental capacity be treated as competent witnesses if they are capable of giving evidence in a manner in which that evidence is, or can be rendered, intelligible to the court without causing undue disturbance? (para. C.19)

(25) The immunity conferred on bankers under section 6 of the Bankers' Books Evidence Act 1879 should be preserved (para. C.20)

(26) It should be made clear 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 based on lack of citation to his being compelled to give evidence. (para. C.21)

(27) Should there be a statutory provision enacting that the spouses of parties in civil cases are both competent and compellable witnesses? Alternatively, should a spouse adduced as a witness 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? (para. D.03)

(28) There should be a rule in defended actions of status or in defended consistorial causes that if the defender does not give evidence the most favourable construction will be put on the evidence led for the pursuer. (para. D.05)

(29) It should be made clear that a party who is allegedly in breach of interdict, interim interdict or other order of the court is not a compellable witness at a proof on the matter. (para. D.06)

(30) Section 3 of the Evidence Further Amendment (Scotland) Act 1874, which relates to proof of a promise of marriage in any action of declarator of marriage founded upon such a promise cum copula subsequente, should be repealed. (para. D.07)

(31) Should the Thomson Committee's recommendation that 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 defence list of witnesses, be implemented in all cases? (para. E.02) (Thomson 140)

(32) On the question of whether the accused should be compelled to give evidence at his own trial should there be
(a) no change in the present law? (para. E.05)
(b) a provision that he should be compellable only if he leads evidence in his own defence, with an exception being made in the case of expert evidence of insanity or perhaps some other mental or physical condition? (para. E.06)

(c) a provision that when a case has been made against an accused it should be regarded as incumbent upon him to give evidence in all ordinary cases, and if he refuses without good cause to answer any questions the court or jury may draw such inferences as appear proper? (para. E.07)

(33) If it is considered that the accused should not be compelled to give evidence, it should be provided that both the prosecutor and any co-accused may comment on this failure, and the judge or jury may draw an adverse inference. (para. E.08) (Thomson 138)

(34) Sections 142 and 347 of the Criminal Procedure (Scotland) Act 1975, which 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, should be repealed. (para. E.09) (Thomson 139)

(35) If an accused gives evidence after calling a witness to the facts it should be open to the judge, prosecution and any co-accused to comment. (para. E.10)

(36) We propose that in no circumstances should the accused's failure to give evidence amount to corroboration. (para. E.11) (Thomson 44)

(37) If two or more accused are tried simultaneously and any of them give evidence, that evidence should be capable of being founded on in favour of any or all of the accused or against any or all of the accused. (para. E.12) (Thomson 110)

(38) An accused person should be entitled to call another accused with his consent as a witness on his behalf, or to cross-examine that other accused if that other accused gives evidence, but he should not be entitled to do both. (para. E.13) (Thomson 109)

(39) Where there is more than one accused, should the court have power to dismiss an accused against whom the Crown have not made out a prima facia case? (para. E.18)

(40) In summary procedure it should be made clear that an accused who has pleaded not guilty and has been discharged after the prosecutor has accepted his plea, or against whom the charge has been withdrawn, is a competent and compellable witness for both the prosecution and the defence in the subsequent trial of a co-accused. (para. E.19)

(41) A co-accused who has pleaded guilty and remained in court during the trial should be competent as a witness, but his presence in court should go to the weight or value to be attached to his evidence, and should accordingly be open to comment. (para. E.20)

(42) (a) Should the accused be entitled to attack the character of any witness without entitling the prosecution or another party to attack his own character? or
(b) Should any attack by an accused on the character of any witness for the Crown or a co-accused render the accused liable to cross-examination about his own character? or
(c) Should the accused be entitled only to put relevant questions to the witnesses for the prosecution or a co-accused without rendering his character liable to be attacked, but any other questions which attack the character of witnesses for the Crown or a co-accused would render him liable to cross-examination as to his own character? (para. E.22)

(43) If (42)(b) is answered in the affirmative should there be a limitation on its application in the case where these questions are essential for the proper conduct of the defence? (para. E.22)

(44) If, under sections 141(e) and 346(e) of the Criminal Procedure (Scotland) Act 1975, one accused confines his evidence to statements exculpating his co-accused, he should not be entitled to claim the common law privilege against self-incrimination. (para. E.23)

(45) If proposition No. 38 is accepted and the law is altered to make an accused person a competent but not compellable witness for a co-accused, and if proposition No. 44 is accepted that such an

accused should not be entitled to claim the privilege against self-incrimination, sections 141(e) and 346(e) of the Criminal Procedure (Scotland) Act 1975 should be reworded. (para. E.23)

(46) It should be made clear that sections 141(e) and 346(e) of the Criminal Procedure (Scotland) Act 1975 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. (para. E.24)

(47) Should it be made clear that the words "tending to show" occurring in sections 141(f) and 346(f) of the Criminal Procedure (Scotland) Act 1975 permit cross-examination of the accused about his misconduct, if the misconduct has already been mentioned at the trial? (para. E.25)

(48) It should be made clear that the absolute prohibition on certain questions in sections 141(f) and 346(f) of the Criminal Procedure (Scotland) Act 1975 does not apply to questions put in examination-in-chief. (para. E.26)

(49) It should be made clear that the word "charged", as used in proviso (f) of sections 141 and 346 of the Criminal procedure (Scotland) Act 1975, means "charged in court". (para. E.27)

(50) It should be clarified that where the accused foregoes the protection provided by the first part of proviso (f) to sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975 it does not necessarily follow that he can be asked questions tending to show that he had committed, been convicted of, or charged with other offences, or is of bad character; such questions should only be permitted if they are relevant to the issue before the jury, or to the credibility of the accused. (para. E.28)

(51) A party intending to cross-examine an accused by virtue of proviso (f) of sections 141 or 346 of the Criminal Procedure (Scotland) Act 1975 should be required to apply to the judge for leave to do so, and it should be in the discretion of the judge to grant or refuse such leave. (para. E.29)

(52) We consider that it would be inadvisable to express in legislative form the proposition that when evidence that the accused has committed or been convicted of another offence is justified by proviso (f)(i) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975, it is generally undesirable that it should be first adduced in cross-examination. (para. E.30)

(53) The word "character" occurring in proviso (f)(ii) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975 should not be changed. (para. E.31)

(54) The first limb of proviso (f)(ii) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975 should not be amended to cover the case where the accused has led evidence of witnesses to his own good character, but does not cross-examine on the subject or allude to it in his own evidence-in-chief. (para. E.32)

(55) An accused who makes imputations on the character of witnesses for a co-accused should not have the protection provided by the first part of proviso (f) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975. (para. E.33)

(56) Should a co-accused, as well as the prosecutor, be entitled to examine the accused to rebut his claim to be of good character, and be entitled to adduce evidence for that purpose? (para. E.34)

(57) We propose that the word "unnecessary" or "unjustifiably" be inserted in the last part of proviso (f)(ii) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975. (para. E.35)

(58) When an 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 a co-accused to cross-examine him under proviso (f)(ii) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975. (para. E.36)

(59) Should there be a provision that when an imputation is made by an accused A against a witness for the prosecution or against a witness for the co-accused B, both the prosecution and B can examine the accused A who makes the imputation? (para. E.37)

(60) We propose that proviso (f)(iii) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975 be repealed. If this is not acceptable, we suggest that it be made clear that the proviso applies where the accused witness has given evidence against a person other than the person seeking to bring out his character. (para. E.38)

(61) If proviso (f)(iii) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975 is not repealed we propose a provision to the effect that an accused does not give evidence against a co-accused within the meaning of the proviso where his evidence, if believed, would tend to result in the acquittal of the co-accused. (para. E.40)

(62) Would it be advantageous to amend sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975 to prevent an accused from bringing out the misconduct of another accused who has given evidence against him? We strongly oppose amending these sections to make this matter one for the judge's discretion. (para. E.41)

(63) Is there any satisfactory means of dealing with the situation which arises where there are two accused, A and B, A having a bad record and B none, and B gives evidence and attacks witnesses for the benefit of A and himself, while A does not give evidence and so cannot be cross-examined under proviso (f) of sections 141 or 346 of the Criminal Procedure (Scotland) Act 1975 on his record? (para. E.43)

(64) Should there be a provision expressly laid down in Scots law that where an accused has been cross-examined as to his previous convictions under provisos (f)(ii) and (iii) of sections 141 and 346 of the Criminal Procedure (Scotland) Act 1975 the judge must direct the jury that these convictions merely go to the accused's credibility and not to the probability of his guilt? (para. E.44)

(65) A spouse should be a competent witness for the Crown in all cases. (para. F.02) (Thomson 124)

(66) With regard to the compellability of spouses should,
(a) the judge decide in each case whether the spouse is to be compellable or not,
(b) the spouse be compellable in all cases in which she is competent,
(c) the spouse be compellable only where the offence is serious, or cannot be proved without the spouse's evidence or,
(d) the present areas of compellability be extended with a view to the protection of the interests of children? (para. F.04)

(67) If a spouse is not entitled to decline to answer any questions should there be any sanction against failure to answer a relevant question? (para. F.04)

(68) Should the spouse be a compellable witness for the accused in all cases unless she is charged and tried with him? (para. F.05)

(69) We propose that the evidence of a witness called on behalf of one accused should be competent evidence for or against another accused. (para. F.06)

(70) Should the spouse of an accused be a competent witness for a co-accused with the spouse accused's consent in every criminal case? (para. F.07)

(71) The law relating to the fact that the spouse of a co-accused may not be called as a witness generally, should be rationalised. (para. F.08)

(72) Should the wife of an accused be competent to give evidence on behalf of a co-accused whether or not the accused is willing? (para. F.09)

(73) Where there are two accused A and B, should Mrs A be compellable for B in all circumstances, or should she be compellable for B only in cases where she would be compellable on behalf of the prosecution? (para. F.10)

(74) We propose that both the prosecution and a co-accused should be entitled to comment on the fact that the accused's spouse has declined to give evidence. (para. F.11)

(75) A judge should normally give a warning about the evidence of accomplices (socii criminis). Should he also generally give a warning about the evidence of a co-accused? (para. F.14)

(76) Should the rule requiring the jury to be directed to apply special scrutiny to the evidence of an accomplice be extended to defence as well as prosecution witnesses? (para. F.15)

(77) While we would not wish to encourage in any way advocates or solicitors for either side in criminal proceedings to give evidence, it should nevertheless be made clear that, in principle, both are competent witnesses in the case in which they are engaged. (para. F.17)

(78) We propose that the oath and affirmation in civil proceedings should take the same form as the oath and affirmation in criminal proceedings. (para. G.04)

(79) A witness who has a religious belief which is not opposed to the taking of oaths, but declines to say what form of oath binds him, should be required to affirm. (para. G.05)

(80) Section 345 of the Criminal Procedure (Scotland) Act 1975, which dispenses with the repeated administration of the oath to the same witnesses in summary criminal procedure, should be extended to repeated administration of the affirmation, and to other proceedings, such as expert witnesses in High Court circuits. (para. G.06)

(81) The form of affirmation specified in para. 2(b) and Schedule, Part 4, of the Act of Adjournal (Form of Oaths) 1976, should be used in civil as well as criminal proceedings, and the rule that the witness must use the precise words of the statutory form should be abolished. (para. G.08)

(82) There should be a general rule that a party or his advocate has a discretion to call such witnesses as he pleases in the order that he chooses. 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, the position of a party allegedly in breach of an order of the court, and the question whether there should be any statutory rule that the defender in an action of affiliation and aliment must not be called as first witness for the pursuer. (para. G.11)

(83) Should there be a general rule stating that it is for a party or his advocate to make up his mind, subject to the courts seeing that the witness has fair play, how he will examine his witness? (para. G.12)

(84) Should there be a general rule for both civil and criminal cases that the evidence of every witness should be evidence in causa, and subject to general cross-examination? (para. G.13) (Thomson 110)

(85) Should a judge be entitled to call and question witnesses on his own initiative? If so, should the rule be varied depending on what type of action is being heard? (para. G.14)

(86) Any comprehensive enactment should restate the law that a witness who declines to answer a competent and relevant question in court, which that witness is compellable to answer, is in contempt. (para. G.16)

(87) When a party or his advocate is eliciting evidence from a witness through an interpreter, it should be provided that the questions ought to be directed to the witness as though there was no interpreter there. (para. G.17)

(88) We propose that the rule applicable to criminal trials, that when evidence is elicited by the court the parties are entitled to question the witness thereon, should be specifically applied to civil cases also. (para. G.18)

(89) It should be in the discretion of the trial 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. (para. G.19)

(90) When there is an apparent inconsistency in the evidence of a witness, the cross-examiner should be entitled to leave the inconsistency and found on it, or give the witness an opportunity to explain it, but there should be no fixed rule to this effect. (para. G.20)

(91) If a cross-examiner receives a general answer negativing his case, should there be a rule that he must proceed to put further detailed questions which can only be answered in the negative? If so, should the rule distinguish between civil cases and criminal cases? (para. G.21)

(92) Should there be detailed rules on the consequences of failure to cross-examine a witness, and if so, what should they be? (para. G.24)

(93) We would suggest to the relevant authority that it should be made clear that 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. (para. G.25)

(94) We propose 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. (para. G.27)

(95) We suggest that the judge should be given an express discretion to allow any question which either party or a juryman wishes to ask a witness, after the witness's re-examination is closed, to be put direct to the witness. (para. G.28)

(96) Should there be a provision that the judge must formally ask a witness at the conclusion of his evidence (a) whether he wishes to say anything in expansion or clarification of the answers he has given or (b) whether he has any further information which he thinks might help the court? (para. G.30)

(97) Should there be 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 been taken? (para. G.32)

(98) Should a judge 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 such evidence? (para. G.33)

(99) We suggest to the relevant authority that the Sheriff Court Rules should make provision for the recording of submissions as to competency and relevancy (para. G.34)

(100) Should experts' reports and notes on which they are examined, or which they read as part of their evidence, be made productions? (para. G.36)

(101) A witness should not be allowed to refresh his memory from a document which is privileged from production, with the 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. (para. G.38)

(102) Should there be a rule 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 with appropriate provision for disclosure to the other party? Should a similar procedure be adopted in civil cases? (para. G.40)

(103) It should be made clear that at common law a judge may recall a witness, even after both cases have been closed, only for the limited purpose of clearing up obscurities. (para. G.43)

(104) It should be made clear that section 4 of the Evidence (Scotland) Act 1852 and sections 149 and 350 of the Criminal Procedure (Scotland) Act 1975, which relate to the recall of any witness on the motion of a party, are not limited to recall for the purpose of rectifying some accidental omission, but may be invoked whenever the interest of justice requires it. (para.G.44)

(105) The provisions of sections 149 and 350 of the Criminal Procedure (Scotland) Act 1975 should be available to a prosecutor, at the discretion of the trial judge, even although the prosecutor has closed his case, but the defence case has not been opened. (para. G.45).

(106) The rule flowing from M'Neilie v. H.M. Advocate 1929 J.C. 50 should be changed, and if a witness denies that he made a previous statement which is different from his evidence, the court should have power on a motion by the Crown at the close of the defence case, and before speeches to the jury, to allow the Crown to lead additional evidence (whether from a new or recalled witness) to prove that the witness did make a different statement. This proposition should be extended mutatus mutandis to civil proceedings. (para. G.46)

(107) We propose 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 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. (para. G.47) (Thomson 120).

(108) We propose that the court should have power, on a motion made by the Crown at the close of the defence case and before speeches to the jury, to allow the Crown to lead additional evidence (whether from a new or recalled witness) solely for the purpose of contradicting relevant and material evidence given by any defence witness, provided that the court is satisfied that the Crown could not reasonably have forseen that the defence would lead such evidence (para. G.48) (Thomson 121a)

(109) For the purpose set forth in the foregoing proposal, the Crown and the defence should be permitted to lead evidence from witnesses whose names are not included in the respective list of witnesses. (para. G.48) (Thomson 122)

(110) Should the law be changed so that if a recalcitrant witness offers to return to the box after the party who called him has closed his case advantage can be taken of the witness's offer? If so how best can this be achieved? (para. G.49)

(111) It should be provided that the judge, prosecution and defence should be entitled to comment on the omission of any party to call any witness, or to adduce any evidence from any witness on any particular topic. (para. G.50)

(112) There should be a provision that when a statute requires the taking of evidence by shorthand it should be possible by enacting a statutory instrument to provide for the recording of evidence by some other method. (para. H.01)

(113) The provisions in the Conjugal Rights (Scotland) Amendment Act 1861 and the Evidence (Scotland) Act 1866 relating to the methods of recording oral evidence should be consolidated. (para. H.02).

(114) We suggest to the appropriate authority that Rule 65 of the Sheriff Court Rules which provides for the recording of evidence in narrative form is no longer necessary. (para. H.04)

(115) There should be a provision in general terms that the court may take evidence of 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 reason. (para. H.04)

(116) Sections 3 and 4 of the Justiciary and Circuit Courts (Scotland) Act 1783 are obsolete and may be repealed. (para.H.05)

(117) In criminal trials on indictment should there be an express provision to the effect that the presiding judge is to continue to be obliged to take and preserve a note of the evidence or proceedings, making it clear that the rule applies to all judges? (para. H.06)

(118) Section 237(1) of the 1975 Act should be repealed in relation to the judge's notes of the proceedings and section 237(2) should be repealed in its entirety. In substitution for the provision in sub-section (1) relating to the notes of the proceedings there should be a provision giving the High Court express power to call for these at any time. (para. H.06) (Thomson III 13)

(119) Should section 146 of the Criminal Procedure (Scotland) Act 1975 be amended? (para. H.06)

(120) Section 276 of the Criminal Procedure (Scotland) Act 1975 should be amended to make it clear that it is not necessary that the declaration de fideli administratione officii be administered to the shorthand writer at the beginning of each trial. (para. H.07)

(121) Should there be a provison that in summary criminal procedure a shorthand writer may be made available at public expense if so required by the accused or the Crown, on cause shown, or by 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? (para. H.08)

(122) Section 359 of the Criminal Procedure (Scotland) Act 1975 should be amended to provide that the names and designations of witnesses be recorded, and that all documents produced or referred to should be noted. (para. H.08)

(123) In civil jury trials it should be provided that the judge's charge be recorded, and in the case of an appeal, printed for the use of the Appeal Court. (para. H.09)

(124) Should there be a provision that in ordinary actions 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 a point of law only? (para. H.10)

(125) There should be a statutory provision that decree in an undefended consistorial case in the Sheriff Court cannot be pronounced until the grounds of action are substantiated by sufficient evidence. (para. H.11)

(126) Should there be a rule for the Sheriff Court that in consistorial cases evidence should be recorded in full? (para. H.12)

(127) Would it be advantageous to introduce into Scots law a provision that a written statement by any person is admissible in criminal proceedings to the like extent as oral evidence, if certain conditions are satisfied? (para. J.04)

(128) If the foregoing proposition is acceptable should the conditions for the admission of a written statement include:-

(a) that all parties consent to the admission of the statement;
(b) that the statement should be signed by the person who made it, and embody a declaration that it is true to the best of his knowledge and belief; and
(c) that a copy of the statement is made available to the other parties a fixed period before the trial? (para.J.04)

(129) We propose a statutory provision that judicial notice should 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. (para. K.02)

(130) Should judicial notice be taken of 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 if appearing in a publication or form purporting to have been issued by public authority? (para. K.03)

(131) Should there be a provision 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 by the laws of a foreign country to make the execution or attestation, with the proviso that the document must be accompanied by a certification by a diplomatic or consular official either of the country of origin or the country receiving the document, as to the genuineness of the signature and official position of the executing or attesting person? (para. K.06)

(132) It should be made clear that the standard of proof in civil proceedings facing the party who wishes to dispute the verdict of a criminal court is proof on a balance of probabilities.(para. K.08)

(133) Should section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 be amended to provide 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 anyone other than the person adjudged guilty, 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 be rebuttable by evidence establishing the contrary on a balance of probabilities? (para. K.10)

(134) There should not be an exception to the general presumption of guilt when an extract conviction is produced in subsequent civil proceedings if it can be shown that the jury's verdict is "unsafe or unsatisfactory". (para. K.11)

(135) There should be a rule of pleading 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. (para. K.12)

(136) We propose that there should, in criminal cases where the guilt of an accused depends on another person having committed an offence, be a provision for the admissibility of convictions analogous to section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, and that if an accused wishes to dispute the correctness of another person's conviction he would have to prove it wrong on a balance of probabilities. (para. K.21)

(137) (a) If an accused has been tried on one charge and is then tried on what is likely to be a more serious charge, should a conviction on the first charge be admissible in the second trial?
(b) Should an accused in the second trial be permitted to rely on a verdict of not guilty or not proven in the first trial? (para. K.22)

(138) In order to increase the utility of section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 should paramours be named in divorce decrees? (para. K.23)

(139) Should the principle of res judicata be extended to the situation where there are two or more civil actions by different pursuers against the same defender, or by the same pursuer against different defenders, which raise the same issue of fact? (para. K.24)

(140) Section 353 of the Criminal Procedure (Scotland) Act 1975, which relates to proof of official documents in summary criminal proceedings, should be extended to all proceedings, both civil and criminal. (para. K.26)

(141) In relation to the admissibility of documentary evidence we propose:-
(a) that the same rules of admissibility should apply in both civil and criminal cases
(b) that records which are compiled either in the course of regualr performance or under a duty should be admissible

(c) that records of diagnoses and opinions should be admissible
(d) that 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. (para. L.08)

(142) For documentary evidence to be admissible it should not 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. If there were to be such a requirement permanent records made after the event from then destroyed contemporaneous records should be admissible. (para. L.09)

(143) There should be a provision that information indirectly supplied to the recorder of a statement should be admissible, provided the information originates from a person with personal knowledge of the matters dealt with, and that there is a duty all the way down the chain from him to the person who made the record to pass on the information. (para. L.10)

(144) We propose a wider definition of the word "document" in any future legislation. (para. L.11)

(145) Copies of documents, at present admissible in civil causes by virtue of section 7(3A) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, should also be admissible in criminal trials, provided they are certified as correct copies. (para. L.11)

(146) Should signed precognitions, precognitions recorded on tape, precognitions in writing in question and answer form, the answer being in the writing of the witness, and precognitions on oath be admissible? (para. L.13)

(147) Should any type of precognition be admissible, together with the evidence of the precognoser, where the maker of the statement has died or become unable by reason of health to give evidence either in court or on commission? (para. L.13)

(148) Statements taken after an accident by an employee or investigator, in the course of his duties, from employees who cannot subsequently be traced, should be admissible. (para.L.15)

(149) There should be a provision that notes or transcripts of evidence be admissible, together with any judgment dealing with the credibility of witnesses. (para. L.16)

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

(151) Are the present procedural rules on the admissibility of computer evidence satisfactory? (para. L.18)

(152) We propose 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. (para. L.19)

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

(154) Business books, minutes of meetings, including draft minutes and minutes of meetings in sequestration proceedings, and the trustees Sederunt Book should be admissible as evidence of the facts stated therein, without the support of a witness. (para. L.21)

(155) If the foregoing provision is not thought to be acceptable we propose that copies of entries in bankers' books should be received if they are certified as true copies by the signature of an officer of the bank. Should this proposition be extended to other financial institutions, or even to documents used for recording the financial transactions of a wide variety of undertakings? (para. L.21)

(156) There should be a provision making it 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. (para. L.22)

(157) There should be a provision that Ordnance Survey Maps are sufficient evidence of boundaries and other features as at the date of the map. (para. L.23)

(158) If there is to be no new general provision as to the admissibility of documents, we propose that maps, other than Ordnance Survey Maps, plans and histories be admissible as evidence of boundaries and other features, such weight to be given to them as the court considers justified by the circumstances. (para. L.23)

(159) There should be a provision to the effect that if a pursuer refuses a medical examination the action should be sisted, and in the event of a defender refusing an adverse inference may be drawn. (para. M.03)

(160) There should be introduced a provision on the lines of parts III and IV of the Family Law Reform Act 1969, with the sanctions for refusal to submit to a blood test being the same as those in the foregoing proposition. (para. M.07)

(161) Evidence of physical resemblance, or want of physical resemblance, between a child and its supppsed parent or parents should be admissible as evidence of parentage. (para. M.08)

(162) It should be made clear in both civil and criminal cases, where the authenticity of a recording is challenged, that it is for the party putting forward the recording to prove it to be authentic on a balance of probabilities. (para. M.09)

(163) We propose the abolition of proof by writ or oath. (para.N.04)

(164) Should the rule prohibiting the admission of extrinsic evidence in relation to documents be

(a) abolished or

(b) expressed and operated as a rebuttable presumption that when the terms of an agreement have been reduced to writing, that writing contains with exactness and completeness all those terms? (paras. P.06 and P.07)

(165) In actions where adultery is in issue the rule which permits the admission of evidence that the defender has acted in a similar manner on a previous occasion should be abolished. (para. Q.03)

(166) Should the general rule that evidence on collateral issues is inadmissible be maintained, or should such evidence be allowed more widely? (para. Q.03)

(167) The rule which permits cross-examination of a party on acts of unchastity about which it has been held incompetent to present substantive evidence should be abolished. (para. Q.04)

(168) We propose that in cases of murder or assault the accused should be entitled to prove that the victim committed specific acts of violence. (para. Q.05)

(169) In cases of rape and similar assaults should the court have a discretion to admit evidence of the complainer's sexual behaviour with other men, both before and after the alleged offence? (para. Q.06)

(170) In cases of rape or similar assaults evidence that the complainer was of bad moral character or that she associated with prostitutes should no longer be admissible as being relevant to credibility. (para. Q.07)

(171) We propose a provision permitting proof of a witness's previous convictions, provided that such convictions are relevant to his credibility. (para. Q.09)

(172) The law should be amended to allow previous convictions outside the United Kingdom to be libelled against the accused. (para. Q.10)

(173) It should be competent for a party to lead evidence in rebuttal of evidence, given by a witness called by his opponent, which is relevant to that witness's character or credibility, and such a rule should apply to both civil and criminal cases. (para. Q.11)

(174) Should evidence of a witness's physical or mental condition, which could affect the reliability of his evidence, be admissible even when there is no suggestion of mental illness? (para. Q.12)

(175) An ordinary witness should be permitted to give evidence in the form of an expression of opinion which he has formed by applying his previous knowledge and experience to his actual perceptions. (para. R.02)

(176) We propose that all witnesses should be entitled to state opinions on the issues before the court, subject to the qualification that a non-expert witness should be allowed to state an opinion only if it is an intrinsic part of his evidence. (para.R.05)

(177) An expert witness should be permitted to be present in court while both witnesses to opinion and witnesses to fact are giving evidence, whether or not the expert witness himself is to give evidence of fact. (para. R.07)

(178) We propose that if an allegedly genuine document is admissible for the purpose of comparatio literarum in a criminal trial, although it may be inadmissible for any other purpose, the same rule should apply in civil cases. (para. R.12)

(179) Should there be a rule that neither a judge nor a jury should arrive at a decision on the question of the authenticity of a writing upon their own impression of its genuineness without the aid of evidence? (para. R.13)

(180) We propose that the court should have a discretion to admit expert evidence even when a nautical assessor is sitting. (para. R.15)

(181) Should provision be made for a "court expert system" in Scotland? (para. R.16)

(182) Should there be a provision whereby

(a) in civil proceedings the parties should be obliged to disclose to each other, in advance of any proof, reports which they intend to found upon

(i) by all experts

(ii) by some experts only, such as medical experts, or

(iii) by some experts only in certain types of litigation only, such as personal injuries claims?

and (b) in criminal proceedings the parties should be obliged to disclose to each other, in advance of the trial, reports which they intend to found upon

(i) by all experts or

(ii) by some experts only? (para. R.18)

(183) If a witness is entitled to refuse to answer a question on the ground of a privilege, the privilege should be formulated in such a way as to make it incumbent on the judge to require the question to be withdrawn and expunged from the record of proceedings, either ex proprio motu or at the request of the witness or his legal adviser. (para. S.02)

(184) If a witness requires to disclose damaging facts in order to obtain the privilege mentioned in the foregoing proposition, should he be able to do so in camera, or should he state them in open court with or without an undertaking that they will not be used against him? (para. S.02)

(185) Should the common law privilege against self-incrimination be abolished, and a general statutory protection substituted therefor by which a witness would be compelled to answer all questions, although the answers could not be used against him in subsequent civil or criminal proceedings? Alternatively, should immunity be provided in a limited number of cases on similar lines to that in section 31(1) of the Theft Act 1968? Should such a provision extend to offences committed anywhere in the United Kingdom? (paras. S.05 and S.06)

(186) Should the privilege against self-incrimination be extended to privilege against incrimination of a spouse, with the right to waive the privilege being that of the witness, not his spouse? (para. S.07)

(187) Should there be a privilege against incrimination under foreign law? (para. S.08)

(188) If the privilege in the foregoing proposition is favoured, should it be restricted territorially, and if so should the territorial extent be that of the EEC? Should there be a rule that there must be a distinct possibility of the party claiming privilege being prosecuted in the foreign country before the privilege can be invoked? (para. S.08)

(189) Should section 3 of the Evidence (Scotland) Act 1853 be repealed? (para. S.10)

(190) If section 3 were not to be repealed it is suggested:-

(a) The privilege for communications between spouses should be that of the communicator alone, and should be waivable by the communicator alone. (para. S.11)

(b) If the privilege were attached to the communicator alone, and not waived by him, it should be provided that the other spouse should not be asked, and if asked, should not be required to answer, any question tending to elicit information about any matter communicated to her, and that the presiding judge should give the appropriate warning. (para. S.12)

(c) A communication between spouses which has been intercepted or overheard should be admissible. (para. S.13)

(d) If some form of privilege is to be retained, we provisionally recommend that it should cease to apply after the marriage has been dissolved by death or divorce. Should it also cease to apply if the parties have been judicially separated or are no longer cohabiting? (para. S.14)

(e) If a privilege were to be retained, should there be a proviso that it will not apply in proceedings between spouses? (para. S.15)

(191) We propose that the privilege concerning marital intercourse, which was enacted by section 7 of the Law Reform (Miscellaneous Provisions) Act 1949, should be abolished both in relation to civil and criminal cases. (para. S.16)

(192) Should sections 141(d) and 346(d) of the Criminal Procedure (Scotland) Act 1975, which relate to disclosure of communications made during a marriage, be repealed? (para. S.17)

(193) If sections 141(d) and 346(d) of the Criminal Procedure (Scotland) Act 1975 are not repealed, should there be a provision that divorced and separated spouses do not have a privilege regarding marital communications? (para. S.18)

(194) We provisionally propose that a bankrupt at his public examination should be required to answer all questions, but that his answers should not be available for use against him in any subsequent civil or criminal proceedings, other than in relation to perjury in respect of such answers. (para. S.19)

(195) The privilege whereby a witness is not bound to answer a question tending to show that he has committed adultery should be abolished. (para. S.20)

(196) We propose that privilege should apply to communications made by an accused with the object of obtaining a solicitor's services, even if these are not in fact retained, provided that the relationship of solicitor and client was at least in contemplation and the communications were fairly referable to that relationship. (para. S.22)

(197) We propose that the general rule that communications between a client and his legal advisers are irrecoverable be restated in terms which would permit the recovery of any relevant documents or other material, other than any prepared predominantly for the purpose of consideration by professional advisers in anticipation or in connection with litigation. If this is not acceptable, we would not in any event propose that privilege be extended to reports made by a servant, present at the time of an accident, to his employer. (para. S.26)

(198) Should a principle be introduced that a mediator in a matrimonial dispute cannot, without the consent of both spouses, disclose any communications with either of them, if made while he was acting as such mediator between them, in connection with pending or contemplated matrimonail proceedings? If it is thought there should be such a principle, should it be extended to cover direct negotiations between the spouses when no third party intervenes? (para. S.28)

(199) There should be no privilege conferred on marriage guidance counsellors in relation to communications made to them. (para.S.29)

(200) Should a privilege similar to that which exists between solicitor and client be conferred in the case of clergymen, doctors, journalists or partners, or any other group? (para.S.37)

(201) Should the court be vested with a discretionary power to confer a privilege similar to that which exists between solicitor and client in circumstances where for instance, disclosure would be more harmful than helpful to the public interest? (para.S.38)

(202) Should the law on hearsay be abolished? If yes, generally or in what circumstances? (para. T.02)

(203) If a witness is unfit by reason of bodily or mental condition either to give evidence in court or on commission hearsay should be admitted as evidence of the facts alleged in the statement. Should such an exception be extended to temporary disability? (para. T.05)

(204) Hearsay of an oral statement should be admitted, subject to appropriate safeguards, where the maker of the statement is abroad and cannot reasonably be expected to return, cannot with reasonable diligence be identified or found, or cannot reasonably be expected due to lapse of time to have any recollection of the matter. (para. T.06)

(205) We propose that where the maker of a statement is a prisoner of war, and the court is satisfied as to this fact, hearsay evidence of the statement should be admissible in criminal as well as civil cases. (para. T.07)

(206) We propose that the date on which the competency of the maker of the statement should be tested is the time when the statement is tendered in evidence. (para. T.08)

(207) We propose that it be made clear that hearsay of hearsay is admissible, provided that each statement fulfills the necessary conditions as to the maker and the nature of the statement. (para. T.09)

(208) Should evidence of a statement by way of preocognition by someone who would have been a competent witness be admitted, and if so in what circumstances? (para. T.10)

(209) We propose that any new rule regarding the admissibility of written statements by persons who are dead, or who are unable to give evidence through unfitness by reason of bodily or mental condition, should also apply to oral statements. (para. T.10)

(210) We propose that evidence of a witness now deceased, given in prior proceedings between different parties, even although there has been no cross-examination on behalf of a party to the later action, should be admissible. (para. T.11)

(211) If a witness is unable to give evidence by reason of his bodily or mental condition a dying deposition which he has given should be admissible as evidence. (para. T.12)

(212) We propose that it should be made clear that dying depositions are admissible in all criminal trials and also in civil cases. (para. T.12)

(213) We propose that when a dying deposition is to be used as evidence, the maker thereof having died, the sheriff who took the deposition should make a statement to the court indicating the circumstances in which the deposition was made. (para. T.13)

(214) We propose that privilege should attach to statements contained in dying depositions. (para. T.14)

(215) It should be made clear that deponents have the alternative of taking the oath or affirming. (para. T.15)

(216) We propose that if the credit of a witness is impugned on a material fact, on the ground that his account is a late invention, evidence of an earlier statement by a witness to the same effect should be admissible. (para. T.16)

(217) Evidence of previous consistent statements should be admissible as evidence of the facts stated therein. Should there be any restriction on their admission? (para. T.17)

(218) It should be made clear that section 3 of the Evidence (Scotland) Act 1852, and sections 147 and 349 of the Criminal Procedure (Scotland) Act 1975, do not admit of any exceptions. (para. T.20)

(219) If precognitions as a whole are not to be admissible should precognitions on oath be admissible? (para. T.21)

(220) We propose that where a witness has given evidence on commission, and also appears in court, it should be competent to contradict the witness by using his statements made in the deposition. (para. T.22)

(221) Should previous inconsistent statements of ordinary witnesses, not being precognitions, be admitted as evidence of the facts stated therein? (para. T.23)

(222) We propose that in both civil and criminal proceedings the fact that a witness, whom it is sought to call, has been present in court during the evidence of the witness whom it is sought to discredit should not render the witness incompetent. (para. T.24)

(223) If Proposition 217 is not acceptable, should the rule as to the admissibility of res gestae statements be restated so that it is clear that they are admissible as evidence of the facts stated therein? (para. T.28)

(224) We propose that a document which is knowlingly advanced as true in earlier judicial proceedings for the purpose of proving a particular point should be admissible against the party in subsequent proceedings to prove the same point. (para. T.31)

(225) Should a document which has not been uttered be receivable as an admission? (para. T.32)

(226) Admissions which involve a party other than the maker should be admissible against that other party as well as against the maker. (para. T.33)

(227) A statement by an agent or employee should be admissible against his principle or employer if it concerns a matter within the scope of or relating to the agency or employment. (para. T.34)

(228) It should be competent for the Crown to lead evidence of statements made by a suspect, before arrest, in answer to police questioning, provided that such statements are fairly obtained and the suspect has been cautioned before he made them. (para. T.36) (Thomson 21)

(229) We propose that it should be made clear that it is necessary to libel previous malice in the indictment relating to a murder charge as a matter of fair notice. (para. T.39)

(230) We propose that evidence of an accused's reply to a less serious charge should be admissible in relation to a more serious charge, provided that each of the crimes falls into the same category, such as dishonesty or personal violence, and substantially covers the same species facti. (para. T.40)

(231) If the Thomson Committee's recommendations on statements to the police are accepted, we propose that it should be made clear that if a person wishes to make a statement when he is in prison the police should be called to take that statement. (para. T.41)

(232) We propose that it be made clear that the test of admissibility of evidence of statements to persons other than the police, by the person to whom the statement is addressed, should be whether the statement was fairly obtained or not. (para. T.42)

(233) We propose that expressions uttered by a person while unconscious e.g., sleep, anaesthesia, coma should not be admitted as evidence of their truth. We invite comment on whether or not, if real or circumstantial evidence is obtained in consequence of what has been said, it should be admissible to prove them as explaining and leading up to its discovery. (para. T.43)

(234) We propose that it be made clear that evidence of statements overheard is admissible, but would welcome views on the extent to which such a provision should be qualified by the requirement that it be fairly obtained. (para. T.45)

(235) We propose that it be made clear that intercepted letters may be admitted in evidence, provided such letters are written voluntarily and not as a result of any inducement or trap. (para. T.46)

(236) We propose that it should be competent in both solemn and summary courts to narrate in the indictment or complaint that the accused has failed to appear at an earlier diet or trial, and to found on this an inference of the accused's guilt. (para.T.48)

(237) We propose that statements, written or oral, made by an accused in his own favour should be admissible for the purpose of showing that the statement was made. (para. T.50)

(238) If evidence of a confession by one accused is led as admissible against him, and its terms implicate another accused, that confession should be admissible against the other accused. (para. T.51)

(239) The accused should be entitled to found on any statement made in his favour by a co-accused. (para. T.52)

(240) It should be made clear that evidence of facts obtained as a result of an inadmissible confession should be admitted provided that (a) the prosecution do not disclose the source of the information and (b) the information was not obtained by methods which the court decides were unfair in the circumstances. (para.U.02)

(241) A sheriff should have power to grant a warrant to search the premises of a third party, but unless the sheriff is satisfied that there is a real risk of the evidence being destroyed or tampered with, the third party should be given an opportunity of being heard before the warrant is granted. (para. U.04) (Thomson 18)

(242) We propose that in civil cases, as in criminal cases, the court should be entitled to exclude evidence obtained by illegal or irregular means. (para. U.06)

(243) We propose that it should be made clear that where the Crown assert insanity against a defence assertion of diminished responsibility, the jury should be directed that they cannot find for the Crown unless they are satisfied beyond reasonable doubt that the accused was insane rather than of diminished responsibility. (para. V.03)

(244) In cases where insanity or diminished responsibility is in issue, should the burden of proving these conditions, which lies on the accused, be reduced to an evidential one? (para. V.05)

(245) It should be made clear that where his defence is that of mistake the burden of proof on the accused is evidential only. (para. V.06)

(246) Should the "doctrine" of recent possession be dispensed with and be replaced by a rule that guilt can be proved by circumstantial evidence, and that in cases of theft or reset the nature and circumstances of the accused's possession of stolen property may be sufficient evidence of guilt? (para. V.07)

(247) We propose that it should be made clear that Scots law does not impose a legal burden of proof upon an accused, except where a statute expressly so provides, where a fact constituting exculpation is peculiarly within the accused's own knowledge. (para. V.08)

(248) If a general rule is formulated making it clear that the burden of proof on the defence is an evidential one only, we propose that there be an exception to this rule in the case where the fact that a person other than the accused has committed an offence is relevant, and that there should be a persuasive burden on the defence of disproving the guilt of the other person on a balance of probabilities. (para. V.12)

(249) We propose that where any criminal conduct is in issue in a civil case the standard of proof should be on a balance of probabilities. (para. V.16)

(250) The standard of proof to rebut the presumption of legitimacy should be proof on a balance of probabilities. (para. V.17)

(251) We propose that it be made clear that the standard of proof in cases of contempt of court should be proof beyond reasonable doubt. (para. V.18)

(252) Should the standard of proof in actions for contravention of lawburrows be proof beyond reasonable doubt? (para. V.19)

(253) Should the requirement of corroboration in civil cases be
(a) abolished completely
(b) abolished in some classes of action
(c) left as it is at present or
(d) restored to the position prior to the passing of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968? (para. X.06)

(254) If corroboration in civil actions is to be retained should the "doctrine" of corroboration by false denial also be retained? (para. X.09)

(255) Should the requirement of corroboration be dispensed with in a wider category of criminal cases involving regulatory offences, and if so to what extent and under what circumstances should that dispensation apply? (para. X.11)