SCOTTISH LAW COMMISSION

RESEARCH PAPER

on the

LAW of EVIDENCE

of SCOTLAND

by

Sheriff I D Macphail

April 1979

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

FOREWORD

In its First Programme of Law Reform this Commission recommended that

> "the law of evidence should be examined by us with a view to its reform, the consolidation of the relevant statutes, and ultimately to codification."[1]

In 1968 the Commission issued for comment the first part of a draft Evidence Code.[2] The draft Code, however, was not sufficiently well received as a whole, particularly by the representative bodies of the practising profession in Scotland, to encourage us to proceed immediately with further consideration of it. Instead we thought we should first examine the existing law with a view to its reform in particular areas.[3] With this object in mind we invited Sheriff Macphail, who was at the time a practising advocate and lecturer in Evidence and Procedure at Edinburgh University, to prepare a research paper identifying those areas of the law of Evidence which should be considered with a view to possible reforms and to indicate possible changes in the law. We are indebted to Sheriff Macphail for producing what is an important contribution to the literature of the law of Scotland. This is published by the Commission in the conviction that it will conduce to informed public discussion of the reform of the law of Evidence.

The Commission left the selection of topics entirely to Sheriff Macphail's discretion but we will require to consider whether all the topics examined by him are best considered in the context of our programme on the law of Evidence and, possibly, to consider also whether there are other matters not examined by Sheriff Macphail which we should examine in this context. We must/

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[1] Scot Law Com No 1, para 8.

[2] Scot Law Com Memorandum No 8.

[3] Scot Law Com No 28, Seventh Annual Report, p 4 Item 1.

must also consider whether special attention should be drawn to particular points made by Sheriff Macphail and to other points which have occurred to us in the course of examination of his paper. We propose, therefore, to issue shortly a consultative Memorandum summarising Sheriff Macphail's paper and drawing attention to those questions on which we would especially welcome advice. Though much will depend on the views we receive on consultation, we hope that our ultimate proposals can be formulated in such a way as to facilitate the later codification of the law of Evidence.

Sheriff Macphail has stated the law as at 1 June 1978 but there have been several important developments in the law of Evidence since that date, the not least of these being the introduction of the Criminal Justice (Scotland) Bill in the House of Commons recently. Our Consultative Memorandum will take account of relevant changes introduced by legislation or case law since 1 June 1978, and of current proposals for changes in the law. The Memorandum will also contain a table of all existing statutes affecting the law of Evidence set out in such a way as to facilitate their possible amendment and future consolidation.

We wish to make it clear that the views expressed in Sheriff Macphail's paper are his own and do not necessarily represent the views of the Scottish Law Commission.

THE LAW OF EVIDENCE

CONTENTS

REFERENCES AND ABBREVIATIONS

ALJ	-	Australian Law Journal
AS	-	Act of Sederunt
BC	-	"Evidence in Criminal Cases", a memorandum adopted by the General Council of the Bar of England and Wales (1973)
Best	-	The Principles of the Law of Evidence (12th ed, 1922)
Brit J Crim	-	British Journal of Criminology
Can BR	-	Canadian Bar Review
Clive and Wilson	-	E M Clive and J G Wilson, The Law of Husband and Wife in Scotland (1974)
CLJ	-	Cambridge Law Journal
CLRC	-	Criminal Law Revision Committee, Eleventh Report: (Evidence (General) (1972 Cmnd 4991))
Col LR	-	Columbia Law Review
Crim LR	-	Criminal Law Review
Cross	-	Evidence (4th ed, 1974)
Cross and Wilkins	-	Outline of the Law of Evidence (3rd ed, 1971)
Dickson	-	W G Dickson, A treatise on the Law of Evidence in Scotland (3rd ed, 1887)
Draft Code	-	Draft Evidence Code (First Part), Scottish Law Commission memorandum no 8 (1968)
Encyclopaedia	-	Encyclopaedia of the Laws of Scotland (1926-1933)
Grant, Grant Committee	-	The Sheriff Court (1967, Cmnd 3248)
Heydon	-	J D Heydon, Cases and Materials on Evidence (1976)
HLR	-	Harvard Law Review
ICLQ	-	International and Comparative Law Quarterly
JCL	-	Journal of Criminal Law

JLSSc	- Journal of the Law Society of Scotland
JR	- Juridical Review
Lewis	- W J Lewis, Manual of the Law of Evidence in Scotland (1925)
LJ	- The Law Journal
LQR	- Law Quarterly Review
LRC 13	- Law Reform Committee, 13th Report: Hearsay Evidence in Civil Proceedings (1966, Cmnd 2964)
LRC 15	- Law Reform Committee, 15th Report: The Rule in Hollington v Hewthorn (1967, Cmnd 3391)
LRC 16	- Law Reform Committee, 16th Report: Privilege in Civil Proceedings (1967, Cmnd 3472)
LRC 17	- Law Reform Committee, 17th Report: Evidence of Opinion and Expert Evidence (1970, Cmnd 4489)
LS Gaz	- Law Society Gazette
Macdonald	- J H A Macdonald, A Practical Treatise on the Criminal Law of Scotland (5th ed, 1948)
Med Sci & Law	- Medicine, Science and Law
Mich LR	- Michigan Law Review
MLR	- Modern Law Review
Model Code	- American Law Institute, Model Code of Evidence (1942)
NILQ	- Northern Ireland Legal Quarterly
NLJ	- New Law Journal
Nokes	- G D Nokes, An Introduction to Evidence (4th ed, 1967)
Phipson	- Phipson on Evidence (12th ed, 1976)
RC	- Rules of the Court of Session, 1965, as amended
Renton and Brown	- Criminal Procedure according to the Law of Scotland (4th ed, 1972)

Sc L Rev	-	Scottish Law Review
SCOLAG	-	Scottish Legal Action Group Bulletin
Taylor	-	A Treatise on the Law of Evidence (12th ed, 1931)
Thomson, Thomson Committee	-	Departmental Committee on Criminal Procedure in Scotland (Second Report), (1975, Cmnd 6218)
Walkers	-	A G Walker and N M L Walker, The Law of Evidence in Scotland (1964)
Wigmore	-	J H Wigmore, A Treatise on the Anglo-American System of Evidence (3rd ed, 1940)
Williams	-	Glanville Williams, The Proof of Guilt (3rd ed, 1963)
1840 Act	-	Evidence (Scotland) Act, 1840 (3 and 4 Vict cap 59)
1852 Act	-	Evidence (Scotland) Act, 1852 (15 Vict cap 27)
1853 Act	-	Evidence (Scotland) Act, 1853 (16 Vict cap 20)
1874 Act	-	Evidence Further Amendment (Scotland) Act, 1874 (37 and 38 Vict cap 64)
1887 Act	-	Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict cap 35)
1898 Act	-	Criminal Evidence Act, 1898 (61 and 62 Vict cap 36)
1954 Act	-	Summary Jurisdiction (Scotland) Act, 1954 (2 and 3 Eliz II, cap 48)
1975 Act	-	Criminal Procedure (Scotland) Act, 1975, cap 21

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PART I

INTRODUCTION

Chapter 1

1. Remit

1.01 The Scottish Law Commission has asked the writer

> "to write a paper identifying those areas of the law of evidence which should be considered by the Scottish Law Commission with a view to possible reforms, to indicate, where considered appropriate, possible changes in the law of evidence which might be recommended by the Commission ...."

2. The procedural framework

1.02 In approaching this task, the writer has made certain assumptions about the procedural framework within which the law of evidence will operate in the future, and about the objectives which should be attained within that framework by means of the rules of evidence. As to criminal procedure, it has been assumed that there is unlikely to be any radical alteration in pre-trial and trial procedures, other than on the lines recommended by the Departmental Committee on Criminal Procedure in Scotland under the chairmanship of Lord Thomson. In their Second Report, the Committee record their view "that our existing system of criminal procedure [is] fundamentally sound and that improvement [is] all that [is] needed and not radical change."[1] Where appropriate, the recommendations in the Committee's Second Report have been taken into account. As to civil procedure and pleading, it is difficult to forecast any alterations which may be made to the present rules. The Rules of the Court of Session are/

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[1] Cmnd. 6218, para. 1.10

are constantly under review, and the Sheriff Court Rules Council have not yet published in their entirety the proposed new Sheriff Court Rules. Where it is necessary to discuss possible changes in the Rules of the Court of Session and the Sheriff Court Rules, the principle has been adopted that in areas where they have concurrent jurisdiction the practice and procedure of both courts should be uniform as far as possible, and variations should be the exception and not the rule.[2]

3. The objectives of the rules of evidence

1.03 In endeavouring to ascertain the objectives of the rules of evidence, within/

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[2]Cf. Master I H Jacob and Professor G S A Wheatcroft, "Courts and Methods of Administering Justice", Third Commonwealth and Empire Law Conference, 1966, p 305, on the undesirable effect of the differences in procedure between the High Court and the county courts in England.

within the given procedural framework, it is useful to consider the aims of the major statutory reforms of the nineteenth century.

Bentham's Rationale of Judicial Evidence

> "inspired reforms in many parts of Europe and bore fruit in these islands in the series of statutes beginning with the Scottish Act of 1840 and the English Act of 1843. All these statutes give expression to Bentham's liberalising principle that moral turpitude or interest is a ground of criticism not of the admissibility of the witness but of the reliability of his evidence."[3]

Bentham's approach to the reform of the law of evidence may be explained in the words of Professor H L A Hart:[4]

> "... in his critique of the rules of procedure and evidence which Bentham thought disgraced the law courts of his day, he took as a paradigm what he terms 'the domestic or natural system' of settling disputes: common sense rules such as the head of a household might use.[5] There, no sensible man would refuse to hear and question the parties interested or the person under suspicion or refuse to draw obvious conclusions from their silence. This at any rate should be our starting point or regulative ideal for the law of evidence, and he considered it a damaging criticism of the technical system that, as he said, 'no private family composed of half a dozen members could subsist a twelvemonth under the governance of such rules'.[6] The natural system needed only common sense for its discovery 'because in principle there is but one mode of searching out the truth': it is, Bentham says, 'the same, in all times and in all places - in all cottages, in all palaces - in every family and every court of justice'. Its principle injunction is to be summed up thus: 'Hear everybody who is likely to know anything about the matter, hear everybody but most attentively of all, and first of all those who are most likely to know most about it - that is the parties'."[7]

1.04 Bentham's injunction, "Hear everybody who is likely to know anything about/

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[3] Dow v MacKnight, 1949 J C 38, L J-G Cooper at pp 56-57. On the series of nineteenth-century Scottish statutes dealing with the competence and compellability of witnesses, see post, para 3.02; and Lord Trayner, "The Advances of a Generation", (1886) 2 Sc L Rev 57, 89, at pp 89-92.

[4] H L A Hart, "Bentham and the Demystification of the Law", (1973) 36 MLR 1, at p 11.

[5] Works, V, p 7, VII, pp 197, 598, ed Bowring, 1838-1843.

[6] Works, VI, p 205.

[7] Works, VII, p 599.

about the matter", is echoed in Professor Edmund M Morgan's foreword to the Model Code of Evidence published by the American Law Institute in 1942:

> "A code of evidence should concern itself primarily with admissibility, and in this respect it should be complete in itself. Consequently it should begin with a sweeping declaration that all relevant evidence is admissible, that no person is incompetent as a witness and that there is no privilege to refuse to be a witness or to disclose relevant matter or to prevent another from disclosing it. Then it should set up specific exceptions to this fundamental rule."[8]

A similar approach was adopted in the Draft Evidence Code which the Scottish Law Commission circulated for comment and criticism in 1968. Reference was made in the Commentary to "the progress of theory and practice from an exclusionary to a liberal conception of the admissibility of evidence";[9] and in the introduction to chapter 1, which dealt with hearsay, it was said:

> "... there is a growing feeling, to which this Code tries to give effect, that all relevant evidence ought to be competent.[10] Since so many of the decisions which judges and jurymen take in their private lives proceed in whole or in part on the evaluation of hearsay, it is hard to claim that such evidence is a priori incompetent when offered in court."

1.05 It may be readily admitted that any modern reform of the law of evidence should continue to be inspired by Bentham's liberalising approach. If the object of a judicial inquiry is to ascertain the truth or otherwise of the facts in issue, it follows that, ideally, all evidence should be admissible which is relevant in the sense that it tends to render probable the existence or non-existence of any such fact; and that, ideally, every person who is capable of giving relevant evidence should be a compellable witness. But in practice there must be certain exceptions; and in the definition of these exceptions lies the major difficulty in formulating possible changes in the law. The words of Viscount Birkenhead are a sufficient/

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[8] Model Code, p 11.

[9] Art 6.1, commentary.

[10] Cf Hollington v Hewthorn & Co Ltd, [1943] 1 KB 587, Goddard L J at p 594.

sufficient warning of the need for caution before modifying or reducing any of the exceptions to admissibility under the present law:

> "It is, of course, a commonplace that the decision of legal issues must depend on rigid rules of evidence, necessarily general in their scope and very likely, therefore, in individual applications, to present an appearance of artificiality and even of inconsistency. But there must be a general code, for otherwise the admission or rejection of evidence would depend upon the individual caprice of an individual judge; 'Quot judices tot sententiae.' And it is undoubtedly true that it is even better that some slight degree of injustice should be done in an individual case than that the Courts should abandon the sure anchorage of a dependable rule. Such an injustice may occasionally occur, for it is almost a commonplace that a sensible and experienced citizen, in the course of reaching a decision as to whether a certain thing has or has not happened, will allow his judgment to be influenced by evidence which would not be accepted in the Courts. Indeed, I have no doubt that judges of the highest eminence reach conclusions in their own private and domestic affairs by reference to a standard more relaxed than the Courts allow. But this is not the point - or, at least, it is not the whole point. The issues pronounced upon by Courts in criminal, and, indeed, in civil matters, are attended with such decisive consequences that the adoption in matters of evidence of a standard of admissibility which is so cautious as to be meticulous may not only be defended but is, in fact, essential."[11]

1.06 Apart from these assumptions as to the continuity of the essential features of the present rules of procedure and pleading, and as to the validity of a cautiously liberalising approach to the admissibility of evidence, the writer has endeavoured to eschew any preconceptions of a general kind as to the reform of the law. In particular, he has refrained from presuming that the rules of evidence in criminal cases are unduly favourable to the accused. In England, on the other hand, the Criminal Law Revision Committee in their Eleventh Report have expressed the view that relaxation of the rules as to admissibility appears to them to be justified by the fact that criminal trials/

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[11] Rutherford v Richardson [1923] AC 1, at p 5.

trials now take place in circumstances very different from those which prevailed when the more restrictive rules were adopted.[12] They point out that in the past, in England, trials were often conducted with indecent haste; accused persons enjoyed far less legal representation than now; it was not until the Criminal Evidence Act, 1898, that the accused and his spouse were able in all cases to give evidence on oath; there are now far greater rights of appeal against conviction; the quality of juries and of lay magistrates has greatly improved; and criminals are far more sophisticated than they used to be. As to the last of these considerations, there is now, according to the Committee,

> "a large and increasing class of sophisticated professional criminals who are not only highly skilful in organising their crimes and in the steps they take to avoid detection but are well aware of their legal rights and use every possible means to avoid conviction if caught. These include refusal to answer questions by the police and the elaborate manufacture of false evidence."

The Committee continue:

> "The chief significance of these comparisons for present purposes is that strict and formal rules of evidence, however illogically they may have worked in some cases, may have been necessary in order to give accused persons at least some protection, however inadequate, against injustice. But with changed conditions they may no longer serve a useful purpose but on the contrary have become a hindrance rather than a help to justice. There has also been a good deal of feeling in the Committee and elsewhere that the law of evidence should now be less tender to criminals generally. With the improvements mentioned it seems to us reasonable to expect that the right amount of weight will be given to some kinds of evidence previously rejected as likely to be too prejudicial to the accused."[13]

The Committee go on to refer to "the notably high proportion of acquittals in contested cases on indictment."[14]

1.07 Since it may appear surprising that a writer on reform of the law of evidence in Scotland should decline to adopt the general views of that/

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[12] Evidence (General), Cmnd 4991, para 20.
[13] CLRC, para 21.
[14] CLRC, para 22.

that most eminent and highly skilled Committee, perhaps it should be explained that the considerations referred to by the Committee - other than the position as witnesses of the accused and his spouse, and the extension of rights of appeal - have little relevance to Scottish practice. The law relating to the accused and his spouse as witnesses is considered in Part III. As to the class of criminals referred to by the Committee, sophisticated professional crime does not appear to be a serious problem in Scotland. The Scottish Council on Crime, in their memorandum Crime and the Prevention of Crime,[15] point out that much of Scotland's crime "is not a serious challenge to law and order but more a symptom of social ill-health",[16] and state:

> "It is clear ... that the category of crime which has the most serious actual and potential consequences not only for the victim but also for the peace and order of the country is that of crimes of violence against the person, including homicide. It is this type of crime rather than highly organised armed robberies, drug trafficking or complex financial swindles which in Scotland is the most serious in its consequences for individual members of the public."[17]

As to the enforcement of the law, the Council found:

> "The number of persons convicted in Scottish courts annually has kept very much in step with the number of persons proceeded against; in 1950, charges were proved against 88% of those proceeded against and in 1970 the proportion was 94%. Of those persons proceeded against in 1950, 98.5% were dealt with summarily (ie by the lay summary courts or the sheriff summary court) and 1.5% on indictment (in the sheriff and jury court or the High Court); these proportions have remained virtually constant throughout the period under review and at face value this suggests that the criminal cases appearing in court now are on average neither more serious nor less serious than those of twenty years ago although the possibility cannot be ruled out that public prosecutors have over the period made changes in their policy. It is noteworthy also that over the period 1950-73 there has been little, if any, change in the relative proportions of the different types of crime taken on indictment ... whilst in both 1950 and 1970 crimes against the person represented less than
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> 2%/

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[15] Scottish Home and Health Department, 1975.
[16] Para 34.
[17] Para 8.

> 2% of the total crimes committed they comprised 30% of the crimes taken on indictment. The fact that over the last two decades the proportionate contribution of crimes of violence to the total crimes taken on indictment has remained constant is to a degree surprising but - whilst there can be no question but that crimes of violence constitute a serious problem in Scotland - it may be that the concentrated reporting of crimes of that type by the media, to the exclusion of other serious crime, has given a somewhat erroneous impression of the true crime position."[18]

Thus, although "all the evidence points to there having been a real and probably substantial increase in the level of criminality in Scotland since the early 1950s",[19] it does not seem possible to argue that any general modification of the Scottish rules of evidence in favour of the prosecution is justified either by any growth of a particular class of criminals or by any unsatisfactory trend in the rate of acquittal of those prosecuted. It appears that in Scotland the case for such modification of the rules of evidence is not proved, and it is suggested that the burden of proving it rests on its advocates: those who urge that the system should be changed in favour of the prosecution must discharge the onus of proof that lies upon anyone in a free society who proposes increased powers for the State against the citizen.[20] A feeling that the law of evidence should now be less tender to criminals generally, if such a feeling is prevalent in Scotland, would not appear to be a sound basis for reform.

1.08 It seems preferable to consider the purpose of a criminal trial, and the extent to which that purpose is served or frustrated by the rules of evidence. The Lord Justice-General has described that purpose in these terms:

> "In all our criminal courts in Scotland the object of trial is to enable the Crown to secure the conviction of the guilty by proof beyond reasonable doubt upon evidence sufficient in law; and at

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[18] Para 21.
[19] Para 4.
[20] See post, paras 5.04-5.11.

> the same time to ensure that the protection which the law seeks to afford to the innocent is denied to none. What is at stake in a criminal trial is the interest of the community, and it must never be forgotten that that interest requires of a civilised system of criminal law - which the law of Scotland undoubtedly is - that even if its administration results in the acquittal from time to time of the apparently guilty it should involve the minimum of risk at any time of the conviction of the innocent. Some may nowadays be heard to say that the protection which our law affords to the accused is too great and that it should be reduced to simplify the conviction of the criminal. The arguments of the advocates of change are familiar but, in my opinion, no change deserves serious consideration, in spite of the laudable object, if the result of its adoption would be to increase to any significant extent the risk of the conviction of the innocent. If an increased risk of convicting the innocent is the price of a greater prospect of convicting the guilty, then as far as I am concerned it is a price which no sound and just system of law can seriously afford to pay."[21]

It is with these principles in view that the rules of evidence in criminal cases have been considered in this Volume.

4. Foreign systems

1.09 The Scottish Law Commission are enjoined, by section 3(1)(f) of the Law Commissions Act, 1965, "to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions." In the field of evidence, a consideration of foreign rules is a fascinating exercise, but only seldom of direct practical value. It is no doubt true in a general way that "the rules of evidence and of debate must be largely the same in any society, if the object is to get at the truth without too much waste of time, and to reach decisions quickly after as full and relevant a discussion as time permits."[22] On the other hand, Professor Kahn-Freund has recently said:

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[21] Lord Emslie, "The Role of Judges in Society in Scotland", (1974) 19 JLS Sc 205, at p 208. Similar views have been expressed by Lord Salmon, in H L Deb vol 338, col 1603 (14th February 1973), and in his Justice lecture on 27th June 1974.

[22] J P Plamenatz, "The Legacy of Philosophical Radicalism", in Law and Opinion in England in the 20th Century (ed Morris Ginsberg), p.39.

> "All that concerns the technique of legal practice is likely to resist change. In most respects the organisation of the courts and of the legal profession, the law of procedure and the law of evidence help to allocate power, and belong, in Montesquieu's sense, to the lois politiques. Comparative law has far greater utility in substantive law than in the law of procedure, and the attempt to use foreign models of judicial organisation and procedure may lead to frustration and may thus be a misuse of the comparative method."[23]

The writer would, therefore, adopt the following sentences from the Introduction to the Draft Code:

> "Since the law of evidence has to fit into the framework of substantive law, and also into current court procedure which the Code is not intended to deal with, it is clear that assistance can, for the most part, only be looked for from legal systems which resemble ours in principles, ideals and practice. As a consequence it will be seen that the other jurisdictions most frequently referred to are those of England and the United States. It will also be observed, however, that foreign systems are applied to mainly for explanation and comment; in the particulars in which reform of the law is recommended, our proposals owe very little to foreign sources."[24]

5. Codification

1.10 The writer expresses no opinion on the question of the form of any enactment designed to reform the law of evidence. When the Draft Code was prepared, it seemed to the Scottish Law Commission "that for many reasons the law of evidence was the branch not only the most easily susceptible of codification, but was also that in which a code would be of the highest practical value."[25] More recently the view has been expressed that the law of evidence "could, and should, be codified, and codified in the continental style by the enactment of general principles, not dealt with in the usual British way by enactment of enormously detailed and verbose provisions."[26]

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[23] O Kahn-Freund, "Uses and Misuses of Comparative Law", (1974) 37 MLR 1 at p 20. Cf Professor Alan Watson, "Legal Transplants and Legal Reform", (1976) 92 LQR 79.

[24] Draft Code, p 2. See also the Final Report of the Committee on Supreme Court Practice and Procedure (the Evershed Committee), paras 247-251.

[25] Draft Code, Introduction, p 1.

[26] Professor D M Walker, "The Work of the Scottish Law Commission, 1972-73", 1974 SLT (News) 149.

The matter is outwith the writer's remit. He has not attempted to construct a statutory code of any kind covering the whole law, or even to draft clauses in conventional form on any topic, but merely to identify those areas of the law which should be considered by the Commission with a view to possible reforms, and to indicate some possible changes in the law which the Commission might recommend.

6. Principles and concepts

1.11 The writer has, however, assumed that it is unnecessary at this stage to propose any restatement and redefinition of the general principles and basic concepts of the law of evidence. In a codifying statute which sought to restate the whole law of evidence, it would no doubt be desirable to begin with a statement of the inclusionary principle that whatever facts, statements, opinions or things may tend to prove or disprove a fact in issue are relevant and admissible, except as otherwise provided in the exclusionary rules set forth in the statute. The exclusionary rules could then be grouped under various principles of exclusion, such as unreliability (eg certain categories of hearsay), unfairness (eg forced confessions), moral obligation (eg communications between husband and wife), and public policy (eg Crown privilege). The terminology of the law of evidence could then be defined in an interpretation section similar to section 3 of the Indian Evidence Act, 1872, in which Sir James Fitzjames Stephen defined "court", "fact", "relevant", "facts in issue", "document", "evidence", "proved", "disproved" and "not proved".[27] Such a comprehensive statement of principles and definitions would probably not be necessary in a measure less general in scope than a complete statutory code. Another reason for/

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[27] Cf Model Code, Rule 1.

for dispensing with such a statement at this stage is that the principles and concepts of this branch of the law are already well understood by the profession. When Stephen wrote, India did not possess a uniform law of evidence.[28] Sometimes the Muslim law of evidence was followed, sometimes the English, and sometimes a supposed law based on "an imperfect understanding of imperfect collections of not very recent editions of English textbooks".[29] But in present-day Scotland the law of evidence not only is very familiar to the practitioner but is fully expounded in a recent textbook of outstanding quality.

1.12 Is there then any room for new definitions, or even for new concepts? Wigmore wrote,

> "The law of evidence has suffered in its most vital parts from an ailment almost incurable - that of confusion of nomenclature."[30]

The modern Scottish practitioner's nomenclature is probably derived from W J Lewis's Manual of the Law of Evidence in Scotland, because until quite recently most university lecturers on evidence based their teaching on that work, which was published in 1925. Lewis employed three basic concepts: admissibility, relevancy and competency. He taught that in order to be admissible, evidence must be relevant to the facts in issue;[31] and it was the province of competency to determine the means whereby the relevant facts might be proved.[32] The Sheriffs Walker, whose terminology is adopted in this memorandum, reserve the term "competency" for their treatment of specialties of witnesses, and devote their opening chapter to/

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[28] A K Ghose, The Law of Evidence in India, pp 17-19.

[29] Stephen, Report of Select Committee on the Evidence Bill, cit in A Gledhill, The Republic of India (British Commonwealth series, 2nd ed), p 241.

[30] Wigmore, Evidence, V, p 20.

[31] Manual, p 33.

[32] Manual, p 63.

to a general discussion of admissibility and relevancy of evidence, which begins:

> "Admissible evidence is evidence which a court of law may both receive and consider for the purpose of deciding a particular case. To be admissible in this sense, evidence must satisfy two requirements - it must be relevant and it must conform to the peremptory rules of the law of evidence."

In England the two basic concepts of relevancy and admissibility are traditionally recognised;[33] but Professor Montrose has suggested that a scheme of four basic concepts is required for the satisfactory elaboration and exposition of the rules of evidence: receivability, relevancy, materiality and admissibility.[34] In this scheme, the basic concept is that of receivability, which is that of tendered evidence being in accordance with the laws of evidence. To be receivable, it must satisfy the conditions of each of the three other concepts.

> "In the first place, evidence is only received in proof of facts to which it is 'rationally' related: this gives rise to the concept of 'relevance'. Secondly, evidence must be related to facts in issue before the court. Hence arises the concept of materiality. Furthermore, evidence may be excluded by reason of a rule of law taking note of the conditions of litigation or some specific policy of the law: there is, in other words, also the concept of admissibility."[34]

The scheme is interesting, but it would be difficult to secure the adoption of additional concepts which are not employed in Scottish practice, "and it is by no means certain that their adoption would render the exposition of the law any clearer."[35]

7. Method of treatment

1.13 An explanation of the arrangement of this Research Paper is contained in the Foreword and a summary of propositions for consideration will be found in the consultative Memorandum to be issued. The arrangement of/

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[33] Cross, pp 24-25.

[34] J L Montrose, "Basic Concepts of the Law of Evidence", (1954) 70 LQR 527, esp at p 535.

[35] Cross, p 25.

of topics in this Paper admittedly involves the inconvience that all the questions relating to important areas of the law of evidence, particularly in criminal cases, are not always considered together. Thus, although the rules relating to extra-judicial confessions, the compellability of the accused, and the cross-examination of the accused, cannot be considered in isolation from one another, they are discussed in different places in Parts III and IV. It is hoped, however, that the rather elaborate Table of Contents will afford the reader an adequate guide to the contents of the Volume. For the selection and arrangement of topics, and the views expressed as to possible reforms, the writer is alone responsible. It is to be expected that numerous topics, questions and difficulties will occur to the reader, which have not been considered by the writer. Some of the topics selected for discussion by the writer are also considered in the Second Report of the Thomson Committee: indeed, it is thought that all the matters within the remit of the Committee which directly affect the law of evidence, are referred to in this paper. The overlapping of topics is inevitable because, as the Committee observe, "Evidence and Procedure are closely connected subjects. The dividing line between them is often very thin and in some respects in practice, they so overlap as to render it impossible to deal with them separately."[36] It will be obvious that on all matters the views expressed by the writer are tentative, and in many cases their consequences have not been fully worked out. The writer's main object in expressing such views has been to make the Paper less uninteresting to read than it would otherwise be: it is hoped that the reader will be impelled to formulate his own solutions to the problems discussed.

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[36] Thomson, para 1.06.

1.14 No attempt is made in this Paper to expound the present law of evidence in Scotland. Instead, at the beginning of each section references are given to the passages in established modern text-books where the present law is stated, and some reference is made to the relevant cases and statutes which have been decided and enacted since the publication of these volumes. The law is considered as at 1st June 1978. Further, when reference is made to the Second Report of the Thomson Committee or to the Eleventh Report of the Criminal Law Revision Committee, no attempt is made to reproduce at length the reasoning, often highly relevant and useful, which these Reports contain. It is assumed that copies of Walker and Walker's Law of Evidence in Scotland, Renton and Brown's Criminal Procedure (4th ed), and these two Reports are available to the reader. They are referred to in the footnotes as "Walkers", "R & B", "Thomson" and "CLRC". A complete list of references and abbreviations is appended to the Table of Contents.

PART II

EXCLUSION OF EVIDENCE

Chapter 2

JUDICIAL KNOWLEDGE: JUDICIAL ADMISSIONS

2.01 This chapter is concerned with two classes of facts about which evidence need not, or may not, be given: (1) facts within judicial knowledge; and (2) facts which are judicially admitted. Evidence is also excluded by the conclusive or irrebuttable presumptions of law, which cannot be contradicted by evidence to the contrary; but since these are properly regarded as rules of substantive law, they do not fall within the scope of this memorandum.

1. Judicial knowledge[1]

2.02 The classes of facts which are held to fall within judicial knowledge appear to be fairly well defined. They include Acts of Parliament; Scots law and judicial procedure; Community law;[2] the ordinary meanings of English words and phrases; facts of history and public national events; facts of general economic and social custom and behaviour; and facts of nature. Problems have arisen as to the taking of judicial notice of statutory instruments and of English law, and it is thought that these problems could be resolved by legislation, not necessarily in the context of reform of the law of evidence in Scotland. It may be, however, that some provision should be made to permit the taking of judicial notice of foreign law in certain circumstances. Other questions have arisen as to whether or not particular facts fall within/

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[1] Walkers, paras 52, 53. And see G D Nokes, "The Limits of Judicial Notice", (1958) 74 LQR 59.

[2] European Communities Act, 1972 (cap 68), secs 2, 3; H P Bulmer Ltd v J Bollinger S A, [1974] Ch 401, Lord Denning MR at pp 418-419.

within judicial knowledge: it seems unlikely that legislation could adequately provide for these, but procedures to deal with such difficulties have been suggested. All these matters are discussed in the following paragraphs.

2.03 (1) Statutory instruments. Sir Rupert Cross writes:[3]

> "It is unfortunate that there is no express provision for the taking of judicial notice of statutory instruments because, even in modern times, the courts have varied in their insistence on the production of a Stationery Office copy[4] and it is not even clear that proof by this method is authorised in the case of all statutory instruments."

Scottish writers, on the other hand, have assumed that statutory instruments need not be produced,[5] citing Macmillan v M'Connell.[6] It is doubtful whether that assumption is justified by the case cited,[7] but it seems to be supported by earlier dicta[8] and has apparently never been challenged in the Scottish courts. The same view seems to have been taken by the English Court of Appeal in Snell v Unity Finance Co Ltd,[9] which, as Sir Rupert Cross notes elsewhere,[10] suggests that judicial notice may be taken of all statutory instruments. Many of the problems which have arisen in England have probably been circumvented in the Scottish summary criminal courts, where they would have been most likely to arise, by the application of section 353 of the Criminal Procedure (Scotland) Act, 1975, and its predecessors,[11] whereby provision has been made for the proof of official documents in summary criminal/

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[3] Cross, p 139; see also Phipson, para 49.
[4] Palastanga v Solman, [1962] Crim LR 334.
[5] Lewis, p 69; Walkers, para 198(c); Renton and Brown, 14-16.
[6] 1917 J C 43.
[7] See Lord Dundas at p 49; Lord Johnston at p 51; Lord Skerrington at p 53; Lord Anderson at p 53.
[8] Sharp v Leith, (1892) 20 R (J) 12, Lord M'Laren at pp 15-16; Hutchison v Stevenson, (1902) 4 F (J) 69, Lord M'Laren at p 72.
[9] [1964] 2 QB 203.
[10] Cross, p 526, n 5.
[11] See post, para 11.33.

criminal procedure. The question of proof of statutory instruments is more fully discussed elsewhere.[12]

2.04 (2) Application of English law. English law is held to be within judicial knowledge in three contexts. Firstly, the judicial knowledge of the Scottish judges includes English law to the extent that they are bound to apply the English law of charity in income tax cases[13] and others where that law is made applicable by Parliament. Thus, the Local Government (Financial Provisions etc) (Scotland) Act, 1962,[14] which makes provision for the reduction and remission of rates payable by charitable and other organisations, enacts by section 4:

> "(10) In this section - (a) 'charity' means an institution or other organisation established for charitable purposes only ... and 'charitable' is to be construed in the same way as if it were contained in the Income Tax Acts."[15]

And the Consumer Credit Act, 1974,[16] enacts by section 189:

> "(1) In this Act, unless the context otherwise requires - ... 'charity' means ... as respects Scotland ... an institution or organisation established for charitable purposes only (... 'charitable' being construed in the same way as if it were contained in the Income Tax Acts)."

Accordingly the Scottish courts, when considering the question whether an institution is a charity within the meaning of such legislation, must determine whether or not its purposes are both beneficial to the community and within the spirit and intendment of the preamble to the Statute/

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[12] See post, para 11.02.

[13] Commissioners for the Special Purposes of the Income Tax v Pemsel, [1891] AC 531.

[14] 10 and 11 Eliz II, cap 9.

[15] See Belhaven-Westbourne Church Congregational Board v Glasgow Corporation, 1965 SC (HL) 1; Scottish Burial Reform and Cremation Society v Glasgow Corporation, 1967 SC (HL) 116.

[16] 1974, cap 39.

Statute of Elizabeth.[17] It is well known that the Scottish judges "feel embarrassed at having to administer as part of the law of Scotland a difficult and technical branch of English law",[18] and attention has been pointedly drawn to the need for reform.[19] The Committee chaired by Lord Goodman which was set up by the National Council of Social Service to carry out an inquiry into charity law could not agree on a new definition of "charity".[20]

2.05 Secondly, the Scottish judges are bound to apply codes of criminal law, evidence and procedure which are based on English law[21] when sitting as the Courts-Martial Appeal Court.[22] Thirdly, an inferior court which is asked to vary a maintenance order issued by a court in another part of the United Kingdom may for that purpose take notice of the law in force in any other part of the United Kingdom.[23] Sheriff Garrett expressed the opinion that that provision was intended to apply only to the rules relating to the maximum rates of aliment in that part of the United Kingdom.[24] It would be useful to ascertain from sheriff court practitioners whether or not the provision has caused any difficulty. It is, however, clearly inappropriate to consider any alteration of the law on/

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[17] 43 Eliz I, cap 4: now set out in the Mortmain and Charitable Uses Act, 1888 (51 and 52 Vict cap 42), sec 13.

[18] Inland Revenue v Glasgow Police Athletic Association, 1953 SC (HL) 13, Lord Normand at p 21.

[19] Scottish Burial Reform and Cremation Society v Glasgow Corporation, 1966 SC 215, Lord Strachan at p 228; Glasgow Trades House v Inland Revenue, 1970 SC 101, Lord Cameron at p 114.

[20] Charity Law and Voluntary Organisations: Report of the Goodman Committee (National Council of Social Services, 1976).

[21] Army Act, 1955 (3 and 4 Eliz II, cap 18), esp secs 70 and 99(1); Air Force Act, 1955 (3 and 4 Eliz II cap 19), esp secs 70 and 99(1); Naval Discipline Act, 1957 (5 and 6 Eliz II, cap 53), esp sec 42. See Professor T B Smith, British Justice: The Scottish Contribution, pp 30-33.

[22] Courts-Martial (Appeals) Act, 1968, cap 20, sec 2(1)(b); Hendry, 1955 SLT (Notes) 66.

[23] Maintenance Orders Act, 1950 (14 Geo VI, cap 37), sec 22(2).

[24] Thompson v Thompson, (1953) 69 Sh Ct Rep 193; see also Cowan v Cowan, (1952)68 Sh Ct Rep 3; 1952 SLT (Sh Ct)8.

on these three matters in the context of the reform of the Scottish law of evidence.

2.06 (3) Judicial notice of foreign law. Various proceedings under the Maintenance Orders (Reciprocal Enforcement) Act, 1972,[25] require the Scottish courts to notice foreign law. Section 7 of the Act makes provision for the confirmation by a United Kingdom court of a provisional maintenance order made in a reciprocating country. It enacts that the court shall refuse to confirm the order if the payer establishes any such defence as he might have raised in the proceedings in which the order was made.[26] The court receives from the court which made the order a statement of the grounds on which the making of the order might have been opposed by the payer; and it is provided that that statement shall be conclusive evidence that the payer might have raised a defence on any of these grounds.[27] It is further provided that in any proceedings for confirmation under section 7 the sheriff shall apply the law in force in that country with respect to the sufficiency of the evidence.[28] The statement which the sheriff court receives from the court which made the order does not, however, include a statement of the law of the reciprocating country with respect to the sufficiency of evidence. One sheriff has held that the sheriff may assume, without making inquiries or hearing evidence or submissions on behalf of the parties, that under the foreign law corroboration is not required;[29] but it is not known whether his reasoning would be generally approved. Section 9 provides that on an application for the revocation of a registered order the court shall, unless the payer and the payee are for the time being residing in the United Kingdom, apply the law applied by the reciprocating/

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[25] 1972, cap 18.
[26] Sec 7(2)(b)(i).
[27] Sec 7(3).
[28] Sec 7(7)(c).
[29] Killen v Killen, Glasgow Sheriff Court, 27th September 1977.

reciprocating country in which the registered order was made. In that situation, precise information as to the foreign law is not provided; but it does not seem to be required, because the court may make a provisional order if it has reason to believe that the ground of the application is one on which the order could be revoked according to the foreign law, notwithstanding that it has not been established that it is such a ground.[30]

2.07 Apart from the situations noted in the three preceding paragraphs, foreign law, for the Scottish courts, is a matter of fact to be proved by evidence, so that a Scottish judge cannot take judicial notice of foreign law.[31] Since a finding by a Scottish court as to what the law of a foreign state is on a particular matter is treated as a finding of fact, no probative value is attributed to it in any action other than that in which the finding is made. If the same point of foreign law arises in subsequent actions between different parties, the foreign law must be proved afresh in each case: otherwise the court will apply the general presumption that the foreign law coincides with the law of Scotland. It may therefore be useful to enact a provision on the lines of section 4(2)-(5) of the Civil Evidence Act, 1972,[32] and clause 44(2)-(5) of the Draft Criminal Evidence Bill.[33] These permit the reception as evidence of foreign law of any previous determination by an English court of the point in question, provided it is reported in citable/

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[30] Sec 9(4).

[31] Anton, Private International Law, pp 565-567; Duffes v Duffes, 1971 SLT (Notes) 83. Quaere whether the Scottish courts would take judicial notice of certain items of foreign law as matters of notoriety, eg the legality of roulette in Monte Carlo (cf Saxby v Fulton, [1909] 2 KB 208, at pp 211, 221).

[32] 1972, cap 30; preceded by LRC 17, paras 64, 74(19).

[33] CLRC, para 271, p 253.

citable form (ie in a report, transcript or other document which could, if the question had been one of English law, have been cited as an authority in legal proceedings in England and Wales), and provided notice of intention to rely upon it has been given to the other parties to the proceedings; the foreign law is then to be taken to be in accordance with the determination unless the contrary is proved. Some such provision could perhaps effect some saving of inconvenience and expense. No doubt it would scarcely ever be invoked in criminal proceedings, where questions of foreign law very seldom arise, but it could be of some limited value in civil causes, such as those brought by virtue of the Recognition of Divorces and Legal Separations Act, 1971.[34]

2.08 The Law Reform Commission of Canada, taking the view that foreign law is often relatively easy to determine by resort to textbooks and foreign statutes, has proposed new statutory provisions whereby a judge may take judicial notice of a foreign law, and must do so if a party requests it, gives the other party sufficient notice to enable him to prepare to meet the request and furnishes the judge with sufficient information to enable him to comply with it. This proposal, which might well avoid difficulty and expense in the ascertainment of foreign law, also seems worthy of consideration. These provisions are only permissive, and place no burden on the judge to do independent research on foreign law. If the information which he is given is insufficient, he will not comply with the request, for it is further provided that if he cannot determine the foreign law he may either apply local law, or dismiss the action. Such a provision may be thought to be preferable to the present law of Scotland, whereby if no question of foreign/

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[34] 1971, cap 53; see Broit v Broit, 1972 S C 192.

foreign law is raised the law of Scotland is applied, even where it is likely to be radically different from the foreign law.[35]

2.09 (4) Matters of fact. The matters of fact which fall within judicial knowledge vary from time to time, so that the court sometimes has difficulty in answering the question whether or not a particular fact must be proved by evidence. The answer may vary even from year to year[36] and from place to place.[37] Again, a judge[38] may doubt whether a fact which is within his personal knowledge may also be properly treated as within judicial knowledge.[39] Courts-martial are bound to "take judicial notice of all matters of notoriety".[40] But such a provision cannot definitely indicate whether a particular fact is a matter of notoriety or not. Sir Rupert Cross suggests that there is something to be said for a practice whereby a judge could state that he proposed to take notice of the existence of certain facts within his personal/

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[35] Law Reform Commission of Canada, Evidence Project Study Paper no 6, "Judicial Notice", pp 4-5, 14, 20; Report on Evidence, pp 45, 105 (Evidence Code, secs 84(2)(b), 85).

[36] McIlhargey v Herron, 1972 J C 38 (breath test carried out with Alcotest R80 device); cf R v Jones, [1970] 1 WLR 16, followed in Mohammed v Mackenzie, High Court of Justiciary, 16th February 1972, unreported (approval of device by Secretary of State).

[37] Oliver v Hislop, 1946 JC 20 (technical term in local statute).

[38] It has recently been held in England that a distinction falls to be drawn between professional judges and lay justices, in respect that it is not improper for a justice with specialized knowledge of the circumstances forming the background of a particular case to draw on that specialized knowledge in interpreting the evidence (Wetherall v Harrison, [1976] 2 WLR 168; for commentary see [1976] Crim LR 54).

[39] The Privy Council has said that a judge cannot make use of medical knowledge which he may have acquired in one case in his direction to the jury in another (A G for South Australia v Brown, [1960] AC 432, at p 449). In Kennedy v Smith, 1976 SLT 110, at p 115, it was said that whether or not a particular combination of circumstances is likely to exacerbate the effects of a particular consumption of alcohol is a matter of evidence.

[40] Army Act, 1955, sec 99(3); Air Force Act, 1955, sec 99(3): cf Indian Evidence Act, sec 57.

personal knowledge, subject to anything urged upon him to the contrary.[41] Such a practice is embodied in the American Model Code, rule 804(1) of which provides:

> "The judge shall inform the parties of the tenor of any matter to be judicially noticed by him and afford each of them reasonable opportunity to present to him information relevant to the propriety of taking such judicial notice or to the tenor of the matter to be noticed."[42]

Rule 201(e) of the Federal Rules of Evidence for United States Courts and Magistrates provides in part as follows:

> "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed."

2.10 The Law Reform Commission of Canada has made proposals for the judicial notice of facts which are not necessarily common knowledge among most persons of average intelligence and experience, but which are nevertheless well-known within the territorial jurisdiction of the court, such as facts of local history or geography, or are readily and accurately verifiable by resort to sources where accuracy cannot be reasonably questioned, and are, therefore, also not the subject of reasonable dispute: such facts may be scientific, historical, geographical or chronological facts which are verifiable by reference to such sources as treatises, maps, almanacs or encyclopaedias. It is not proposed to impose on the judge the burden of finding the necessary information on his own initiative. Judicial notice of these matters is discretionary, unless a party requests the judge to take judicial notice of any such matter and gives notice of such request to the adverse/

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[41] Cross, p 141.

[42] See also rule 806(4) and Foreword, pp 65-69.

adverse party and furnishes the necessary information: in that event only, judicial notice is mandatory. The judge may, in considering whether to take judicial notice or what facts to notice, decide in each case the most suitable sources of information to consult. Procedural fairness when a matter is or has been judicially noticed is preserved by affording each party the opportunity to be heard regarding the propriety of taking judicial notice and informing each party of the sources of information used. If the judge decides that a matter is to be judicially noticed, a party cannot present evidence disputing the fact.[43]

2. Judicial Admissions[44]

(1) Judicial admissions in civil causes[45]

(a) Admissions on record

2.11 The general rules that facts which are admitted on record need not be proved, and that a party may not lead evidence to contradict his own admissions, are well understood. Questions have, however, arisen about implied admissions.

2.12 The rule that a party is held as admitting any averment of a fact within his knowledge which he does not deny, has been enacted both by Act of Sederunt[46] and in the sheriff court rules of 1907,[47] and has frequently been affirmed by the courts.[48] It seems, however, that a fact is held to be within a party's knowledge only if the fact is his state/

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[43] Law Reform Commission of Canada, Evidence Project Study Paper no 6, "Judicial Notice", pp 3-5, 9, 16-17; Report on Evidence, pp 44-46, 103-106 (Evidence Code, secs 82-85).

[44] Walkers, paras 48, 49.

[45] It is assumed that no special difficulties arise over oral admissions at the Bar and the admission of facts in special cases and summary trials.

[46] A S, 11th February 1828, sec 105. See Dickson, para 281.

[47] Rule 44.

[48] Eg in Clark v Clark, 1967 SC 296, Lord Milligan at p 305.

state of knowledge,[49] or the existence of a simple legal relationship with another,[50] or any other matters about which he does not have to make inquiries in order to ascertain the truth.[51] The effect of O'Connor[51] is that a party is not bound to admit or deny a fact which is readily ascertainable by him and has in fact been ascertained by him. If that is correct, it is arguable that the rule should be extended to matters about which a party may readily obtain information. On the other hand it could be difficult to predict in any case whether or not the judge would regard a particular fact as falling within such an extended rule. It may be preferable to extend the "demand for admission" procedure under rule 99 of the Rules of the Court of Session, which is mentioned below.[52]

2.13 The question whether an implied admission may be construed from an averment arose in a different way in Lord Advocate v Gillespie,[53] where Sheriff N E D Thomson followed a dictum of Lord Sorn to the effect that in practice cases occur in which it is right to treat an averment in answer as equivalent to an admission.[54] It seems clear, however, that that dictum did not command the approval of the Second Division in Wilson v Clyde Rigging and Boiler Scaling Co,[55] and that generally an averment has no evidential value unless it is expressly framed as an admission.[56]

(b)

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[49] Central Motor Engineering Co v Galbraith, 1918 SC 755, LP Strathclyde at p 765, Lord Mackenzie at p 770.

[50] Ellis v Fraser, (1840) 3D 264, Lord Gillies at p 271, Lord Mackenzie at p 271.

[51] O'Connor v W G Auld & Co (Engineering) Ltd, 1970 SLT (Notes)16.

[52] Post, paras 2-18 et seq.

[53] 1969 SLT (Sh Ct) 10.

[54] Dobson v Colvilles Ltd, unreported on this point in 1958 SLT (Notes) 30, but the dictum is printed in Lord Wheatley's opinion in Wilson n 55 infra, at p 330.

[55] 1959 SC 328.

[56] Lee v NCB, 1955 SC 151, Lord Sorn at p 160; Stewart v Glasgow Corporation, 1958 SC 28; Wilson, n 12 supra.

(b) Admissions by minute

2.14 Provision is made for joint minutes of admission in jury trials in the Court of Session by rule 122 of the Rules of Court. The practice there prescribed is also followed in Court of Session proofs and in proofs and civil jury trials in the sheriff court, and it is relevant to consider whether or not it is necessary to enact similar, or different, rules for these forms of inquiry. It is suggested that it would probably be convenient to enact similar rules.

2.15 It also seems material to consider whether or not anything need be done to encourage parties to agree medical and other evidence by joint minute, particularly in actions of damages for personal injuries. The use of minutes of admission has been encouraged by the courts[57] and by the Grant and Thomson Committees. The Committees' recommendations, and the question of the disclosure and exchange of experts' reports, are discussed in Chapter 17.

2.16 Rule 167(g) of the Rules of Court provides that in actions of divorce, nullity of marriage or separation, where the parties are agreed as to the custody of, aliment for or access to a child of the marriage, they may embody such agreement in a joint minute. Joint minutes are also commonly used to express agreements as to payment of a capital sum or periodical allowance under section 26 of the Succession (Scotland) Act, 1964,[58] although rule 165, which deals with actions defended on the financial conclusions only, does not make provision therefor. In Lothian v Lothian[59] Lord Fraser held that a joint minute as to aliment was/

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[57] Bell v Blackwood, Morton & Sons Ltd, 1959 SLT (Notes 54); see also Mearns v British Transport Commission, 1960 SLT (Notes) 56.

[58] 1964, cap 41.

[59] 1965 SLT 368.

was binding on the parties and effective although the Court had not interponed authority thereto, and that there was no locus poenitentiae until authority was interponed. But in Robson v Robson[60] Lord Avonside held that joint minutes in matrimonial causes were essentially different from those in other causes and not only did not bind the court but did not prevent a party from resiling in order to bring to the notice of the court facts relevant to the subject-matter of the minute. It may be, therefore, that there is room for some legislative clarification of the extent to which joint minutes in consistorial causes are binding.

2.17 An acceptable view may be 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 the financial rights and obligations inter se of the parties to a marriage should be binding and effective. The distinction seems to be justified by the nature of the duties imposed on the court in actions relating to the custody or upbringing of children. Where in any proceeding the custody or upbringing of a child is in question, the court in deciding that question must regard the welfare of the child as the first and paramount consideration;[61] and the court may not grant decree of divorce, nullity of marriage or separation unless and until the court is satisfied as respects every child for whose custody, maintenance and education it has jurisdiction to make provision in the action either (a) that arrangements have been made for the care and upbringing of the child and that those arrangements are satisfactory or are the best which can be devised in the circumstances, or/

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[60] 1973 SLT (Notes) 4.

[61] Guardianship of Infants Act, 1925 (15 and 16 Geo V, cap 45), sec 1.

or (b) that it is impracticable for the party or parties appearing before the court to make any such arrangements.[62] It seems clear that these imperative duties cannot be removed from the court by any agreement which may have been made by the parties appearing before it. But no similar duties appear to be incumbent on the court in relation to applications for a capital sum or periodical allowance. It is true that section 26(2) of the Succession (Scotland) Act, 1964,[63] provides that where such an application has been made,

> "the court, on granting decree of divorce, shall make with respect to the application such order, if any, as it thinks fit, having regard to the respective means of the parties and to all the circumstances of the case ..."

It does not, however, enact any prohibition making it incompetent for the judge to give effect to an agreement of parties regulating the payment of a capital sum or periodical allowance, without any evidence having been led. Nor does it provide that the court may not grant decree of divorce unless and until it is satisfied that satisfactory arrangements have been made for the payment of these. The court cannot make an order under section 26 unless an application is made, and it is submitted that section 26(2) need relate only to defended applications. At common law, in any defended action for payment of a sum of money the amount of which is in the discretion of the court, the court, if minded to grant decree, is bound to take into account all the proved or admitted circumstances which are relevant to its award; but if the action is undefended, or if the parties reach agreement/

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[62] Matrimonial Proceedings (Children) Act, 1958 (6 and 7 Eliz II, cap 40), sec 8(1). See also sec 8(2).

[63] 1964, cap 41.

agreement as to quantum, the court is not bound to hear evidence as to quantum and, if it thinks fit, to adjust the figure agreed. It is thought that if Parliament had intended to impose such duties on the court in applications under section 26, it would have done so in clear terms. In actions of aliment in the sheriff court, the amount of aliment may be agreed upon by the parties and decree pronounced in terms of a joint minute.[64] It seems difficult to define any consideration of public policy which might have led to the placing of applications under section 26 in a special category. The parties to such applications need not enter into a joint minute without having ascertained for themselves, as they may seek to do by commission and diligence, all the relevant figures; and whether or not any agreement should be made would appear to be entirely a matter for themselves and their advisers. It does not appear to be the current practice of at least the majority of judges, in applications where a joint minute has been lodged, to require evidence relating thereto and to decline to interpone authority to the minute.

(c) Demand for admission

2.18 Rule 99 of the Rules of the Court of Session provides:-

> "Either party may by letter call upon the other party to admit without prejudice the date, signature, transmission, or receipt, of any relevant document, or the verbal accuracy of a copy thereof, within such time as the court may appoint; and in case of refusal or delay to admit any such matter within the time appointed, the expense of any proof rendered necessary by such refusal or delay shall be paid by the party refusing or delaying, whatever the result of the cause may be, unless the court shall certify that the refusal or delay was reasonable; and no expense of proving any document shall be allowed unless the procedure authorised by this paragraph has been followed forth."

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[64] Clive and Wilson, p 204.

2.19 It is arguable that this rule should be extended to apply to facts as well as documents, and that a similar extended rule should also be enacted for civil causes in the sheriff court. In the English High Court, any party may, not later than twenty-one days after an action is set down for trial, serve on any other party a notice requiring him to admit, for the purpose of that cause or matter only, the facts specified in the notice.[65] If the party on whom the notice is served fails to make the admissions specified within seven days or a longer period allowed by the court, he will have to bear the cost of proving the matters in question at the trial, unless the court otherwise orders.[66] If he does make the admissions, they may not be used against him in any other proceedings or in favour of any person other than the one who gave the notice to admit.[67]

2.20 It is unnecessary to emphasise the dangers of importing a rule from another system, and of elaboration of procedure; but a Scottish rule in somewhat similar terms could be regarded as no more than a logical extension of rule 99, and could meet the present situation in which a defender may properly withhold an admission in his pleadings of a fact readily ascertainable, or indeed ascertained, by him.[68] It is sometimes asserted that a defender is entitled to "put the pursuer to his proof"of matters about which the defender has, or could easily obtain, information. It is difficult to reconcile this assertion with the rule of pleading that a party must admit/

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[65] Rules of the Supreme Court, ord 27, r 2(1).
[66] RSC ord 62, r 3(5).
[67] RSC, ord 27, r 2(2).
[68] As in Ganley v Scottish Boarowners Mutual Insurance Association, 1967 SLT (Notes) 45, and O'Connor v W G Auld & Co (Engineering) Ltd, 1970 SLT (Notes) 16; but see Ellon Castle Estates Co Ltd, v Macdonald, 1975 SLT (Notes) 66, and post, para 2.21.

admit or deny facts averred by his opponent which are within his knowledge,[69] unless by taking the view that the rule applies only to facta propria in the strictest sense. It may be thought necessary to make it clear that penalties may be imposed on those who unreasonably withhold admissions. On the other hand it may be thought that by virtue of section 1 of the Administration of Justice (Scotland) Act, 1972,[70] and the rules made thereunder[71] parties may now obtain adequate facilities for investigation, and that it would be an undesirable inconsistency that a party should be required to admit a fact under notice, but not in his pleadings.

2.21 In any event it seems unsatisfactory that a dishonest defender is entitled to cause delay and possibly hardship by insisting in irrelevant or unfounded defences. The court cannot grant decree until after the closing of the record,[72] so that the pursuer is denied his remedy either until the defences are repelled after debate or until he establishes his case at inquiry. The Court of Session's power to close the record before the expiry of the 12-week period of adjustment permitted by the Practice Note of 16th December 1968 appears to be seldom exercised and in any event cannot be exercised earlier than four weeks after the date of the interlocutor continuing the cause for adjustment. It is within the discretion of both the Court of Session[73] and the sheriff court[74] to grant an interim decree both before and after the record has been closed, but only where it is admitted or obvious that a sum is due to the pursuer by the/

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[69] J M Lees, Handbook of Pleading (2nd ed), p 46.

[70] 1972, cap 59.

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

[72] Court of Session Act, 1825 (6 Geo IV, cap 120), secs 4, 10.

[73] Mackay, Practice, I, pp 582-583; Maclaren, Court of Session Practice, pp 1090-1091.

[74] Dobie, Sheriff Court Practice, pp 162-163; George Hotel (Glasgow) Ltd v Prestwick Hotels Ltd, (1961) 77 Sh Ct Rep 97, 1961 SLT (Sh Ct) 61.

the defender. Only in an exceptional case[75] may the Court be able and willing, before inquiry, to draw an inference which is contrary to a party's denial and grant decree against him; and even in such a case the Court cannot do so until the record has been closed and parties have been heard in debate.

2.22 It seems unfortunate that there is no generally available procedure in the Scottish courts analogous to the English procedure of summary judgment under Order 14 of the Rules of the Supreme Court, whereby a plaintiff or counterclaiming defendant may apply for judgment on the whole or part of his claim and his opponent may show cause against the application by stating his defence to the claim and showing that there is a real issue which ought to be tried. Where, for example, a defendant enters an appearance and thus indicates that he intends to contest the claim, the plaintiff may issue a summons for summary judgment returnable before a Master and supported by an affidavit in which he verifies his own claim and swears to his belief that the defendant has no defence except perhaps on the amount of damages. It is then for the defendant to show that he has a defence, but if the Court is satisfied that the defendant has raised no triable issue or question or that the case is not one which for some other reason ought to go to trial, it will give summary judgment, ie a speedy judgment without a trial against the defendant. It is understood that this procedure is used in a substantial number of cases, and it greatly accelerates the process of the law.[76] The Grant Committee rejected/

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[75] Such as Ellon Castle Estates Co Ltd v Macdonald, 1975 SLT (Notes) 66.

[76] I H Jacob, Accelerating the Process of Law: A Preliminary Memorandum (International Congress on the Law of Civil Procedure, Ghent, 1977).

rejected a suggestion that a similar procedure might be introduced in the sheriff court,[77] but it is doubtful whether they appreciated that it is only after a defendant has entered an appearance that a plaintiff may ask for summary judgment.

2.23 Rule 89A of the Rules of Court,[78] which makes provision for interim payments by certain defenders to pursuers, and mutatis mutandis by pursuers to counter-claiming defenders, at any time after defences have been lodged, applies only to actions of damages for personal injuries, and enables the court to make an order for interim payment of damages if satisfied that liability has been admitted or that, if the action proceeded to proof, the pursuer would succeed on the question of liability without any substantial finding of contributory negligence. It is difficult to predict the course which the court would be likely to adopt if a defender in such an application, whose defences were irrelevant or restricted to a simple denial, declined to state any specific defence and show that there was a real issue which ought to be tried. So long as a defender is entitled to insist in such defences, it is not clear that in such a situation the court would be prepared to hold that the pursuer would succeed if the action proceeded to proof, and accordingly that the pursuer had satisfied the condition of making an interim award contained in rule 89A(1)(c)(ii).

(2) Judicial admissions in criminal causes

2.24 These are (a) the plea of guilty to a charge, which if accepted excludes/

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[77] Grant, para 554.

[78] Introduced by A S (R C Amendment) 1974, and in operation since 1st October 1974; see Glasgow Herald, 30th October 1974; Douglas's C B v Douglas, 1974 SLT (Notes) 67; Littlejohn v Clancy, 1974 SLT (Notes) 68; Boyle v Rennies of Dunfermline Ltd, 1975 SLT (Notes) 13; Nelson v Duraplex Industries Ltd, 1975 SLT (Notes) 31.

excludes all inquiry into the accused's guilt of that charge, and (b) admission by minute, which limits the scope of inquiry.

(a) Plea of guilty[79]

(i) Probative value

2.25 The rules as to the probative value of a plea of guilty seem worthy of examination. According to the present law and practice, neither a plea which has been tendered and rejected,[80] nor a plea which has been tendered and withdrawn, may be founded on by the prosecutor. Nor may reference be made in the course of a trial on any charge to any other charge in the same indictment[81] or complaint to which the accused has pleaded guilty. In Strathern v Sloan[80] various reasons were given for the rule forbidding the prosecutor to use against the accused a plea of guilty which has been tendered and not accepted. Lord Justice-Clerk Aitchison said (at p 80):

> "If the panel, notwithstanding his plea of guilty, chooses to enter the witness-box, he must have entire freedom to give his evidence, contrary to his plea of guilty which the prosecutor has declined to accept. This does not involve any encouragement of false testimony, as it is not unfamiliar that a panel may offer a plea of guilty, not because he is guilty of the offence charged, but because a public trial might disclose facts more hurtful to his own reputation, or the reputation of others, than the recording of a plea on his own confession."

Lord Mackay said (at p 84) that between 1840 and 1903

> "the Crown never sought to augment its proof, when it had taken the option of leading its proof, by the process (which would seem to me personally highly inequitable) of tendering in proof the plea which it had not 'accepted'."

2.26 The validity of these considerations must naturally be acknowledged, but it may be questioned whether the present rules are not too inflexible to/

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[79] R & B, para 18-06.

[80] Cochran v Ferguson, (1882) 5 Couper 169, 10 R (J) 18; Strathern v Sloan, 1937 JC 76.

[81] Walsh v H M Advocate, 1961 J C 51.

to be entirely fair to the prosecutor in all circumstances. A plea of guilty is a solemn judicial confession of fact, and if accepted, may result in an immediate conviction. If it is withdrawn, or not accepted, conviction thereon cannot follow; but it is difficult to see why the withdrawal or non-acceptance should in all cases deprive the confession of all probative value. No doubt there are cases in which a partial plea is tendered, or a plea is withdrawn, for entirely proper motives: a plea may be tendered for reasons such as those referred to by Lord Justice-Clerk Aitchison, and a plea may be withdrawn because it had been tendered without legal advice[82] or, in terms of section 122 of the Act of 1975,[83] "to an irrelevant or incompetent charge" or "under substantial error or misconception, or in circumstances which tended to prejudice the person accused." But there are other cases where the motives of the accused are less worthy: a partial plea may be tendered in the hope that a particular prosecutor will accept it rather than seek to prove the charge libelled, as a more resolute prosecutor might be inclined to do; or a plea may be withdrawn because the accused has become aware that certain evidence has been lost, or that witnesses are unlikely (for good or bad reasons) to attend or to adhere to the prosecutor's precognitions, or because he considers that from the judge before whom he finds himself he is likely to receive a more severe sentence than he had expected. It is true that he should be allowed to withdraw his plea only if, in the High Court, the terms of section 122 of the Act of 1975 are satisfied,[83] or, in summary procedure, the circumstances are/

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[82] Williams v Linton, (1878) 6 R (J) 12.

[83] See R & B, paras 8-05, 10-05. Thomson recommends that in the sheriff and jury court the court should have a discretionary power to permit the plea to be withdrawn on the same grounds as are stated in section 122 (para 22.02).

are very special;[84] but the circumstances urged in court may be different from the considerations genuinely impelling withdrawal, and it may be difficult for the court to check whether the circumstances urged are genuine or not.[85]

2.27 It may be that the considerations which favour the inadmissibility of withdrawn or unaccepted pleas had particular force prior to 1898, when the accused was unable to explain to the jury from the witness-box his reasons for tendering the plea. But if such pleas were to be made admissible now, the accused would be entitled to make his explanations to the jury. It would seem to be wrong to assume that there is any principle that the jury are not entitled to know anything of what took place in open court before they were empanelled: they are entitled to know, if the matter is libelled in the indictment, that the accused failed to appear at an earlier diet of trial, and to regard his absence as an implied confession of guilt; and the accused is entitled to go into the witness-box and explain his absence away.[86] It appears to be arguable that it is illogical to let the jury know of and draw inferences from actings of the accused which may amount to an implied confession, but to refuse to permit the disclosure of an explicit confession. As to the admissibility of a plea which has been withdrawn: it may now be thought unjustifiable to withhold from the jury the fact that the accused has changed his tune. If the prosecutor were entitled to found on the plea, the accused/

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[84] R & B, para 14-29; M'Clung v Cruickshank, 1964 JC 64.

[85] Thomson, para 22.05. The implementation of Thomson's recommendation that in summary cases the accused if present in court should plead personally, may remove one possible source of alleged misunderstanding (para 22.06).

[86] See post, paras 20-27-20.29.

accused would be entitled to explain in his evidence why it had been withdrawn. The jury would be directed that if his reasons seem to them to be good, they will ignore the plea; but if his reasons leave them unconvinced, they may take the plea into account as a solemn, although perhaps not necessarily conclusive, confession of guilt. The admissibility of a plea which has not been accepted may be thought to involve more complex considerations, in that it may seem unfair to allow a prosecutor to decline to accept a plea and then to found on it at the trial. But it would be unjust if the accused were to be acquitted of a charge to which he had pleaded guilty in whole or in part, because his plea could not be drawn to the attention of the jury. It seems difficult to justify the possibility of the acquittal of an accused by a jury on a charge to which he had pleaded guilty in open court before the trial commenced, on the ground that the law does not permit the jury to know of such deliberate and untainted confessions.

2.28 The rule that in the course of a trial on any charge no reference may be made to any other charge in the same indictment or complaint to which the accused has pleaded guilty, is supportable on the grounds that in solemn procedure the other charge is not before the jury and that their judgment on the charge before them might be influenced if they were aware of the plea of guilty to the other charge. But in certain circumstances - where, for example, the Moorov doctrine may be properly applied to a series of charges[87] - it may seem unrealistic to exclude from the jury's consideration the fact that the accused has pleaded guilty to other charges. This seems particularly unrealistic in a situation where the jurors, prior to/

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[87]It is thought that in such a case it may be prudent for the Crown to decline to accept pleas of guilty to any of the charges.

to being empanelled, have been sitting in the public benches and have heard the plea of guilty to these charges being tendered.

2.29 The solution may be to make the admission of evidence of the plea of guilty a matter for the discretion of the presiding judge, guided by what is proper in the interests of fairness. The judge is already endowed with such a discretion when questions arise as to the admissibility of evidence of the accused's previous convictions or bad character under sections 141(f) and 346(f) of the Act of 1975.[88] In relation to the admission of evidence of a plea of guilty, he would consider the relevant circumstances and decide whether the confession made by the plea had any probative value, and if so whether that probative value exceeded the prejudice that might be imported by referring to it. It may well be that in the vast majority of cases in practice the result of such consideration would be that the evidence would not be admitted; but it may be thought desirable to make provision for its admission in the comparatively rare cases where its admission would be in the interests of fairness.[89] It is not suggested that the trial-within-a-trial procedure should be employed in eliciting the relevant circumstances.[90] Nor is it suggested that any probative value should be attached to an intimation to the procurator-fiscal of an intention to plead guilty, or to an attempt to negotiate a partial plea,[91] or to a departure from a section 102 letter.[92]

(ii) Plea/

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[88] O'Hara v H M Advocate, 1948 JC 90. See post, para 5.49.

[89] On the whole matter cf R v Rimmer, [1972] 1 WLR 268.

[90] Cf R v Rimmer, [1972] 1 WLR 268; R v Hetherington, [1972] Crim LR 703. On the trial within a trial see post, paras 20.37-20.52.

[91] Thomson, para 21.02.

[92] See Thomson, paras 24.07-24.08.

(ii) Plea of guilty by letter

2.30 The Thomson Committee considered a proposal that there should be a rule in summary proceedings that an accused who pleads guilty by letter should be deemed to be admitting any previous convictions which have been libelled against him, unless he expressly denies them. In solemn procedure, any conviction set forth in the notice of previous convictions attached to the indictment is held to apply to the accused unless he gives written intimation to the contrary in accordance with a prescribed procedure.[93] The Committee recommended that a statutory rule should be introduced on the lines proposed.[94]

(b) Admissions by minute[95]

2.31 Facts and documents may be admitted in both solemn[96] and summary[97] procedure, where the accused is legally represented. The statutory provisions are not in identical terms. Section 354 of the 1975 Act, re-enacting section 36 of the Summary Jurisdiction (Scotland) Act, 1954 and the substance of section 39 of the Summary Jurisdiction (Scotland) Act, 1908,[98] uses the expression "has legal assistance in his defence", not "is legally represented" as in section 150, which re-enacts section 1 of the Criminal Procedure (Scotland) Act, 1965. The word "may" in section 354(2), as distinct from "shall" in section 150(2), seems to indicate that admissions may be made orally in summary proceedings. Again, the accused may sign the minute in summary proceedings. It would probably be desirable to prescribe one mode of procedure, to be followed in/

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[93] 1975 Act, sec 68.
[94] Thomson, paras 19.01-19.04.
[95] R & B, para 18-05.
[96] 1975 Act, sec 150.
[97] 1975 Act, sec 354.
[98] See Trotter, Summary Criminal Jurisdiction, p 254.

in each type of proceedings. The Thomson Committee point out that it may not be absolutely clear from the wording of the statutory provisions that any fact admitted in a minute by an accused is not to be held proved unless the prosecutor accepts it as proved. The Committee have no doubt that that was what was intended, and accordingly recommend that the law should clearly state that a unilateral admission should not be accepted by the court as proof of the matters therein stated unless there is agreement from the opposing side.[99]

2.32 There is no provision in either case that an admission may be withdrawn. In English and court-martial procedure, an admission may with leave of the Court be withdrawn in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter.[1] It is not clear that such a provision would be desirable in Scottish practice. The absence of such a provision may be thought to ensure that admissions are made only after due consideration. On the other hand the safeguard that leave of the court would have to be obtained, perhaps on special cause shown, could prevent abuse of such a provision, as by an accused who dispensed with the services of his advocate in the course of the trial. But if withdrawal of admissions were to be permitted in the course of a trial, it would be too late for the prosecutor to cite witnesses and he would be obliged to start afresh with a new indictment or complaint.[2]

2.33 The Thomson Committee considered whether some method could be devised to increase the use of minutes of admission, thus avoiding the calling/

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[99] Thomson, para 36.05.

[1] Criminal Justice Act, 1967 (cap 80), sec 10(4).

[2] See J L, "The Criminal Procedure (Scotland) Bill", 1965 SLT (News) 65.

calling to court of witnesses whose testimony is not in dispute. The Grant Committee thought that sheriffs might be justified in encouraging parties to minute their agreement on matters where no dispute was possible.[3] Prosecution evidence about finger-prints, blood groups and medical matters frequently goes unchallenged by cross-examination, and much time and inconvenience could be saved by the preparation of joint minutes covering these and other matters. It is, however, difficult to suggest any formal means of encouraging their use. It may be proposed, for example, that the unreasonable failure of the defence to agree timeously a joint minute prepared by the prosecutor should involve an award of expenses against the accused. Such a proposal, however, is inconsistent with the accused's right to put the prosecution to the proof of its case; and even if an award of expenses could be quantified, in an acceptable way, it would have no practical effect in legal aid cases while in other cases some inquiry into the means of the accused would have to be made. The matter is fully discussed in the Thomson Report, which recommends that the initiative for reaching agreement should lie with the Crown,[4] and that in solemn procedure there should be informal discussion between prosecution and defence on the subject before the first diet.[5]

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[3] The Sheriff Court (1967, Cmnd. 3248), para 532.

[4] Thomson, para 36.04.

[5] Thomson para 30.05.

PART III

THE MEANS OF PROOF

Chapter 3

ORAL EVIDENCE I: COMPETENCE AND COMPELLABILITY OF WITNESSES - GENERAL[1]

1. Development of the law[2]

3.01 "Our early law of proof by witnesses, which was largely inherited from the canon law, had long been in decay. It aimed at excluding every witness whose character, connexion with the parties, or interest in the cause was supposed to taint his testimony. In process of time this obscurantist trend defeated its own ends; for the problem came to be where to find an admissible witness (Dickson on Evidence, sec 1542), and the illogical corollary was accepted that the tainted evidence might be accepted cum nota if there was penuria testium - the one situation which called for greater and not less stringency. But ideas like these are part of the history of our law, for they were exploded by Bentham's Rationale of Judicial Evidence, which inspired reforms in many parts of Europe and bore fruit in these islands in the series of statutes beginning with the Scottish Act of 1840 and the English Act of 1843. All these statutes give expression to Bentham's liberalising principle that moral turpitude or interest is a ground of criticism not of the admissibility of the witness but of the reliability of his evidence."[3]

3.02 The first of the series of statutes governing the modern Scots law of competence and compellability is the Evidence (Scotland) Act, 1840/

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[1] See Walkers, chap 28.

[2] See Introduction to Scottish Legal History (Stair Society, vol 20), chap 22, D M Walker, "Evidence", at pp 306-7.

[3] Dow v MacKnight, 1949 J C 38, L J-G Cooper at pp 56-57. See also L J-C Thomson at pp 42-43.

1840,[4] which inter alia abolished the objections of relationship to a party and, in the supreme and sheriff courts, presence in court during the proceedings.[5] Then the Evidence (Scotland) Act, 1852,[6] abolished the objections of conviction of crime, interest, agency or partial counsel, absence of citation and precognition subsequent to citation, but made it clear that such witnesses might be examined as to credibility. Next, the Evidence (Scotland) Act, 1853,[7] by section 3 made the parties and their spouses competent witnesses except in criminal cases, and by section 4 also excepted proceedings instituted in consequence of adultery, actions for breach of promise of marriage, and actions of status, adherence or separation. The Evidence Further Amendment (Scotland) Act, 1874,[8] repealed section 4 of the 1853 Act and enacted that the parties to any proceeding instituted in consequence of adultery, and their spouses, were competent witnesses but no witness in such proceedings was to be liable to be asked or bound to answer any question tending to show guilt of adultery unless he or she had already given evidence denying adultery. Section 6 of the Bankers' Books Evidence Act, 1879,[9] dealt with the compellability of bankers in relation to the production of bankers' books, and the Criminal Evidence Act, 1898,[10] made provision for the competence and compellability of the accused and his spouse.

2. Reform of the law/

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[4] 3 and 4 Vict cap 59.

[5] See post, paras 3.16 et seq.

[6] 15 Vict cap 27. The provisions of the 1852 Act as to the recall of witnesses and as to the examination of witnesses as to previous statements, are considered in chapters 8 and 19.

[7] 16 Vict cap 20.

[8] 37 and 38 Vict cap 64.

[9] 42 Vict cap 11.

[10] 61 and 62 Vict cap 36.

2. Reform of the law

3.03 The competence and compellability of witnesses was one of the subjects dealt with in the Draft Evidence Code with the Scottish Law Commission circulated for comment and criticism in 1968. It appears from the comments received that there is general agreement that the statutes noted above could usefully be consolidated and amended.[11] There are some differences of view about the way in which the law should be changed, particularly in criminal cases, but at least it now seems possible to contemplate the introduction of statutory provisions to the effect that all persons are competent and compellable witnesses, except as otherwise provided in the statute. Such a statute would also have to deal with the topic of privilege. This section of the memorandum therefore considers a number of possible exceptions to a general rule that all persons are competent and compellable witnesses. First are considered exceptions which may be applicable to all proceedings; second, exceptions in civil causes; and third, exceptions in criminal trials. The rules relating to privilege, and to frivolous citation, are considered in chapters 18 and 24.

3. Classes of witnesses

(1) Heads of State

3.04 It is submitted that the Sovereign and foreign Heads of State, should be competent, but not compellable witnesses. There is no Scottish authority to the effect that the Sovereign is an incompetent witness. In England, in R v Mylius,[12] a prosecution for a criminal libel/

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[11] The provision of the Acts of 1840 and 1852, so far as relating to criminal proceedings, and of the Act of 1898, except so far as relating to courts-martial, have been repealed by and re-enacted in the Act of 1975. The relevant sections of the 1975 Act are noted in the appropriate paragraphs below.

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

libel on the Sovereign, the Attorney-General (Sir Rufus Isaacs) stated to the court that the British Sovereign could not go into the witness-box to testify in person:

> "... this is not a private privilege which the Sovereign can waive at pleasure, but is an absolute incapacity attached to the sovereignty by the constitution for reasons of public policy."

The Solicitor-General, who also appeared, later explained:

> "One interesting question of law had to be investigated - can the reigning Sovereign give evidence as a witness in proceedings in the King's Court? It was a disappointment to His Majesty when I had to advise that this was, on constitutional grounds, impossible. There is, in fact, a precedent to illustrate this proposition derived from ancient times: a man convicted of treason during the Wars of the Roses had to be released because the sole evidence against him was the testimony of the King himself. But after Mylius was convicted, Isaacs was permitted to read in court a statement, signed by the King's own hand, in which he, on his word of honour, denied the whole story."[13]

3.05 It is thought that the Sovereign may nevertheless be a competent witness in the Scottish courts. Although it is said that no civil remedy now lies against the Sovereign in her personal capacity,[14] it used to be possible to sue the Crown in contract and, at one stage, to raise an action for reparation against the Crown, in times when the distinction between the personal and the official aspects of the kingship had not been developed; and it may be supposed that the Scottish courts would not have regarded the Sovereign as an incompetent witness.[15] The maxim/

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[13] Viscount Simon, Retrospect, p 92.

[14] Crown Proceedings Act, 1947 (10 and 11 Geo VI, cap 44), sec 40(1); Walker, Delict, i, p 107.

[15] "The Lordis of Sessioun alanerlie, and na uther inferior juge within this realme, ar jugeis to the Kingis actiounis; for his Hieness, nor his Advocat, may not be callit befoir ony inferiour juge, but befoir thame alanerlie." (A v B, (1534) Mor 7321). See also Balfour, Practicks, 267; Somerville v Lord Advocate, (1893) 20 R 1050, Lord M'Laren at p 1075; J R Philip, "The Crown as Litigant in Scotland", (1928) 40 Jur Rev 238; Lord Murray, "Rex Non Potest Peccare", (1939) 55 Sc L Rev 1, 40; J D B Mitchell, Constitutional Law (2nd ed), p 304; P Jackson, "Sovereign Immunity: A Feudal Principle?" (1975) 91 LQR 171.

maxim Rex non potest peccare, which the Law Officers in Mylius[12] may have had in view, is essentially a developed doctrine of English law, and no reported instance of its application in Scotland has been found prior to 1707. In any event it seems desirable that the Sovereign should be a competent witness. It is not impossible that her evidence could be of value on rare occasions, such as a prosecution for a crime allegedly committed in the presence of the Sovereign.[16]

3.06 Modern English writers assume that the Sovereign and foreign Heads of State are competent, but not compellable, as witnesses.[17] It is plain that their attendance cannot be enforced. Any rule in favour of foreign Heads of State should no doubt extend only to the Heads of State recognised by the Crown, either de facto or de jure. It is thought that the Sovereign's evidence should be given on oath.[18]

(2) Members of Diplomatic Missions and International Organisations

3.07 It seems possible to propose a rule that members of these classes are competent but not compellable witnesses, except in so far as (a) otherwise provided by statute or Order in Council or (b) immunity is waived by the state or organisation which the proposed witness represents. A variety of statutes and Orders in Council have to be promulgated/

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

[16] See Nicholson, The Times, 23rd August and 29th October 1974, a prosecution for committing a nuisance in front of the Queen by raising a banner, in which Buckingham Palace declined a request from the defendants that Her Majesty should appear to give evidence on their behalf at Aldershot Magistrates Court.

[17] Cross, pp 162-163; Phipson, para 1471.

[18] Best, pp 113, 170-173; Taylor, ii, para 1381.

promulgated from time to time relating to the privileges of these classes, and of different divisions of these classes,[19] and it would probably be difficult to express the rule in a more positive way.

(3) Judges

3.08 "(a) Supreme Courts. While there is no actual decision, it is plain from the opinions in the undernoted case[20] that it is incompetent to call a judge as a witness as to judicial proceedings which took place before him, though he might be a witness as to an extraordinary event such as a riot or possibly an assault. In view of these opinions it is thought that some earlier cases[21] where judges were examined of consent, both of themselves and of parties, are now of no importance.

3.09 "(b) Inferior Courts. Judges of inferior courts are competent witnesses to the proceedings before them[22] and are frequently called in trials for perjury to testify as to the evidence given in their courts.[23,24]

3.10 The distinction between judges of the supreme courts and those of the inferior courts appears to be based on two considerations. The first/

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[19] International Finance Corporation Act, 1955 (4 Eliz II cap 5), sec 3; International Development Association Acts, 1960 (8 and 9 Eliz II, cap 35), sec 3, and 1964 (cap 13); Civil Aviation (Eurocontrol) Act, 1962 (10 and 11 Eliz II, cap 8), sec 2; Diplomatic Privileges Act, 1964 (cap 81), sec 2, Sched I, arts 1, 29, 31; Arbitration (International Investment Disputes) Act, 1966 (cap 41), sec 4; International Organisations Act, 1968 (cap 48); Diplomatic and Other Privileges Act, 1971 (cap 64).

[20] Muckarsie v Wilson, 1834, Bell's Notes, 99.

[21] Harper v Robinson and Forbes, (1821) 2 Mur 383; Gibson v Stevenson, (1822) 3 Mur 208; Stewart v Fraser, (1830) 5 Mur 166, Lord Pitmilly at p 188.

[22] Monaghan, (1844) 2 Broun 131.

[23] Eg Davidson v M'Fadyean, 1942 J C 95.

[24] Walkers, para 365. For another analysis of the authorities, see J M Lees, "The Citation of Judges as Witnesses", (1887) 3 Sc L Rev 273.

first is that it is inconsistent with the dignity of high judicial office that a judge of the supreme courts should be cross-examined and contradicted by other evidence as to judicial proceedings which have taken place before him.[25] The second is that in summary courts the judge is the best witness of the evidence given. A distinction between the judges of the supreme courts and those of the inferior courts is also drawn in the field of liability for judicial acts;[26] and it is interesting that in England such a distinction has recently been held to be no longer tenable.[27]

3.11 If adequate provision is made against frivolous citation,[28] it may be unnecessary to enact a special rule relating to judges, other than the self-evident rule that a judge is not a competent witness in a trial at which he is presiding. But if it is thought necessary to exempt them from the general rule that all persons are competent and compellable witnesses, it is arguable that the exception should extend to all judges, or perhaps only to all professional judges, and to all occurrences in court. The extension to all occurrences in court may be maintainable on the ground that the line between judicial proceedings and extraordinary events may sometimes be difficult to draw. If such a special rule were enacted, it would be necessary to make provision for a number of exceptional situations in which a judge's testimony would be necessary or valuable, such as the following.

(i) Where an accused person attempts to impugn his judicial declaration, the/

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[25] Dickson, para 1636.

[26] D M Walker, Delict, i, pp 111-113.

[27] Sirros v Moore, [1975] Q B 118, Lord Denning M R at pp 131-137, Ormrod L J at p 149-150.

[28] See Chapter 24 below.

the sheriff before whom it was emitted should be enabled to speak to its terms. (ii) In a prosecution for perjury and subornation of perjury allegedly committed in a summary civil or criminal court in which the evidence was not recorded, the judge or judges of the court should be available as witnesses, on the grounds of the gravity of the offence and the probability that the judge or judges are able to give the best evidence. (iii) Where a contempt of any court has amounted to a criminal offence and the contemnor is prosecuted, the judge should be able to give evidence at the contemnor's trial. The judge may be one of a very few witnesses of some forms of contempt, such as an intimidating gesture at a witness from the public benches. Such a contempt could no doubt[29] be prosecuted as subornation, or attempting to defeat the ends of justice. (iv) Where an appeal is taken against a conviction of, or sentence imposed for, contempt of court, the judge should be able to present to the appeal court a full statement of his reasons for dealing with the matter as he did. This would be particularly useful in a case of prevarication.[30] Under certain modes of appeal, such as petition[31] or suspension,[32] it is not possible for the appeal court to ascertain formally the judge's reasons, unless by asking him for a report.[33] In addition to making provision/

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[29]Gordon, Criminal Law, (2nd ed), para 51.09, n 34.

[30]Macleod v Speirs, (1884) 11 R (J) 26, at p 32.

[31]Wylie v H M Advocate, 1966 SLT 149.

[32]Graham v Robert Younger Ltd, 1955 J C 28, at p 34. On the proper channels of review, see Cordiner, 1973 SLT 125.

[33]However, the Phillimore Committee recommended only that in appeals against findings of contempt in civil proceedings there should be a right of appeal by way of note or minute in the process out of which the contempt arose, and in criminal proceedings on indictment a right of appeal by way of note of appeal (Report of Committee on Contempt of Court (1974, Cmnd 5794), paras 195-198, rec 33). The Thomson Committee recommend in their Third Report that the judge should be entitled to an opportunity to comment where his conduct is attacked in a bill of suspension (Cmnd 7005, paras 9.08-9.10).

provision for such situations, it would be advisable to declare that a sheriff would remain able to speak to precognitions on oath[34] and dying depositions.

3.12 It may be noted that in England "the judges do not appear to object to giving evidence, at least from the well of the court, concerning that which occurred in cases tried by them when they can assist subsequent litigation by doing so."[35] In Scotland, cases have from time to time arisen in which such evidence from the judge of first instance might have been helpful.[36]

3.13 It is debatable whether any provision need be made as to the competence and compellability of chairmen of tribunals and inquiries.

(4) Jurors[37]

3.14 It is settled that jurors in both civil[38] and criminal[39] cases may not give evidence of discussions that took place in the jury box or jury room, although they may immediately correct the verdict announced by the foreman.[39] Hume and the Scottish judges base the rule on the principle that the jury would otherwise be exposed to external influences. English judges and writers justify the rule on that ground and on the ground of finality.[40] The rule is confined to the proceedings/

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[34]The Thomson Committee have, however, observed that a precognition on oath, signed by the sheriff, should speak for itself (Second Report, para 44.07). See chapter 24.

[35]Cross, p 275.

[36]Eg Plasticisers Ltd v William R Stewart & Sons (Hacklemakers) Ltd, 1972 SC 268, at pp 278-279, 282-284.

[37]Dickson, paras 1118, 1642-1646.

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

[39]Hume, ii, 429-430.

[40]Boston v W S Bagshaw & Sons, [1966] 1 WLR 1126, Lord Denning M R at p 1136; Lord Devlin, Trial by Jury, p 48. And see Glanville Williams, The Proof of Guilt (3rd ed), pp 308-315.

proceedings in the jury box or jury room.[41] It is thought that the rule is generally accepted and may be readily expressed as an exception to the general rule. It may be desirable to include in the exception the axiomatic rule that a juror may not testify in the trial in which he is serving as a juror.

(5) Arbiters[42]

3.15 The same may perhaps be said of the rule that a decree-arbitral, like any other finished writ, must stand or fall on its own merits, and must be construed by itself,[43] although in an action for enforcement or reduction of his award the arbiter's evidence is competent on any matter which would entitle the court to interfere with his award.

(6) Presence in court[44]

3.16 (a) General. It seems desirable to revise the present law as to the presence in court of persons who are to give evidence, while other witnesses are being examined. At common law a witness other than an expert witness is excluded if he has been in court during the examination of any of the previous witnesses. The common law was modified by section 3 of the Act of 1840, which in turn has been repealed so far as relating to criminal proceedings by Schedule 10, Part I, of the 1975 Act. The statutory rule as to civil proceedings is accordingly section 3 of the 1840 Act, read as follows:

> "In any trial before any judge of the Court of Session ... or before any sheriff in Scotland, it shall not be imperative on the court to reject any witness against whom it is objected

that/

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[41] M'Guire v Brown, 1963 S C 107, L P Clyde at p 109, Lord Guthrie at p 112.

[42] Dickson, paras 1023, 1639; Walkers, para 365(c).

[43] Dickson, para 1023.

[44] Dickson, paras 1599-1601, 1761; Walkers paras 367, 413(d); R & B, paras 10-34, 18-70, 18-80; Draft Code, art 6.10.

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

In criminal proceedings, the relevant provisions are sections 140 and 343 of the 1975 Act, each of which reads as follows:

> "In any trial the court need not reject any witness against whom it is objected that he has, without the permission of the court, and without the consent of the party objecting, been present in court during the proceedings; but the court may, in its discretion, admit the witness, where it appears to the court that the presence of the witness was not the result of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his presence, or that injustice will not be done by his examination."

While the 1840 Act applied only to trials in the Court of Session, the High Court and the sheriff court, the 1975 Act applies to "any trial". It may be that the 1840 Act created a distinction between these courts and other courts on the ground that the former are presided over by experienced lawyers.[45] The distinction was perhaps undesirable in principle, and in any event inappropriate in the case of stipendiary magistrates' courts.

3.17 It has been said that the present law exhibits a rigidity of outlook in the admission of evidence which, while characteristic of its date (ie 1840), is not in accordance with modern ideas and practice.[46] It appears that in England there is no rule of law in civil proceedings which provides that witnesses in a trial must remain outside the court until/

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[45] Docherty and Graham v M'Lennan, 1912 S C (J) 102, Lord Dundas at p 104.

[46] Draft Code, art 6.10, commentary.

until called to give evidence: in practice they do so, but whether or not they remain in court is solely a question for the discretion of the judge. On the application of either party he may at any time order all witnesses on both sides, other than the one under examination, to withdraw, but not to leave the court again after giving evidence so as to communicate with other witnesses before they give evidence. But he has no right to refuse to hear a witness who nevertheless remains in court.[47] In criminal cases in England the general rule and practice is that witnesses as to fact should remain out of court until they are required to give their evidence.[48]

3.18 Whatever form any restatement of the law of Scotland may take, it is submitted that it should take into account the following matters, some of which have created difficulties under the present law.

3.19 (b) Procedure. There has been no judicial guidance as to whose "culpable negligence" or "criminal intent" is involved, or as to how the court is to be satisfied on the points mentioned in the statutes.[49] It appears to be for the party tendering the witness to satisfy the court.[50] In Macdonald v Mackenzie[51] Lord Mackay envisaged that that party might lead the person tendered himself, or "lead independent testimony to establish the negatives involved". It is submitted, however, that there is room for considerable simplification of the procedure to be followed on the tendering as a witness of a person who has been in court and is outwith any excepted category. It is thought that it would be sufficient to/

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[47] Moore v Lambeth County Court Registrar, [1969] 1 WLR 141; Re Nightingale decd, [1975] 1 WLR 80; Supreme Court Practice 1976, vol 1, note 38/1/4; Phipson, para 1545.

[48] R v Smith (Joan), [1968] 1 WLR 636, at p 637.

[49] Cf Walkers, para 367(a).

[50] Macdonald v Mackenzie, 1947 JC 169; Ryan v Paterson, (1972) 36 JCL 111.

[51] 1947 J C 169, at p 174.

to provide that if a person who ought not to have been in court is presented as a witness, he is nevertheless to be admitted; or - if a provision in such terms is thought to be too wide - that it shall be competent for the court, in its discretion, to admit him. Any such provision as to judicial discretion should, it is submitted, be in general terms, and should not state the grounds on which it should be exercised. It does not appear to be necessary to add a provision to the effect that if the person is admitted, his evidence is to be scrutinised with exceptional care:[52] whether a jury need be directed in that sense is perhaps a matter which may be left to the discretion of the presiding judge. But there may be room for a provision that comment may be made by the judge and the parties or their advocates on the witness's unauthorised presence in court.

3.20 (c) Sec 3 of the 1852 Act. The present provisions may cause difficulty when it is sought to recall a witness, who has been present in court during the evidence of another witness, in order to prove the previous statement of that witness under section 3 of the 1852 Act.[53] The question was raised but not decided in Dyet v NCB.[54]

3.21 (d) Parties and their advocates.[55] It should be made clear that any exclusionary rule does not apply to the parties and their advocates. Their competence as witnesses is discussed in Chapter 4. The fact that a party has listened to the evidence of witnesses before giving/

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[52] Cf Draft Code, art 6(10)(b).

[53] Now, so far as relating to criminal proceedings, secs 147 and 349 of the 1975 Act. On procedure under sec 3 of the 1852 Act see Chapter 19.

[54] 1957 SLT (Notes) 18.

[55] See R & B, para 18-80, n 26.

giving evidence himself should, however, remain a matter for judicial comment[56] or condemnation[57] in appropriate circumstances.

3.22 (e) Company directors, etc. There is a need for a rule on the question whether or not a director or other representative of a corporate or unincorporated party may be present in court before giving evidence.[58] It is suggested that if an advocate's client is a non-natural person, he should be entitled to designate and have present with him in the courtroom throughout the case an officer or employee of the client, whether or not it is intended that the officer or employee should give evidence.

3.23 (f) Expert witnesses. In practice, an expert witness is normally allowed to hear the evidence of the witnesses to fact, unless objection is taken. In the High Court this course on occasions has not been permitted, both where opposed by[59] and sought by[60] the accused, but has been permitted in the face of a statement by the Crown that it was decidedly adverse to the practice of the Court.[61] A distinct rule as to the presence of expert witnesses would probably be helpful.[62]

3.24 (g) Pars judicis. 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 it is pars judicis to raise any question as to the admissibility/

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[56] Penman v Binny's Trustees, 1925 SLT 123.

[57] See Fraser v Smith, 1937 SN 67; Walkers, para 175 (defender as first witness for pursuer in action of affiliation and aliment).

[58] As to the right of audience of such representatives, see Chapters 4 and 6.

[59] Dingwall, (1867) 5 Irv 466, at pp 471-472.

[60] Granger, (1878) 4 Coup 86, at p 87.

[61] Murray, (1858) 3 Irv 262, at pp 263-265.

[62] See post, para 17.11.

admissibility as a witness of a person who ought not to have been present in court. The matter was referred to in Macdonald v Mackenzie.[63]

3.25 (h) Trials and proofs. Section 3 of the 1840 Act applies to trials and not, in terms, to proofs which became a normal mode of inquiry after the Evidence (Scotland) Act, 1866. It has apparently been assumed in practice that section 3 applies to proofs. Any new provision should cover all modes of judicial inquiry in court.

3.26 (i) Children under 14 at criminal proceedings. It may be noted here that no child under 14 years of age, other than an infant in arms, may be present during a criminal trial or any proceedings preliminary thereto, except during such time as his presence is required as a witness or otherwise for the purpose of justice.[64]

(7) Children,[65] and persons of defective physical[66] or mental[67] capacity

3.27 The Draft Code[68] proposed the following rule:

> "A person is incompetent as a witness if from nonage or from any physical or mental incapacity he is incapable of either (a) understanding the obligation to tell the truth, or (b) giving evidence in a manner in which the same is or can be rendered intelligible to the Court. The competence of a witness under this Article is to be decided by the presiding judge, who may make such investigation, including the calling of witnesses, as he may think fit, and whose decision in the matter is not subject to review."

The first sentence was generally accepted, but there were suggestions that the second sentence was unnecessary, that it implied independent investigation/

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[63] 1947 J C 169, Lord Mackay at p 175, Lord Jamieson at pp 176-177.
[64] 1975 Act, secs 165, 361.
[65] Walkers, para 349; R & B, para 18-73. There is, of course, no rule of exclusion as between parent and child (1840 Act, sec 3; McGregor v T, 1975 SLT 76).
[66] Walkers, para 351; R & B, para 18-72.
[67] Walkers, para 350; R & B, para 18-71
[68] Art 6.2.

investigation and the calling of witnesses by the judge, and that the last clause should be deleted on the ground that the wrongful admission or exclusion of evidence is a ground of appeal. It is thought that the first sentence could be a useful model for any statutory provision which did not involve procedural innovation, but that the second sentence would be unnecessary.[69]

3.28 Another view is that children and persons of defective physical or mental capacity should no longer be incompetent as witnesses: they should be permitted to give evidence, and the judge should direct the jury, or himself if sitting alone, to take into account any immaturity or incapacity which is displayed or proved when assessing the weight to be given to the testimony. Under the present law, which requires the judge to determine whether the witness should be examined, it may be difficult for the judge to form any view of the witness's competence without hearing at least some part of the witness's evidence; and he may also find it difficult to decide whether the witness's immaturity or doubtful capacity ought to exclude the witness entirely, or merely affects credibility. It may be, therefore, that immaturity or defective capacity would be better treated as a matter of credit than of competency.[70]

3.29 The Thomson Committee considered the question whether children who have been the victims of sexual offences should be required to give evidence in court. The Committee's view is that while the present procedure is not ideal, and children are inevitably caused a certain amount of distress/

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[69] On the administration of the oath to children and persons of defective mental capacity, see post, para 8.03.

[70] Cf the views of the Law Reform Commission of Canada, Evidence Project, Study Paper no 1: "Competence and Compellability", pp 1-3; Report on Evidence, p 88.

distress by having to give evidence in court, none of the alternative procedures considered by the Committee would satisfactorily resolve the problem or serve the interests of justice. They therefore propose that the present procedure should be retained. They point out that a great responsibility rests on the legal profession in this matter, and advocates should never be aggressive in their examination or cross-examination of children. They also suggest that everything possible should be done to create an atmosphere of reassurance when children are being examined.[71] Normally, when the child gives evidence, the court is cleared,[72] and the judge, advocates and other officers of court do their best to avoid distressing the child. A relative, normally the mother, is sometimes invited to sit beside the child during the child's evidence.

(8) Bankers

3.30 The limited immunity conferred on bankers under section 6 of the Bankers' Books Evidence Act, 1879,[73] was also considered in the Draft Code,[74] and it seemed to be generally accepted that that immunity should be preserved. It may be that the provision for proof of the conditions to be satisfied before a copy may be received, could with advantage be simplified.[75]

(9) Person not cited as witness

3.31 Section 1 of the Evidence (Scotland) Act, 1852, provides that no/

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[71] Thomson, paras 43.31-43.32.

[72] See post, para 7.02.

[73] 42 Vict cap 11; Emmott v Star Newspaper Co, (1892)62 L J Q B 77.

[74] Art 6.11.

[75] See post, para 12.37. For applications under sec 7, see para 25.19.

no person adduced as a witness shall be excluded from giving evidence by reason of having appeared without citation, and that every such person, who is not otherwise disqualified by law from giving evidence, shall be admissible as a witness. That section has been repealed so far as relating to criminal proceedings by Schedule 10, Part I, of the 1975 Act, and replaced by sections 138 and 341 of that Act, which are in similar terms. In McDonnell v McShane,[76] an action of affiliation and aliment, the pursuer called the defender as a witness and objection was taken on the ground that he had not been cited to attend as a witness for the pursuer. It was submitted that although the defender was a competent witness, a competent witness was not necessarily a compellable witness, and that a party, who had not been cited by his opponent, could not be compelled against his will to be examined by his opponent as a witness. The Sheriff-Principal, Sir Allan G Walker, QC, in rejecting that submission, said (at p 63):

> "Citation merely compels a person's attendance within the precincts of the court, whereas the question of compellability is a question of law to be decided after the attendance of the potential witness has been secured in one way or another. If a competent witness, who has knowledge of the circumstances to be inquired into, is present in court, I can see no inherent objection to his being compelled to give evidence, whether he be a party or not, if the court decides that this is desirable in the interests of justice with a view to the ascertainment of the facts."

It is thought, with respect, that that view of the matter, which follows Watson v Livingstone,[77] must be correct; but since it was expressed obiter and the learned Sheriff-Principal considered that the point was not without difficulty, it may be desirable to enact an express provision on the matter.

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[76] 1967 SLT (Sh Ct) 61.

[77] (1902) 5 F 171. See also Lord Stormonth Darling in Parker v N B Railway Co, (1900) 8 SLT 18: "... the simple and not unfamiliar case of a witness being brought by one side and being examined by the other ... who finds the witness on the spot."

Chapter 4

ORAL EVIDENCE II: COMPETENCE AND COMPELLABILITY OF WITNESSES - CIVIL CASES

1. Spouses[1]

4.01 The common law rule that the spouse of a party was not, in general, a competent witness, was altered by section 3 of the Evidence (Scotland) Act,1853. That section provides:

> "It shall be competent to adduce and examine as a witness in any action or proceeding in Scotland ... the husband or wife of any party, whether he or she shall be individually named in the record of proceedings or not; but nothing herein contained ... shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband evidence of any matter communicated by him to her during the marriage."

4.02/

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[1] See Walkers, paras 354-355; Clive and Wilson, pp 364-366. The privilege against incrimination is considered in Chapter 18. The evidence of spouses in criminal proceedings is considered in Chapter 6.

4.02 The terms of the section have given rise to various questions, which could with advantage be resolved. There is also a question as to the necessity for the privilege attaching to evidence of marital intercourse, which was conferred by the Law Reform (Miscellaneous Provisions) Act, 1949. These questions are discussed in the following paragraphs.

(1) Compellability

4.03 The question whether one spouse is, as a general rule, a compellable witness against the other, does not appear to have been decided. It is submitted, however, that section 3 makes the spouse of a party compellable as well as competent. The wording of the final part of the section, which applies to communications and contains the words "or compellable", appears to indicate that it was the intention of the leading part of the section to make spouses generally compellable. The corresponding English statute, the Evidence Amendment Act, 1853,[3] renders the spouses of parties "competent and compellable to give evidence" in civil cases, and it has been suggested that it would be surprising if, on a matter of this nature, Parliament had intended to enact different rules for England and Scotland.[4] The main source of doubt is Leach v R,[5] where the House of Lords, in holding that a wife, although rendered competent by the Criminal Evidence Act, 1898, to give evidence against her husband in particular criminal proceedings, was not thereby made compellable to give such evidence, indicated that any alteration of the law relating to the compellability/

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[3] 16 and 17 Vict cap 83.

[4] Clive and Wilson, p 364, n 68. See, however, Rumping v DPP, [1964] AC 814, Lord Reid at pp 834-835.

[5] [1912] AC 305; see also Hoskyn v Metropolitan Police Commissioner, [1978] 2 WLR 695.

compellability of spouses must be made only by definite and certain language, and not by implication.

4.04 But whatever the effect of section 3 of the Act of 1853, the question which must now be considered is how the law should be stated for the future. It is submitted that there should be a new statutory provision, enacting that the spouses of parties are both competent and compellable.

> "The policy considerations applying to the evidence of spouses in civil cases are different from those applying in criminal proceedings. It is one thing for the State to renounce the evidence of unwilling spouses in its own interests but another for it to deprive private litigants of such evidence. Arguably, therefore, it is right that spouses should be compellable in civil cases."[6]

The English rule to that effect, which was enacted in 1853, does not seem to attract criticism: Cross writes that subject to one relatively minor point, as to the evidence of divorced spouses about communications during marriage,[7] "there is no case for any reform in the law relating to the competence and compellability of the parties' spouses in civil cases."

4.05 If the spouses are not to be compellable, it is thought that it should be enacted that the spouse adduced as a witness must be warned by the presiding judge that he need not answer the questions put to him. It is also thought that it should be made clear whether the privilege survives their judicial separation or the dissolution of the marriage.[8]

(2) Confidential communications

4.06 Provision was made for the protection of communications in civil causes/

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[6] Clive and Wilson pp 365-366.

[7] See post, para 4.10.

[8] See post, para 4.10.

causes by section 3 of the Act of 1853 which, as already observed, provides that nothing in the Act "shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage," with a similar provision regarding wives. It is submitted that these provisions should be repealed, or at least altered. Any decision on the matter would be influenced not only by the social and religious importance attached to the institution of marriage, but also by an assessment of the utility of the present law. It is difficult to conceive that candour of communications between husband and wife is influenced today by section 3 of the Evidence (Scotland) Act, 1853. Other very close family relationships are not protected by any similar provision, and it is hard to believe that they would be enhanced if section 3 were extended to cover them. It is therefore suggested that the privilege created by section 3 is of little practical importance, and that its repeal would have a very minimal effect, if any, on the institution of marriage, the ascertainment of truth and the doing of justice.[9] In England, the provision of section 3 of the Evidence Amendment Act, 1853, which like section 1(d) of the Criminal Evidence Act, 1898, enacts that no husband shall be compellable to disclose any communication made by him to his wife during the marriage, with a similar provision regarding wives, has been repealed (except in relation to criminal proceedings) by section 16(3) of the Civil Evidence Act, 1968, following upon the Sixteenth Report of the Law Reform Committee.

4.07 (a) Whose privilege? If section 3 were not to be repealed, a number/

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[9] Cf LRC 16, para 43. Clive and Wilson express the view that it is doubtful whether there is any real need for the privilege (p 366).

number of matters would require consideration. The first is whether the privilege should be conferred on one or other of the spouses. Since section 3 uses the phrase "competent or compellable", either the party or the witness may object, and a witness spouse cannot disclose an inter-spousal communication even if he or she wishes to do so. But there can be no breach of marital confidence if the spouse who made the communication is willing that it should be disclosed: it is difficult to see why the spouse who reposed the confidence should not be at liberty to disclose it. It is therefore submitted that if a privilege for communications between spouses were to be retained, it should be that of the communicator, and it should be waivable by the communicator alone. The Model Code and the Uniform Rules of Evidence in the United States make the privilege that of the communicator alone. Section 122 of the Indian Evidence Act makes the privilege a joint one requiring waiver by both spouses.

> "But there are practical disadvantages in making the privilege a joint one. One of the spouses may not be present or readily available when the claim for privilege arises. In such a case the evidence would be shut out even although the absent spouse, if asked, would have had no objection to the disclosure. Presumably the absence of the consent of a deceased spouse would be irrelevant, but what is to happen when the marriage between the spouses is dissolved? We see no easy solution to these problems."[10]

4.08 (b) Warning. If the spouses were to remain neither competent nor compellable, or if the privilege were attached to the communicator and not waived by him, it should be provided that the witness 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 given an appropriate warning.

4.09/

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[10] LRC 16, para 42.

4.09 (c) Subject-matter of the privilege. Another question, if some form of privilege is to be retained, is whether the subject-matter of the privilege should be extended from communications made in the form of words, letters or gestures, to any information which is obtained as a result of the matrimonial relationship. It would also 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.[11] If the policy of the law is to be the protection of marital communications, consistency would seem to require that such evidence should be inadmissible.

4.10 (d) Confidentiality after dissolution of marriage or separation. A further matter for consideration, if some form of privilege is to be retained, is whether the privilege should continue even if the marriage has been dissolved by death or divorce, or if the parties have been judicially separated or are no longer cohabiting. The present law is not clear, since there appears to be no reported Scottish decision on the question whether section 3 permits the examination of a divorced or widowed spouse as to communications from the other spouse during marriage. The Sheriffs Walker,[11] following Dickson,[12] state that the confidentiality of such communications remains although the marriage has been dissolved by death or divorce; but Clive and Wilson[13] point out that Dickson's statement is erroneously based on Monroe v Twistleton.[14] A statutory provision/

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[11] Walkers, para 355(b).

[12] Para 1660; and see Rumping v DPP, [1964] AC 814, Viscount Radcliffe at p 839; Duchess of Argyll v Duke of Argyll, [1967] Ch 302, Ungoed-Thomas J at pp 332-333.

[13] At p 365.

[14] (1802) Peake Add Cas 219.

provision placing the matter beyond doubt may be thought to be desirable. The content of the provision would depend on the view taken of the utility of extending the privilege beyond the duration of the parties' ordinary married life. It may be thought that rules designed to protect conjugal harmony have no place once a marriage has broken down or been dissolved. On the other hand, however, Dickson's statement of the principle of the confidentiality rule enacted by section 3 was

> "that unlimited confidence between husband and wife is essential to the happiness of the married state; and this confidence the law secures by keeping perpetually inviolable whatever has been confided by one of the spouses to the bosom of the other."[12]

It may be doubted whether that is a function which section 3 continues to discharge, but if it is thought that it does, there should perhaps be made a provision on the lines that a judicially separated spouse, or one whose marriage has been dissolved, should be inadmissible as to any facts which are said to have occurred during the marriage, but admissible as to facts after the dissolution or separation. The mere cessation of cohabitation should not, it is thought, be taken as a condition of the witness's admissibility, since it may not be readily ascertainable (unlike death, divorce or judicial separation), and since any disclosure might prejudice any prospects of a reconciliation (assuming the privilege to have value in sustaining the matrimonial relationship).

4.11 (e) Excepted proceedings. Any new provision would have to take/

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[12] Para 1660; and see Rumping v DPP, [1964] AC 814, Viscount Radcliffe at p 839; Duchess of Argyll v Duke of Argyll, [1967] Ch 302, Ungoed-Thomas J at pp 332-333.

take account of the fact that despite the generality of the words "any proceeding" in section 3, the rule has not in practice been applied in divorce proceedings[15] or, according to the Sheriffs Walker, in other cases "where the action is concerned with the conduct of the spouses towards each other". Nor does it extend to examination in bankruptcy.[16] The Model Code and the Uniform Rules exclude the privilege in actions between spouses, while the Indian Evidence Act excludes it both in such actions and in some criminal proceedings. The Law Reform Committee were of the view that if a privilege were to be retained, there would have to be a provision that it should not apply in proceedings between spouses.[17]

(3) Privilege concerning marital intercourse

4.12 This privilege was enacted by the Law Reform (Miscellaneous Provisions) Act, 1949,[18] which provides by section 7:

> "(1) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period.
>
> (2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters foresaid."

Section 7(1) was designed to abolish the rule in Russell v Russell[19] which prohibited a spouse from giving evidence of non-access which tended to bastardise a child born in wedlock. The rule in Russell had not been adopted by the law of Scotland.[20] Section 7(2) created an entirely new privilege/

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[15] Gallacher v Gallacher, 1934 SC 339; MacKay v MacKay, 1946 SC 78.

[16] Sawers v Balgarnie, (1858) 21 D 153; Bankruptcy (Scotland) Act, 1913 (3 and 4 Geo V, cap 20), secs 86, 87; Goudy, Bankruptcy (4th ed), pp 236-237.

[17] LRC 16, para 43.

[18] 12, 13 and 14 Geo VI, cap 100.

[19] [1924] AC 687.

[20] Burman v Burman, 1930 SC 262; Brown v Brown, 1972 SC 123.

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 to 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.

4.13 It is submitted that this privilege should be abolished, in relation to both civil and criminal[21] causes. It is difficult to discern any convincing justification for its existence. It appears that only once in the course of the Parliamentary debates was any attempt made to justify the subsection, when it was said that it introduced into cases falling within the ambit of section 7 the rule in criminal proceedings that neither spouse is a compellable witness against the other.[22] As Cowen and Carter[22] point out:

> "the analogy with the position of the accused's spouse in criminal proceedings is not happy. The rationale of the rule that there he or she is merely competent and not compellable can only be the undesirability from the point of view of public policy of forcing a person into a position where he or she may be instrumental in securing the conviction of his or her spouse. The adequacy of this rationale even in criminal cases has been doubted in the House of Lords.[23] It is totally inappropriate here ... The subsection is not restricted in its operation to cases where the husband or wife is a witness against the other. In cases where this is not so, any analogy with the criminal

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[21] It may not have been intended to extend to criminal causes. Walkers appear to regard it as applicable only to civil causes (para 354). Cross suggests that there may be room for an argument that, in spite of the reference to "any proceedings", criminal proceedings were not contemplated in an Act concerned with civil cases (p 260).

[22] Z Cowen and P B Carter, Essays in the Law of Evidence (Oxford, 1956), pp 230-233.

[23] Leach v R, [1912] A C 305, Lord Loreburn L C at p 309.

law must liken the position of the witness to that of the accused rather than his or her spouse. The privilege of the accused is based on the danger of self-incrimination. To regard the privilege conferred by subsection (2) in this way would be patently ludicrous.

"Respect for the personal squeamishness of the witness would not appear to provide adequate justification for this new statutory privilege. It is submitted that the danger of embarrassing a witness is a lesser evil than that a party should suffer injustice ...

"The only plausible defence of the provisions of the subsection would appear to be that the intimate details of the marriage bed should not be aired in public. But this is really almost as much an argument against allowing the evidence to be given rather than for a privilege in respect of it. Its inadequacy as a justification for the exclusion of the truth has been demonstrated by critics of the rule in Russell v Russell too many times to bear repetition."

The Law Reform Committee wrote in their Sixteenth Report:

"Where considerations of legitimacy do not arise, the only justification for the privilege is that of delicacy, but if either spouse is indelicate enough to give evidence on the topic, as is common in matrimonial causes, it is not much use for the other to refuse to give evidence about it, for this would leave the evidence of the first spouse uncontradicted. Where considerations of legitimacy do arise, either spouse can give evidence that marital intercourse did not take place during the period within which the child must have been conceived. If the husband gives such evidence and the wife relies upon her privilege, the uncontradicted evidence of the husband may be believed or disbelieved. If it is untrue, the wife runs the risk of its being believed if she refuses to give contradictory evidence. The natural inference to draw from her claiming the privilege is that the husband's evidence is true - though it may, in fact, be untrue. It seems to us that the privilege is illusory and may in some cases result in injustice to the child of the marriage. For our part, we would recommend the abolition of the privilege ..."[24]

4.14 In England, section 7(1) and (2) came to be contained in section 43(1) of the Matrimonial Causes Act, 1965,[25] but, following the Committee's Report, the privilege which had been contained in section 7(2) was repealed by section 16(4) of the Civil Evidence Act, 1968,[26] except/

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[24] LRC 16, para 44.

[25] 1965, cap 72.

[26] 1968, cap 64. See now Matrimonial Causes Act, 1973 cap 18, sec 48(1).

except in relation to criminal proceedings. The Criminal Law Revision Committee described the privilege as "unimportant" and had no doubt that it should be abolished in criminal proceedings.[27]

4.15 If the privilege is to remain, it should be provided that the witness should be warned by the judge that he need not answer any question tending to show whether or not marital intercourse took place between the spouses during any period.

(4) Compellability of defender in consistorial cause

4.16 Although the pursuer in a consistorial cause may adduce the defender as a witness, and not infrequently does so in undefended actions of divorce in order to lay before the court evidence as to the welfare of the children in the defender's care, difficulties have sometimes arisen in defended actions where, the pursuer having closed his proof, the defender has led no evidence. In Bird v Bird,[28] an action of divorce for adultery in which that course had been adopted, Lord Justice-Clerk Alness said (at p 374):

> "I cannot help feeling that it is unfortunate that the court should be disabled from probing this case to the bottom, and that it should be deprived, by the course which the defender pursued, of available and relevant evidence ... I take the liberty of adding that it would be deplorable if the course adopted by the defender in this case were reared into a practice in divorce procedure. It may be justifiable in highly exceptional cases, as the decision in Faddes[29] shows, but, in my opinion, it should be pursued with rigorous parsimony."

Lord Anderson said (at p 735);

> "Cases involving status can be decided only on evidence, and the court is entitled to rely on all the available evidence being adduced. The case of Faddes,[29] on which the defender's counsel/

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[27] CLRC, para 173.

[28] 1931 SC 731.

[29] Faddes v M'Neish, 1923 SC 449, an action of affiliation and aliment in which nothing material had been proved by the pursuer against the defender.

counsel relied as a justification for the course followed, was a case raising no question of status. It was a petitory action laid on debt, which, if no defence had been lodged, would have been decided in the pursuer's favour without any proof. In such a case the duty of adducing all available evidence does not appear to me to be so strong as in a case like the present. I do not suggest that in every consistorial cause a defender who has lodged defences is bound to give evidence, but the cases in which the course taken in this case may be followed without adverse comment must be very exceptional in their circumstances."

In White v White,[30] an action of divorce on the ground of cruelty in which the defender had not gone into the witness-box, Lord President Cooper said:

> "I humbly agree with the observations in Bird v Bird[28] that it is in general most undesirable, and may be exceedingly perilous, that a party to a defended consistorial case should abstain from making his or her evidence available to the court. In exercising its difficult and delicate jurisdiction in cruelty cases the court requires all the assistance that can be derived from all relevant evidence bearing upon the relations of the spouses, and particularly from the evidence of the spouses themselves; and it must be very rarely indeed that considerations of forensic strategy justify the withholding from the court of a vital part of the material required for a just decision."

4.17 These cases suggest the question whether a rule should be introduced to the effect that the parties in defended actions of status, or in defended consistorial cases are bound to give evidence. It would be necessary to consider whether such a rule should apply to all consistorial cases, or only to actions of status, and what provision and definitions should be formulated for the highly exceptional cases in which a party's failure to give evidence is justifiable.

2. Party allegdly in breach of order of court

4.18 It is thought that a party who denies his opponent's allegation that/

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[28] 1931 SC 731.

[30] 1947 SLT (Notes) 51. See also Thomson v Thomson, (1955) 71 Sh Ct Rep 341, 1955 SLT (Sh Ct) 99 (action of separation on ground of cruelty).

that he is in breach of interdict, interim interdict, or other order of court is not a compellable witness at a proof on the matter. When such an allegation is made, the party against whom it is made is liable, upon proof of it, to judicial censure, fine and imprisonment; and the standard of proof, in any event in a case of breach of interdict,[31] is proof beyond reasonable doubt. It is submitted that in these circumstances the party should not be a compellable witness. If he were to remain silent he would no doubt take the risk that the court would accept as truthful the evidence against him and draw therefrom inferences which were adverse to him; and it may be that the existence of that risk accounts for the fact that the question of his compellability does not appear to be the subject of any reported Scottish decision.[32]

3. Parties and solicitors in civil cases[33]

4.19 The Acts of 1852, section 1; 1853, section 2, 3 and 4; and 1874, sections 1 and 3, render the evidence of a party and the party's solicitor admissible, even in a case which the solicitor is conducting, except in regard to the proof of a promise of marriage in any action of declarator of marriage founded upon promise of marriage cum copula subsequente. The opinion has been expressed that the promise must be proved by the writ of the defender, but the copula may be proved prout de jure.[34] It is thought that this exceptional provision could now be repealed.

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[31] Gribben v Gribben, 1976 SLT 266.

[32] Cf Comet Products UK Ltd v Hawkex Plastics Ltd, [1971]2 QB 67.

[33] Dickson, para 1576; Walkers, para 367(c). As to their presence in court see para 3.21 above. The confidentiality of professional communications between solicitor and client is considered in Chapter 18. As to the competence as witnesses of lawyers in criminal cases, see post para 6.35.

[34] Encyclopaedia, IX, para 935; Walton, Husband and Wife (3rd ed), p 29; but cf Walkers, paras 156(c), 317(b); Clive and Wilson, pp 115-116.

4.20 It is also thought that a party's advocate should continue to be a competent witness, even in a case which he is conducting. Sir Rupert Cross is of opinion that while there are obvious objections to an advocate acting as a witness in a case which he is professionally engaged,[35] it would probably be going too far to say that he is not a competent witness in such circumstances.[36] The Court of Appeal of British Columbia has recently observed that although it is not prohibited, it is generally undesirable that counsel himself should give evidence as a witness in a case on behalf of his client, but there is no impropriety in a solicitor giving evidence on behalf of a client for whom his partner acts as advocate.[37]

4. Company directors, etc

4.21 It may be useful to consider the question of the permissible role in Scottish court proceedings of representatives of corporate or unincorporated bodies who are not legally qualified. Reference has already been made to the need for a rule as to their presence in court before giving evidence.[38] Should they have any right of audience, other than in summary causes to the extent permitted by rule 17 of the Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, and at first diets in summary criminal procedure by virtue of section 334(3)(b) of the 1975 Act? It appears that in England there is a practice whereby county courts and magistrates' courts have a discretion to permit the representation/

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[35] In R v Secretary of State for India, Ex parte Ezelciel, [1941] 2 KB 169, at p 175 note, it was observed that it was "irregular and contrary to practice" for a barrister to act as counsel and witness in the same case.

[36] Cross, p 167 n 1.

[37] Phoenix v Metcalfe, (1974) 48 DLR (3d) 631.

[38] Para 3.22, above.

representation of corporate bodies in appropriate cases by persons other than solicitors or barristers.[39] If such representation were to be permissible in any Scottish court, it would presumably be competent, although open to comment, for such a representative to give evidence.

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[39] H C Deb vol 901, col 1253, 1st December 1975 (Solicitor-General's answer to Parliamentary Question.)

Chapter 5

ORAL EVIDENCE III: COMPETENCE AND COMPELLABILITY OF WITNESSES - CRIMINAL CASES: THE ACCUSED

5.01 This chapter is concerned with the accused as a witness. It considers his position (1) as a witness for the prosecution, (2) as a witness for himself (a) when being tried alone and (b) when being tried with co-accused, and (3) as a witness for a co-accused. Next, the restrictions placed on cross-examination of the accused by sections 141 and 346 of the 1975 Act (formerly section 1 of the Criminal Evidence Act, 1898,[1]) are examined.

1. The accused

(1) The accused as witness for the prosecution

5.02 Sections 141(a) and 346(a) of the 1975 Act, which are derived from section 1(a) of the Criminal Evidence Act, 1898, provide:

> "the accused shall not be called as a witness in pursuance of this section except upon his own application".

The effect of these provisions is that the accused is not a competent witness for the prosecution until the charge against him is withdrawn or until he has been acquitted or convicted: he is then a competent and compellable witness for the prosecution in the trial of a co-accused for the same and other offences. In summary procedure, a co-accused who has pleaded guilty and whose plea has been accepted may competently be called as a witness for the prosecution at the trial of his co-accused, even where he has not yet been sentenced.[2] The Thomson Committee take the view that the same principles should apply in both summary and solemn/

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[1] 61 and 62 Vict cap 36.

[2] Copeland v Gillies, 1973 SLT 74; R & B, para 18-55. On the problem of whether to sentence the accused before or after he has given evidence, see R v Coffey, [1977] Crim L R 45.

solemn cases, and recommend that in solemn cases a co-accused who has already pleaded guilty to the indictment may be called for the Crown or the defence despite the fact that he is not on the Crown or defence list of witnesses; but where that procedure was invoked, the defence would be entitled to ask for an adjournment in order to precognosce the co-accused, and neither the Crown nor the defence would be able to call the co-accused after their case was closed.[3] It seems necessary, however, to recognise that where a co-accused pleads guilty and gives evidence for the Crown before sentence, there is a risk that he will be tempted to tell lies incriminating his co-accused in the hope of obtaining a lighter sentence by giving evidence satisfactory to the prosecution. It appears to be arguable that there should be a general rule that no co-accused who pleads guilty may give evidence for the Crown until he has been sentenced, except in defined categories of cases, such as those where it is necessary to defer sentence for reports or for other reasons. The contrary arguments are that any hope of a lighter sentence should be illusory, and that in general co-accused should be sentenced at the same time, whatever their pleas, so that the full facts disclosed by the trial may be taken into account.[4]

5.03 It may be that any new legislation should also overrule the ratio of M'Ginley and Dowds v MacLeod,[5] where the accused B and C, who were tried on a charge of assaulting A, had been adduced as Crown witnesses in the previous trial of A on a charge of assaulting B in the same brawl. The Court held by a majority that B and C were not exempt from prosecution, on/

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[3]Thomson, paras 50.27-50.28.

[4]See J D Heydon, "Obtaining Evidence versus Protecting the Accused: Two Conflicts", [1971] Crim LR 13, at pp 15-17.

[5]1963 JC 11.

on the ground that the exemption applied only to a socius criminis and covered only the libel in support of which he was called to give evidence. Lord Guthrie, who dissented, considered that the exemption was applicable to other persons than socii criminis, and that the procedure adopted had violated two principles, since B and C could not have absolute security as to the effect of their testimony upon themselves, and since they were prevented from reserving completely their defence until their own trial. It appears that the procedure adopted could cause the difficulties that in A's trial, B and C could refuse to answer questions designed to establish provocation, and thus cause unfairness to A; or they could answer such questions and have their statements used against them in their own trial.[6] It seems to follow from the decision that if A had been tried by a jury, the judge need not have directed the jury to apply a special scrutiny to the evidence of B and C, as he would have been bound to do had they been socii criminis.

(2) The accused as witness for himself[7]

(a) When being tried alone

(i) Compellability[8]

5.04 The Thomson Committee[8] has considered the question whether the accused should be compelled to give evidence at his own trial. The question raises issues of fundamental importance to the rights of the individual and the assumptions underlying the administration of criminal justice. There is a number of possible answers to the question, and the answer to be given will depend on the respondent's views on a number of/

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[6] See Anon, "Socius or Hostis", (1963) 79 Sc L Rev 21.
[7] Walkers, para 356; Renton and Brown, paras 18-07 to 18-09.
[8] See Williams, chap 3; Thomson, paras 50.01-50.12.

of other questions. What should be the objectives of our system of criminal procedure and evidence?[9] It has hitherto been thought to be more important for society that the innocent should be acquitted than that the guilty should be convicted.[10] The Criminal Law Revision Committee, on the other hand, say that "it is as much in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted."[11] Should we now aim at the conviction of the de facto guilty, with a tolerable proportion of erroneous convictions of the de facto innocent? Or should we adhere to the orthodox objectives of the conviction of the de facto guilty and the acquittal of the de facto innocent, with a tolerable proportion of erroneous acquittals of the de facto guilty? What is wrong with the orthodox objectives? Have acquittals of the de facto guilty reached intolerable proportions? On what evidence may it be concluded that they have? If they have, would it be prudent to try to reduce the number of such acquittals by altering the present rule that the accused is not a compellable witness? If the present rule shields the de facto guilty, does it also shield the de facto innocent accused who is inarticulate, stupid, or nervous? If so, is the latter function so unimportant/

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[9] See Chapter 1 above.

[10] Peter Stein and John Shand, Legal Values in Western Society (Edinburgh University Press, 1974), p 82; Warner v Metropolitan Police Commissioner, [1969] 2 AC 256, Lord Reid at p 278. See also Arthurs v A-G for Northern Ireland, (1971) 55 Cr App R 161, Lord Morris of Borth-y-Gest at p 168: "The rules and practices which have been evolved in criminal cases have as their purpose that those only will be convicted who are proved to be guilty. It is the aim of all to strive to reduce to a minimum the risks of the conviction of one who is in fact innocent."

[11] CLRC, para 27 (italics supplied); commented on by Sir Brian MacKenna, "Criminal Law Revision Committee's Eleventh Report: Some Comments," [1972] Crim LR 605. See also Michael Zander, "The CLRC Report - A Survey of Reactions", (1974) LS Gaz 954-955.

unimportant that it may be dispensed with? Could the system be adjusted in any other way in order to moderate the assumed number of erroneous acquittals? Or would it be more prudent to increase the efficiency of the system of detection of criminals, rather than to alter the system of criminal justice applied to those who are caught?

5.05 This paper does not attempt to answer these questions, but enumerates a number of possible answers to the question whether the accused should be a compellable witness. The various answers tend to indicate the respondents' assumptions about the matters raised by the other questions; and these assumptions normally include a judgment as to whether there is any real reason to fear that too many criminals, and especially professional criminals, now secure unjustified acquittals. It is thought that a proper approach to a judgment on that matter is to be found in the following passage:

> "The question whether too many criminals are acquitted is in itself a meaningless one. Too many by what criteria? It obviously cannot be suggested that the 'proper' acquittal rate of defendants generally or defendants who are criminals or defendants who are dangerous criminals should be any particular proportion - 10 per cent., 25 per cent., 50 per cent., or any other. The acquittal rate reflects the aggregate of individual jury decisions working the existing legal system. The feeling that it is too high is simply a political-social value judgment reflecting some inarticulate sense that the system is tipped too far in favour of the defence. Equally, the feeling that the acquittal rate is about right reflects an equivalent political-social value judgment that the balance between prosecution and defence is approximately the right one. In neither case can objective criteria be formulated by which one can measure what the proportion is, against what it ought to be.
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> "Those who urge that the system should be changed in favour of the prosecution must however discharge the onus of proof that lies upon anyone in a free society who proposes increased powers for the state against the citizen."[12]

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[12]Michael Zander, "Are Too Many Professional Criminals Avoiding Conviction?" (1974) 37 MLR 28, at p 60.

The work of the Oxford University Penal Research Unit suggests that it is dangerous to assume from a high national acquittal rate in England that juries there are too often gulled into acquitting,[13] and the studies by the Unit and by Mr Michael Zander[14] indicate that juries only very rarely convict against the weight of the evidence. Mr Zander submits that the evidence of the studies so far completed in England does not support the belief that acquittals even of professional criminals are a significant problem in England at present. This view has been challenged by J Baldwin and M J McConville[15] and, more recently, by Mr John A Mack.[16] Mr Mack maintains that professional criminals exhibit unusually well-developed defensive skills at each stage of the process of detection, arrest, charge and trial,[17] and that the criminal justice system's transactions with major property criminals are weighted in their favour.[18] One factor in their favour is the court's refusal to accept evidence of police awareness of the criminal subculture of their area. The court, he says,

> "excludes the kind of evidence that would satisfy the plain man ... evidence of a kind which after much sifting and investigation would be accepted by most sociologists."[19]

Mr Mack identifies as the actual point of controversy in the current debate "the limiting conditions which define, set bounds to, 'judicial evidence/

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[13] By-passing the Jury and The Jury at Work (Blackwell, Oxford, 1972). See also Sarah McCabe and Robert Purves, The Shadow Jury at Work (Blackwell, Oxford, 1974).

[14] Michael Zander, "Are Too Many Professional Criminals Avoiding Conviction?" (1974) 37 MLR 28.

[15] J Baldwin and M J McConville, "The Acquittal Rate of Professional Criminals: A Critical Note", (1974) 37 MLR 439, and Zander's reply, at p 444.

[16] John A Mack, "Full-time Major Criminals and the Courts", (1976) 39 MLR 241.

[17] Ibid, p 247.

[18] Ibid, p 260.

[19] Ibid, p 262.

evidence'," and asks, "Is it desirable that these conditions should be revised?"[19] It is thought that detailed and convincing research on the effect of particular exclusionary rules of evidence would have to be carried out before any proposals could properly be made for changing the rules in favour of the prosecution. As Mr Zander points out,

> "No research has yet been done on the [hypothesis] that fewer guilty and especially professional criminals would be acquitted if the rules of evidence were more rational. In the nature of things such research is difficult to carry out - since it is not easy to determine what might be the effect of changes in the rules of evidence on jury decisions.
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> "Such research would however be well worth attempting. It should, for instance, be possible to discover what types of suspects rely on their right of silence, in what sorts of cases and with what apparent effect on their chances of conviction. It must be possible to find out what sorts of defendants rely on their right not to give evidence in court and whether they tend to be convicted or acquitted. It should also be possible to investigate what kinds of information, gossip, or other sources of 'knowledge' the police have about acquitted defendants which suggests that they were in truth guilty of the offence. Such research might make it possible to assess what changes in the rules of evidence could serve to convict men who now get acquittals. How many extra convictions and in what class of cases might be secured, for instance, by the abolition of the right of silence in the police station or the court room, the abolition of the caution, the wider admissibility of hearsay evidence or of the evidence of spouses, or by relaxation of the restrictions on the admissibility of previous convictions?"[20]

5.06 Without the benefit of research, a number of possible answers have been given to the question whether the accused should be a compellable witness. (i) The simplest answer to the question is an absolute negative, which may be justified on traditional principles. The first is that no person should be compelled to incriminate himself, either in answer to caution and charge or in the witness-box. The second is that prosecutions should/

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[19] Ibid, p 262.

[20] Michael Zander, "Why I Disagree with Sir Robert Mark", Police, April 1974, p 16.

should be brought only where the evidence available to the prosecutor seems reasonably likely to satisfy the judge or jury beyond reasonable doubt that the accused is guilty, and the compellability of the accused would encourage the bringing of prosecutions when the prosecutor had insufficient evidence but hoped by stringent cross-examination to extract the necessary corroboration from the accused.[21] The third is that the compellability of the accused would lead in practice to some imperceptible but definite change or shift in the onus of proof, and in fact, in the eyes of the jury, to the accused being apparently required to prove his innocence.

5.07 (ii) Another possible answer is that the accused should be a compellable witness only if he leads any evidence in his defence, upon the view that he should not be permitted to adduce the evidence of others yet remain silent himself. An exception would have to be made for expert medical evidence of insanity or, perhaps, any other mental or physical condition of the accused which was being relied on by way of defence.

5.08 (iii) According to Professor Glanville Williams, "The sensible solution would be to require an accused person to listen to questions put to him by counsel for the prosecution, though with no penalty for refusal to answer. This is the French practice, with the difference that the questions are asked by the judge. In neither England nor France can the defendant be forced to confess his own guilt, though the two systems differ on whether questions can be addressed in his direction. In/

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[21] Such a practice was judicially disapproved in M'Arthur v Stewart, 1955, JC 71, by Lord Carmont at p 75.

In France, as elsewhere on the continent, an unfavourable inference may be drawn from the accused's silence under questioning; in England, an unfavourable inference may be drawn from the accused's failure to volunteer for questioning. This is not such a great cleavage, but in the occasional cases where the point is important the balance of advantage seems to lie with the continental practice."[22]

5.09 (iv) A further possible answer has been advanced in England by the Criminal Law Revision Committee.[23] In their opinion, the present law and practice are much too favourable to the defence. They are convinced that, when a prima facie case has been made against the accused, it should be regarded as incumbent upon him to give evidence in all ordinary cases. They therefore propose that, if at the trial of the accused the court considers that there is a case for him to answer, then, subject to certain exceptions, the court shall at the appropriate time call on him to give evidence and that, if he then refuses to do so or if he refuses without good cause to answer any questions, the magistrates' court or jury may draw such inference from the refusal as appear proper and may treat it as corroboration,[24] or as capable of being corroboration, of any evidence given against the accused. The proposal has been strongly criticised by the English Bar Council[25] and others. On the other/

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[22]Williams, pp 62-63. Professor Williams refers to Hammelmann, "The Evidence of the Prisoner at his Trial", (1949) 27 Can BR 653, for a discussion of the French practice, and to V Bayer, "La signification de l'aveu de l'inculpé dans le droit de procédure pénale de certains états occidentaux européens", (1959) Rivista Italiana di Diritto e Procedura Penale 724.

[23]CLRC, paras 110, 113; pp 176-177, 216-217.

[24]On failure to testify as corroboration see para 5.28 below.

[25]BC, para 82. Cf, however, A A S Zuckerman, (1973) 36 MLR 509.

other hand, Sir Rupert Cross[26] has pointed out that the proposal does not subject the accused

> "to what has been rhetorically described as 'the cruel trilemma of self-accusation, perjury or contempt.'[27] The trilemma would be self-accusation, perjury or, on appropriate facts, the risk of adverse inferences. If it be thought that this trilemma is cruel, I would have no objection to the abolition of the accused's liability to be prosecuted for perjury in giving false evidence on his own behalf.[28] Such prosecutions are rare in England, and many Europeans think that even the possibility of proceedings of this nature is an Anglo-Saxon absurdity. If, for the loaded phrase 'self-accusation' we were to substitute 'liability to cross-examination', the defendant at a criminal trial would be confronted with the choice between giving the court his version of the facts with the possibility of a cross-examination which might or might not be unpleasant, and running the risk of adverse inferences being drawn from his failure to testify, a risk the magnitude of which would vary considerably from case to case. If, as I shall suggest he should be, an accused with a criminal record is adequately protected from cross-examination on that subject, I fail to see how the choice can realistically be described as a cruel one. I also fail to see how human dignity enters into the question, and the suggestion that putting a certain amount of pressure on the accused to testify is tantamount to making him dig his own grave leaves me cold."[29]

5.10 It should be added that the Committee's proposals are Benthamite both in substance and in spirit. According to Bentham, "between delinquency on the one hand and silence under inquiry on the other, there is a manifest connection: a connection too natural not to be constant/

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[26] An Attempt to Update the Law of Evidence (Hebrew University of Jerusalem, 1974), p 9. See also Cross, "The Right to Silence and the Presumption of Innocence - Sacred Cows or Safeguards of Liberty?" (1970) 11 JSPTL 66, and R H Field, "The Right to Silence: A Rejoinder to Professor Cross", (1970) 11 JSPTL 76.

[27] Goldberg J in Murphy v Waterfront Commission of New York Harbor, 378 US 52 at p 55.

[28] See however H M Advocate v Cairns, 1967 JC 37.

[29] Cross refers to Goldberg J in Murphy (supra) and Erwin N Griswold, The Fifth Amendment Today (1955), p 7.

constant and inseparable."[30] As Professor Hart points out,[31] Bentham thought that the protection given to the accused

> "rested on no rational principle at all, but partly on irrelevant memories of the Star Chamber[32] and chiefly on two non-reasons. These were sentimentality which he called disparagingly 'the old woman's reason'[33] and a mistaken conception of fairness which he called 'the fox-hunter's reason'.[34] The 'old woman's reason' insisted that it was bad and inhuman that any pressure should be brought to bear upon a guilty person to contribute to his own conviction. The 'fox-hunter's reason' was that the accused, innocent or guilty, must, like the fox when it is hunted by gentlemen, be given a fair chance to escape. This meant that we should make the contest between prosecutor and accused more nearly equal by making it as difficult as possible for the jury to learn of the naturally cogent evidence of the accused's guilt. Lord Denman in his review of the French version of Bentham's work on evidence took the fox-hunter's reason seriously and, as Bentham would think, irrationally. 'Human beings are never to be run down like beasts of prey, without respect of the laws of the chase. If society must make a sacrifice of one of its members, let us carve him as a feast fit for the gods, not a carcase fit for the hounds.'[35] Bentham did not overlook the danger that innocent persons exposed to questioning might be confused or trapped. But he thought that this danger arose mainly from hectoring or bullying methods of interrogation or cross-examination, or from the intimidating formalities and strange atmosphere of a criminal trial, which a decent legal system, following a natural procedure, would eliminate."[36]

It may be admitted that the evidence of the accused would normally be highly relevant evidence, that there is nothing repugnant about a man being condemned out of his own mouth unless there be something repugnant about the truth, and that it seems absurd that compellable prosecution witnesses should be challed in cross-examination about matters/

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[30] Works, VII, p 446.
[31] H L A Hart, "Bentham and the Demystification of the Law", (1973) 36 MLR 1, at p 15.
[32] Works, VII, pp 455-456.
[33] Works, VII, p 452.
[34] Works, VII, p 454.
[35] (1824) 40 Edinburgh Review 186.
[36] Works, VII, p 451.

matters which are very probably within the knowledge of the silent accused. The writer would, however, be inclined to adopt the words of Professor Hart:[37]

> "It is at this point that many who would follow Bentham with enthusiasm in his other criticisms of the mystery and complexities of the English law and legal practice might begin to feel doubts, and perhaps to sense that in an exclusively utilitarian philosophy there is something very dangerous to contemporary as well as to older conceptions of civil liberties."

5.11 The foregoing answers to the question whether the accused should be a compellable witness were given in the context of the present procedural framework and rules of evidence. If, however, the possibility of altering that framework and these rules be admitted, different answers to the question may be given. It would not be realistic to consider the question in isolation from proposals for reform of the law as to the interrogation of suspects and accused persons, the admissibility of confessions, judicial examination, the procedure of "no case to answer", the restrictions on cross-examination of accused persons, the admissibility of evidence as to the accused's character, and the entitlement of the prosecution and any co-accused to comment on the accused's failure to answer questions at the judicial examination and on his failure to testify at the trial. It may be argued, for example, that if the English procedure of "no case to answer" were to be introduced into Scotland, as the Thomson Committee have recommended,[38] it would be only right that the accused should be compelled to go into the witness-box if the Crown has demonstrated to the court that there is a prima facie case against him.[39] It may also be argued that if an accused/

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[37] Note 31, supra, at p 14.
[38] Thomson, para 48.05.
[39] Thomson, para 50.05.

accused with a criminal record is adequately protected from cross-examination on that subject, the choice whether or not to testify cannot realistically be described as a cruel one.[40]

5.12 This Volume, however, adopts the reasoning and conclusions of the Thomson Committee, who were unanimously of opinion that an accused person should not be compelled to give evidence at his trial.[41] The Committee reached that opinion not only on grounds of principle but also in the light of their decisions as to the following matters, which this paper also adopts. The Committee recommend the revival of judicial examination in realistic form in indictment cases:[42] this, they believe, will improve the prospects of convicting the guilty, without prejudice to the innocent, much more than insistence upon the accused entering the witness-box at his trial. Further, having recommended the adoption of the English "no case to answer" procedure, the Committee recommend that in every case in which the Crown has established a prima facie case against the accused, it should be competent for the prosecution to comment on the failure of the accused to attempt to refute the case against him by giving evidence; and further, that in cases where the judge or jury may have some doubt as to whether or not they should accept the evidence for the Crown, they may draw an inference adverse to the accused from his failure to attempt to refute the evidence for the Crown.[43] The jury would be informed, as now, that the accused was not bound to give evidence, but they would also be told that they might take note of his silence and draw from it whatever inference they considered/

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[40] Cross, cit ante para 5.09.
[41] Thomson, para 50.09.
[42] Fully discussed in Thomson, chap 8.
[43] Thomson, para 50.15.

considered proper in the light of all the evidence. The judge in a summary case would be entitled to draw the same inference. It would follow from the fact that this inference might be drawn that the accused and his advisers would know that the accused remained silent at his peril, and that this would result in future in more accused electing to give evidence.[44] It is submitted by the present writer that even if the Thomson Committee's proposals as to judicial examination and "no case to answer" are not implemented, the right to comment on the accused's failure to testify should be extended to the prosecutor and any co-accused.[45]

(ii) Consequences of decision to testify

5.13 If the accused decides to give evidence on his own behalf, three procedural considerations arise.

5.14 (A) List of witnesses. In solemn procedure, his name need not be included in the list of defence witnesses.[46] It is thought that this causes no difficulty.

5.15 (B) Unsworn statement. He gives his evidence on oath or affirmation and, unless otherwise ordered by the court, does so from the witness-box or other place from which the other witnesses give their evidence.[47] He is not entitled to make an unsworn statement from the dock.[48] Section 1(h) of the 1898 Act, which preserves "any right" of the accused to do so, relates to English procedure only, and the Criminal Law Revision Committee has recommended the abolition of the right/

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[44] Thomson, para 50.12.
[45] See post, paras 5.21-5.27.
[46] Kennedy v HMA, (1898) 2 Adam 588, 1 F (J) 5.
[47] 1975 Act, secs 141(g), 346(g).
[48] Gilmour v HMA, 1965 JC 45.

right to make an unsworn statement in English proceedings.[49] That proposal was "one of the most strongly attacked parts" of their Report.[50] The Thomson Committee, however, like the English Committee, saw no good reason for allowing the accused to make such a statement.[51] Section 1(h) has not been re-enacted in sections 141 and 346 of the 1975 Act, and accordingly no longer applies to Scotland.

5.16 (C) Accused as first witness. Sections 142 and 347 of the 1975 Act (formerly section 2 of the Act of 1898) provide:

> "Where the only witness to the facts of the case called by the defence is the accused, he shall be called as a witness immediately after the close of the evidence for the prosecution."

It is submitted that this provision should be repealed quoad Scotland, and that it should be enacted that the judge, the prosecutor and any co-accused shall be entitled to comment on the stage of the defence evidence at which the accused has given his testimony. It appears that section 2 may have been enacted as a rule of convenience for English proceedings, because of rules about the order of speeches in these. The effect of section 2 in England is that if the accused is the only defence witness to the facts, his advocate may not make an opening statement after the close of the prosecution case. But for section 2, the accused's case would be repeated to the jury three times, in his advocate's opening statement, in his own evidence, and in his advocate's closing speech. By virtue of section 2, however, the accused's advocate may make an opening statement only if he calls a witness to the facts other than the accused/

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[49] CLRC, paras 102-106, pp 176, 215; and see Williams, pp 71-72.

[50] J D Heydon, Cases and Materials on Evidence, p 392; see, eg, BC, para 82(e).

[51] Thomson, para 50.17.

accused. These considerations are not applicable in Scottish criminal practice, and there is no reported example of the enforcement of section 2 in Scotland.[52] In any event "the only method of enforcing it, viz, by refusing to allow the evidence of the accused if he has already called, for example, an expert witness, seems drastic."[53] It is submitted, therefore, that section 2 should no longer apply in Scotland.

5.17 At the same time it seems necessary to consider whether any new provision should be enacted as to the stage of the defence case at which the accused must be called. There does not appear to be any reported Scottish authority corresponding to the authoritative statement of Lord Alverstone C J in R v Morrison:[54]

> "In all cases I consider it most important for the prisoner to be called before any of his witnesses. He ought to give his evidence before he has heard the evidence and cross-examination of any witness he is going to call."

In R v Smith (Joan)[55] the Court of Appeal reiterated and endorsed that statement as correctly stating the law, but said that there were "rare exceptions, such as when a formal witness, or a witness about whom there is no controversy, is interposed before the accused person with the consent of the court in the special circumstances then prevailing." But despite the apparent absence of reported Scottish authority to the same effect, it seems that in Scottish criminal practice where an accused person is to give evidence he almost invariably does so before any other witnesses who may be called on his behalf.

5.18 It is submitted that that rule of practice, if such it be, should not/

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[52] R & B, para 18-07, n 34.

[53] Walkers, para 356.

[54] (1911) 6 Cr App R 159, at p 165.

[55] [1968] 1 WLR 636, at p 637.

not be elevated into a rule of law in Scotland. The question whether that should be done arises quite sharply because the Criminal Law Revision Committee has proposed not only that section 2 should be restated but that it should be further provided that the accused shall be called first "except in so far as the court in its discretion otherwise allows."[56] It may be suggested that the consideration in favour of such an additional provision - that the accused would otherwise have the advantage of being able to trim his evidence so as to accord with that of his witnesses - is equally valid in both Scotland and England. That is no doubt true, but any consequent legislative provisions need not be the same in both countries. It is noteworthy that the existence of a rule of law preventing an accused from giving evidence after calling witnesses has been denied in South Australia; and that in South Africa, while the accused may give evidence at any stage of the defence case, in practice he is usually called as the first witness because to adopt any other course may give rise to adverse comment.[57] It may be urged against the Committee's proposal that it is questionable whether it is appropriate for a presiding judge to trammel the presentation of the defence by imposing any restriction on the accused's advocate as to the order in which he calls his witnesses. It may also be said that in any event the judge is unlikely to be sufficiently informed of the considerations underlying the advocate's proposed order, so as to determine whether or not to allow it. Finally, in/

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[56] CLRC, para 107, pp 176, 215; approved by BC, para 81.

[57] Professor E Griew, "The Order of Defence Evidence", [1969] Crim LR 347, at pp 350 n 14, 358 n 38.

in the event of a breach of the proposed rule - as by the advocate failing to raise with the judge the question of the order of witnesses, calling one witness or more to fact, and then seeking to call the accused - the penalisation of the breach by refusing to allow the accused to give evidence would be drastically disproportionate to the gravity of the advocate's fault. But although the Committee's proposal may be open to some criticism on these lines, it seems necessary to ensure that in the ordinary case the accused will be called as the first witness to the facts for the defence. A rule to the effect that the fact that the accused has given evidence after calling a witness to the facts, may be made the subject of comment by the judge and by the prosecution and any co-accused,[58] may be thought to have the merits of flexibility and effectiveness.

5.19 The Thomson Committee consider that although in general the accused should give evidence as first witness for the defence, as usually happens, it should nevertheless be in the discretion of the defence advocate to decide in what order he will call his witnesses. They therefore recommend that section 2 should be repealed quoad Scotland;[59] but they do not consider the question of comment.

(iii) Consequences of failure to testify[60]

5.20 There is an obvious risk that if the accused does not go into the witness-box the court will, as a matter of fact, draw from the prosecution/

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[58] Considerations favouring the conferring on the prosecutor of a right to comment are mentioned in the following paragraphs, where comment on the accused's failure to testify is considered.

[59] Thomson, paras 50.18-50.20.

[60] Walkers, para 357; R & B, para 18-09, Williams, pp 57-63.

prosecution evidence inferences which are adverse to him. In McIlhargey v Herron[61] Lord Justice-Clerk Grant said:

> "... the silent defender does take a risk and if he fails to challenge evidence given by witnesses for the Crown by cross-examination or, in addition, by leading substantive evidence in support of his challenge, he cannot complain if the court not merely accept that unchallenged evidence but also, in the light of all the circumstances, draw from it the most unfavourable and adverse inferences to the defence that it is capable of supporting."[62]

There is, however, a difficult question whether a jury should be explicitly invited to draw such inferences: the matter is discussed in subsequent paragraphs.[63]

(A) Comment

5.21 "In the case of a trial by jury, three courses were open to the framers of the legislation of 1898. The first would have been to prohibit any comment by the judge or prosecution on the accused's failure to testify; the second would have been simply to prohibit comment by the prosecution; and the third would have been to make an express provision that the judge could, if he thought fit, draw the jury's attention to such inferences as might properly be drawn from the accused's failure to testify. The first course was ultimately adopted by the legislature of New South Wales,[64] and a provision permitting comment either by the judge or the prosecution was held to be an infringement of the Fifth Amendment of the United States constitution in Griffin v California/

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[61] 1972 JC 38, at p 42.

[62] It has been held in England that where an accused does not give evidence, and has admitted nothing, the jury are not entitled to draw inferences unfavourable to the accused where the sole issue is one of identification: R v Mutch, [1973] 1 All E R 178.

[63] Paras 5.25-5.27 below.

[64] Crimes Act, 1900, sec 407, overruling Kops v R, Ex parte Kops, [1894] AC 650.

California[65] by rendering it costly for the accused to exercise his privilege not to be a witness against himself. The second course was in fact adopted in the legislation. The third course is recommended in the 11th Report of the Criminal Law Revision Committee.[66] [67] "

5.22 (aa) Comment by judge.[68] The question of the competency of comment by the judge to the jury does not appear to have been fully argued to the High Court in Scotland until very recently, but it seems clear that the competency of such comment was taken to be established by the obiter observations of Lord Justice-General Strathclyde, with which Lord Justice-Clerk Scott Dickson agreed, in Brown v Macpherson.[69] In that case Lord Dundas expressed doubt on the matter, and in Scott (AT) v H M Advocate,[70] although apparently in argument the question of competency had not been raised and Brown had not been cited, Lord Moncrieff observed that he would welcome a further consideration of Brown so far as it was directed towards that question. In Knowles v H M Advocate,[71] however, the High Court declined an invitation by the applicant's counsel to take steps to reconsider Brown, laid down that "if comment is made it should only be made in special circumstances and if made should be made with care," and approved/

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[65] (1965) 380 U S 609. See para 5.26 below.
[66] CLRC, para 110.
[67] Cross, pp 354-355.
[68] See I D W, "When Silence is Golden", 1958 SLT (News) 13.
[69] 1918 JC 3, at p 8. For an example of pointed comment in a case where the jury were entitled in the absence of any explanation by the accused to draw an inference of guilt, see L J-C Aitchison in H M Advocate v Hardy, 1938 JC 144. For English practice see R v Mutch, [1973] 1 All ER 178; R v Sparrow, [1973] 1 WLR 488; Sir Arthur James, "What Judges say to Juries", in The British Jury System, ed Nigel Walker (University of Cambridge Institute of Criminology, 1975), p 56, at p 58.
[70] 1946 JC 90, at pp 97-98.
[71] 10th October 1974, unreported.

approved the following observations of Lord Justice-General Normand in Scott:

> "Although a comment of the kind is, in my view, competent, it should be made with restraint and only when there are special circumstances which require it; and, if it is made with reference to particular evidence which the panel might have explained or contradicted, care should be taken that the evidence is not distorted and that its true bearing on the defence is properly represented to the jury."

5.23 It is thought that Knowles removes, as far as it is possible to do so, the doubts expressed in Macdonald:[72]

> "It seems doubtful whether, and if so in what circumstances and for what purpose, the judge may comment on the fact that the accused has not given evidence."

It seems desirable to maintain a degree of flexibility. It would be impossible to lay down with precision ab ante all the various circumstances in which comment would be proper,[73] just as it would be undesirably restrictive to prescribe, as in England, an "accepted form" of comment to be made in nearly all cases in which a comment is thought necessary.[74] The questions of the purpose of comment on the accused's failure to testify, and whether such comment by judge or prosecutor or co-accused should be permitted at all, are, however, matters of some difficulty, and will be considered in subsequent paragraphs.[75]

5.24 (bb) Comment by prosecution.[76] Sections 141(b) and 346(b) of the 1975 Act, which are adapted from section 1(b) of the Act of 1898, each provide:

> "the failure of the accused or the spouse of the accused to give evidence shall not be commented upon by the prosecution."

It/

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[72] At p 291, citing both Brown and Scott.

[73] For examples, see Walkers, para 357.

[74] See R v Mutch, [1973] 1 All ER 178, at p 182.

[75] Paras 5.25-5.27 below.

[76] See Walkers, para 357; R & B, para 18-09; Clark v HMA 2 February 1977.

It is now suggested by the undernoted writers[77] that both the prosecution and the judge should be entitled to comment on the accused's failure to testify. It may be urged in support of the suggestion that a reply to such comment by the prosecution could be made in the speech for the defence; that the traditions of the Crown Office are such that it is highly unlikely that the right to comment would be abused; and that any abuse could and no doubt would be corrected by the presiding judge and, if insufficiently corrected, could form a ground of appeal. In any event there seems to be no need for a prohibition on comment by the prosecution in summary criminal trials.

5.25 (cc) Purpose of comment. It seems necessary to recognise, however, that there is very little difference, if any, between permitting comment by the judge or prosecutor and inviting the trier of fact to draw inferences from the accused's failure to give evidence. It appears from the opinion of Lord Justice-General Strathclyde in Brown[78] that he considered there to be no difference: he indicates that the object of commenting on the accused's silence is to invite the jury to take it into consideration. It was said in Sparrow[79] that failure to give evidence "has no evidential value"; but comment on the failure brings it to the attention of the jury as a factor which they may take into consideration in deciding whether the accused is guilty or not, and from which they may infer that his defence is not a good one. As Cross points out, the only reason for commenting is to draw attention to possible/

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[77] Justice, "Preliminary Investigations of Criminal Offences", [1960] Crim LR 793, at p 812; Williams, p 163; CLRC, paras 108-110, 113; BC, para 83. And see Cross, "The Evidence Report", [1973] Crim LR 339, at pp 336-7.

[78] 1918 J C 3, at p 8.

[79] R v Sparrow, [1973] 1 WLR 488.

possible legitimate inferences.[80] If it is accepted that there is no real distinction between commenting and pointing to inferences, it may be thought desirable to recognise that in any new statutory provision. Thus clause 5(3) of the English Committee's draft Bill provides that the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from his failure to testify as appear proper. Part 7, rule 11(d) of the rules of evidence proposed by the Ghana Law Reform Commission reads:

> "If an accused in a criminal action does not testify on his own behalf, the court, the prosecution and the defence may comment on the accused's failure to testify, and the tribunal of fact may draw all reasonable inferences therefrom."[81]

It is submitted that if the words "the prosecution" are omitted, this rule represents the de facto position in modern Scots law. On the other hand, a rule which frankly recognised that adverse inferences might legitimately be drawn from the accused's failure to give evidence might attract the criticisms that it would lighten the burden of proof borne by the prosecution, and that it failed to take account of the manifold reasons other than guilt which might impel an accused person not to testify.

5.26 It is of considerable interest that the present law in the United States is that neither the prosecutor nor the judge should be permitted to comment. In Griffin v California[82] the Supreme Court held that comment by the prosecutor or the court on the accused's failure to testify violated the Fifth Amendment of the United States Constitution that no person/

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[80] An Attempt to Update the Law of Evidence (Hebrew University of Jerusalem, 1974), p 11.

[81] Rule 201(3) of the American Law Institute's Model Code of Evidence is in substantially the same terms as those of the proposed Ghana rules.

[82] (1965) 380 US 609.

person shall be compelled to be a witness against himself. Professor R H Field writes:

> "... how important is the prohibition of comment by the prosecution? It seems to me that once you take the step of making the accused a competent witness in his own behalf, an adverse inference is inevitable if he chooses not to testify ... I believe that it is right not to allow either the prosecutor or the judge to comment upon the defendant's silence. To permit it would load the dice against him even more than would be the case if his failure to testify passed without comment."[83]

5.27 The Thomson Committee have, however, recommended that in every case in which the Crown has established a prima facie case against the accused, it should be competent for the prosecution to comment on the failure of the accused to attempt to refute the case against him by giving evidence; and further, that in cases where the judge or jury may have some doubt as to whether or not they should accept the evidence for the Crown, they may draw an inference adverse to the accused from his failure to attempt to refute the evidence for the Crown.[84] They make this recommendation in the light of their proposal for the adoption of the English "no case to answer" procedure. It may be thought, however, that the right to comment should be extended whether the latter procedure is adopted or not.

(B) Corroboration

5.28 The Criminal Law Revision Committee has recommended that the accused's refusal to give evidence may be treated as corroboration of any evidence given against him.[85] The recommendation is contrary to Scottish principle,[86] and the Thomson Committee do not agree with it.[87]

Cross/

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[83] R H Field, "The Right to Silence", (1970) 11 JSPTL 76, at p 78.
[84] Thomson, para 50.15.
[85] CLRC, para 111, pp 177, 216. See para 5.09 ante.
[86] Robertson v Maxwell, 1951 JC 11; Wightman v H M Advocate, 1959 JC 44.
[87] Thomson, paras 8.27, 50.16.

Cross submits, however, that the distinction between a matter which can very properly be taken into account by the jury and something which corroborates other evidence, is a distinction without a difference.[88]

(b) Accused as witness for himself when co-accused[89]

(i) Consequences of decision to testify

5.29 (A) Effect of evidence. Questions as to the admissibility and effect of the accused's evidence quoad his co-accused under the present law are considered by the Sheriffs Walker.[89] The learned editor of Renton and Brown points out[90] that whatever the common law rule may be, the situation in practice is that when one of two or more co-accused gives evidence his evidence is evidence in the case, available like any other evidence for or against all the accused. The Draft Code proposed the following rule:

> "If two or more accused be tried simultaneously and any of them give evidence, that evidence may be founded on in favour of any or all of the accused or against any or all of the accused."[91]

The rule was generally accepted without comment, although there was a suggestion that it should apply only when the accused were being tried together on a common charge, and that the evidence might be founded on only so far as relating to the common charge. It might be difficult to operate that suggestion in practice. The rule has been approved by the Thomson Committee.[92]

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[88] Cross, pp 357-358, and An Attempt to Update the Law of Evidence supra, pp 13-14.

[89] Walkers, paras 359, 361; and see Renton and Brown, para 18-49. It is now clear that a co-accused is not a socius criminis (Martin v HMA, 1960 SLT 213; Slowey v HMA, 1965 SLT 309; McGuiness v HMA, 1971 SLT (Notes) 7); McCourt v HMA, 1977 SLT (Notes) 22.

[90] Para 18-17, n 81. See also G H Gordon, "Lindie v H M Advocate", (1974) 19 JLSSc 5, 33, at p 34.

[91] Art 6.3(b)

[92] Thomson, para 38.22.

5.30 If the evidence of one accused were to be evidence in the whole case, there would be no point in retaining the rule[93] that the evidence of a witness led for one co-accused is not admissible against another. The Draft Code proposed the following rule, which received no adverse comment and has been approved by the Thomson Committee:[92]

> "The evidence of a witness called on behalf of one accused is competent for or against another accused."[94]

(B) Cross-examination

(aa) By co-accused[95]

5.31 The rule that an accused may be cross-examined by a co-accused only where his evidence tends to incriminate that co-accused rests on Gemmell v MacNiven.[96] Gemmell bears to follow Hackston v Millar,[97] but that decision is not authority for the word "only" in the rule. The rule is also qualified by Lee v H M Advocate[98] which held that the co-accused has a duty to cross-examine the accused in the witness-box if he intends to give evidence incriminating that accused. It is thought that it would be more satisfactory to give the co-accused a right to cross-examine which is not so restricted. That was proposed in the Draft Code, by article 6(3)(c), with hardly any adverse comment. It is now the law in England.[99]

5.32 Article 6(3)(c) of the Draft Code is in the following terms:

> "An accused person may, with the consent of another accused,

call/

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[92] Thomson, para 38.22

[93] See Young v H M Advocate, 1932 JC 63, at pp 73-74; Walkers para 362.

[94] Art 6(3)(d).

[95] W A Brown, "Right and Duty in Cross-examination of a Socius", (1968) 13 JLS Sc 230. As to the order in which co-accused lead evidence and cross-examine, see para 8.25 post.

[96] 1928 JC 5.

[97] (1906) 8F (J) 52, 5 Adam 37; considered in Townsend v Strathern, 1923 JC 66, and by R N Gooderson, "The Evidence of Co-Prisoners", (1952) 11 CLJ 209, at p 223.

[98] 1968 SLT 155.

[99] R v Hilton, [1972] 1 QB 421.

call that other accused as a witness on his behalf, or he may cross-examine that other accused if that other accused give evidence, but he cannot do both."

The Thomson Committee made the following observations on the rule:[1]

"Rule (c) will involve an alteration to the existing law. As regards the first part of (c) we favour the suggestion that an accused may, with the consent of another accused, call that other accused as a witness on his behalf. The second part of (c) would allow an accused person to cross-examine a co-accused whether or not the evidence of that co-accused incriminates him (cf Young v H M Advocate, 1932 JC 63). This change accords generally with the views of the majority of our witnesses. The present rules whereby co-accused A may only be cross-examined on behalf of another accused if his evidence incriminates them, is unduly restrictive in that the other co-accused are unable to obtain from A evidence in their favour. We therefore approve of the content of rule (c) and recommend accordingly. Indeed, we would go further and recommend that the evidence of every witness, whether an accused or not, should be evidence in causa and subject to general cross-examination."

The latter recommendation is repeated in the next chapter of this paper.

(bb) Cross-examination by the prosecutor

5.33 It is not "regarded as proper for the prosecution to use their right to cross-examine one accused as a way of turning him into a witness against another accused."[2] In Young v H M Advocate,[3] Lord Justice-General Clyde said:

"The right of cross-examination is always subject in Scotland to the control of the trial court;[4] and, if (as in R v Paul[5])

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[1] Thomson, para 38.22.

[2] R & B, para 18-17; see also Walkers, para 361.

[3] 1932 JC 63, at p 74.

[4] In McCourtney v HMA, 1978 SLT 10, at p 13, the Court observed that that statement was obiter, and that the Court's attention had not been directed to the question whether the trial judge had a discretion to refuse to allow cross-examination by a co-accused once the conditions of sec 141(f)(iii) of the 1975 Act had been satisfied. See para 5.66 below.

[5] [1920] 2 KB 183; 14 Cr App R 155. One co-accused went into the witness-box and said no more than that he pleaded guilty. The Crown was held to have been entitled to cross-examine him on the alibi of his co-accused.

> one of the accused used his right to be called as witness for the defence simply to plead guilty in the box, it must not be assumed that, in Scotland, either his co-accused or the prosecutor would be entitled eo ipso to cross-examine him in order to incriminate others of the co-accused. Further, it may well be that a prosecutor is not entitled, under the cloak of cross-examination, to examine an accused upon matters irrelevant to the question of his own guilt, and extraneous to any evidence he has given, in order to make him an additional witness against his co-accused. The latitude allowed to cross-examination as a test of credibility is so wide as to make it impossible to lay down any general rule applicable to all cases, and the trial court must be vested with a certain measure of discretion."

It may be, therefore, that if A is charged with an offence on his own as well as with one in concert with B, and gives evidence only in respect of the former, the prosecution cannot cross-examine as to the latter, while B may have no right to cross-examine at all.[6] It may therefore be necessary to consider whether the prosecution should not also have an unrestricted right of cross-examination. There are difficulties. To grant the prosecution such a right would be almost equivalent to eradicating, in the case of a co-accused who elected to testify, the prohibition on the prosecutor from calling co-accused to testify against each other, especially since the prosecutor could endeavour to elicit his evidence by leading questions and other tactics permissible in cross-examination. If the co-accused were spouses, they could be cross-examined by the prosecutor so as to incriminate each other, although normally one spouse is not compellable to give evidence against the other.[7] Again, the prosecutor's cross-examination would occur after the co-accused's advocate had exhausted his normal rights of cross-examination.[8] If the accused did not give evidence against the co-accused/

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[6] R & B, para 18-17; see also Walkers, para 361.

[7] R v Armstrong, [1957] Crim LR 198.

[8] See para 8.25, post.

co-accused until he was cross-examined by the prosecutor, it would be too late for the co-accused to cross-examine him under sections 141(f)(iii) or 346(f)(iii) of the 1975 Act (formerly section 1(f)(iii) of the Act of 1898). Further, if the co-accused's right of cross-examination were to remain restricted, the prosecutor would be given an advantage not enjoyed by the co-accused. On the other hand, to make the prosecutor's right of cross-examination subject to the discretionary control of the judge, as indicated in Young, may mean that it would often be difficult at the time for the judge to distinguish between the prosecutor cross-examining co-accused A in order to damage A and cross-examining A in order to damage co-accused B.[9]

(ii) Consequences of failure to testify

5.34 (A) Comment. It is suggested that the advocates for the other accused, in addition to the judge and the prosecutor, should be entitled to comment on the failure of a co-accused to give evidence. Neither the Act of 1898 nor any Scottish authority prohibits comment by the co-accused. It has been established in England that he has a right to comment,[10] but the question remains open in Scotland. The decision in R v Wickham[10] seems justified by analogy with the position in England under section 1(f)(iii) of the 1898 Act,[11] by which a co-accused has an absolute right, unfettered by any discretion in the court, to cross-examine a co-accused on his record once he gives evidence against the first co-accused.[12]

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[9] On the whole matter see J B Heydon, "Obtaining Evidence versus Protecting the Accused: Two Conflicts", [1971] Crim LR 13, at pp 19-20.

[10] R v Wickham, (1971) 55 Cr App R 199; R v Sparrow, [1973] 1 WLR 488, at p 496 F-G.

[11] Secs 141(f)(iii), 346(f)(iii) of the 1975 Act.

[12] Murdoch v Taylor, [1965] AC 574; see Heydon, Cases and Materials on Evidence, p 157.

5.35 (B) Incriminating evidence by subsequent co-accused. If, by virtue of the order in which they appear in the complaint or indictment,[13] any other accused is entitled to lead evidence after the co-accused who has elected not to give evidence, there is nothing to prevent such other accused from giving evidence incriminating him. If he had given evidence, such a co-accused would have been bound to cross-examine him in order to give him an opportunity to deal with the allegation of incrimination.

(3) Accused as witness for co-accused[14]

5.36 (a) Compellability. The question of compellability again arises here, in the form, whether an accused should be a competent and compellable witness on the application of another accused. The present law is that a person charged with an offence shall not be called as a witness except upon his own application;[15] and it appears that one co-accused cannot call another co-accused to give evidence for him.[16] It has been said[17] that there seems nothing to stop the other co-accused volunteering to do so, so long as he is prepared to take the risk of being asked awkward questions about his own share in the crime, and that the position is thus virtually the same in England;[18] but this seems at least doubtful. It is thought that in any event it is desirable, and should be made clear, that if an accused is willing to give evidence on behalf of his co-accused, the co-accused should be entitled/

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[13] See para 8.25, post.
[14] Walkers, paras 360, 361; Renton and Brown, paras 18-50, 18-53, 18-54, 18-56, 18-57.
[15] 1975 Act, secs 141(a), 346(a): see para 5.02 above.
[16] Dickson, para 1564; Macdonald, p 291; Morrison v Adair, 1943 JC 25.
[17] G H Gordon, "The Evidence of Spouses in Criminal Trials", 1956 SLT (News) 145. Cf R & B, para 18-17, n 80.
[18] R v Rowland, [1910] 1 KB 458.

entitled to call him. It has been noted above (para 5.32) that the Thomson Committee favoured the suggestion in the Draft Code that an accused may, with the consent of another accused, call that other accused as a witness on his behalf. That accused could hardly be a compellable witness for his co-accused so long as it remains the law that an accused person is not obliged to give evidence.[19] It is proposed elsewhere that it should be unnecessary to give notice of an intention to lead the evidence of any co-accused whose name appears on the indictment.[20] Sheriff Gordon has suggested that

> "an appropriate rationalisation of the law which would, incidentally, help to reduce the number for cases in which the evidence of one co-accused was not available to the other, would be to introduce the English practice of allowing the court to dismiss an accused against whom the Crown have not made out a prima facie case, and to declare unequivocally that the evidence of all witnesses in a case (unless there are questions of the competency of spouses) is evidence for and against all parties to the case."[21]

5.37 (b) When charge against accused withdrawn. In summary procedure, an accused person who has pleaded guilty is a competent witness for both prosecution and the defence in the subsequent trial of a co-accused.[22] The same is probably true of an accused who has pleaded not guilty and has been discharged after his plea has been accepted by the prosecutor, for a person who has been discharged can hardly/

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[19] The Thomson Committee, in the light of their recommendation that the accused should not be a compellable witness at his trial, rejected a proposal that he should be compelled at his own trial to give evidence on behalf of his co-accused. Where such evidence is desired, the only way to obtain it is by motion for a separate trial (Thomson, para 38.23).

[20] Para 24.55 below.

[21] (1974) 19 JLSSc 5, 33, at p 34. The latter point is met by the proposal in paras 5.29 and 5.32 above, and para 8.18 below that the evidence of every witness should be evidence in causa.

[22] Copeland v Gillies, 1973 SLT 74; R v Boal, [1965] 1 QB 402, at p 415; see para 5.02 above.

hardly be regarded as "a person charged"; it would be desirable to make this clear.[23] It should probably also be made clear, in view of the state of the authorities,[24] that one co-accused may without leave call another the charge against whom has been withdrawn.

5.38 (c) Presence in court. Under the present law, it is possible that the court may not permit a co-accused who has pleaded guilty to be called as a witness if he has remained in court during the trial.[25] It may be thought that his presence in court is a consideration which should go not to the exclusion of his evidence but merely to the weight or value which ought properly to be attached to it.[26]

(4) Cross-examination under secs 141(e) and (f) and 346(e) and (f) of the 1975 Act[27]

5.39 Sections 141 and 346 of the 1975 Act (formerly section 1 of the 1898 Act) read as follows:

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

been/

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[23] Cf R v Conti, [1974] Crim LR 247.

[24] Henderson, (1850) J Shaw 394, at pp 422-3, 429; McCabe, (1857) 2 Irv 599; Macdonald, pp 291-292.

[25] Ryan v Paterson, (1972) 36 JCL. He ought to be removed (Dickson, para 1564).

[26] See paras 3.16-3.19 above.

[27] Walkers, paras 356, 358; R & B, paras 18-10 - 18-16; Williams, pp 216-226; Cross, pp 358-379; Phipson, paras 532-538. CLRC, paras 114-136, commented on by Colin Tapper, (1973) 36 MLR 167, and BC paras 126-138.

been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless -

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

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

(iii) the accused has given evidence against any other person charged with the same offence."

5.40 In England, and in other jurisdictions where provisions on similar lines have been adopted, paragraphs (e) and (f) have given rise to numerous judicial decisions and much academic controversy. In Scotland, on the other hand, the only part of these provisions which has been the subject of reported decision is the second limb of paragraph (f)(ii), and the authoritative construction placed upon it in 1948[28] has never been called in question. The reason for the absence of other Scottish authority may be that in Scotland the Crown are not astute to take advantage of every opportunity which may be technically open to them under the provisions. In O'Hara[28] Lord Justice-Clerk Thomson observed (at p 95):

"One can only presume that the absence of any cases on this topic in Scotland is due to the fact that the prosecutor rarely attempts to insist on the magnitude of his rights."

And/

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[28] O'Hara v HMA, 1948 JC 90; applied in Fielding v HMA, 1959 JC 101, HMA v Deighan, 1961 SLT (Sh Ct) 38, and HMA v Grudins, 1976 SLT (Notes) 10.

And the Thomson Committee say that

> "normally, if the prosecutor has any doubt, he will refrain from attacking the accused's character."[29]

But whatever the reason for the lack of conflict over these provisions in the Scottish courts, those who consider the law with a view to its reform are faced with the question whether there can be any justification for altering provisions which, in Scotland, have apparently caused virtually no doubt or difficulty in practice for over three-quarters of a century. One possible answer, it is suggested, is that whatever the situation may be in practice, if the provisions are in any respects unsound, or unnecessarily obscure, or too narrowly stated, then they should be altered in the interests of the rationalisation of the law, and as a result they may be of greater practical utility than they have apparently been in the past. Various parts of the provisions appear to be open to criticism in the respects which have just been mentioned, and a number of modifications are suggested in the following paragraphs.

(a) Terminology of proviso (e)

5.41 (i) "On his own behalf". When this paragraph was consolidated, its opening words were significantly altered. Section 1(e) of the 1898 Act provides:

> "A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged."

Sections 141 and 346 of the 1975 Act are in identical terms except that they begin:

> "The accused who gives evidence on his own behalf in pursuance of this section may be asked ..."

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[29] Thomson, para 50.24.

The alteration is not unimportant, because in England section 1(e) is not expressly confined to cases in which the accused is giving evidence "on his own behalf", and the court would not read these words into it: it has been held that it applies when one accused confines his evidence to statements exculpating his co-accused.[30] In Scotland, however, by virtue of the 1975 Act, an accused who so confined his evidence would apparently be able to claim the common law privilege against self-incrimination. It is submitted that he should not be allowed to do so. In addition, if the law of Scotland is altered to the effect of making an accused person a competent, but not compellable, witness for a co-accused,[31] and if it is accepted that such an accused should not be entitled to claim the privilege, it will be necessary to remodel paragraph (e).

5.42 (ii) "Tend to incriminate him as to the offence charged". There is a question as to the proper construction of the words "tend to incriminate him as to the offence charged." They could mean "tend to convince or persuade the jury that he is guilty", or they could have the narrower meaning, "tend to connect him with the commission of the offence charged." In Jones v DPP[32] Lord Reid expressed the opinion that they had the narrower meaning. The Criminal Law Revision Committee[33] considered the question in this way:

> "Section 1(e) clearly prevents the accused from claiming privileges in relation to a question directly incriminating him/

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[30] Cross, p 358; R v Rowland, [1910] 1 KB 458.

[31] See para 5.36 above.

[32] [1962] AC 635, at pp 662-663; see also Murdoch v Taylor, [1965] AC 574, Lord Reid at p 583.

[33] CLRC paras 170, 171.

him of the offence charged. But whether he may refuse to answer other incriminating questions is obscure. The question might arise in relation to (i) other offences which are directly or indirectly relevant as tending to show that the accused committed the offence charged or (ii) other offences which are relevant to his credibility as a witness. An example of (i) would be where the accused is charged with shoplifting in shop A, swears that he was not in the shop at the material time, is asked in cross-examination where he was and wishes to object to answer because the answer would show that he was in another shop committing a similar offence. An example of (ii) would be where the accused is charged with theft, has made imputations against a witness for the prosecution and then gives evidence, is asked in cross-examination whether he has not made a number of false tax returns and wishes to object because the answer would tend to incriminate him as to the tax returns. There is no direct authority on whether the objection would be upheld in either of these cases. This may be surprising, although the question would ordinarily not arise because the accused's claim of privilege would be likely to have very much the same effect as an admission."

The Committee favoured a solution

"by which the accused should have no privilege against self-incrimination in the case of questions about the offence charged or about any other offence which is admissible as tending directly or indirectly to show that he committed the offence charged but should have the privilege in respect of other offences which are relevant to his credibility as a witness. Therefore in the two examples suggested in paragraph 170 the accused could not refuse to say where he was at the time of the shoplifting, but could refuse to answer about the tax returns. To allow the privilege in the former case, even in theory, might make the law seem artificial, but it would seem reasonable to allow it in the latter case. But no privilege should, in our view, be allowed if the accused has claimed to be of good disposition or reputation, as mentioned in clause 7; for this would be inconsistent with the principle of that clause that the accused must not be allowed to mislead the court or jury by claiming a merit which he does not possess."

The Committee's view was accepted by the Bar Council.[34] It is submitted that/

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[34] BC, para 23.

that it should be adopted in Scotland, subject to the retention of the word "character" instead of "disposition or reputation". That terminology is considered in paragraph 5.51.

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

5.43 The relation of proviso (e) to proviso (f) is discussed by the Criminal Law Revision Committee in the following terms:

> "116. There has been a total difference of judicial opinion on the fundamental question of the relation between paragraphs (e) and (f). Eventually in Jones v Director of Public Prosecutions, [1962] A C 635, the majority of the House of Lords (Viscount Simonds, Lord Reid and Lord Morris of Borth-y-Gest) held that paragraph (e) allows only questions tending directly to criminate the accused as to the offence charged, and not questions tending to do so indirectly such as questions about other misconduct of which evidence was admissible at common law. That is to say, the question must relate directly to the offence charged, and it is not enough that the other misconduct would have been admissible during the case for the prosecution. On this view paragraph (f) allows questions which tend indirectly to criminate the accused as to the offence charged, and questions directed to his credibility as a witness, only if the case falls within one of the three exceptions in paragraph (f). The minority (Lord Denning and Lord Devlin) considered that paragraph (e) allowed questions tending, whether directly or indirectly, to criminate the accused as to the offence charged and that paragraph (f) related only to questions directed to the credibility of the accused as a witness. The majority, however, held that the words 'tending to show' in paragraph (f) meant tending to show for the first time, so that the prohibition in the paragraph would not be infringed if evidence of the conduct had already been given, whether by the accused himself (as happened in the case in question) or (when this was admissible at common law) by the prosecution. The minority disagreed with this view and considered that 'tending to show' meant tending to show when regarded in isolation. The result was that all five members of the House of Lords held that the disputed question was admissible, but for different reasons.
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> "117. Having regard to the difficulty which the 1898 Act caused in Jones it is clearly desirable to make fresh provision. We propose that the Bill should restate the law on both the points mentioned above in accordance with what we regard as the right policy. On the question of the relation between paragraphs (e) and (f) we have no doubt that the minority view gives the right result. We therefore propose that the accused, if he gives evidence, should be open to cross-examination about any misconduct of which evidence

would/

would have been admissible (in particular, under clause 3 [of the Committee's Draft Bill, which makes provision as to the admissibility of other conduct of the accused tending to show disposition]) during the case for the prosecution. On the question of 'tending to show' in paragraph (f), we adopt the majority view, so that cross-examination of the accused about his misconduct will not be forbidden if the misconduct has already been mentioned at the trial. This result is secured by the combination of subsections (1) and (2) of clause 6. Subsection (1) contains the general prohibition of cross-examination 'tending to reveal to the court or jury' the fact that the accused has committed other misconduct; subsection (2) removes the prohibition in relation to misconduct which is admissible in evidence as mentioned."[35]

5.44 The relation between the two provisos, and the conflicting decisions, are discussed by the undernoted writers.[36] The Committee's proposal on the matter is supported by the Bar Council.[37]

(c) Proviso (f)

5.45 (i) Inapplicable to examination-in-chief and re-examination. It is suggested that it should be made clear that in Scotland, as well as in England, the prohibition in proviso (f), although absolute, does not prevent questions concerning the subjects mentioned being put to the accused by his own advocate in examination-in-chief or re-examination on the infrequent occasions when his advocate wishes to do so. In Jones,[38] Lord Reid said:

"... I turn to consider proviso (f). It is an absolute prohibition of certain questions unless one or other of

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[35] Subsection (3) contains a provision, analogus to subsection (2), to remove the prohibition in relation to misconduct of one accused which is admissible on behalf of a co-accused for the purpose of showing that the latter is not guilty of an offence with which he is charged.

[36] Cross, pp 360-363, 377; Heydon, Cases and Materials on Evidence, pp 276-277, 286-287.

[37] BC para 128; cf C Tapper, (1973) 36 MLR 167 at pp 168-169.

[38] [1962] AC 635 at p 663.

three conditions is satisfied. It says that the accused 'shall not be asked, and if asked shall not be required to answer', certain questions. It was suggested that this applies to examination-in-chief as well as to cross-examination. I do not think so. The words 'shall not be required to answer' are quite inappropriate for examination-in-chief. The proviso is obviously intended to protect the accused. It does not prevent him from volunteering evidence, and does not in my view prevent his counsel from asking questions leading to disclosure of a previous conviction or bad character if such disclosure is thought to assist in his defence."

5.46 (ii) "Tending to show". The views expressed in the House of Lords in Jones, and by the Criminal Law Revision Committee, on the meaning of the words "tending to show" in proviso (f) have already been set out in paragraph 5.43 above.

5.47 (iii) "Charged". It is thought that any restatement of the law should incorporate the decision of the House of Lords in Stirland v DPP[39] that the word "charged" as used in proviso (f) means "charged in court."

5.48 (iv) Acquittals. The decision of the House of Lords in Maxwell v DPP[40] made it clear that where the accused "throws away the shield" provided by the first part of proviso (f), it does not always 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. Viscount Sankey, L C, said:

"The substantive part of that proviso is negative in form and as such is universal and is absolute unless the exceptions come into play. Then come the three exceptions: but it does not follow that when the absolute prohibition is superseded

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[39] [1944] AC 315.
[40] [1935] AC 309.

by a permission, that the permission is as absolute as the prohibition. When it is sought to justify a question it must not only be brought within the terms of the permission, but also must be capable of justification according to the general rules of evidence and in particular must satisfy the test of relevance. Exception (i) deals with the former of the two main classes of evidence referred to above, that is, evidence falling within the rule that where issues of intention or design are involved in the charge or defence, the prisoner may be asked questions relevant to these matters, even though he has himself raised no question of his good character. Exceptions (ii) and (iii) come into play where the prisoner by himself or his witness has put his character in issue, or has attacked the character of others. Dealing with exceptions (i) and (ii), it is clear that the test of relevance is wider in (ii) than in (i); in the latter, proof that the prisoner has committed or been convicted of some other offence, can only be admitted if it goes to show that he was guilty of the offence charged. In the former (exception (ii)), the questions permissible must be relevant to the issue of his own good character and if not so relevant cannot be admissible. But it seems clear that the mere fact of a charge cannot in general be evidence of bad character or be regarded otherwise than as a misfortune. It seemed to be contended on behalf of the respondent that a charge was per se such evidence that the man charged, even though acquitted, must thereafter remain under a cloud, however innocent. I find it impossible to accept any such view. The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore, irrelevant; it neither goes to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness. Such questions must, therefore, be excluded on the principle which is fundamental in the law of evidence as conceived in this country, especially in criminal cases, because, if allowed, they are likely to lead the minds of the jury astray into false issues; not merely do they tend to introduce suspicion as if it were evidence, but they tend to distract the jury from the true issue - namely, whether the prisoner in fact committed the offence on which he is actually standing his trial. It is of the utmost importance for a fair trial that the evidence should be prima facie limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined.

"It does not result from the conclusion that the word 'charged' in proviso (f) is otiose: it is clearly not so as regards the prohibition; and when the exceptions come into play there may still be cases in which a prisoner may be asked about a charge as a step in cross-examination leading to a question whether he was convicted on the charge, or in order to elicit some evidence as to statements made or evidence given by the prisoner in the course of the trial on a charge which failed, which tend to throw doubt on the evidence which he is actually giving, though cases of this last class must be rare and the cross-examination permissible only with great safeguards.

> "Again, a man charged with an offence against the person may perhaps be asked whether he had uttered threats against the person attacked because he was angry with him for bringing a charge which turned out to be unfounded. Other probabilities may be imagined ..."

It is suggested that the effect of the decision in Maxwell should be incorporated in any restatement of the law. The terminology of proviso (f) appears to suggest that when the accused throws his shield away, any questions about charges in court are permissible, whatever the result of the charge may have been.

5.49 (v) Application to judge and judicial discretion. It is also suggested that any restatement of the law should enact the rule laid down in O'Hara[41] that a party intending to cross-examine an accused by virtue of proviso (f) must apply to the judge for leave to do so, and that it is in the discretion of the judge to grant or refuse leave. It has been said that the application of judicial discretion leads to uncertainty in practice and tends, without adequate justification, to reverse accepted principles of law,[42] but this does not appear to have been a serious difficulty in Scottish practice. It is thought that any provision as to the discretion should be in general terms, and should not state the grounds on which it should be exercised. It seems best to leave it to the courts to lay down any relevant general principles.[43]

(d) Cross-examination under proviso (f)(i).

5.50 It was said in Jones[44] that when evidence that the accused has committed or been convicted of another offence is justified by proviso (f)(i)/

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[41] 1948 JC 90, L J-C Thomson at p 99, Lord Jamieson at p 102.

[42] B Livesey, "Judicial discretion to exclude prejudicial evidence in criminal cases", [1968] CLJ 291, at pp 301-309.

[43] Cf CLRC para 271.

[44] [1962] AC 635, CCA at p 646; see also Lord Denning at p 668, Lord Morris of Borth-y-Gest at p 685.

(f)(i), it is in general undesirable that it should be first adduced in cross-examination. It is for consideration whether any rule on these lines could or should be appropriately expressed in legislative form.

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

5.51 (i) "Character". The first limb of paragraph (f)(ii) permits cross-examination on the lines prohibited by the substantive part of proviso (f) if

> "the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establish the accused's good character, or the accused has given evidence of his own good character."

The Criminal Law Revision Committee have recommended that the word "character", the construction of which has caused difficulty in England, should be abandoned in favour of "disposition", "reputation" and, where appropriate, "credibility".[45] The Thomson Committee, on the other hand, disagree with that recommendation:

> "In our view, there is no justification for change. There may well be cases which will raise narrow issues as regards attempts to set up good character but in our view neither the attempts of the Criminal Law Revision Committee nor any other that we can think of would in practice obviate the difficulties raised in such cases. Accordingly we are not in favour of any amendment of the law as presently enacted."[46]

5.52 (ii) Witnesses for the accused. The phraseology of the first limb does not in terms cover the case where the accused has led evidence of witnesses to his good character but does not cross-examine on the subject or allude to it in his own evidence in chief: such witnesses may be cross-examined as to his character, but he himself may not. It is thought that the phraseology should be recast in order to/

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[45] CLRC paras 118, 133-136.
[46] Thomson, para 50.26

to cover such a case, and that it should be made possible for the accused to be recalled for cross-examination as to character, by a co-accused as well as the prosecutor, after such witnesses have given evidence.[47]

5.53 (iii) Witnesses for co-accused. It is submitted that the provisions of the first limb should be extended to questions asked of the co-accused and of witnesses for a co-accused. It appears that under the present law one accused, seeking to show that the offence was committed by his co-accused, may ask questions of the co-accused or the co-accused's witnesses with a view to establish his own good character, without throwing away the shield provided by the first part of proviso (f). It is submitted below that imputations on the character of the witnesses for a co-accused should necessitate throwing away the shield;[48] and that a co-accused, as well as the prosecutor, should be entitled to cross-examine the accused and adduce evidence in order to rebut his claim to be of good character,[49] and where he has made imputations against the character of a witness for the prosecution.[50]

5.54 (iv) Co-accused's right to rebut claim of good character. The Criminal Law Revision Committee proposed that a co-accused, as well as the prosecutor, may cross-examine the accused to rebut his claim to be of good character and may adduce evidence for this purpose. This appears to the Committee to be clearly right, because each of the accused may be seeking to show that the offence was committed by the other or others.[51]

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[47] In England it is understood to cover such a case: see Cross, p 366; cf Heydon, Cases and Materials on Evidence, pp 273-274.
[48] Para 5.59 below.
[49] Para 5.54 below.
[50] Para 5.58 below.
[51] CLRC, para 136.

(f) The second limb of proviso (f)(ii)

5.55 (i) General. The second limb of proviso (f)(ii) permits cross-examination of the accused tending to show that he has committed, been convicted of, or charged with other offences or is of bad character, if

> "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution."[52]

This is the only part of the provisions which has been the subject of reported decision in the Scottish courts,[53] and they have interpreted it differently from the House of Lords.[54] In O'Hara,[53] a distinction was drawn between imputations which are necessary to enable the accused fairly to establish his defence, and imputations on the general character of the witnesses: the first do not deprive the accused of the protection of the prohibition, but the second may, in the judge's discretion, do so.[55] In R v Selvey,[54] on the other hand, the House of Lords declined to accept such a distinction. Viscount Dilhorne said that the authorities on the second limb establish the following propositions: (1) the words of the statute must be given their ordinary natural meaning; (2) section 1(f) of the 1898 Act permits cross-examination of the accused as to character both when imputations on the character of the prosecutor and his witnesses are cast to show their unreliability as witnesses independently of/

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[52] See R L C Hunter, "Imputations on the Character of Prosecution Witnesses", 1968 J R 238.

[53] O'Hara v HMA, 1948 JC 90; applied in Fielding v HMA, 1959 JC 101, HMA v Deighan, 1961 SLT (Sh Ct) 38, and HMA v Grudins, 1976 SLT (Notes) 10.

[54] R v Selvey, [1970] AC 304.

[55] 1948 JC 90, L J-C Thomson at p 99, Lord Jamieson at p 101.

of the evidence given by them and also when the casting of such imputations is necessary to enable the accused to establish his defence; but (3) in rape cases the accused can allege consent without placing himself in peril of such cross-examination; and (4) if what is said amounts in reality to no more than a denial of the charge, expressed, it may be, in emphatic language, it should not be regarded as coming within the section.[56]

5.56 The Criminal Law Revision Committee recommended, in effect, that Selvey should be overruled, and that the accused would lose his shield only if the main purpose of casting the imputations was to discredit the prosecutor or his witnesses and not directly to further the defence of the accused.[57] The Thomson Committee endorsed the principle enunciated in O'Hara, and observed that the effect of the recommendations of the Criminal Law Revision Committee seems to be to bring the law in England into line with the position in Scotland.[58] That appears to be true; but it does not follow that the wording of the second limb of proviso (f)(ii) should not be altered. It may be said that the distinction in O'Hara does not follow from the ordinary and natural interpretation of the words of the section, and that in order to arrive at that distinction it is necessary to qualify these words by adding or inserting the words "unnecessary" or "unjustifiably" or "for purposes other than that of developing the defence" or other similar words.[59] It is thought, accordingly, that in any restatement of the/

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[56] [1970] AC 304, at p 339.
[57] CLRC, paras 119-130.
[58] Thomson, paras 50.21-50.25.
[59] Cf R v Hudson, [1912] 2 KB 464, Lord Alverstone C J at pp 470-471.

the law a provision equivalent to the second limb of proviso (f)(ii) should be phrased in such a way as to incorporate the principle in O'Hara.

5.57 It must be recognised, however, that even a provision in such terms would represent, as did section 1(f) of the 1898 Act, a somewhat unsatisfactory compromise between the treatment of the accused in every respect as an ordinary witness and the complete prohibition of any cross-examination of the accused about misconduct otherwise admissible in evidence. Lord Justice-Clerk Thomson said that the principle seems to be that it is unfair that an accused with a bad record should stand safe in the box while blackguarding the witnesses who testify against him.[60] It would certainly be unsatisfactory if respectable witnesses were to be subjected to unfounded accusations by an accused whose record could not be disclosed: such people might be unwilling to act as witnesses, or might feel a deep sense of injustice if they did so act, only to be unjustly impugned in the witness-box. On the other hand, the present law permits an accused person to make unfounded attacks on witnesses with impunity, so long as he does not go into the witness-box himself.[61] The law also permits the defence to attack the character of murder victims[62] and other dead victims of crime, and to ask questions with a view to establish the bad character of persons who have not been called as witnesses.[63] Another difficulty is that the present/

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[60] O'Hara v HMA, 1948 JC 90, at p 98.

[61] See para 5.69 below.

[62] HMA v Grudins, 1976 SLT (notes) 10.

[63] See R v Lee, [1976] 1 WLR 71.

present law has the effect of deterring an accused with a record from attacking prosecution witnesses who themselves have bad records and whose credibility may be suspect; and there is no equivalent rule deterring the prosecution from attacking defence witnesses. It may be supposed, however, in the light of the experience of the two Committees, that it is not easy to formulate any less unsatisfactory rule.

5.58 (ii) Co-accused's right to cross-examine. It is submitted that when one of two or more co-accused casts imputations on the prosecutor or his witnesses, the court should have a discretion to allow his co-accused to cross-examine him under proviso (f)(ii). That was held to be the law in R v Lovett.[64] It should be noted that while the court may refuse leave to a co-accused to cross-examine under proviso (f)(ii), it cannot refuse it to a co-accused under proviso (f)(iii).[65]

5.59 (iii) Imputation against witness for co-accused. It is submitted that the rule in O'Hara should be extended to cover the case where the imputation is made against a witness for a co-accused. The Criminal Law Revision Committee formulated a clause the effect of which is that, whether the imputation is made by the accused (A) against a witness for the prosecution or against a witness for the co-accused (B), both the prosecution and B will be able to cross-examine the accused A who makes the imputation. This seems to the Committee to be clearly right. In particular, they say, the fact that the prosecution may have refrained from cross-examining A should not prevent B from cross-examining/

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[64] [1973] 1 WLR 241.
[65] See para 5.66, below.

examining him, especially if the witness against whom the imputation is made is more favourable to B than to A.[66]

5.60 (iv) Discretion. In O'Hara it was held that it was a question for the presiding judge to decide whether cross-examination of the accused under proviso (f)(ii) should be allowed, and it was assumed that the prosecutor would always ask for leave to cross-examine. It may be useful to include in any new provision a rule to the effect that all cross-examination under this proviso may be undertaken only with leave of the court, and it is always within the discretion of the judge to permit or refuse it.

(g) Proviso (f)(iii)

5.61 (i) General. Proviso (f)(iii) permits cross-examination on the prohibited matters if

> "the accused has given evidence against any other person charged with the same offence."

It has been observed that it is not clear whether this exception applies where the accused witness has given evidence against a person other than the person seeking to bring out his character: nor is it clear whether it applies where the evidence relied on by the cross-examiner has been given in other proceedings.[67] It is thought that both difficulties may be resolved if the rationale underlying the exception is that the accused witness "is in the same position as a witness for the prosecution so far as the co-accused is concerned, and nothing must be done to impair the right of a person charged to discredit/

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[66] CLRC, para 131.
[67] R & B, para 18-16.

discredit his accusers."[68] In any event, however, it is desirable that these two difficulties should be resolved.

5.62 (ii) "Evidence against". It seems important to consider the significance and aptness of this expression. In Murdoch v Taylor[69] a majority of the House of Lords held that "evidence against" means evidence which supports the prosecution's case in a material respect or which undermines the defence of the co-accused. Lord Reid, however, pointed to the distinction between the expression "would tend to criminate" in proviso (e) and "against" in proviso (f)(iii), and stated that if the intention had been that the latter proviso should apply to all evidence which would tend to criminate the co-accused, the obvious course would have been to use the expression "tending to criminate" instead of "against".[70] Lord Reid pointed out that if the expression "against" is given the wider meaning, an accused person with previous convictions, whose story contradicts in any material respect the story of a co-accused who has not yet been convicted, will find it almost impossible to defend himself, and if he elects not to give evidence his plight will be just as bad. In McCourtney v H M Advocate[71] the Court observed that the test favoured by the majority in Murdoch was "a stiff one", and expressed no opinion as to the correctness of its formulation. Murdoch also established that what an accused person says in cross-examination is just as much a part of his evidence as what he says in examination-in-chief, and that it is not necessary that the accused should have/

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[68] Cross, p 375.
[69] [1965] AC 574, Lord Donovan at p 592.
[70] At p 583.
[71] 1978 SLT 10, at p 13.

have a hostile intent against his co-accused: the test for whether his evidence is "against" his co-accused is objective and not subjective.[72]

5.63 The interpretation of the majority in Murdoch was applied, logically but with an odd result, in R v Davis,[73] where A and B were charged jointly with the theft of a number of items including a cross. The circumstances of the theft were such that either A or B or both of them must have stolen it. B gave evidence that A had stolen it. A then gave evidence and denied the theft. It was held that his denial was evidence against B within the meaning of proviso (f)(iii), and that A was accordingly liable to be cross-examined about his own previous convictions. It appears, therefore, that in England, where a crime must have been committed by one or other of two accused, either of them necessarily exposes his character to cross-examination merely by denying that he is the criminal. The judge has no discretion to exclude the cross-examination. It is submitted that this is an unattractive result, which should be avoided in Scotland by appropriate statutory provision. The question of judicial discretion to exclude cross-examination is considered below, at paras 5.66-5.68.

5.64 The necessity for adhering to the natural meaning of "against" appears to be emphasised by R v Bruce[74] where the construction laid down in Murdoch appeared to cause some difficulty. Bruce was tried with/

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[72] See also R v Stannard, [1965] 2 QB 1.

[73] [1975] 1 WLR 745.

[74] [1975] 1 WLR 1252; see also R v Hatton, (1976) 64 Cr App R 88.

with McGuiness and other youths on a charge of robbery. McGuiness, in his evidence, supported the prosecution case that there was a plan to rob. Bruce, on the other hand, denied that there was a plan to rob. McGuiness's counsel then cross-examined Bruce about his previous convictions on the basis that he had given evidence against McGuiness. In one sense Bruce's evidence was in favour of McGuiness since it contradicted the prosecution's case, but in another sense it was evidence against him since it also contradicted his evidence. The Court of Appeal held that on balance Bruce's evidence exculpated McGuiness of robbery and did not incriminate him. They thought it right to give the words of proviso (f)(iii) their ordinary meaning, if they could, without adding any gloss to them, but Murdoch and other cases "at first sight show that a gloss has been put upon these words which this court is bound to put upon them". Stephenson L J, giving the judgment of the court, said (at p 1259):

> "In our judgment, evidence cannot be said to be given against a person charged with the same offence as the witness who gives it if its effect, if believed, is to result not in his conviction but in his acquittal of that offence. The fact that Bruce's evidence undermined McGuiness's defence by supplying him with another does not make it evidence given against him. If and only if such evidence undermines a co-accused's defence so as to make his acquittal less likely is it given against him. If that puts a gloss upon a gloss, the addition is needed to preserve the natural meaning of the sub-paragraph. Bruce's evidence did not so undermine McGuiness's defence. He should not have been asked questions about his previous convictions."

It is thought, with respect, that that is the correct result, and it is submitted that it should be made possible for a Scottish court to arrive at such a result without difficulty by making it clear that an accused does not give evidence against a co-accused where his evidence, if believed, would result in the acquittal of the co-accused.

5.65/

5.65 (iii) "Any other person charged with the same offence". In England these words have been literally interpreted, so that the exception has been held not to apply in cases where two persons have been charged on the same indictment with different offences arising out of the same transaction or series of transactions.[75] It has, however been held to apply where two accused, A and B, were charged in separate counts on the same indictment with possessing the same forged notes, A having given the notes to B so that their possession was not joint but consecutive;[76] and where two accused were charged in separate courts on the same indictment with causing the same death by dangerous driving, notwithstanding that different facts were alleged against each.[77] The rationale of the exception appears to be that where A gives evidence against his co-accused B, A appears in much the same light, so far as the trial of B is concerned, as a prosecution witness and should therefore be subject to the same cross-examination by B as if he were a prosecution witness.[78] If so, it is difficult to see any reason why it should not be extended to cover all cases where the accused are tried together. The Criminal Law Revision Committee have recommended that in section 1(f) of the Act of 1898 the words "jointly charged with the same offence" should be altered to "jointly charged with him in the same proceedings."[79] It is submitted that an amendment on similar lines should be made in Scotland.

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[75] R v Roberts, [1936] 1 All ER 23; R v Lovett, [1973] 1 WLR 241; R v Rockman, [1978] Crim L R 162.

[76] R v Russell, [1971] 1 QB 151.

[77] R v Hills, [1978] 3 WLR 423.

[78] Professor J C Smith's commentary on Rockman n. 75 above.

[79] CLRC, para 132.

5.66 (iv) Discretion - (A) cross-examination by co-accused. It has been held by the House of Lords in Murdoch v Taylor,[80] an English appeal, that if an accused gives evidence against his co-accused, the court has no discretion to prevent B from cross-examining A under proviso (f)(iii), although it has a discretion to prevent the prosecution from doing so.[81] That is so upon the view that A, by giving evidence against B, becomes, from B's point of view, like a witness for the prosecution, and is therefore open to cross-examination on his misconduct in order to show that he should not be believed. Similarly, in McCourtney v H M Advocate[82] it was held by the High Court that once an accused has given evidence against a co-accused there is no discretion in the trial judge to refuse to the accused the right to cross-examine him as to his criminal record. The Court observed that it could never be conducive to a fair trial to deny to an accused person, against whom a co-accused has given evidence, the right to cross-examine him as to credit and character.

5.67 Arguments in favour of giving a discretion to the trial judge do not appear to be strong. It may be argued that there might be a case for giving a discretion to the court in order to enable it do so justice, as far as possible, in a case where A has only one relevant conviction and B has many, and B proposes to question A about his single conviction and to call witnesses to say that A committed the offence, but not to give evidence himself. In Scotland, however, the trial judge could not have the material on which to exercise a discretion in that situation/

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[80] [1965] AC 574.

[81] See para 5.68 below.

[82] 1978 SLT 10, at p 13.

situation, because he remains ignorant of the criminal records of A and B unless and until they are convicted, and he is also unaware of the nature of the evidence to be called on behalf of B. It may be further argued that cases can arise in which the connection between the charge against one accused and those against his co-accused are tenuous, and that in such a case, where two accused are not charged with the same offence or, at least, are not charged with offences which are so inter-connected as to stand or fall together, gross injustices might result if one accused, as a matter of right, was allowed to cross-examine another as to his antecedents and character.[83] But cases where the charges are as described where it would be in the interests of the accused to give evidence against another, and where it would be unfair to permit the other to elicit his record or bad character, may be thought to be rare. It may also be pointed out that a discretion is confided to the judge in allowing cross-examination under proviso (f)(ii); but, as the Court pointed out in McCourtney,[82] it is easy to appreciate that in the interests of the fair trial of the accused it may be necessary for the Court to retain control of the exercise of the right given to the prosecutor by proviso (f)(ii). In England, the majority of the Criminal Law Revision Committee reached the view that it is unacceptable that it should be possible to prevent an accused person from bringing out the misconduct of another accused who has given evidence against him. In particular, they thought it unsound to make the matter one of discretion, because/

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[82] 1978 SLT 10, at p 13.

[83] Cf I R Scott, "Cross-examination by Co-defendant", (1973) 36 MLR 663.

because that might lead to too much difference in the way in which the discretion was exercised.[84]

5.68 Discretion - (B) cross-examination by prosecutor. It should be made clear that the prosecutor may cross-examine under proviso (f)(iii), subject to the discretion of the court. That appears to be the law in England.[85] It may be supposed that it is in only very exceptional circumstances that an application by the prosecutor for leave to cross-examine under that proviso would be granted. Sir Rupert Cross suggests as a possible instance a case in which two persons jointly charged with the same offence (ie assuming no reform of that part of the proviso) each gave evidence against the other, but, because they both had criminal records, neither cross-examined the other under proviso (f)(iii).[86]

(h) Other problems

5.69 (i) The silent accused. The consideration that the rule in proviso (f) applies only where the accused elects to give evidence, gives rise to two abuses. First, if he makes imputations but does not give evidence himself, his record cannot be admitted under proviso (f), which refers only to questions asked in cross-examination. At common law, the prosecutor is never permitted to attack the character of the accused, unless the accused has set it up;[87] and the accused, by attacking the character of the witnesses and suggesting that they are unreliable, is putting in issue not his own character but the witnesses' characters.[88] If, under solemn procedure, he does not give evidence, his record can be admitted by statute only if he leads evidence to prove previous/

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[84] CLRC, para 132.
[85] R v Lovett, [1973] 1 WLR 241, at p 245.
[86] Cross, p 376.
[87] Dickson, para 15.
[88] Cf R v Butterwasser, [1948] 1 KB 4; R v Lee, [1976] 1 WLR 71.

previous good character.[89] A second abuse is that where there are two accused, A and B, and A has a bad record and B none, B goes into the witness-box and attacks the witnesses for the benefit of both A and himself, while A remains in the dock and cannot be cross-examined on his record. The Criminal Law Revision Committee considered it impossible to find a way of preventing these abuses, consistently with the principle that the purpose of the cross-examination of the accused is to show whether the witness attacked or the attacker is more likely to be telling the truth.[90] It may be that the proposals made elsewhere in this Volume,[91] and in the Thomson Report,[91] as to permissible comment on, and inferences to be drawn from, the accused's failure to give evidence, will, if adopted, encourage accused persons to give evidence and thus diminish these abuses.

5.70 (ii) Directon to jury. It has been held in England that where an accused has been cross-examined as to his previous convictions, the judge is obliged to direct the jury that the convictions go only to his credit.[92] Sir Rupert Cross points out that the judge is obliged to direct the jury in something like the following terms:

> "You must not infer from the fact that the accused has numerous convictions that he is guilty because he is the kind of man who would commit this crime but when considering the weight to be attached to his testimony to the effect that he did not commit this crime, you must remember that it is rendered less trustworthy than would otherwise be the case by the fact that he has numerous convictions."[93]

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[89] 1975 Act, sec 160.
[90] CLRC, para 131.
[91] Paras 5.21-5.27, 5.34 above; Thomson paras 50.13-50.15.
[92] R v Vickers, [1972] Crim LR 101.
[93] An Attempt to Update the Law of Evidence, pp 21-22; and See Cross, pp 374-375.

Whatever direction is given to the jury, it seems likely that they will take the accused's record into account when deciding whether or not he committed the crime. Whatever a direction may be worth, the question which arises here is whether any restatement of the law of evidence in Scotland should include a rule that a direction should be given that the answers given in cross-examination merely go to the accused's credit and not to the probability of his guilt.