SCOTTISH LAW COMMISSION

RESEARCH PAPER

on the

LAW of EVIDENCE

of SCOTLAND

by

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

Chapter 6

ORAL EVIDENCE IV: COMPETENCE AND COMPELLABILITY OF WITNESSES - CRIMINAL CASES: THE ACCUSED'S SPOUSE, AND OTHERS

1. The accused's spouse[1]

(1) As witness for the prosecution[2]

6.01 At common law, one spouse is not a competent witness against the other, except where he or she is the alleged victim of the crime charged against the accused. In such a case the spouse is both a competent and a compellable witness against the accused. The crime charged in such a case need not involve physical injury to the spouse: cases of false accusation of crimes,[3] forgery[4] and theft[5] have been reported.

6.02 A variety of statutory provisions render the accused's spouse a competent, though not a compellable, witness for the prosecution. The most important of these provisions are sections 143 and 348 of the Act of 1975 (based on section 4 of the Act of 1898), each of which provides:

> "(1) The spouse of a person charged with-
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> (a) bigamy,
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> (b) any offence mentioned in Schedule 1 to this Act or
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> (c) any offence under any enactment mentioned in Schedule 4 to this Act,
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> may/

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[1] Dickson, paras 1570-1573; Lewis, Manual, pp 306-307; Macdonald, pp 286-287; Clive and Wilson, pp 360-364; G H Gordon, "The Evidence of Spouses in Criminal Trials", 1956 SLT (News) 145.

[2] Walkers, para 353; R & B, paras 18-19 to 18-21.

[3] Millar, (1847) Ark 355.

[4] Foster v HMA, 1932 JC 75.

[5] Harper v Adair, 1945 JC 21.

may be called as a witness either for the prosecution or for the defence without the consent of the person charged.

(2) Nothing in this section or in section 141 or section 346 of this Act [by virtue of which the accused and his spouse are competent witnesses for the defence] shall affect a case where the spouse of a person charged with an offence may at common law be called as a witness without the consent of that person."

The offences mentioned in Schedule 1 are certain offences against children under 17 years of age, namely (a) any offence under the Sexual Offences (Scotland) Act, 1976, (b) incest, (c) any offence under sections 12, 15, 22 or 33 of the Children and Young Persons (Scotland) Act, 1937, and (d) any other offence involving bodily injury to a child under 17 years of age. The enactments mentioned in Schedule 4 include section 96 of the Mental Health (Scotland) Act, 1960, which relates to sexual intercourse with a female defective, and various offences under social security legislation. Besides these provisions of the Act of 1975 are a number of other statutes which render the accused's spouse a competent, but not a compellable, witness for the prosecution in trials for offences created by these statutes.[6]

6.03 The accused's spouse is made both competent and compellable as a witness for the prosecution on charges within the Evidence Act, 1877,[7] such as non-repair of or nuisance to a public highway or bridge. The effect of this Act is expressly preserved by section 6 of the Act of 1898. Section 6 was repealed and not re-enacted by the Act of 1975, but the Act of 1877 appears to extend to Scotland and to be unrepealed.

6.04 The commentary on the Draft Code made the following observations on the present state of the law:

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[6] A list is given in Clive and Wilson, pp 361-362.
[7] 40 and 41 Vict cap 14.

> "The complexity of the present law can be shown if one figures a case of A and B charged together with (1) stealing Mrs A's ring, (2) assaulting a neighbour's child, and (3) murdering the neighbour. Against A, Mrs A is compellable on charge (1), competent but not compellable on charge (2), and incompetent on charge (3). Against B she is competent on all three charges. The confusion can be imagined if A and B are tried together, as they are almost certain to be."[8]

It also seems an indefensible anomaly that a wife should be competent and compellable when her husband is charged with a comparatively minor assault upon her, yet not compellable when he is charged with incest. The public interest and the best interests of the child against whom the offence of incest was committed would appear to require that any competent witness to the crime to be a compellable witness. It is therefore proposed to examine the rationale of the present law as to the competence and compellability of the accused's spouse as a witness for the prosecution, and to consider various possible reforms.

6.05 (a) Competence. The general rule that one spouse is not a competent witness against the other appears to be founded on respect for the matrimonial relationship, and the risk of perjury of the spouse were admitted. Stair explains that spouses (and children)

> "are commonly inhabile witnesses. And though parties would consent, yet these are not obliged to depone against one another, lest thereby disgust and prejudice should arise betwixt so near relations, or they be in too great tentation of perjury; and therefore they are exeemed from being witnesses or judges one against another, even in capital matters."[9]

Erskine writes:

> "Wives and children cannot be compelled to give testimony/

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[8] Draft Code, commentary to arts 6.4 and 6.5.
[9] Stair, IV, 43.7(4).

testimony against their husbands and parents ob reverentiam personarum, et metum perjurii."[10]

Hume's reason for the exclusion of a wife is that

> "if she be willing to appear on such an occasion, it can only be from one of two motives; out of affection to the man, and to save him by her purjury, or to convict him, for the gratification of deadly malice."[11]

Alison writes:

> "... so strong and irrestible are the reasons, founded on domestic peace and tranquillity, which have led to this rule, that it must obviously obtain in the law of all civilised states."[12]

It appears that the exception in the common law rule, whereby the spouse is competent and compellable when she is the alleged victim of the crime charged against the accused, is founded on the consideration that in such a case her evidence may be necessary.[13]

6.06 The question whether these considerations remain valid today, like the question of the compellability of the accused, is not simply a technical question for a lawyer, but a matter for public discussion. The lawyer may point out that the spouse is admitted in cases of injury to her person or property, where malice on her part is not unlikely; that the general rule has been eroded by a number of statutory exceptions which cannot be justified by references to these traditional principles; and that the present law appears to be an unconsidered product of history, rather than the reflection of any decision as to what the policy of the law should be. One would expect any such decision to be based on concern not only/

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[10] Erskine, Institute, IV 2.24.
[11] Hume, ii, 349.
[12] Alison, ii, 461.
[13] Hume, ii, 349; Dickson, para 1572.

only for the married couple but for the family unit as a whole; yet there is no rule of exclusion as between brothers[14] or sisters[15] or between parent and child:[16]

> "the situation of the wife is peculiar in the law, and different from that of any other near relation of the pannel."[17]

Whatever assessment might have been made in the past of the competing interests of society in the conviction of the guilty, in the protection of the matrimonial relationship, and in the avoidance of perjury, it may be that in modern Scotland the interest in conviction of the guilty would be regarded as heavily outweighing the interests in the avoidance of perjury and in the preservation of the very small number of marriages that removal of this ground of incompetence might affect. It may be supposed that in general, if the spouse is willing to give evidence for the Crown, marital harmony is beyond saving. Clive and Wilson observe:

> "The underlying reason for excluding a spouse as a witness for the prosecution is presumably a recognition that to some extent the interests of the family come before the interests of the State. It is deemed to be better that some guilty men should go unpunished than that their wives should be compelled to testify against them. The present law, however, goes too far in protecting the conjugal relationship. The general rule makes no allowance for cases in which the spouses are embittered or separated. There is no need to protect a marriage which is dead, or a spouse who does not want protection. The exceptions, too, are curiously limited. Why does the State need the evidence of willing spouses in social security cases but not in inland revenue cases? Why not make a spouse always competent but not, in general, compellable for the prosecution?"[18]

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[14] HMA v Parker, 1944 JC 49; 1975 Act, sec 139.
[15] Hume. ii, 346; 1975 Act, sec 139.
[16] 1975 Act, sec 139; McGregor v T, 1975 SLT 76.
[17] Hume, ii, 349.
[18] Clive and Wilson, p 363.

6.07 The Criminal Law Revision Committee recommended that the spouse should be made competent as a witness for the prosecution in all cases unless she is herself a co-accused.[19] The Thomson Committee agreed with the Criminal Law Revision Committee that the question of how far a spouse should be a competent and compellable witness for the prosecution was

> "essentially a question of balancing the desirability that all available evidence which might conduce to the right verdict should be before the court against (i) the objection on social grounds to disturbing marital harmony more than is absolutely necessary and (ii) what many regard as the harshness of compelling a wife to give evidence against her husband."

They came to the conclusion, as regards competency, that taking account of the foregoing considerations and the weight of the evidence of their witnesses, the balance was in favour of the spouse now becoming a competent witness in all cases. They saw no good reason for continuing to distinguish between those offences where the spouse is at present a competent witness, and others. Further, they agreed with the Criminal Law Revision Committee that where a spouse is willing to give evidence, the law would be showing excessive concern for the preservation of marital harmony if it were to say that he or she must not do so. They therefore recommended that a spouse should be a competent witness for the Crown in all cases.[20] It is submitted that this recommendation should be adopted.

6.08 (b) Compellability. As to compellability, there is a striking difference between the common laws of Scotland and England. Where the spouse is the alleged victim of the crime charged against the accused, she/

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[19] CLRC, para 148. The recommendation was supported by the Bar Council (BC, para 85).

[20] Thomson, para 43.20.

she is in Scotland both competent and compellable as a witness for the Crown, but in England, although she is a competent witness, she is not compellable. The English law was recently declared by the House of Lords in Hoskyn v Metropolitan Police Commissioner[21] (Lord Wilberforce, Viscount Dilhorne, Lord Salmon and Lord Keith of Kinkel, Lord Edmund-Davies dissenting), which overruled R v Lapworth.[22] In Scotland, although reported decisions are few,[23] the law is well settled and may be traced back with certainty to H M Advocate v Commelin.[24] It is nevertheless desirable to consider the foundations in principle or policy of the decision in Hoskyn. These appear to be: the protection of the matrimonial relationship by the common law; the repugnance to compulsion of the spouse which would be felt by ordinary people; and the risk of perjury by the spouse. Lord Salmon referred to

> "the especial importance which the common law attaches to the status of marriage. Clearly, it was for the wife's own protection that the common law made an exception to its general rule by making the wife a competent witness in respect of any charge against her husband for a crime of violence against her. But if she does not want to avail herself of this protection, there is, in my view, no ground for holding that the common law forces it upon her.
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> "In many such cases, the wife is not a reluctant or unwilling witness; she may indeed sometimes be an enthusiastic witness against her husband. On the other hand, there must also be many cases when a wife who loved her husband completely forgave him, had no fear of further violence, and wished the marriage to continue and the pending

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[21] [1978] 2 WLR 695.
[22] [1931] 1 KB 117.
[23] In Foster v HMA, 1932 JC 75, frequently cited as an authority on this branch of the law, the question of compellability did not arise.
[24] (1836) 1 Swin 291.

prosecution to fail. It seems to me altogether inconsistent with the common law's attitude towards marriage that it should compel such a wife to give evidence against her husband and thereby probably destroy the marriage."[25]

A different view was expressed by Geoffrey Lane L J in the Court of Appeal (Criminal Division) and by Lord Edmund Davies in his dissenting speech in the House of Lords. Geoffrey Lane L J said:

"It must be borne in mind that the court of trial in circumstances such as this where personal violence is concerned (and this case is a good example where wounding with a knife is concerned) is not dealing merely with a domestic dispute between husband and wife, but it is investigating a crime. It is in the interests of the state and members of the public that where that is the case evidence of that crime should be freely available to the court which is trying the crime. It may very well be that the wife or the husband, as the case may be, is the only person who can give evidence of that offence. In those circumstances it seems to us that there is no reason in this case for saying that we should in any way depart from the ruling ... in Rex v Lapworth, [1931] 1 KB 117..."[26]

Lord Edmund-Davies said:

"... the criminal law serves a dual purpose: to render aid to citizens who themselves seek its protection, and itself to take active steps to protect those other citizens who, though grievously in need of protection, for one reason or another do not themselves set the law in motion. And it does not follow that their failure should mean that, proceedings having nevertheless been instituted, the injured spouse should be less compellable as a Crown witness than one unrelated by marriage to the alleged assailant. I readily confess to a complete absence of any feeling of 'repugnance' that, in the circumstances of the instant case, Mrs Hoskyn was compelled to testify against the man who had three days earlier become her husband. And, agreeing as I do with the attitude of Geoffrey Lane L J, I am regretfully unable to accept the view expressed by my noble and learned friend, Lord Salmon, that '... if she does not want to avail herself of [the law's] protection, there is, in my view, no ground for holding that the common law forces it upon her'."[27]

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[25] [1978] 2 WLR 695, at p 709.
[26] cit [1978] 2 WLR 695, at p 713.
[27] [1978] 2 WLR 695, at p 714.

6.09 It is thought that these passages from the judgments of Lord Edmund-Davies and Geoffrey Lane L J are consistent with the policy of the present law of Scotland, and with the modern social policy objective of strengthening the protection which the law affords against a spouse's violence. Parliament, and the Law Commissions, have in recent years come to recognise that domestic violence is a matter in which the state should properly be concerned.[28] To allow a spouse, and in particular a "battered wife" to choose whether or not to give evidence would be likely to increase the violent spouse's opportunities to inflict injuries for which he could not be brought to justice.

6.10 But is the present law of Scotland as to compellability satisfactory? There are various possible answers to this question, including the following. (1) The law should not be changed. (2) The spouse should not be compellable in any circumstances. (3) In each case the judge should decide whether the spouse is to be compellable or not. (4) The spouse should be compellable in all cases in which she is competent. (5) The spouse should be compellable only where the offence is serious, or cannot be proved without the spouse's evidence. (6) The present areas of compellability should be extended with a view to the protection of the interests of children.

6.11 (1) The first solution commended itself to the Thomson Committee. They shared the view of the majority of their witnesses that/

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[28] Domestic Violence and Matrimonial Proceedings Act, 1976 (cap 50); Report on Matrimonial Proceedings in Magistrates' Courts (Law Com no 77 (1976) Part III; Domestic Proceedings and Magistrates' Courts Act 1978 (cap 22) Family Law - Occupancy Rights in the Matrimonial Home and Domestic Violence (Scot Law Com memo no 41).

that the spouse should not be made a compellable witness in all cases. They thought that social considerations should remain paramount, and that the present law had struck the right balance in confining compellability to the circumstances mentioned in para 6.01 above.[29] Against that view it may be argued that the present law is complex and can lead to anomalous results (see para 6.04 above). It may be added that the non-compellability of a spouse who is a competent witness for the prosecution by virtue of the statutory provisions discussed in para 6.02 above rests in Scotland on an inappropriate foundation. Her non-compellability in such a case appears[30] to depend on the acceptance into the law of Scotland of R v Leach,[31] where the House of Lords held that a spouse was not compellable under the Act of 1898. But in Hoskyn[32] the ratio decidendi of Leach[31] was said to be based largely upon their Lordships' opinion as to the effect of the common law of England; and that law, as explained at para 6.08 above, is essentially different in this respect from the common law of Scotland.

6.12 (2) Considerations favouring the view that the spouse should not be compellable in any circumstances were stated in Hoskyn (see para 6.08 above); and in the Eleventh Report of the Criminal Law Revision Committee the case in favour of restriction of the areas of compellability was stated thus:

> "... if the wife is not willing to give the evidence, the State should not expose her to the pitiful clash between the duty to aid the prosecution by giving evidence, however unwillingly,

and/

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[29] Thomson, para 43.21.
[30] Walkers, para 353, n 60.
[31] [1912] AC 305.
[32]]1978] 2 WCR 695, Lord Salmon at p 711.

> and the natural duty to protect her husband whatever the circumstances. It has been argued strongly in support of this view that the law ought to recognise that, as between spouses, conviction and punishment may have consequences of the most serious economic and social kind for their future and that neither of them should in any circumstances be compelled, against his or her will, to contribute to bringing this about. It is also pointed out that there is at least a considerable likelihood that the result of more compellability will be either perjury or contempt by silence."[33]

These arguments are no doubt particularly applicable to the matrimonial relationship, but they apply also to the relationship between parent and child and to other close relationships. Clive and Wilson, however, propose that the spouse should always be competent but not, in general, compellable for the prosecution. They point out that the Draft Code objected to that solution upon the view that the matter should be settled by a rule of law, and not by the exercise of a discretion by the witness, these being

> "the grounds advanced in the old case of David Cunningham, June 23, 1806, Hume, ii, p 346, n 3. That case was, however concerned with a ten year old child called as a witness against his (sic) father. It is surely less objectionable to require a spouse of mature years to make a deliberate decision (doubtless often difficult and embarrassing) whether or not to testify than it is to require a vulnerable and immature child to make such a decision."[34]

6.13 (3) A third solution is to grant a discretion not to the witness but to the judge: to give the judge the right, after weighing the competing interests of family harmony and society's protection in the particular case, to exempt the spouse from any of the legal consequences of not testifying.[35] It is thought that each of these second and third solutions/

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[33]CLRC, para 147.

[34]Clive and Wilson, p 363.

[35]Law Reform Commission of Canada, Evidence Project, Study Paper no 1, "Competence and Compellability", p 7, Report on Evidence (Evidence Code, sec 57), p 89.

solutions would be likely to create a degree of uncertainty in the administration of justice which outweighs any benefit which might accrue to individual witnesses.

6.14 (4) There are various arguments in favour of the extension of the areas of compellability which lead to the conclusion that spouses should be compellable for the prosecution in all cases. The first is the straightforward one that, if it is left to the wife to choose whether or not to give evidence against her husband, the result may be that a dangerous criminal will go free.[36] Another is that while the cases where a spouse is both competent and compellable are of a kind that show that the marriage is not working well and is deemed therefore not worth preserving, it is very difficult to draw a distinction between those cases and many others of the same kind. Again, to make the spouse compellable saves him or her from making the difficult decision whether to testify or not, and prevents the accused from entertaining animosity towards the spouse on the ground that the spouse is testifying as the result of a voluntary decision.

6.15 A modification of the fourth solution was proposed by the Draft Code. It was suggested that the spouse should be in all cases a compellable witness, but that the accused should be in general allowed to object to the witness answering questions the answers to which might inculpate the accused: such objection would be competent unless the accused was charged with (a) a crime injurious to the property or person of the spouse, (b) bigamy, (c) incest or any offence involving moral or bodily injury to a person under seventeen years of age or (d) an/

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[36]CLRC, para 152.

an offence under an enactment providing that the spouse was a competent witness or that an offence was one to which the proposed article applied. It was conceived that the merits of the suggestion were (i) that the law would continue to recognise the special marital relationship, and (ii) that the privilege against answering such questions would be conferred upon the accused, who had an interest to enforce it, and not upon the witness who, if called upon to exercise an option, could be unfairly placed in an embarrassing position.[37] Under rule 501 of the Federal Rules the accused has in general a privilege to prevent his spouse from testifying against him. It may be, however, that the accused should not be permitted to object to any relevant question put to his spouse.

6.16 (5) A fifth view is that the present areas of compellability should be extended, but no so far as to make the spouse compellable in all cases. This view gives rise to the difficulty of determining the basis on which the areas of compellability should be selected. One possible, although novel, basis is the seriousness of the offence: resulting in a rule that the spouse should be compellable in very serious cases such as murder or spying, or perhaps in all serious cases of violence.[38] Another possible basis is the difficulty of proving the offence without the spouse's evidence. This would seem to be part of the rationale of the present law relating to the spouse's competence and compellability as a prosecution witness. But if difficulty of proof is to be the basis, it becomes arguable that in any particular case in which it would be difficult to prove an/

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[37] Draft Code, arts 6.4, 6.5 and commentary.
[38] CLRC, para 152.

an offence without the evidence of the spouse, the spouse should be compellable.

6.17 It seems difficult to do more than attempt a compromise of the competing considerations of the integrity of the matrimonial relationship, the desirability of convicting those who have committed crimes, and the best interests of any children involved. If that is so, then a minimal extension of the present areas of compellability, mainly with a view to the protection of the interests of children, may be acceptable. It may be that compellability should be extended from cases of injury to the person or property of the spouse to sexual offences against, and any offence consisting of an assault on or a threat of violence to, children belonging to the same household as the accused, in view of the seriousness of such cases and the difficulties of proof. That is the solution which commended itself to the Criminal Law Revision Committee,[39] but not to the Thomson Committee.[40] It may be that compellability should also be extended to all cases of incest with children, on the ground that in such cases the same considerations of seriousness and difficulty of proof arise.

(2) As witness for accused[41]

6.18 (a) Compellability. Sections 141 and 346 of the 1975 Act (formerly section 1 of the 1898 Act) provide:

> "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:
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> Provided/

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[39] CLRC, paras 149-152.
[40] Thomson, paras 43.18-43.21.
[41] Walkers, para 352; R & B, paras 18-19, 18-20.

Provided that -

(c) the spouse of the accused shall not, save as mentioned in section 143 [in section 346, section 348 (see para 6.02 above)] of this Act, be called as a witness in pursuance of this section except upon the application of the accused."

Thus, the spouse is a competent witness for the defence at every stage of the case, whether the accused is on trial alone or along with a co-accused, but cannot, save as mentioned in sections 143 and 348, be called except upon the application of the accused. It has been suggested that it should be provided that the spouse shall also be a compellable witness for the accused in all cases unless she is jointly charged and tried with him.[42] According to Sir Rupert Cross,[43] the only valid criticism of this proposal is "that it could lead to a spouse being confronted with the disagreeable choice between committing perjury and incriminating the accused; but this is more than outweighed by the sense of grievance which an accused must occasionally experience on account of his inability to compel his spouse to give evidence under the present law." There is no reported decision on the spouse's compellability for the defence, no doubt because reluctant spouses are seldom called as defence witnesses.

6.19 (b) Effect of evidence. The present law is that the evidence of a spouse called by one accused is not evidence for or against another.[44] This is not the situation in practice. The Draft Code proposed that the evidence of a witness called on behalf of one accused should be competent/

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[42] CLRC, para 153, pp 180, 222.
[43] Cross, p 162.
[44] Alison, ii, 621-622; Young v H M Advocate, 1932 J C 63, p 74.

competent evidence for or against another accused.[45] The proposal appears to be generally acceptable.

(3) As witness for co-accused

6.20 The present law appears to be that generally one co-accused may not call the spouse of another accused as a witness, since sections 141(c) and 346(c) of the 1975 Act (formerly section 1(c) of the 1898 Act) provide that that spouse shall not be called except upon the application of that other accused, and it does not seem possible in Scottish criminal procedure for one accused to "apply" for his spouse to be called as a witness for another accused. In English procedure, to which the sections' phraseology is applicable, the accused's spouse is a competent witness for a co-accused with the accused's consent in every criminal case.[46]

6.21 There appears to be an exception to the general rule that the spouse of a co-accused may not be called as a witness: it seems that an accused's spouse may be called as a defence witness by a co-accused without the accused's consent in the exceptional statutory cases in which the spouse is a competent witness for the prosecution. The point is fully argued in the undernoted article.[47] The situation arises because of the phraseology of section 4(1) of the Act of 1898 (now sections 143(1) and 348(1) of the 1975 Act). The Sheriffs Walker find the provision difficult to understand, and suggest that for practical purposes it may be ignored.[48] The matter obviously requires attention.

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[45] Draft Code, art 6.3(d). See para 5.29 above and 6.24 below.
[46] Cross, p 157.
[47] Gordon, "The Evidence of Spouses in Criminal Trials", 1956 SLT (News) 145, at p 146. See also Cross p 157.
[48] Walkers, para 352.

6.22 (a) Competence. It seems clear that the present law should be amended at least to the extent of making it clear that the spouse is a competent witness for the co-accused if the accused is willing. Should reform go further? It has been recommended that the wife of accused A should be competent to give evidence on behalf of his co-accused B whether or not A is willing, upon the view that A should not have any right to prevent her from giving evidence on behalf of B if she is willing to do so.[49] As to this proposal, Cross comments:

> "It might be said that an accused who feared that his spouse might incriminate him while exculpating his co-accused should have the power to restrain him or her from giving evidence for the co-accused, but the right balance between this point and fairness to the co-accused seems to be struck by leaving the decision whether to testify to the accused's spouse."[50]

She appears to be already competent for a co-accused without the accused's consent in the cases mentioned in the preceding paragraph.

6.23 (b) Compellability. The next question is the extent to which the spouse of accused A should be compellable as a witness for his co-accused B. The Criminal Law Revision Committee considered the matter in this way:

> "In favour of making her so it is argued that the interests of justice require that B should be able to compel anybody not being tried with him to give evidence on his behalf and that the fact that the witness happens to be A's wife should make no difference, even though the result might be her incriminating A. Against this it is argued that, since the prosecution cannot call Mrs A as a witness in order that she may incriminate A, it is wrong that they should be able to

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[49] CLRC, para 155.
[50] Cross, p 162.

compel her to incriminate him by cross-examination if she is called by B. We think that the argument against compellability is the stronger. We considered a possible compromise by which Mrs A should be compellable on behalf of B only if A consented. Then A could give his consent if Mrs A could help B's defence without incriminating A. But on the whole we are opposed to this, because it might be procedurally awkward, and embarrassing for A's defence, if it were necessary to ask him in court whether he consented to his wife's giving evidence, especially if he agreed at first that she should do so but changed his mind before the time came to call her because of evidence given meanwhile. But we propose that Mrs A should be compellable on behalf of B in any case where she would be compellable on behalf of the prosecution even though the result might be that she would incriminate A. Here the argument mentioned above against making her compellable for B in general does not apply; and although the general arguments for compellability on behalf of the prosecution (in particular the possibility of intimidation by the witness's husband) do not apply either, it seems wrong to deny to the co-accused a right which is given to the prosecution."[51]

6.24 (c) Effect of evidence. It is suggested that the proposed general rule[52] that the evidence of a witness called on behalf of one accused should be competent evidence for or against another accused, should apply. It is said that the position of the evidence of the spouse of one accused as evidence against a co-accused is probably the same as that of any other witness.[53]

(4) Comment on failure to testify

6.25 Sections 141(b) and 346(b) of the 1975 Act (formerly section 1(b) of the 1898 Act) provide that the failure of the accused's spouse to give evidence shall not be commented upon by the prosecution. It is an open question whether any comment may be made by or on behalf of a co-accused. It is suggested that both the prosecutor and the co-accused's/

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[51] CLRC, para 155, pp 180-181, 222-223.
[52] Paras 5.29, 6.19 above.
[53] R & B, para 18-20.

co-accused's advocate should be entitled to comment.[54] The Criminal Law Revision Committee recommends that the prosecutor should be entitled to do so.[55] If a similar recommendation were to be adopted in Scotland, it would seem wrong to deny to the co-accused a right given to the prosecution.

(5) Confidential communications[56]

6.26 The Criminal Evidence Act, 1898, enacted by section 1(d):

> "Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage."

The 1975 Act now enacts, by sections 141(d) and 346(d):

> "nothing in this section or in section [143, 348] of this Act shall compel a spouse to disclose any communication made to him or her by the other spouse during the marriage."

As various commentators have pointed out, there is one marked contrast between the provisions of section 1(d) of the 1898 Act and those of section 3 of the Evidence (Scotland) Act, 1853 (set out at para 4.01 above). The Act of 1853, while making the party's spouse a competent witness, provides that nothing in that Act shall render the spouse "competent or compellable" to give against the other spouse evidence of any matter communicated to the witness by that spouse during the marriage. In the Act of 1898, the words "competent or" do not appear. The objection is therefore open only to the witness. It may be doubted, however, whether this should be so, since the person in need of protection is the accused, and not/

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[54] Cf paras 5.21-5.27, 5.34 above.

[55] CLRC, para 154, pp 181, 223.

[56] Walkers, para 355(c). On confidential communications in civil cases, see paras 4.06-4.11, ante.

not the witness.[57] The evidence of third parties as to such communications is competent.[58]

6.27 Clive and Wilson make the following comments:

> "The rule on communications between spouses is anomalous. It has three possible justifications. One is that a man ought to be able to confide in his wife in the knowledge that his confession will never be used against him.[59] If this argument is accepted, the privilege should belong to the accused and not, as at present, to the witness,[60] and it should survive divorce. It is doubtful, however, whether the argument is sound. Perhaps men will confide, or not confide, in their wives whatever the law. How many know the present position? The second argument is that it is repulsive to use evidence of communications between husband and wife.[61] If this argument is accepted, evidence of interspousal communications should be incompetent, whether it emanates from an unwilling spouse, a willing spouse or a third party. However, many would argue that such evidence was in a quite different category from, say, evidence extracted by torture and was no more objectionable than evidence of communications to a doctor, a priest or a close friend. The third argument is that it is repulsive to force a person to reveal marital communications and divulge marital confidences, even if he or she is a competent and willing witness in general. This is probably the most satisfactory of the three unsatisfactory reasons for the privilege. But it is anomalous that a spouse should have this privilege when a similar privilege is not accorded to other recipients of confidential or intimate communications."[62]

6.28 Various possible modes of reform are suggested. One is to preserve the privilege, extend it to communications made by the witness to the accused, and attach it to the spouses jointly, so that neither a spouse nor a third party should be compelled to disclose such communications against the will of the spouse having the interest to object: it would/

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[57] R & B, para 18-22.

[58] Cf Rumping v DPP, [1964] AC 814; and see post, para 21.15.

[59] Dickson, para 1660.

[60] See Gordon, 1956 SLT (News) 145, at p 147, for criticism of HM Advocate v HD, 1953 JC 65, which illustrates the proposition that refusal to disclose such communications is a privilege of the witness and not a right of the accused. But Cross (p 259) considers that it can hardly be doubted that the case would have been decided in the same way in the English courts.

[61] Cf Rumping v DPP, [1964] AC 814, at p 846.

[62] Clive and Wilson, pp 363-364.

would not apply where both spouses waived the objection. An alternative course would be to abolish the privilege altogether. It has been proposed at para 4.06 above that the corresponding privilege in civil causes should be abolished; and if that were done, it would be undesirable that witnesses in criminal cases should enjoy a privilege which was not available in civil cases.[63]

(6) Privilege concerning marital intercourse

6.29 For the reasons already given in relation to civil causes,[64] it is submitted that this privilege should be abolished.

(7) After dissolution of marriage or separation

6.30 Reference is made to the discussion earlier in this Volume, at para 4.10, of a similar problem in the context of civil proceedings. Whether, for the purpose of the rules as to competence and compellability, and as to confidential communications, the divorced spouse of an accused is in the same position as a spouse, seems never to have been decided in Scotland.[65] The Criminal Law Revision Committee proposed that, if the spouses were no longer married, they should be compellable as if they had never been married.[66] The divorced spouse of the accused would then be competent and compellable on all matters for all parties. In Scotland, a provision on similar lines could perhaps be enacted in respect of not only divorced spouses but also separated spouses.

2. Accomplices[67]

6.31 The present law is that the evidence of an accomplice is received with/

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[63] CLRC recommended abolition: para 173.
[64] See paras 4.12-4.15, ante.
[65] See Clive and Wilson, pp 362-363. For the law of England see R v Algar, [1954] 1 QB 279, and Cross, pp 158-160, 259.
[66] CLRC, paras 156-157, pp 180, 223.
[67] Walkers, para 363; R & B, para 18-58.

with suspicion, and a jury must be specifically directed to apply to it "a special scrutiny, over and above the general examination which a jury has to apply to all the material evidence in every case."[68] The reason given for the rule is that

> "Whether [socii] have already pled guilty or been convicted, or whether they have turned King's evidence, there is always a temptation to minimise their part in the crime and blacken the accused."[69]

Three questions arise in relation to this rule: (1) whether it should be the law that a direction is invariably required; (2) who is to be regarded as an accomplice for the purposes of the rule; and (3) whether any direction should be given as regards the evidence of an accomplice who is a witness for the defence.

6.32 (1) Necessity for direction. It is arguable that there is no need for an invariable warning about the evidence of accomplices, and that it should be a matter for the judge's discretion whether to give the jury a warning. The Criminal Law Revision Committee, when discussing the English rule that the jury must be warned that though they may convict on the evidence of an accomplice it is dangerous to do so unless it is corroborated, observed:

> "The reason for the rule is supposed to be the danger that the accomplice may be giving false evidence against the accused in order to minimise his own part in the offence or out of spite against the accused. But although it is clearly right that the attention of the jury should be drawn to these possibilities, if they exist, there are many cases where there is no such possibility. For example, it may be obvious that the accomplice has no ill-feeling against the accused, and he may be repentant and clearly trying to tell the truth about his own part. There may also be

many/

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[68] Wallace v HMA, 1952 JC 78, L J-G Cooper at p 82.

[69] Dow v MacKnight, 1949 JC 38, Lord Jamieson at p 55.

many other cases where, in the circumstances, there can be no doubt but that the accomplice's evidence may be wholly reliable, yet the judge must still warn the jury that it is dangerous to rely on it.

"184. In truth the idea that there is something about the evidence of accomplices so special as invariably to require a direction that it is dangerous to rely on the evidence is in our view very much in need of reconsideration."[70]

Lord Cooper seemed to come close to that view when he referred to

"... the old dogma that those with a presumed interest to lie are incapable of speaking the truth. That dogma I reject, in favour of the modern view that the appraisal of the value of evidence is a rational process. The evidence of socii criminis always requires very narrow scrutiny and juries must always be so warned. But the penitent thief is not a figment of the imagination, and the socius criminis is by no means the only type of witness likely to concoct false evidence."[71]

The Committee recommended that it should be for the judge to consider whether the circumstances are such that a warning should be given.[72]

The Bar Council, on the other hand, favoured the retention of the rule, saying:

"In theory, the abolition of the special rule in regard to such witnesses has some attraction but, in practice, we find it difficult to imagine a case where a jury ought not to be warned about accomplice evidence. We are concerned lest, if the rule be abolished, judges will vary widely in deciding whether a warning should be given. In those circumstances we think it would serve no useful practical purpose to abolish the rule - and might do positive harm."[73]

6.33 (2) Who is an accomplice? The term "accomplice" does not appear to have been authoritatively defined in the Scottish courts. It is now clear that a co-accused is not to be regarded as an accomplice;[74] but it is not settled whether the term applies to a person/

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[70] CLRC, paras 183-184. See also Williams, Proof of Guilt, pp 143-151; J D Heydon, "The Corroboration of Accomplices", [1973] Crim L R 264.

[71] Dow n 69 supra, at p 57.

[72] CLRC, para 185.

[73] BC, para 165.

[74] See para 5.29, n 89, above.

person, other than an accused, who has neither admitted nor been convicted of the charge, but to whom the evidence points as an associate. In Wallace v HM Advocate[75] Lord Keith said:

> "I am not satisfied that any witness can be treated as a socius unless he had already been convicted of the crime which is charged against an accused [or is charged along with an accused] or gives evidence in the witness-box confessedly as an accomplice in the crime charged. In all these [three] cases I think a witness is a socius. In the case of any other witness I should, as at present advised, hesitate to say that the court has any duty or right to arrogate to itself the task of saying that such a witness, who after all is not on trial, is a socius in the offence with which an accused is charged."

It may be argued, on the other hand, that where the evidence points to the witness as an associate, it seems only fair to the accused that the jury should be given a specific and particular warning that the witness's evidence is suspect evidence deserving of close scrutiny, notwithstanding that the witness has neither admitted nor been convicted of the charge.

6.34 (3) Cum nota warning in respect of defence witness? The second matter is that the rule requiring the jury to be directed to apply a special scrutiny to the evidence of an accomplice, has been laid down only quoad witnesses for the prosecution, where "crucial evidence for a conviction is the evidence of a person who is in a reasonable sense an accomplice or associate in the crime"[76] with which the accused is charged. The question has not been raised whether it is proper to give a similar direction as regards a defence witness. It may be that a failure to give such a direction could result in injustice. It is possible/

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[75] 1952 JC 78, at p 83. The words in the supplied square brackets were disapproved in Slowey v HMA, 1965 SLT 309, and do not represent the present law. Otherwise, however, Lord Keith's dictum has been said to have much force: see Murdoch v HMA, 1955 SLT (Notes) 57.

[76] Wallace n 75 supra, L J-G Cooper at pp 81-82.

possible to conceive of a situation in which a witness called for the defence has been characterised as an accomplice in the evidence for the Crown, or is shown to be an accomplice in the Crown's cross-examination of him or of other defence witnesses. It may be thought to be unfair to the accused that the presiding judge should seem to denigrate evidence called on his behalf; but fairness is not a unilateral consideration, and it is necessary to have regard to the public interest is the ascertainment of the truth and the conviction of those who are in fact guilty.[77]

3. Public prosecutors[78] and defence advocates

6.35 The present law excludes the legal representative on one side of the bar but not on the other; yet the justification for the rule applies to both. The present law has been stated thus:[79]

> "A public prosecutor conducting a case may not be examined as a witness, and the fact that he has been is a good ground for quashing the conviction.[80] If he is not actually conducting the case he is a competent witness.[81] A defence solicitor or counsel is, on the other hand, a competent witness for his client."[82]

In Ferguson[80] Lord Deas justified the exclusion of the prosecutor in the following way:

> "If the public prosecutor were not to be understood to be excepted in the Act [section 3 of the Evidence (Scotland) Act, 1853], the result would be that you might have, either on the one side or the other, the officer of the law who, in the

discharge/

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[77] Cf Miln v Cullen, 1967 JC 21, at pp 26, 29-30.

[78] Walkers, para 364. On the competence of advocates as witnesses in civil cases see paras 4.19-4.20 above.

[79] R & B, para 18-69.

[80] Ferguson v Webster, (1869) 1 Coup 370; Graham v M'Lellan, (1910) 6 Adam 315, 1911 SC (J) 16.

[81] Mackintosh v Wooster, 1919 JC 15.

[82] Campbell v Cochrane, 1928 JC 25.

> discharge of his duty, had precognosced all the witnesses, or read all the precognitions, adduced as a witness, while it would be impossible for him to divest himself of, or distinguish between, the knowledge he had obtained in his official capacity and what he had obtained otherwise, - which last might be of little or no importance to the result of the case."

It may be observed that similar considerations apply to defence advocates; that the terms of section 1 of the Evidence (Scotland) Act, 1852 were apparently not before the court in Ferguson; that the effect of the statutes of 1852 and 1853 is that no witness is to be disqualified by reason of agency or partial counsel; and that these statutes apply to criminal as well as to civil proceedings.[83]

6.36 There are at least two possible views as to how the law should now be stated. One is that the person conducting the prosecution and the defence advocate should both be competent witnesses, and the weight of their evidence should be determined like that of any other witness. It may be that they could sometimes give valuable evidence, particularly on a matter which has arisen unexpectedly in the course of the trial. Another view is that both should be incompetent. A variation of the second view is that the prosecutor should be incompetent as well as the person conducting the case on his behalf.

6.37 It may be noted here that sections 138(4) and 341(4) of the 1975 Act, which replace section 1 of the 1852 Act so far as it relates to criminal proceedings, provide:

> "Where any person who is or has been an agent of the accused shall be adduced and examined as a witness for the accused, it shall not be competent to the accused to object, on the ground of confidentiality, to any question proposed to be put to such a witness on matter pertinent to the issue of the guilt of the accused."

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[83] See Mackintosh, n 81 supra, L J-C Scott Dickson at pp 18-19; Campbell, n 82 supra, L J-G Clyde at p 28.

6.38 A question has already been raised as to the possibility of extension of the limited right of audience of representatives of corporate or unincorporated bodies who are not legally qualified.[84]

4. Person not named in list

6.39 The question whether there should be a rule in both solemn and summary procedure that only witnesses, whose names have been supplied to the other party at least three days before the trial, may be led in evidence, is considered in Chapter 24, paras 24.53 - 24.59.

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[84] See para 4.21, above.

Chapter 7

ORAL EVIDENCE V: PUBLICITY

7.01 The law relating to the presence of the public in the courtroom during the examination of witnesses, and to the publication of evidence, is in some respects unsatisfactory. In this chapter the common law and statutory provisions on the subject are examined, and it is suggested that consideration be given, in particular, to the statutory provisions relating to the publication of evidence in matrimonial proceedings and in proceedings involving children.

1. Common law

7.02 At common law, witnesses are generally examined in open court, but the court has an inherent power to sit in private if justice cannot otherwise be done, or if publicity is not in the public interest.[1] Thus, a Scottish court appears to have a right to close its doors during certain actions for declarator of nullity of marriage and certain actions of divorce, not so much in the interests of public decency, as in the interests of justice, in that publicity would be likely to interfere with the ascertainment of the truth by inhibiting the witness from speaking frankly. The court may also be cleared in the interests of national security; or in the event of a disturbance; or when evidence concerning secret processes is to be given; or where publicity would prejudice other proceedings, as where evidence in a civil case is heard behind closed doors because criminal investigations are proceeding in relation to the same subject-matter.[2] Examinations under section 268 of the Companies Act, 1948, are in practice held behind closed doors.[3]

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[1] Cf Scott v Scott, [1913] AC 417; McPherson v McPherson, [1936] AC 177.

[2] See McGeachy v Standard Life Assurance Co, 1972 SC 145.

[3] Wilton, Company Liquidation, p 122.

7.03 Four matters relating to the common law regarding the examination of witnesses in public seem to be worthy of comment: (1) power to prohibit publication of proceedings; (2) the exclusion of representatives of the Press (including radio and television); (3) the restriction of public access to the courtroom; and (4) the necessity for a rule relating to the unofficial recording of evidence.

(1) Power to Prohibit publication of proceedings

(a) Proceedings in public

7.04 It appears that the Scottish courts have no power at common law to forbid publication of their proceedings. In practice the Press exercise discretion in refraining from publication of such particulars as the names of complainers in cases of blackmail or rape,[4] and complies with judicial requests not to publish particular matters such as the evidence led in a trial within a trial;[5] but the press does not appear to be under any legal obligation to refrain from publication of such matters.[6] There is no recorded case of a Scottish newspaper publising information contrary to a judge's request, but, as the Phillimore Committee has pointed out, the recent publication by a newspaper of the names of two victims of alleged blackmail/

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[4] According to one experienced court reporter, "names and addresses are suppressed in Scotland not out of tenderness to the woman in the witness-box, but to minimise the risk that the courts will be deprived of valuable evidence if the identity of the witness is made public" (George Watt, Glasgow Herald, 6th May 1975). The former English practice, of publishing the identities of alleged victims in rape trials in the English courts, was much criticised. The Sexual Offences (Amendment) Act, 1976 (cap 82), which gives effect, with minor changes, to the recommendations in the Report of the Advisory Group on the Law of Rape (Cmnd 6352; Mrs Justice Heilbron in the Chair) amends the law of England by restricting the publication, after an accusation of rape has been made, of particulars identifying the complainant or defendant except in special circumstances (See secs 4-6).

[5] See Chalmers v HM Advocate, 1954 JC 66, Lord Justice-General Cooper at p 81.

[6] It has been held in England that publishing material which has been deliberately kept from the jury's ears is one of two forms of contempt when a person is being tried on a criminal charge (the other being publishing material relating to other offences): R v Border Television Ltd, The Times, 18th January 1978. See also the Green Paper on contempt of court (Cmnd 7145).

blackmail who had given evidence at the trial of their alleged blackmailer[7] "suggests that the traditional co-operation of the press can no longer always be relied upon". The Committee observed:

> "We incline to the view that the important question of what the press may publish concerning proceedings in open court should no longer be left to judicial requests (which may be disregarded) nor to judicial directions (which, if given, may have doubtful legal authority) but that legislation, anologous to that referred to in paragraph 136,[8] should provide for these specific circumstances in which a court shall be empowered to prohibit, in the public interest, the publication of names or of other matters arising at a trial".[9]

7.05 If legislation on these lines is contemplated, it should be noted that a difficulty may arise in a trial which is one of a series of trials, when things are said which may be prejudicial to any of the accused in subsequent trials. In R v Kray[10] Lawton J said that it would not be in the public interest if newspapers desisted from reporting trials, verdicts and sentences merely because there was some indictment still to be dealt with. But in R v Poulson,[11] the first of a series of trials, Waller J said that he could not see how the press could properly report Poulson's evidence without running the risk of being in contempt of a subsequent trial. He suggested to counsel that if they thought something might be prejudicial they should draw his attention to it and he would decide whether it would be prejudicial to some other person at some other trial. As The Times pointed out, the difficulty about this procedure/

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[7] See R v Socialist Worker, ex parte A-G, [1975] QB 637.

[8] Children and Young Persons Act, 1933; Children and Young Persons (Scotland) Act, 1937, as amended by the Social Work (Scotland) Act, 1968; Administration of Justice Act, 1960, sec 12; Judicial Proceedings (Regulation of Report) Act, 1926; Domestic and Appellate Proceedings (Restriction of Publicity) Act, 1968.

[9] Report of the Committee on Contempt of Court (1974, Cmnd 5794), para 141, n 72.

[10] (1969) 53 Cr App R 412, at p 414.

[11] The Times, 4th January 1974. See also [1974] Crim LR 141.

procedure was that the defendants in the later trials were not represented in the first trial, in which the judge and counsel did not necessarily know what the evidence or the defences in the other cases would be, and thus what aspects of the evidence given in the first trial might be prejudicial. Clearly, restrictions on reporting what occurs in open court should be kept to the minimum. It is thought that if the Poulson procedure is to be operated, a fair and accurate report of the proceedings should not amount to contempt unless a ruling has been given and such a report, published in defiance of the ruling, is likely to cause prejudice in the other proceedings. The Phillimore Committee, however, did not commend the procedure. They recognised the risk of the creation of prejudice against an accused person who is facing further charges which are to be tried later, but considered that the public interest in freedom of press coverage of a public trial justified the reporting of the proceedings. Their view was that the fair and accurate reporting of proceedings in open court should in no circumstances be liable to be treated as a contempt.[12]

(b) Proceedings in private

7.06 There may be a doubt as to what information may be published about proceedings before a court sitting in private. It is also sometimes doubtful to what extent publication is permissible because it is not clear whether the court is sitting in private or not: as where an application for interim interdict is heard in chambers instead of open court, or where the court hears an incidental application in an adoption petition in open court without explicitly directing that it is sitting in camera/

[12] Report of the Committee on Contempt of Court (1974, Cmnd 5794, paras 134-141).

in camera. In England, section 12 of the Administration of Justice Act 1960,[13] was enacted in order to remove a doubt of the former kind. Its effect is that the publication of information relating to proceedings before any court sitting in private is not of itself contempt except in those cases where harm is most likely to result from publication: civil proceedings involving children, proceedings relating to the mentally disordered, national security, and secret processes. The publication of other information, and of an order made by a court sitting in private, is not of itself contempt of court unless the court expressly prohibits publication. It may be thought desirable to enact legislation on similar lines for Scotland.

(2) Exclusion of reporters

7.07 On a few occasions in the past, law reporters (including members of Faculty reporting for the official series of law reports as well as press reporters) have been in some doubt whether the court intended to exclude them when ordering the court to be cleared. It is thought that the inferior courts very seldom,[14] and the Supreme Courts never,[15] intentionally/

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[13] 8 and 9 Eliz II, cap 65, see In re R (MJ) (A Minor) (Publication of Transcript), [1975] Fam 89, In re F (orse A) (A Minor) (Publication of Information) [1977] Fam 58. For comment on the present English law see The Times, 17 December 1976; NV Lowe, "Wardship, Contempt and Freedom of Speech", (1977) 93LQR 180.

[14] Since 1967 sheriffs have in a few cases deliberately excluded press representatives (Glasgow Herald, 20th July 1967, 21st January 1969). In the first case the sheriff discriminated among the reporters, allowing one to remain but excluding the others, and was criticised by the Press Council for doing so (Glasgow Herald, 4th June 1968).

[15] Except in summary trials at the request of one or both of the parties: See Forbes-Sempill, Petitioner, Glasgow Herald, 6th December 1968; E M Clive and G A Watt, Scots Law for Journalists (3rd ed), p55; McGeachy, para 7.02, n2, ante.

intentionally seek to exclude bona fide reporters, and would probably do so only in very rare cases, where, for example, national security was involved. It is normally understood that when an order is made for the court to be cleared they may remain in court provided that they do not publish any particulars which might lead to the identification of the parties or witnesses concerned. Sections 166 and 362 of the 1975 Act (formerly section 45 of the Children and Young Persons (Scotland) Act, 1937) specifically do not authorise their exclusion in the situations to which they refer. The very few misunderstandings which occur from time to time naturally result in unfavourable comment, and it may be useful to fomulate a clear rule that unless the judge expressly directs otherwise, reporters may remain in court notwithstanding that it has been cleared, provided that they do not publish particulars of the kind described. In 1973 the Lord Justice-General, after discussion with the other judges of the High Court of Justiciary, agreed that where, for the protection of a witness in a trial for rape it was considered appropriate to clear the court, this order would not apply to reporters covering the case on the understanding that they respected the judge's intention in excluding the public - namely, to protect the witness, the victim of the alleged rape, by refraining from disclosing her identity.[16] It is thought that where a film is to be shown in the course of a proof or trial, and the judge in the exercise of his discretion decides that it should be shown privately, behind closed doors or otherwise, he should allow Press representatives to be present.[17]

(3) Restriction of public access to courtroom

7.08 In some sheriff courts members of the public are prevented from entering the courtroom while witnesses are giving evidence. The practice is/

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[16] Clive and Watt, n 5 supra, p 57.

[17] Cf R v Waterfield, [1975] 1 WLR 711.

is understandable in view of the intrusion of external noise when the courtroom doors are opened in some of the older courthouses, but nevertheless is thought to be objectionable in principle. It would be useful to ascertain whether or not the practice is sufficiently prevalent to justify formal regulation. It is thought that it is for the court to arrange that that members of the public are able to enter the courtroom, listen to the proceedings, and come and go as freely as possible, having regard to the facilities available, the possibility of disorder, the need for security and the danger and fire risk involved if too many people are permitted inside the courtroom.[18]

> "The trial should be 'public' in the ordinary common sense acceptation of the term. The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, ... with due regard to the size of the courtroom, the convenience of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial.[19]

(4) Unofficial recording of evidence

7.09 There is no statutory prohibition of the unauthorised recording of Scottish court proceedings by artistic or mechanical means, but the rule of practice to that effect appears to be well understood.[20] Photography, and/

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[18] Cf R v Denbigh Justices, ex p Williams, [1974] 3 WLR 45.

[19] People v Hartman, (1894) 37 Pac R 153, Garoutte J at p 154 (Sup Ct of California)

[20] See E M Clive and G A Watt, Scotts Law for Journalists (3rd el) chap 13.

and the making of portraits or sketches with a view to publication, in courts and their precincts is forbidden by statute in England by section 41 of the Criminal Justice Act, 1925.[21] The Phillimore Committee has recommended that for the purposes of section 41 a map or plan should be displayed wherever practicable indicating the boundaries of the precincts of the court. As to tape-recorders, the Committee has recommended that regulations should be made governing the unofficial use of tape-recorders in court, and of recordings obtained thereby; and that breach of the regulations in court should be punishable as a contempt.[22]

2. Statutory provisions[23]

(1) Judicial Proceedings (Regulation of Reports) Act, 1926[24]

7.10 This statute, which followed the Report of the Gorrell Commission in 1912[25] and the widespread publicity afforded to the evidence in Russell v Russell,[26] prohibits the publication of indecent matter in relation to any judicial proceedings and, in relation to specified matrimonial causes, any matter whatever other than a number of specified particulars. Section 1(1), as it applies to Scotland, provides:

> "It shall not be lawful to print or publish, or cause or procure to be printed or published:
>
> (a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matters or details the publication of which would be calculated to injure public morals;
>
> (b)/

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[21] 15 and 16 Geo V, cap 86: held to forbid the recording for television of the proceedings in Re St Andrew's, Heddington, [1978] Fam 121.

[22] Report of the Committee on Contempt of Court (1974, Cmnd 5794), paras 41-43, recs 31, 32.

[23] See E M Clive and G A Watt, Scots Law for Journalists (3rd ed), Chap 10; Clive and Wilson, pp 647-649.

[24] 16 and 17 Geo V, cap 61. And see Domestic and Appellate Proceedings (Restriction of Publicity) Act, 1968, cap 63.

[25] Clive and Wilson, p15.

[26] [1924] AC 687.

(b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or an action of adherence and aliment any particulars other than the following, that is to say:

(i) the names, addresses and occupations of the parties and witnesses;

(ii) a concise statement of the charges, defences, and countercharges in support of which evidence has been given;

(iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;

(iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment:

provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (a) of this subsection".

7.11 Section 1(1)(b) of the Act raises a number of problems. In relation to any proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or an action of adherence or of adherence and aliment, it forbids the publication of any particulars other than: (i) the names, addresses and occupations of the parties and witnesses; (ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given; (iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon; and (iv) the summing-up of the judge, and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment. Four comments may be made on these provisions.

7.12 (i) The selection of the types of proceedings to which section 1(1)(b) applies, seems curious. It does not apply to Scottish proceedings for declarator of marriage, bastardy or legitimacy.

7.13 (ii) Strictly read, section 1(1)(b) prohibits publication of the ages of the witnesses, the names of the court, judge and counsel, and the date of the hearing, although these are published in practice.

7.14/

7.14 (iii) Section 1(1)(b)(ii) indicates that a statement of the charges cannot be published until evidence has been given; but in an action of divorce for adultery, when a co-defender is called or a party minuter enters the process, the charge made by the pursuer is clear from a statement of the parties' names which may be - and where public figures are named, usually is - published long before the evidence is heard. Once the evidence has been given, members of the Press vary widely in their view of the extensiveness of the "concise statement" of the charges which they may be permitted to publish.

7.15 (iv) In section 1(1)(b)(iv) the provision for jury trial is unnecessary for Scotland.

7.16 The Act in its present form seems to be of doubtful utility. There does not appear to be any reported case of a prosecution under the Act, or of any judicial consideration of its terms. It would, however, be difficult to assert with confidence that the Act has never been seriously breached; and some effective control of the publication of indecent or highly personal details remains desirable. The comment has been made that "one notices the relish with which the Press publishes full reports of proceedings in court which escape the ban: courtsmartial for misbehaviour with WRNS, claims for breach of promise to marry, or actions for seduction."[27] It may be fairly added that one also notices the desperation with which some newspapers report occurrences in the courtroom which they deem harmless contraventions of the Act: one London journalist, reporting a fairly recent, celebrated Scottish action of divorce told his readers how many times the parties blew their noses.

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[27] Street, Freedom, the Individual and the Law (1st ed, 1963), p 105. The passage does not appear in the current edition.

(2) Proceedings involving children

7.17 The 1975 Act has effected some much-needed[28] consolidation and amendment of the statutory provisions restricting the publicity of proceedings involving children in the criminal courts. Some difficulties, however, remain. There are general questions as to the extent to which publicity should be restricted, the age-limit beyond which the restrictions should not operate, and the penalties to be imposed for contravention of the law. The present law may be considered in relation to (a) summary criminal proceedings in which a child is not being tried jointly with an adult, (b) other criminal proceedings, (c) proceedings under the Social Work (Scotland) Act, 1968, and (d) other civil proceedings.

(a) Summary criminal proceedings where child not charged jointly with adult

7.18 In cases where a child has not been charged jointly with an adult, section 374 of the 1975 Act[29] applies. It provides:

> "(1) Subject as hereinafter provided, no newspaper report of any summary proceedings in the sheriff court in respect of an offence by a child shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of a person under the age of 17 years concerned in those proceedings, either as being the person against or in respect of whom the proceedings are taken or as being a witness therein, nor shall any picture be published in any newspaper as being or including a picture of a person under the age of 17 years so concerned in any such proceedings as aforesaid:
>
> "Provided that the court or the Secretary of State may in any case, if satisfied that it is in the interests of justice so to do, by order dispense with the requirements of this section to such extent as may be specified in the order.
>
> "(2) This section shall, with the necessary modifications, apply in relation to sound and television broadcasts as it applies in relation to newspapers.
>
> "(3)

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[28] See A D Mathie, "The Mary Cairns Case", (1973) 18 JLSSc 389.

[29] Formerly Children and Young Persons (Scotland) Act, 1937 (1 Edw VIII and 1 Geo VI, cap 37), sec 54(1); Children and Young Persons Act, 1963 (cap 37), sec 57; Social Work (Scotland) Act, 1968 (cap 49), sec 31(3) and Sched 2, Part II, para 13.

"(3) This section shall, with the necessary modifications, apply in relation to any proceedings on appeal from a sheriff sitting summarily in respect of an offence by a child (including an appeal by stated case) as it applies in relation to the proceedings before the sheriff.

"(4) Any person who publishes any matter in contravention of this section shall on summary conviction be liable in respect of each offence to a fine not exceeding £500".[30]

Five comments may be made on these provisions.

7.19 (i) Dispensation It would be interesting to know to what extent the courts and the Secretary of State have respectively exercised the dispensing power contained in the proviso to section 374(1). There is a question whether the power should be retained, or whether there should be an absolute prohibition on the publication of the identity of all accused persons under 16 years of age. A similar question arises in the following paragraphs in relation to other criminal proceedings and civil proceedings other than those brought under the 1968 Act.

7.20 (ii) Age-limits In order to ascertain the meaning of the word "child" in section 374, it is necessary to refer to section 462(1) of the 1975 Act, and then to section 30(1) of the 1968 Act, which provides that it means (a) a child under 16; (b) a child over 16 but under 18 in respect of whom a supervision requirement of a children's hearing is in force; or (c) a child whose case has been referred to a children's hearing in pursuance of Part V of the 1968 Act. Clearly, accordingly, the applicability of the statutory restriction on publicity cannot be determined simply by reference to the age of the accused. In addition, there is one age-limit for the accused and another (17) for witnesses and other young persons concerned in the proceedings. In civil proceedings, protection may be extended to any person under the age of 17.[31]

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[30] Increased from £50 by the Criminal Law Act, 1977 (cap 45), sec 31 and Sch 6.
[31] See para 7.29 below.

7.21 (iii) Child charged jointly with adult. It is not apparent from the terms of section 374 of the 1975 Act that it does not apply to summary proceedings where a child is charged jointly with an adult. That is provided by section 370:[32]

> "When a child has been charged with an offence jointly with a person who is not a child the provision of [inter alia] section 374 of this Act shall not apply to summary proceedings before the sheriff in respect of the charges."

7.22 (iv) "Calculated". "Judges are fond of this word, but it is an unfortunate expression because it suggests a meaning which it is not intended to convey. Originally, 'calculated to' bore its literal meaning of 'intended to', but in time it came to mean merely 'likely to'".[33] It is thought that it is used in the latter sense both in section 374 and in sections 169 and 375 which are discussed below. It is submitted that any possible ambiguity should be removed in any new legislation.

7.23 (v) Penalty. The maximum penalty for each offence under this section is now £500.[34] The penalty under section 58(2) of the 1968 Act is £250.[35] Similarly, section 4 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1976[36] provides that where a person aged under 17 is in any way involved in an inquiry thereunder, the sheriff may impose certain restrictions on reporting, and any breach of such restrictions is to be an offence punishable by a fine of £250 maximum. It is thought that the maximum penalty in each case should be the same.

(b) Other criminal proceedings

7.24 In other criminal cases, including summary criminal cases where a child is charged jointly with an adult, sections 169 and 365 of the 1975/

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[32] Formerly 1937 Act, sec 50; 1968 Act, sec 31(3) and Sch 2, Part II, para 10.
[33] Glanville Williams, Learning and Law (9th ed), P 74, n 5.
[34] Increased from £50 by the Criminal Law Act, 1977 (cap 45), sec 31 and Sch 6.
[35] For the terms of sec 58 see para 7.28 post.
[36] 1976, cap 14.

1975 Act[37] empower the court to prohibit publication of certain matter. They provide:

> "(1) In relation to any proceedings in any court, the court may direct that -
>
> (a) no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any person under the age of 17 years concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein;
>
> (b) no picture shall be published in any newspaper as being or including a picture of any person under the age of 17 years so concerned in the proceedings;
>
> except in so far (if at all) as may be permitted by the direction of the court.
>
> "(2) Any person who publishes any matter in contravention of such direction shall on summary conviction be liable in respect of each offence to be a fine not exceeding £500.[30]
>
> "(3) This section shall, with the necessary modifications, apply in relation to sound and television broadcasts as it applies in relation to newspapers.
>
> "(4) In this section, references to a court shall not include a court in England or Wales".

7.25 (i) Absolute prohibition? The main question which arises both here, and in relation to those charged without adults in summary criminal proceedings, is whether there should not be an absolute prohibition on publication. It is thought that informed public opinion is tending towards that view. In a written reply on 30th July 1974 the Secretary of State for Scotland said he hoped that, unless there were exceptional circumstances, the courts would make full use of their power to direct that there should be no publication of the identity of children who are subject/

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[30] Increased from £50 by the Criminal Law Act, 1977 (cap 45), sec 31 and Sch 6.

[37] Formerly 1937 Act, sec 46; 1963 Act, sec 57; 1968 Act, sec 31(3) and Sched 2, Part II, para 7.

subject to court proceedings.[38] It is thought that it may now be appropriate to prohibit absolutely the publication of the identity of all children under 16 who are concerned in criminal proceedings, whether as accused, witnesses, or otherwise, both at first instance and on appeal. Alternatively, instead of an absolute prohibition, a dispensing power could be reserved to the courts and the Secretary of State, as in section 374.

7.26 (ii) Age-limit. In any event, it is submitted that the same age-limit should apply in all criminal proceedings, both to the accused and to others concerned in the proceedings.[39]

7.27 (iii) Penalty. As to the penalty, see para 7.23 above.

(c) Proceedings under the Social Work (Scotland) Act, 1968

7.28 The 1968 Act provides by section 58:

> "(1) Subject to the provisions of this section, no report of any proceedings in any children's hearing, or of any proceedings before the sheriff under section 42 of this Act, or of any appeal under this Part of this Act, which is made in a newspaper or a sound or television broadcast shall -
>
> (a) reveal the name, address or school; or
>
> (b) include any particulars calculated to lead to the identification, of any child in any way concerned in a hearing and no picture shall be published in any newspaper or television broadcast as being or including a picture of a child concerned as aforesaid.
>
> "(2) Any person guilty of any offence against this section shall on summary conviction be liable to a fine not exceeding two hundred and fifty pounds in respect of each offence.
>
> "(3) The Secretary of State may in any case, if satisfied that it is in the interests of justice to do so, by order dispense with the requirements of subsection (1) of this section to such extent as may be specified in the order.
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> "(4) This section shall extend to England and Wales".

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[38] HC Deb vol 878, col 167.

[39] Sec 165 of the 1975 Act (formerly sec 44 of the 1937 Act, as amended by the 1968 Act, Sched 2, Part II, para 6) prohibits the presence in court during criminal trials of children under 14 years of age, other than infants in arms.

The question whether the prohibition on publication should be absolute also arises here. It will be seen that here the dispensing power is reserved exclusively to the Secretary of State, and not granted to the children's hearing or the courts. "Child" has the meaning assigned to it by section 30(1) of the 1968 Act, which has been considered in para 7.20 above. Any difficulty in applying that definition is not of great importance here, since no question of publication would arise until the case had been considered by the Secretary of State.

(d) Other civil proceedings

7.29 Section 46 of the 1937 Act, which is the basis of sections 169 and 365 of the 1975 Act, has been repealed only so far as relating to criminal proceedings.[40] As amended by section 57(1) of the 1963 Act and Schedule 2, Part II, para 7 of the 1968 Act, it provides:

> "(1) In relation to any proceedings in any court the court may direct that -
>
> (a) No newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, of any person under the age of seventeen years concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein;
>
> (b) no picture shall be published in any newspaper as being or including a picture of any person under the age of seventeen years so concerned in the proceedings as aforesaid;
>
> except in so far (if at all) as may be permitted by the direction of the court.
>
> "(2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding fifty pounds".

By section 57(3) of the 1963 Act, the expression "court" in the above section includes any court in England and Wales, and section 57(4) provides that the section is applicable to sound and television broadcasts.

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[40] 1975 Act, sec 461 and Sched 10, Part I.

7.30 It is submitted that these provisions should be consolidated and amended, keeping in view the provisions of section 4(4) and (5) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. The question of the extent to which publication should be prohibited again arises in this context. Is it sufficient to empower the court to make a direction forbidding publication, as in section 46 of the 1937 Act and section 4(4) of the 1976 Act, or should the statute forbid publication unless the court makes an order permitting it, as in section 374 of the 1975 Act? Should the statutory restriction apply to all civil proceedings or, for example, only to consistorial cases? There is also a question whether the same age-limit should apply in both civil and criminal proceedings: in section 46 the limit is 17 years of age. Observations have already been made above about the use of the expression "calculated to" and the size of the penalty of £250, at paras 7.22, 7.23 and 7.27.

7.31 There is, however, a further reason for clarifying the ambit of section 46. No direction under section 46 has been issued by a Court of Session judge for some time, perhaps because it has been thought that it was applicable only to criminal proceedings, with which Part IV of the 1937 Act, in which it appears, is concerned.[41] The repeal of section 46 by the 1975 Act only "so far as relating to criminal proceedings" appears to indicate that in the view of Parliament it did apply and continues to apply in civil cases. It would, however, be desirable to place it beyond doubt that directions may be issued in some, if not all, categories of civil cases, in order to prevent the exposure to undesirable publicity of children involved in custody and other civil proceedings. It may also be desirable specifically to empower the courts to order that matters relating to children should/

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[41] See Clive and Wilson, p 649; A D Mathie, "The Mary Cairns Case", (1973) 18 JLSSc 389, at pp 389-390.

should be heard in chambers. In England the Law Commission has recommended that there should be power for the court to order that petitions for declarations of legitimacy should be heard in camera.[42] It has been pointed out that the reasons advanced by the Commission as to the necessity of protecting children from the disturbing experience resulting from unwelcome publicity applies as much to issues of paternity as to legitimacy proceedings, and it has been recommended that a trial judge should be given a discretion to refer to chambers any issue as to whether a child was or was not a child of the family.[43]

(3) Statutory power to clear court

7.32 There are overlapping statutory provisions as to the power of the presiding judge in a criminal case to clear the court. Section 145(3) of the 1975 Act,[44] which has its origin in the Criminal Procedure Act, 1693, and appears in Part I of the 1975 Act which deals with solemn procedure, provides:

> "From the commencement of the leading of evidence in a trial for rape or the like the judge may, if he thinks fit, cause all persons other than the accused or counsel and solicitors to be removed from the court-room".

The wording of the section, which is an adaptation of the terminology of the Act of 1693, does not appear to be appropriate in modern practice: it authorises the exclusion of Press reporters, and makes no mention of officers/

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[42] Cmnd 3149, 1966

[43] B (LA) v B (CH), Payne J, (1975) 5 Fam Law 158.

[44] 1693, cap 43.

officers of the court or persons otherwise directly concerned in the case, such as the parent of a child who is a witness or is an accused person. It has been observed that it appears to grant power to the judge to make such an order only at the outset of the trial, and not after any witnesses have given evidence.[45] Sections 166 and 362 of the 1975 Act, which re-enact section 45 of the 1937 Act, provide:

> "(1) Where, in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, a person who, in the opinion of the court, is a child is called as a witness, the court may direct that all or any person, not being members or officers of the Court or parties to the case, their counsel or solicitors, or persons otherwise directly concerned in the case, be excluded from the court during the taking of the evidence of that witness:
>
> Provided that nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency.
>
> "(2) The powers conferred on a court by this section shall be in addition and without prejudice to any other powers of the court to hear proceedings in camera."

7.33 It is thought that these provisions should be consolidated and amended. In relation to the terminology of sections 166 and 362, it is suggested that "child" should be defined as a person under a specific age, and that the proviso to subsection (1) should cover the bona fide representatives of sound and television broadcasting corporations. It is also suggested that the words "for rape or the like" in section 154(3) and "in relation to an offence against, or any conduct contrary to, decency or morality", in sections 166 and 362 should be omitted in order to give the presiding judge the widest discretion as to the circumstances in which the court should be cleared. It may be noted that the words just quoted from sections 166 and 362 were deleted from section 46 of the 1937 Act, which deals with restrictions on publicity, by section 57(1) of the Children/

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[45] HIA v Purves and Others, High Court, Edinburgh (Lord Stott), The Scotsman, 5 July 1977.

Children and Young Persons Act, 1963. It has been noted above, in para 7.02, that circumstances arise in which a witness may be inhibited from speaking frankly if he is obliged to give evidence in open court; or in which national security, or secret processes, may be involved; or in which there is a risk of a disturbance in court; or in which any publicity may prejudice other proceedings. At present the judge is empowered by the common law to clear the court in such circumstances. It is therefore thought that any statutory discretion to clear the court should either be expressed in general terms, or should be explicitly stated to be in addition and without prejudice to the court's common law powers, as in sections 166(2) and 362(2) of the 1975 Act.

7.34 As to civil proceedings, it has already been suggested, in para 7.31 above, that some specific provision should be made for the hearing of matters relating to children behind closed doors.

(4) Miscellaneous

7.35 A number of other statutory and other provisions relate to the publicity of court proceedings. Not all of them are concerned with the examination of witnesses, but it is convenient to notice them here. Evidence in criminal cases must be led in the presence of the accused;[46] and witnesses must be examined in the presence of the parties or their advocates.[47] Where a debate has taken place on the relevance of an indictment, the judge must give his decision as to relevance in open court in the presence of the accused.[48] Court of Session advisings must take place "with open doors" except in special circumstances.[49] Summary trials before Lords Ordinary in the Court of Session may, however, take/

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[46] Criminal Justice Act, 1587, cap 57; now 1975 Act, sec 145(1), and see sec 174(5) re insanity in bar of trial.
[47] Evidence Act, 1686, cap 30.
[48] Criminal Procedure Act, 1693, cap 43; now 1975 Act, sec 145(2).
[49] Court of Session Act, 1693, cap 42.

take place in private,[50] and adoption proceedings take place in private unless the court otherwise directs.[51] The High Court may hear bail appeals in chambers;[52] and in the Court of Session certain applications, which similarly do not involve the leading of evidence, are directed to be disposed of in chambers.[53] In the sheriff court, certain applications which do involve the examination of witnesses - such as applications for the correction of an entry in a register of births, deaths or marriages,[54] - are by rule of court or by practice taken in chambers. Applications to the sheriff under the Social Work (Scotland) Act, 1968, are also heard in chambers.[55]

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[50] Administration of Justice (Scotland) Act, 1933 (23 and 24 Geo V, cap 41), sec 10(2); Forbes-Sempill, Petitioner, Glasgow Herald 6th December 1968; E M Clive and G A Watt, Scots Law for Journalists (3rd ed), p55; McGeachy v Standard Life Assurance Co, 1972 Sc 145.

[51] RC 227; AS (Adoption of Children), 1959, para 11. Adoption (Scotland) Act, 1978 (cap 28), sec 57.

[52] Bail (Scotland) Act, 1888 (51 and 52 Vict cap 36), sec 5

[53] See Rules of Court, 1965 (HMSO ed), index sv "Chambers".

[54] Dobie, Sheriff Court Practice, p 558; Registration of Births, Deaths and Marriages (Scotland) Act, 1965 (cap 49), sec 42(5).

[55] 1968, cap 49, sec 42(4).

Chapter 8

ORAL EVIDENCE VI: THE EXAMINATION OF WITNESSES IN COURT[1]

1. Opening statement in solemn procedure

8.01 The Thomson Committee considered proposals that in solemn procedure the presiding judge should be required to make an opening statement to the jury explaining in broad terms the procedure to be followed, and opening speeches by Crown counsel should be introduced. The Committee recommended that notes should be produced for issue to jurors which would set out in general terms the functions of the jury and what is involved in jury service,[2] and that each member of the jury should be given a copy of the charge in the indictment.[3] A leaflet entitled "Information for Potential Jurors" has now been issued by the Scottish Information Office on behalf of Scottish Courts Administration with the approval of the Lord Justice-General, and is sent to each potential juror along with his citation and a form explaining the allowance which he may claim.[4] The Committee commended to judges the practice of making a short statement to the jury prior to the evidence being led, outlining broadly the procedure to be followed and the functions of the judge, counsel and jury;[5] but they considered that the/

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[1] Walkers, paras 337-346.
[2] Thomson, para 51.59.
[3] Thomson, para 51.33.
[4] For comment on the leaflet see 1977 SCOLAG 118.
[5] In H M Advocate v Peters, (1969) 33 JCL 209, before any evidence was led, Lord Thomson briefly told the jury what was going to happen: that there would be no opening speech, that they would hear immediately the evidence for the Crown, then that for the accused, and then speeches for the Crown and each of the accused, and finally the judge's charge in which he would explain to them their respective functions and give to them directions in law. He went on to say that throughout the proceedings and at the end of the day the jury were the judges of the facts, and it was for them to decide whom to believe and what inferences they thought could fairly be drawn from the evidence. He then asked them to give their closest attention to the evidence because the evidence was for them and not for him.

the making of any statement should be left to the judge's discretion. They expressed the view that opening speeches by counsel are unnecessary and undesirable.[6]

2. Oath and affirmation[7]

(1) The present law

8.02 There is some dissatisfaction with the present law. The general rule is that all judicial[8] evidence must be given on oath.[9] The form of oath in civil proceedings is, "I swear by Almighty God, [and as I shall answer to God at the great day of judgment] that I will tell the truth, the whole truth and nothing but the truth;" but the words in square brackets may be omitted.[10] In criminal proceedings the form is the same, except that the words in square brackets are omitted.[11] In M'Laughlin v Douglas & Kidston[12] Lord Justice-General M'Neill said:

> "The obligation to give evidence in the courts of law in this country is an obligation imposed by the law and constitution on all the lieges. The obligation on a witness to tell the truth, the whole truth and nothing but the truth is an obligation imposed by the law irrespective of any oath. The administering of an oath is a means resorted to by the law to insure the fulfilment of the obligation to speak the truth, the whole truth, and nothing but the truth."

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[6] Thomson, chapter 41.

[7] Walkers, para 337.

[8] But at a hearing before the sheriff in an application under section 42 of the Social Work (Scotland) Act, 1968 (cap 49), the child and his parent or representative may either give evidence or make an unsworn statement (Act of Sederunt)(Social Work) (Sheriff Court Procedure Rules), 1971, rule 8(2)). The rules of certain statutory tribunals may not require them to hear evidence on oath or affirmation (Douglas v Provident Clothing & Supply Co, 1969 SC 32).

[9] The accused may not make an unsworn statement (H M Advocate v Gilmour, 1964 JC 45), and any evidence in mitigation must be given on oath or affirmation (Forbes v H M Advocate, 1963 JC 68).

[10] For examples of the confusion they sometimes cause, see Hay Shennan, A Judicial Maid of All Work, pp 167-8.

[11] Act of Adjournal (Form of Oaths) 1976, para 2(a) and Sched, Part 3, which gives effect to Thomson, para 42.12 and rec 116.

[12] (1863) 4 Irv 273, at p 286.

8.03 There are several common law and statutory exceptions to the general rule that all judicial evidence must be given on oath. At common law, if the witness states, expressly or impliedly (as by covering his head), that the manner of taking the oath is not appropriate to his religious belief, the oath is administered in the appropriate manner. Children under twelve years of age are admonished to tell the truth, those between twelve and fourteen are sworn or admonished at the judge's discretion,[13] and those over fourteen are usually sworn. A witness of defective mental capacity is sworn or admonished at the judge's discretion.[14]

8.04 The first major[15] statutory exception is provided by section 1 of the Oaths Act, 1888,[16] as substituted by section 8(1) of the Administration of Justice Act, 1977,[17] which enacts:

> "Any person who objects to being sworn shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath."

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[13] Anderson v McFarlane, (1899) 1 F (J) 36. The CLRC recommend that children under fourteen should never be sworn, but children over that age should always give evidence on oath (paras 204-207, pp 185, 229). The flexibility of the Scottish practice seems preferable: see Walkers, para 349, n 25.

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

[15] Of the statutory provisions for affirmation by members of the Society of Friends and by Moravians, which appear to have been rendered superfluous by the 1888 Act, one has not been repealed. The Quakers and Moravians Acts, 1833 (3 and 4 Will IV, cap 49) and 1838 (1 and 2 Vict, cap 77), which permit, in all cases where an oath is or shall be required, affirmation by persons who are (1833 Act) or have been (1838 Act) Quakers or Moravians, were repealed by the Statute Law (Repeals) Act, 1977 (cap 18), sec 1(1) and First Sched; Part XIV. But the Circuit Courts (Scotland) Act, 1828 (9 Geo IV, cap 29), sec 13, which permits affirmation by Quakers in criminal cases, to that extent remains unrepealed by the False Oaths (Scotland) Act, 1933 (23 and 24 Geo V, cap 20), sec 8 and Sched.

[16] 51 and 52 Vict, cap 46.

[17] 1977, cap 38.

By section 1 of the Oaths Act, 1961,[18] a witness may be required to affirm if, though the taking of an oath is not contrary to his religious belief, it is not reasonably practicable for him to be sworn according to that belief. A further statutory exception is enacted in section 345 of the Criminal Procedure (Scotland) Act, 1975 (formerly section 34 of the Summary Jurisdiction (Scotland) Act, 1954), which provides that where a witness in a summary prosecution is examined on oath in a case in which the accused is charged with an offence under any statute, and where the same witness is examined at the same diet in subsequent cases against the same or different persons accused of offences under the same statute, it shall not be necessary for the judge to administer the oath to the witness in the subsequent cases, but it shall be sufficient that the judge shall remind him in each case that he is still on oath.

(2) Proposals to abolish the oath

8.05 Since the days of Jeremy Bentham, the view has been expressed that the oath should be abolished.[19] Professor Glanville Williams[20] thinks it is doubtful whether there is now anything substantial to be gained by requiring a form of oath or affirmation in any legal proceedings, and approves the view of Sir Travers Humphreys that the giving of evidence on oath by the accused tends to encourage perjury without any probability of his being prosecuted for perjury.[21] The Draft Code proposed the substitution/

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[18] 9 and 10 Eliz II, cap 21, amended by the Administration of Justice Act, 1977 (cap 38), sec 32(4) and Sch 5.

[19] See eg, Lord Kincairney, "The History of the Law of Evidence", (1899) 11 Jur Rev 1, at p 13; F Lyall, "Religion and Law", 1976 Jur Rev 58, at p 62.

[20] Williams, pp 66-71.

[21] But cf H M Advocate v Cairns, 1967 JC 36.

substitution of a new form of affirmation for the oath and affirmation as now administered.[22] The form proposed was:

> "I solemnly and faithfully promise that the evidence which I shall give shall be the truth, the whole truth, and nothing but the truth."

The majority of the Criminal Law Revision Committee considered that witnesses in criminal proceedings should no longer take the oath but should make a declaration undertaking to tell the truth.[23] A Committee of Justice, believing that some form of oath or affirmation "still serves as a reminder of the solemnity of the occasion and of the importance of the information which a witness is about to give,"[24] considered that all witnesses should make the same solemn affirmation, and should be made aware of the fact that they could be prosecuted for giving false evidence. The form of wording suggested was:

> "I solemnly declare and promise that I will tell the truth. I am aware that if I tell a lie [or wilfully mislead the court or tribunal] I am liable to be prosecuted."[25]

8.06 The Thomson Committee considered the question whether the oath administered to witnesses in Scottish criminal proceedings should be altered. They recommended[26] that the oath should be in the form,

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

and/

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[22] Draft Code, chapter 8.

[23] See CLRC, paras 279-281, where the arguments are summarised.

[24] This is probably true. "Less error is found in sworn testimony than in unsworn, but inaccuracies still remain, especially if there has been a considerable lapse of time since the original experience." (Ian M L Hunter, Memory (Penguin, 1964), pp 174-175. And see D S Greer, "Anything but the Truth? The Reliability of Testimony in Criminal Trials" (1971) 11 Brit J Crim 131, at p 147.

[25] Justice, False Witness (1973), paras 66-69, 77. Cf the form of affirmation prescribed by sec 50 of the Law Reform Commission of Canada's Evidence Code: "I promise to tell the truth. I am aware that if I tell a lie or wilfully mislead the court I am liable to be prosecuted."

[26] Thomson, para 42.12 and rec 116.

and the affirmation in the form,

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

These recommendations were implemented by the Act of Adjournal (Form of Oaths), 1976. The Committee also recommended that the citation form for witnesses, and notices in witnesses' waiting rooms, should explain that they will be offered a full and straightforward alternative of taking the oath or making an affirmation, and should stress that the penalties for committing perjury are identical, whether the witness has sworn or affirmed.[27]

8.07 There are strong arguments for the replacement of the oath by a form of declaration,[28] of which perhaps the most logical and least emotive is that since Parliament, in passing the Oaths Act of 1961, recognised that there is nothing wrong in requiring a person to give evidence without being sworn even though he has a religious belief and it is not contrary to his belief to take an oath, it is difficult to see why all witnesses should not be required to give evidence without being sworn. On the other hand, it would be idle to abolish the traditional Scottish oath unless it could be demonstrated that any new form of declaration would be, in the words of the Justice Report,[29] "more meaningful, more generally acceptable and more likely to serve the cause of justice" than the present oath. Depressing though it is hear the oath so frequently dishonoured, especially in criminal cases, it may well be that there are still/

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[27] Thomson, para 42.13.

[28] See CLRC, paras 279-281, where the arguments are summarised.

[29] Justice, False Witness (1973), paras 66-69, 77.

still many witnesses in the Scottish courts to whom the oath, administered with deliberation by the judge, serves to bring home most strongly the solemnity of their obligation to tell the truth and to give their evidence with care.[30] It may be thought that any proposal to abolish the oath in Scottish proceedings would be likely to cause widespread misunderstanding and offence. In any event it would probably be difficult to secure general agreement on the wording of any new declaration. If, however, a new form were to be adopted, it is suggested that it should be administered by the judge, in accordance with current practice. It is also suggested that any new form should be the same in both civil and criminal cases. The sanctions of perjury should, of course, attach to a false declaration.

(3) Reticent religious witness

8.08 Is there room for any modification of the present law, apart from the abolition of the oath? As to the oath, it has been pointed out that if the proposed witness has a religious belief which is not opposed to the taking of oaths but declines to say what form of oath binds him, he would still appear to be incompetent.[31] Such a witness should therefore be required to affirm.

(4) Repeated administration to same witness

8.09 Another question is whether the provision dispensing with the repeated/

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[30] Cf. the minority view of the CLRC at para 281, and Paul Hardin, "An American Lawyer Looks at Civil Jury Trial in Scotland", (1963) 111 University of Pennsylvania Law Review, p 739, at p 746: "His Lordship ... stands and stretches his own right hand high in company with the witness as he solemnly intones. Perjury doubtless occurs in Scotland, but it must be attended with considerable uneasiness when the oath has been administered as I heard it done, for example, by Lord Milligan of the Court of Session."

[31] Cross, p 158; Nokes, pp 399-400. Refusal to testify is contempt of court (Wylie v H M Advocate, 1966 SLT 149; H M Advocate v Airs, 1975 SLT 177, at p 181).

repeated administration of the oath to the same witness in summary criminal procedure[32] should be extended to repeated administration of the affirmation and to other proceedings, such as expert witnesses in High Court circuits, and moneylenders' proofs in the sheriff court.

(5) Interrogation before affirmation

8.10 The Thomson Committee envisaged that the affirmation should be administered by the judge without enquiry into the witness's reasons for his choice.[33] That reform has now been effected by section 8(1) of the Administration of Justice Act, 1977.[34]

(6) Forms and ceremonies in administration of affirmation

8.11 In civil cases, the form of affirmation is:

> "I, [A B, do] solemnly, sincerely and truly declare and affirm that I will tell the truth, the whole truth, and nothing but the truth."[35]

In criminal trials the form is the same except that the words in square brackets are omitted.[36] It is submitted that the simpler form employed in criminal trials should now be used in all proceedings. A matter which seems to require attention is the rule that where a witness makes affirmation, he must use the precise words of the statutory form.[37] It is submitted that the rule is unnecessary, and that it should be provided that/

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[32] 1975 Act, sec 345. See para 8.04 above and R & B, para 18-101.

[33] Thomson, para 42.14.

[34] 1977, cap 38. See para 8.04 above.

[35] Oaths Act, 1888 (51 and 52 Vict cap 46), sec 2.

[36] Act of Adjournal (Form of Oaths) 1976, para 2(b) and Sched, Part 4, which gives effect to Thomson, para 42.12 and rec 116.

[37] M'Cubbin v Turnbull, (1850) 12 D 1123; Dickson, para 1758, n (b); Walkers, para 337(b).

that where a witness affirms, or makes any new form of declaration, the prescribed wording should be followed as nearly as may be, or that the forms and ceremonies used are immaterial. Section 15(1) of the Perjury Act, 1911,[38] which does not extend to Scotland, provides:

> "For the purposes of this Act, the forms and ceremonies used in administering the oath are immaterial, if the court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection, or has declared to be binding on him."

8.12 A suggestion has been made that the judge should ask each witness whether he will take the oath or affirm. This would not be inconvenient if the question was put in the form, "Will you take the oath?" and if the affirmation could be at once administered in the event of a negative answer. The Thomson Committee, however, has recommended that in order to avoid any embarrassment to witnesses the court macer or attendant should ascertain, before a witness enters the court, whether he or she wishes to take the oath or make an affirmation, and such information should be conveyed by the court macer or attendant in a discreet manner to the judge.[39]

8.13 Some judges stand with the right hand upraised when administering the affirmation, while others remain seated and neither raise their hands nor require the witness to do so. It is thought that the latter practice is strictly correct,[40] and is implied by the omission of the direction/

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[38] 1 and 2 Geo V, cap 6. By sec 15(2), amended by the Administration of Justice Act, 1977 (cap 38), sec 32(4) and Sch 5, the expression "oath" includes "affirmation". See Criminal Law: Perjury and Kindred Offences (Law Com No 33), para 44.

[39] Thomson, para 42.14.

[40] Cf Walkers, para 337(b).

direction to raise the right hand from the forms of affirmation for jurors and witnesses in criminal trials provided by the Act of Adjournal (Form of Oaths), 1976.

8.14 This paper does not consider the forms of oath, affirmation and declaration administered to jurors, shorthand-writers, interpreters and the like. The forms administered to jurors were considered by the Grant[41] and Thomson[42] Committees, and the Thomson Committee's recommendation of simpler forms was implemented by the Act of Adjournal (Form of Oaths) 1976, para 1 and Schedule, Parts 1 and 2.

3, Oath of calumny[43]

8.15 The oath of calumny, which used to be signed by the pursuer in an action of divorce or an action for nullity of marriage on the ground of impotency, was abolished by section 9 of the Divorce (Scotland) Act, 1976,[44] which provides:

> "In a consistorial action (whether brought before or after the commencement of this Act) the oath of calumny shall not be administered to the pursuer, and accordingly that oath is hereby abolished, but nothing in this section shall affect any rule of law relating to collusion."

4. Order and manner of examination of witnesses

8.16 (1) Discretion. Any comprehensive restatement of the law of evidence might well include a general rule to the effect that a party or his advocate has a discretion to call such witnesses as he pleases, and/

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[41] Grant, para 708.
[42] Thomson, chapter 42.
[43] D M Walker, "Evidence", Introduction to Scottish Legal History (Stair Society, vol 20), at pp 312-313.
[44] 1976, cap 39.

and in the order that he chooses.[45] Such a provision would be appropriate if it were to be accepted that the accused is not obliged to give evidence and that, if he chooses to do so, he is not obliged to give evidence at any particular stage of the defence case.[46] Consideration would also have to be given to the questions of the compellability of the defender in a defended consistorial cause[47] and of a party allegdly in breach of an order of court,[48] and to the question whether there should be any statutory rule that the defender in an action of affiliation and aliment must not be called as the first witness for the pursuer.[49] Any provisions on these matters would have to be stated as exceptions to the general rule.

8.17 (2) "Hostile" witness. A further rule which might be included in any restatement is that it is for a party or his advocate

> "to make up his mind, subject to the court's seeing that the witness has fair play, how he will examine his witness, and
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> for/

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[45] The only provisions on the matter appear to be those relating to Court of Session jury trials, which, says Lewis (Manual, p 98), "may be regarded substantially, and so far as they go, as setting forth the practice observed in the leading of evidence in all courts, civil and criminal, and whether with or without a jury." They are in these terms, inter alia: "In examining the witnesses, the counsel of the parties shall take the examination of the witnesses in such order as they shall arrange ..." (Codifying Act of Sederunt, 1913, F II 2, derived from A S 16th February 1841, sec 28). For English practice, see Briscoe v Briscoe, [1968] P 501; Barnes v BPC (Business Forms) Ltd, [1975] 1 WLR 1565. The only provision as to the interposition of a witness for one party in the evidence for another party appears to be sec 337(h) of the 1975 Act, which applies to summary prosecutions only and empowers the court, in any case where it considers such a course expedient, to permit any witness for the defence to be examined prior to evidence for the prosecution having been led or concluded. There is a question whether this provision should be extended in any way: it is said to be sparingly used (R & B, para 18-102).

[46] See paras 5.16-5.19 above.

[47] See para 4.16 above.

[48] See para 4.18 above.

[49] See para 3.21 above; Walkers, para 175.

> for the counsel at the end of the day to lay his submissions before the court, having in view his own method of handling the witness, and, if he so chooses, to ask the court to disbelieve the witness, provided that he has given him a fair opportunity of answering any charge of unreliability or untruthfulness which may emerge from his evidence."[50]

The rule that a party may treat as hostile a witness unfavourable to him whom he is examining in chief, applies in both civil and criminal proceedings.[51] It does not appear to be necessary to formulate any rules as to the circumstances in which he is entitled to do so.[52]

8.18 (3) In cross and in causa. It would be necessary to take account of the effect of section 4 of the Act of 1840, which provides:

> "In any action, cause, prosecution, or other judicial proceeding, civil or criminal, where proof shall be taken, whether by the judge or a person acting as commissioner, it shall be competent for the party against whom a witness is produced and sworn in causa to examine such witness, not in cross only, but in causa."

Section 4 has been repealed so far as relating to criminal proceedings by Schedule 10, Part I, of the 1975 Act, which provides by sections 148 and 340:

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

The Thomson Committee have recommended that the evidence of every witness, whether an accused or not, should be evidence in causa and subject to general cross-examination.[53]

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[50] Avery v Cantilever Shoe Co, 1942 SC 469, L P Normand at p 471; see also Walkers, para 341(c); Brennan v Edinburgh Corporation, 1962 SC 36, Lord Sorn at p 421.

[51] Frank v HMA, 1938 JC 17.

[52] Cf CLRC, paras 158-168.

[53] Thomson, para 38.22.

8.19 (4) Calling of witnesses by judge. It may be appropriate to raise here the question whether the judge should be entitled to call and question witnesses on his own initiative. It is arguable that such a power would go some way towards meeting the criticisms that under our present, purely adversary, rules cases arise in which neither party wishes to call a witness who might give relevant evidence, litigation resembles a game rather than a search for the truth, and its outcome may depend on the skill of the victor's advocate rather than on the true merits of his case.[54] On the other hand it may be thought that to confer on the judge even a qualified right to call witnesses - for example, in exceptional circumstances where to do so appears essential to the just determination of the proceedings - would be inconsistent with the primary obligation of the parties to present the evidence and with the judge's obligation to be, and to appear to be, impartial. It appears that in England the judge in a criminal trial has power to call and examine any witness himself; but it has been held that the power should be sparingly and rarely exercised.[55]

5. Questions[56]

8.20 (1) Forms of question. The present law and practice relating to the forms of question which may be put to witnesses seem to be well understood and generally accepted. Chapter 7 of the Draft Code dealt with leading questions; but since a decision as to whether any given question is improperly leading depends on the particular circumstances in/

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[54] See post, paras 8.36-8.38.

[55] Phipson, para 1619; R v Baldwin, The Times, 3rd May 1978.

[56] Walkers, para 339. As to insulting or annoying questions in criminal trials, see R & B, para 18-75.

in which it is asked, it would probably be very difficult to formulate rules on the subject in conventional statutory form which were not so broadly framed as to be of little practical value.

8.21 (2) Refusal to answer. Any comprehensive enactment should no doubt restate the present law that any witness who declines to answer a competent and relevant question in court is in contempt.[57]

8.22 (3) Interpreter.[58] If rules as to the form of question are thought to be desirable, it may be that they should cover the mode of eliciting evidence through an interpreter. It is thought that confusion and misunderstandings sometimes arise when questions are not addressed and answered directly, but the witness is referred to in the third person by the advocate or interpreter. It may therefore be useful to provide that when evidence is given through an interpreter, the advocate's questions ought to be directed to the witness as though there were no interpreter there, in the form of words which would be used to a witness who was going to answer in English, and should not be directed to the interpreter, referring to the witness as "he" or "she"; and the witness's answer ought to be given by the interpreter translating the answer fully and directly as given by the witness.[59]

6. Cross-examination

8.23 (1) Right to cross-examine: (a) General. The Thomson Committee have recommended that the evidence of every witness, whether an accused or not, should be evidence in causa and subject to general cross-examination.[60]

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[57] HMA v Airs, 1975 SLT 177, at p 181.

[58] See R & B, para 18-72, as to deaf and dumb witnesses.

[59] Cf Rukat v Rukat, [1975] 2 WLR 201, Megaw L J at p 207.

[60] Thomson, para 38.22.

It is suggested that for the avoidance of doubt[61] a similar rule should be enacted for civil cases.

8.24 (b) On evidence elicited by Court. It would be useful to enact a provision to the effect that where the presiding judge puts questions to a witness and thereby elicits new evidence which is unfavourable to any party, that party may cross-examine the witness thereon. The rule has been laid down for criminal trials,[62] and it is thought that it should be specifically applied to civil cases also.[63]

8.25 (2) Order of cross-examination. The order in which parties cross-examine does not appear to be readily ascertainable from the reports and text-books, and it may be convenient to state the rules. In criminal cases where there are separately represented co-accused, their advocates cross-examine in order and the prosecutor cross-examines the defence witnesses last.[64] Thus, in the trial of X, Y and Z, X and each of his witnesses are in turn examined by X's advocate then cross-examined by Y, Z and the prosecutor; then Y is examined by his own advocate and crossed by X, Z and the prosecutor.

> "The order in which the accused give or lead evidence is determined by the order in which they appear on the indictment, and this is determined by the Crown on what may be alphabetical, chronological or tactical grounds; or it may be simply a matter of chance. There is much to be said for the view that it should be in the discretion of the judge to change the order. This would have avoided the Lee v H M Advocate[65] problem."[66]

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[61] See Dickson, para 1768; Lewis, Manual, pp 230-231; Walkers para 344(a).

[62] McLeod v HMA, 1939 JC 68.

[63] See Walkers, para 338(a).

[64] His right to do so was recognised at the trial which preceded Young v H M Advocate, 1932 JC 63: see Walkers, para 359, n 33.

[65] 1968 SLT 155.

[66] G H Gordon, "Lindie v H M Advocate," (1974) 19 JLSSc 5, 33, at p 37, n 70.

In a civil action by P against D1, D2 and D3, where the defenders[67] have conflicting interests and are separately represented, P and his witnesses are cross-examined by D1, D2 and D3; D1 and his witnesses are cross-examined by D2, D3 and P; D2 by D3, P and D1; and D3 by P, D1 and D2.

8.26 (3) Where apparent inconsistency in witness's evidence. "Opinions have differed as to the proper course for the cross-examiner when there is an apparent inconsistency in the evidence of the witness. Is he entitled to leave the inconsistency and found on it, or must he give the witness an opportunity to explain it?"[68] A rule to the effect that he must do the latter may be helpful.

8.27 (4) Negative general answer. "Opinions have also differed as to whether a cross-examiner, having received a general answer negativing his case, must proceed to put further detailed questions which can only be answered in the negative."[69] There may be room for a rule distinguishing between civil cases where the cross-examiner's case is explicitly set forth on record, and others, and providing that the duty to put the additional questions exists only in cases of the latter class.

8.28 (5) Failure to cross-examine in civil cases. It is clear that in civil cases,[70] failure to cross-examine a single witness on an essential point does not supersede the necessity for corroboration of his evidence on that point.[71] But does the failure (a) imply that the witness is accepted/

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[67] Separately represented pursuers were entitled to cross-examine each other's witnesses in Boyle v Olsen, 1912 SC 1235: See Walkers, para 344(a).

[68] Walkers, para 342(b), citing Macfarlane v Raeburn, 1946 SC 67, L P Normand at p 73, Lord Moncrieff at pp 76-77.

[69] Walkers, para 342(b), citing Wilson v Thomas Usher & Son, 1934 SC 322, Lord Murray at p 337, L J-C Aitchison at p 338.

[70] Walkers, para 346(a).

[71] Moore v Harland & Wolff, 1937 SC 707; Stewart v Glasgow Corporation, 1958 SC 28; Dingwall v J Wharton (Shipping) Ltd, [1961] 2 Lloyd's Rep 213 (HL (Sc)), Lord Keith at p 219.

accepted by the cross-examiner as a truthful and credible witness on that point; or (b) preclude the cross-examiner from leading evidence to contradict the witness?

8.29 (a) It does not seem to be possible to propose an absolute rule. The tenor of the cross-examination, and considerations of prejudice, may be relevant. In Stewart,[71] Lord Russell said (at p 46):

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

On the other hand, in Walker v McGruther & Marshall Ltd[72] the question in dispute was whether at the time of a road accident the vehicle involved had been driven by the defenders' witness or by another man. The witness deponed that the other man had been driving, and was cross-examined by the pursuer, but the cross-examiner did not specifically put to him that he had been the driver. Lord Stott rejected a submission that in the absence of such cross-examination he was bound to believe the witness, distinguishing Keenan v SCWS[73] on the ground that in the present case the cross-examination had been directed towards showing that the witness was wholly unreliable; and distinguishing Jordan v Court Line[74] on the ground that in the present case there was no prejudice to the defenders as they had all along known that the pursuer's contention was that the witness's story was false.

8.30 (b) In Stewart[71] Lord President Clyde observed, obiter (at p 38):

"Failure/

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[72] O H: Lord Stott, 12th May 1972, unreported.
[73] 1914 SC 959.
[74] 1947 SC 29.

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

There is a passage to the same effect in Lewis's Manual at p 226, supported by a reference to the undernoted case;[75] but this rather drastic course does not seem to be adopted in modern practice. It may be advisable to provide for its abolition, on the view that the Court is able to prevent prejudice to the other party by any of the various means referred to in the following cases which the Court deems appropriate in the circumstances. In Bishop v Bryce[76] Lord President Dunedin indicated that contradictory evidence could be admitted, subject to a possible award of expenses and to the other party's witnesses being recalled for cross-examination before the evidence was led. In Wilson[77] Lord Justice-Clerk Aitchison indicated that the pursuer in a jury trial might be allowed proof in replication.[78] The same remedy is available to the party leading in a proof.[79] In Dawson v Dawson[80] Lord Walker held that the evidence in contradiction was admissible but subject to comment. It is thought that the latter course is usually followed.

8.31 In criminal cases, the failure by the defence to cross-examine a prosecution witness on a material point may be the subject of comment, but does not prevent the cross-examination of other prosecution witnesses on the same point.[81] The effect of failure by the prosecutor to cross-examine on a material point is not clear, and could with advantage be elucidated.

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[75] Robertson, (1842) 1 Broun 152, at p 177.
[76] 1910 SC 426, at p 431.
[77] Wilson v Thomas Usher & Son, 1934 SC 322, at p 338.
[78] See Maclaren, Court of Session Practice, p 611.
[79] Maclaren, Court of Session Practice, p 562; Dobie, Sheriff Court Practice, p 222; Walkers, para 338(a).
[80] 1956 SLT (Notes) 58.
[81] M'Pherson v Copeland, 1961 JC 74. See Walkers, para 346(b).

8.32 (6) Lodging of documents. Differing views are held on the question whether documents used in the cross-examination of a witness must have been lodged as productions. The Sheriffs Walker state that the rules relating to the lodging of documents are not applied to documents written by a witness who is not a party and used merely to test the credibility of that witness; such a document may be produced at the diet, or the witness may be cited to produce it.[82] Some judges and practitioners, however, take the view that a witness may not be cross-examined on an unlodged document, and that R C 107 and 121, which provide that all productions which are intended to be used or put in evidence shall be lodged before the inquiry, are designed to exclude the element of surprise in cross-examination.[83] If the latter view were to be accepted, there would be room for a rule abolishing the distinction between witnesses and parties, and providing that the document should have been lodged in accordance with the rules. But such a rule would impose on a party's legal advisers the burdensome, if not impossible, obligation of lodging every document that might have a bearing on the credibility of witnesses who might or might not be called, and who if called might give evidence in a way that rendered challenge of their credibility unnecessary. There is a strong argument that surprise is a legitimate and valuable weapon in cross-examination, and that the Rules of Court were not designed to exclude it. If that view were to be accepted, perhaps it should be made clear that the Rules of Court do not apply to documents used in cross-examination/

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[82] Para 300(b), citing Paterson & Sons v Kit Coffee Co Ltd, (1908) 16 SLT 180.

[83] Eg Lord Wheatley in Duke of Argyll v Duchess of Argyll, Glasgow Herald, 28th February and 7th March 1963.

cross-examination. It may be useful to add a provision that any such document should be exhibited to the court and the opponent's advocate,[84] but that it need not be shown to the witness before he is cross-examined upon it. It is thought that it would normally be proper practice to lodge the document thereafter. It may also be useful to enact a provision, applicable to all proceedings, that a production may be used in cross-examination before it has been proved: the rule has been explicitly recognised in relation to summary prosecutions[85] and appears to be of general application. If the production is exhibited but not lodged and proved, any evidence elicited under reference to it would appear to be admissible but subject to comment as to its weight.

7. Re-examination

8.33 (1) Leading questions. There appears to be a fairly widespread practice of asking leading questions in re-examination. It is thought that the practice is objectionable, particularly in jury trials, and should be explicitly declared to be so.

8.34 (2) New matter. It would be useful to enact that a party has a right to a second cross-examination on new matter which has been elicited by questions on matters not arising out of cross-examination which the presiding judge has permitted in re-examination. Further cross-examination on such new matter is usually allowed in practice,[86] but there does not appear to be any reported decision or statutory provision on this point.

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[84] Cf Wigmore, vi, para 1861.

[85] Hogg v Clark, 1959 JC 7.

[86] See Walkers, para 338(a).

8.35 (3) Other questions after close of re-examination. In modern practice, once the re-examination is closed, any question which either a party or a juryman may wish to ask must be put through the court.[87] This was not always so. According to Dickson, the Court allow counsel who cross-examined

> "to put any questions which may be proper for clearing up matters which the re-examination may have left in doubt. Some judges, however, require such questions to be put from the Bench."[88]

The practice of putting questions through the court is sometimes cumbersome and unnecessary. There may be no practical reason why the question should not be directly put to the witness and answered by him, provided that the judge and the other parties are given an opportunity to take exception to the question. It is difficult to understand why a witness should not answer directly a proposed question to which no exception has been taken and which he has understood. It is thought that the judge should have a discretion to allow direct question and answer.

8. Final general question?

8.36 The Committee of Justice which produced the report entitled False Witness considered the question "whether at the conclusion of every witness's evidence, the judge or magistrate should formally ask him whether he had any further information which he thought might help the court. At that stage the witness would have a better idea of what was relevant and would be more able to say what he wanted to say without interruption. He would be asked whether he wished to correct, explain or add anything to what he had already said." The Committee rejected the/

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[87] Macdonald, p 299; R & B, 18-78.
[88] Dickson, para 1763.

the idea, expressing the view that it was "impracticable" and that to "invite a witness to say something without specifying the exact nature of the information required would be to invite the irrelevant and the inadmissible."[89]

8.37 The proposal that a witness should be so interrogated raises the important question whether the adversary system has the effect of producing for the court's consideration all the relevant evidence which is within the witness's knowledge. In theory, all such evidence is elicited by means of thorough pre-trial preparation, and by examination and cross-examination in court. But in practice, it may be argued, advocates may be inadequately briefed and badly prepared and litigants and accused persons may be unrepresented: if a witness, having been badly or incompletely examined, could be interrogated in the manner proposed, he would be able to assist the court and to perform his duty to the best of his ability as he saw it.[90] A Scottish supporter of the proposal would perhaps add that this would be no great innovation in Scottish practice, because when a witness is examined on interrogatories it is competent to the commissioner, in the words of the form of interrogatories adopted in practice, "to put any question or questions to the witness touching the matter in question in the cause besides those upon which he has been interrogated, and to require the witness to make such additions and explanations as he shall think necessary" and "to ask the witness whether he knows of any other matter or thing touching the matters in question in the cause besides what he has been interrogated upon/

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[89] False Witness (Stevens & Sons, 1973), paras 75, 76.

[90] This view is expressed by D W Pollard in "False Witness - A Comment", [1974] Crim L R 588, at pp 592-593.

upon. If yea, to declare the same fully and at large as if he had been particularly interrogated thereupon."

8.38 It may be argued on the other hand that procedure on interrogatories is not an impressive precedent, and that the proposal, if carried out in ordinary judicial proceedings, would be an anomalous infringement of the adversary principle. In Thomson v Glasgow Corporation[91] Lord Justice-Clerk Thomson said:

> "It is an essential feature of the judge's function to see that the litigation is carried on fairly between the parties. Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system of administering justice in civil affairs proceeds on the footing that each side, working at arm's length, selects its own evidence. Each side's selection of its own evidence may, for various reasons, be partial in every sense of the term. Much may depend on the diligence of the original investigators, or on the luck of finding witnesses or on the skill and judgment of those preparing the case. At the proof itself whom to call, what to ask, when to stop and so forth are matters of judgment. A witness of great value on one point may have to be left out because he is dangerous on another. Even during the progress of the proof values change, treasured material is scrapped and fresh avenues feverishly explored. It is on the basis of two carefully selected versions that the judge is finally called upon to adjudicate. He cannot make investigations on his own behalf; he cannot call witnesses; his undoubted right to question witnesses who are put in the box has to be exercised with caution. He is at the mercy of contending sides whose whole object is not to discover truth but to get his judgment. That judgment must be based only on what he is allowed to hear. He may suspect that witnesses who know the 'truth' have never left the witness-room for the witness-box because neither side dares risk them, but the most that he can do is to comment on their absence.
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> "A litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points."[92]

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[91] 1962 SC (HL) 36, at pp 51-52.

[92] For a commentary on these observations, see 1963 SLT (News) 21.

9. Objections to evidence

8.39 Two matters are noticed here: (1) failure to take timeous objection; and (2) the recording of submissions in civil cases in the sheriff court.[93] The trial within a trial is considered in the context of extrajudicial confessions in Chapter 20.

(1) Failure to take timeous objection

8.40 Some doubt arose in recent years as to the consequences of failure to take timeous objection to evidence in civil cases.[94] In M'Glone v British Railways Board[95] the House of Lords held that the pursuer was entitled to found on a ground of fault not averred on record which had been put in evidence by questions put to the pursuer's witnesses, no objection having been taken on behalf of the defenders until their own witness was cross-examined to the same effect. Shortly afterwards, in O'Donnell v Murdoch M'Kenzie & Co,[96] evidence for a pursuer which was materially different from his record was "reluctantly" treated by the Second Division as competent evidence in the case, in the absence of timeous objection.[97] But in Hamilton v John Brown & Co (Clydebank) Ltd[98] the First Division, founding on Lord Reid's statement in McGrath v NCB[99] that a defender has to meet/

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[93] Two further matters are noticed by the Thomson Committee in their Third Report, on Criminal Appeals in Scotland (Cmnd 7005). In their proposed scheme of solemn procedure, some questions of admissibility of evidence might be suitable for decision at the first diet (para 14.06). Certification of a question of admissibility of evidence by a High Court judge in a trial on circuit to the High Court should cease to be competent (para 5.12).

[94] There appears to be no doubt about the position in criminal cases. In a summary criminal trial where the accused has legal assistance in his defence, an appeal will not be entertained in respect of any objections to the competency or admission or rejection of evidence at the trial unless such objections have been timeously stated at the trial (1975 Act, sec 454(1): formerly 1954 Act, sec 73). That is so whether the appeal is against conviction or acquittal: Skeen v Murphy, 1978 SLT (Notes) 2.

[95] 1966 SC (HL) 1.

[96] 1966 SC 58, 1967 SC (HL) 63.

[97] 1966 SC L J-C Grant at p 60.

[98] 1969 SLT (Notes) 18.

[99] 4th May 1954, unreported.

meet the case made against him on record and nothing more, held that the pursuer was not entitled to found on any ground of fault which he had not averred. In Hamilton, however, timeous objection had apparently been taken. The decision of the House of Lords in Gibson v British Insulated Callenders' Construction Co Ltd[1] has raised fresh doubts, which may or may not be well founded, that Lord Reid's dictum in McGrath does not appear to be of universal application. It is nevertheless thought that the rule now generally observed in practice in the courts in Scotland, at least in cases other than those of the Gibson type, is that a pursuer may not found on a ground of liability which has not been averred and has been the subject of evidence to which no timeous objection has been taken. If, however, the matter is still in doubt it would be useful to establish a rule to that effect.

8.41 There is a related question whether the judge should be entitled to intervene ex proprio motu to reject inadmissible evidence when a party who is present or duly represented has failed to take objection to it. In practice he does so in undefended cases. Whether he should be entitled to do so in defended cases depends on the view which is taken of the nature of his role in the adversary system. That view also determines the answers to the questions whether the judge should be entitled to call witnesses (see para 8.19), and required to put a final general question to witnesses called by the parties (see paras 8.36-8.38).

8.42 The question whether a party is entitled to object to evidence elicited/

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[1] 1973 SLT 2.

elicited by the judge arose in McCallum v Paterson. Lord Guthrie expressed the view that objection could be taken.[2]

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

8.43 In Hewat v Edinburgh Corporation[3] it was observed that the notes of evidence should always contain a record of the grounds upon which an objection to evidence has been taken and disposed of, and that, where necessary, this should be dictated to the shorthand writer by the Lord Ordinary. It is believed that that was thereafter regarded as the proper practice in both the Court of Session and the sheriff court. There is now, however, one minor difference in practice between the two Courts, in respect that the Court of Session Practice Note of 2nd March 1972 directs shorthand-writers to record submissions as to competency and relevancy.[4] It is thought that the same practice should be followed in the sheriff court. Rules 65 and 66 of the Sheriff Court Rules make provision only for the recording of evidence, and although rule 173 requires that there should be a record of "the proceedings" in a civil jury trial, notes are in practice taken only of the evidence and the charge.[5]

10. Use of documents to refresh memory[6]

(1) Lodging of document

8.44 (a) Civil causes. There appears to be some difference of opinion on the question whether a document must be lodged before it may be used in the witness-box by a witness to refresh his memory. Dickson[7] states the familiar rule of practice/

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[2] 1969 SC 85, at p 92.
[3] 1944 SC 30.
[4] The whole proceedings, including such submissions, are recorded in trials on indictment (Act of Adjournal, 22nd March 1935, para 1: now 1975 Act, sec 274(4)).
[5] Walkers, para 347, n 53. See para 9.12 below.
[6] Walkers, para 341(b); Cross, pp 202-207.
[7] Para 1785.

practice that where documents are used by a witness to refresh his memory, the advocate for the opposite party is entitled to see them in conducting his cross-examination; but he does not suggest that they must be produced. Lewis states that they may be required by the opposite party to be exhibited, but need not necessarily be made productions in the case.[8] In Hinshelwood v Auld[9] Lord Justice-General Clyde and Lord Skerrington refer to "production" of the notes, but it seems clear that the word is used in the sense of exhibition to the cross-examiner. The Sheriffs Walker state that the rules about lodging productions do not apply to documents used to refresh the memory of a witness.[10] In Hendry v Crofthead Co-operative Society Ltd,[11] however, Lord Grieve refused to allow a witness to refresh his memory from hospital records, on the ground that they were not in process. It may therefore be desirable to formulate a rule to the effect that documents used solely to refresh memory need not be lodged as productions. It may, however, be useful to add a provision to the effect that the opponent of the party during whose examination the witness has referred to the document is entitled to lodge the document as a production. The rule stated by the Sheriffs Walker has been understood to apply to documents used to refresh the memory of a witness who is not a party:[12] it may be that it should be extended to parties in the witness-box.

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[8]Manual, p 229.

[9]1926 JC 4.

[10]Walkers, para 300(b) and n 42. And cf Wigmore, iii, para 762.

[11]O H: Lord Grieve, 28th July 1972, unreported.

[12]Paterson & Sons v Kit Coffee Co Ltd, (1908) 16 SLT 180; Walkers, para 300(b).

8.45 (b) Criminal trials. In criminal practice, where a witness is wholly dependent on a note which is proved to have been accurately made, the note apparently need not be a production in a summary trial, but perhaps ought to be a production in a jury trial.[13] In summary trials, documents used by a witness to refresh his memory do not require to be noted as documentary evidence in terms of section 359 of the 1975 Act.[14] It is arguable that a note on which a witness is wholly dependent, so that it is a substitute for his recollection, should be made a production in all civil and criminal cases; but it may be difficult to distinguish, before a witness gives evidence, between notes which revive recollection and those which replace it.[15] It is suggested that experts' reports and notes on which they are examined or which they read as part of their evidence, should be productions, since they contain matters "generally so minute and detailed, that they cannot with safety be intrusted to the memory of the witness."[16] It is arguable that each class of document - the note which does not revive memory and the expert's report containing details not retained in his memory - should be produced either as evidence of the facts recorded[17] or as having a certain weight as contemporary evidence.[18]

8.46/

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[13] Walkers, para 341(b), n 74.

[14] See R & B, para 14-12; and paras 9.09-9.11 below.

[15] R F Purves, "The Policeman's Notebook", [1971] Crim L R 212, at p 215.

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

[17] M'Pherson, (1845) 2 Broun 450; Dickson, para 1778; McGowan v Mein, 1976 SLT (Sh Ct) 29. Cf Wigmore, iii, chap 28, esp para 754; Cross, p 206. In England, sec 3(2) of the Civil Evidence Act, 1968, provides that any statement made in a document which is received in evidence and used by a witness to refresh his memory shall be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

[18] Lewis, p 229.

8.46 The distinction between refreshment and replacement of recollection, which has been referred to above, is not entirely satisfactory. Professor Glanville Williams, discussing the Criminal Law Revision Committee's proposals, writes:

> "The practice of refreshing memory is rather a dodge, because it may be adopted in circumstances where the witness has no memory of the incident beyond what is contained in his note. It is unsatisfactory in such circumstances that the theoretical evidence should be what the witness says in the witness-box, and not his note."[19]

It may be desirable, as an alternative to the reform suggested in the preceding paragraph, to recognise and maintain a distinction between writing used to refresh the memory and writing used as past recollection recorded: in the latter case, the writing would be admissible as evidence of the truth of the matter stated. The witness, having identified the writing and stated that his memory is not refreshed by it, would be available for cross-examination as to the circumstances in which he made it, and these would affect the weight to be attached to the writing, but not its admissibility.

8.47 (c) Policemen's notebooks. In devising any new rule, it would be necessary to keep in view the special considerations applicable to the policeman's notebook. First, since it normally contains details of several cases, the officer may require to take it to various different courts to which he may be cited as a witness. Second, it may contain confidential information, which may relate not only to any particular case in which he is giving evidence but also to other cases, so that if there were to be a general rule requiring notebooks to be lodged in any type of proceedings, it would probably be necessary to devise/

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[19] Glanville Williams, "New Proposals in Relation to Double Hearsay and Records", [1973] Crim LR 139, at p 143.

devise some generally acceptable method of sealing up any parts of the notebook containing such information. The position at present is that in solemn procedure, a practice has grown up in recent years of lodging notebooks when they contain replies to a charge which are both lengthy and incriminating; but it is understood that there is no Crown Office instruction regarding the lodging of notebooks, and that the question whether a notebook is to be lodged in any particular case is a matter for the discretion of the prosecutor, having regard to the circumstances. In summary criminal procedure, it is thought that notebooks are very seldom lodged, although there is nothing to prevent that being done. It is conceivable that in a summary criminal trial in which evidence is to be given of a very lengthy statement, it may be considered desirable to lodge the notebook so that the precise terms of the statement may be conveniently available to the sheriff. It would not, of course, be lodged in advance of the trial. In both solemn and summary procedure it may be necessary to lodge a notebook containing a statement given to the police by a witness who has subsequently died;[20] and it may be desirable to lodge a statement made to the police by a witness during the early stages of their inquiry.[21] Such specialties apart, the familiar practice in both solemn and summary procedure is that the policeman's notebook is not lodged, he is allowed to refer/

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[20] As to the admissibility of such a statement see Chapter 19 below.

[21] It is understood that it is not unknown, although very uncommon, for a police officer during the early stages of an inquiry to request a witness to sign a statement in his notebook in order that the officer might be satisfied that the statement has been accurately noted. As to whether such a statement need to be lodged before being used in cross-examination, see ante, para 8.32.

refer to any entry which he made contemporaneously with the events to which he is speaking, and the defence advocate may inspect the entry if he wishes to do so. If the officer does not use or refer to his notebook in the witness-box, the defence is not entitled to see it.[21a]

(2) Nature of document

8.48 (a) Admissibility. A further question is whether the document used by the witness to refresh his memory must be admissible in evidence. The Sheriffs Walker[22] state that it need not be admissible, and refer to Dickson v Taylor,[23] where a witness was allowed to look at an unstamped document. It is thought, however, that a witness should not be allowed to refresh his memory from a document which is privileged from production.[24] The adverse party would then be unable to see it, and to lodge it if there were any provision generally entitling him to do so such as is discussed in para 8.44. If the document is privileged in part, the judge should be entitled to excise and preserve any privileged part and order exhibition of the remainder of the material to the adverse party.

8.49 (b) Originality. It has been held in England that a witness should be allowed to refresh his memory from a statement or report prepared from his original notes, provided that it is substantially the same as the notes, even though it does not contain all the material in them, and to that extent is not an exact copy: if, on the other hand, the document bears comparatively little relation to the original note the judge may refuse to allow the witness to consult it.[25] The same approach/

[21a] Hinshelwood v Auld, 1926 JC 4. Confidentiality may in any event be claimed for the contents of the notebook.

[22] Walkers, para 341(b).

[23] (1816) 1 Mur 141, at pp 142-3. On the admissibility of unstamped deeds see Walkers, paras 237-239; Phipson, paras 1596, 1777-1778; Beattie, (1850) J Shaw 356.

[24] Cf Gain v Gain, [1961] 1 WLR 1469.

[25] R v Cheng, (1976) 63 Cr App R 20.

approach is adopted in Scotland, in any event in relation to the reports of expert witnesses,[26] and in any restatement of the law it may be desirable to enact a general rule on the matter.

(3) Refreshment of memory from precognition

8.50 Finally, there is a question whether it would be desirable or possible to introduce an effective rule defining the circumstances in which a witness may or may not refresh his memory before he appears in the witness-box.[27] The Thomson Committee considered a suggestion that a witness should be given prior to the trial a copy of any statement or precognition made by him to the police or the procurator-fiscal in order to refresh his memory. It may be suggested that it is objectionable to give a witness in any proceedings a copy of any statement taken from him earlier, on the ground that to do so involves at least a substantial risk of interference with the witness's natural recollection;[28] and in the witness-box it is his genuine recollection which the court requires, undisturbed by reference to what a precognoscer understood him to say at some time in the past. It may be argued on the other hand that a general rule that witnesses should not refresh their memories out of court by reference to notes or written statements would be unenforceable. A more limited rule, prohibiting the police from giving prosecution witnesses a copy of their statements, would be more practicable; but it would be difficult to justify making an exceptional provision for that/

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[26] See Horne v MacKenzie, (1839) 6 C & F 628 (a Scottish appeal to the House of Lords).

[27] See R N Gooderson, "Evidence - Refreshing Memory", [1971] CLJ 210, M N Howard, "Refreshment of Memory Out of Court", [1972] Crim L R 351, both based on R v Richardson, [1971] 2 QB 299.

[28] See Ian M L Hunter, Memory (Penguin, 2nd ed), passim but esp pp 156-158.

that particular case.[29] It may be further argued that it is positively advantageous to allow a witness to refresh his memory from his statement. In Lau Pak Ngam v The Queen[30] the Supreme Court of Hong Kong said:

> "Testimony in the witness-box becomes more a test of memory than of truthfulness if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question ... Refusal of access to statements would tend to create difficulties for honest witnesses but be likely to do little to hamper dishonest witnesses."

In England, Home Office Circular No 82/1969, which was issued with the approval of the Lord Chief Justice and the judges of the Queen's Bench Division, recommended for adoption the following practice:

> "that, notwithstanding that criminal proceedings may be pending or contemplated, the chief officer should normally provide a person, on request, with a copy of his statement to the police. It is recognised that on occasion a chief officer may think it necessary to exercise his discretion to refuse to supply a copy of the witness's statement. Circumstances giving cause for refusal are where the chief officer has reason to suppose that the statement is sought for some sinister or improper purpose which might prejudice the course of justice - for example, to enable the witness to lie consistently or where others are bringing pressure on the witness to obtain a copy of his statement with a view to persuading him to go back on it."

In R v Richardson,[31] in which the Court of Appeal held that there was no general rule that prosecution witnesses might not refresh their memories before trial from statements which they had made non-contemporaneously but near the time of the offence, Sachs L J, giving the judgment of the court, said:

> "First, it is to be observed that it is the practice of the courts not to allow a witness to refresh his memory in the witness-box/

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[29] Professor J C Smith, [1966] Crim L R 444.
[30] [1966] Crim L R 443.
[31] [1971] 2 QB 299.

witness-box by reference to written statements unless made contemporaneously. Secondly, it has been recognised in a circular issued in April 1969 with the approval of the Lord Chief Justice and the judges of the Queen's Bench Division (the repositories of the common law) that witnesses for the prosecution in criminal cases are normally (though not in all circumstances) entitled, if they so request, to copies of any statements taken from them by police officers. Thirdly, it is to be noted that witnesses for the defence are normally, as is known to be the practice, allowed to have copies of their statements and to refresh their memories from them at any time up to the moment when they go into the witness-box - indeed, [counsel for the defendant] was careful not to submit that there was anything wrong about that. Fourthly, no-one has ever suggested that in civil proceedings witnesses may not see their statements up to the time when they go into the witness-box. One has only to think for a moment of witnesses going into the box to deal with accidents which took place five or six years previously to conclude that it would be highly unreasonable if they were not allowed to see them."

Sachs L J stated that the court agreed with the observations in Lau Pak Ngam which have been quoted above, and continued:

"Obviously it would be wrong if several witnesses were handed statements in circumstances which enabled one to compare with another what each had said. But there can be no general rule (which, incidentally, would be unenforceable, unlike the rule as to what can be done in the witness-box) that witnesses may not before trial see the statements which they made at some period reasonably close to the time of the event which is the subject of the trial. Indeed, one can imagine many cases, particularly those of a complex nature, where such a rule would militate very greatly against the interests of justice."

The current English view is that in general, a witness at a criminal trial should be allowed, before giving evidence, to refresh his memory by looking at his written statement, particularly when there has been delay; that it is obviously desirable, although not essential, that the prosecution should inform the defence that the witnesses have refreshed their memories from their statements, where that is the case; and that the time for informing the defence is before the witnesses come into the box/

box to give evidence. Omission so to inform the defence will not of itself be a ground of acquittal.[32]

8.51 The Thomson Committee recommended that a witness, in a case where he so requests, should, before the commencement of the trial, have a right to see any statement which he has given to the police or any precognition given to the procurator-fiscal or defence solicitor.[33] If that recommendation were adopted, it would be necessary to inform witnesses that they had such a right: the information could perhaps be given in the citation form. It would also be desirable to add a directory, if not mandatory, rule, similar to the English rule mentioned above,[32] that where a witness has exercised his right to refresh his memory from a statement or precognition given to one party, that party should inform the other party of the fact before the witness enters the witness-box. It seems reasonable that the same rules should apply in civil cases.

11. Documents, etc, used by way of illustration

8.52 Any comprehensive restatement of the law would no doubt include a provision as to the use of documents, models and other materials for the sole purpose of illustrating the testimony of a witness. In Slater v H M Advocate[34] Lord Justice-Clerk Macdonald said:

> "Many things spoken to by a witness may require illustration, and the witness may illustrate them on the spot. That is for the/

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[32] Archbold (38th ed) para 488a; approved in R v Webb, [1975] Crim L R 159, modified in Worley v Bentley, (1976) 62 Cr App R 239, [1976] Crim L R 310. See also R v Westwell, (1976) 62 Cr App R 251, [1976] Crim L R 441.

[33] Thomson, para 43.04.

[34] (1899) 3 Adam 73; 2 F (J) 4. Cf Marshall v Phyn, (1900) 3 Adam 262; 3 F (J) 21.

> the convenience of everybody, and it would be a great pity if there were any restriction on such a convenient use of illustration. I always quite understood that when a witness produces anything in the box for the sake of illustration, that does not make a production in the case. On the contrary, any article thus used ought in the ordinary case to be taken away by the witness."

It is thought that the same practice is followed in civil procedure, and does not cause difficulty. There is, however, a difficulty as to the noting of documentary evidence in summary criminal procedure, which is noted in para 9.11 below.

12. Recall of witnesses, fresh evidence and evidence in replication[35]

8.53 It is thought that the law on this subject merits reconsideration and restatement. First, the power in the court to recall a witness, which does not appear to be controversial, could be restated. Next, the question of the rights of the prosecution and the defence to adduce new evidence after closing their respective cases, appears to merit examination. It does not appear to be necessary to make any new provision as to evidence in replication in civil cases.[36] The question whether it should be competent for a party to lead evidence in rebuttal of evidence given by a witness called by his opponent which is relevant to that witness's character or credibility is discussed in para 16.18 below.

(1) Recall of witness by judge

8.54 (a) Common law. At common law, a witness may be recalled only by the presiding judge, and then only for the limited purpose of clearing up obscurities/

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[35] Walkers, para 338(b); G H Gordon, "Lindie v H M Advocate", (1974) 19 JLSSc 5; H M, "Recalling Witnesses in Criminal Cases", 1960 SLT (News) 161. Recall of a witness to speak to a previous statement is considered in Chapter 19 below.

[36] See Walkers, para 338(a).

obscurities. The judge may recall a witness for that purpose at any stage of the trial, even after both cases have been closed. In this situation, the witness is the judge's witness, and the judge should question the witness himself.[37] It may be convenient, when restating the judge's power in this regard, to overrule various dicta, which have been doubted[38] and indicate that the judge in a criminal case is entitled to recall a witness to ask him whatever questions might seem necessary to ascertain the facts of the case,[39] and to rectify an omission in the prosecutor's case.[40]

8.55 (b) Evidence (Scotland) Act, 1852, sec 4. Section 4 of the 1852 Act[41] provides:

> "It shall be competent to the presiding judge or other person before whom any trial or proof shall proceed, on the motion of either party, to permit any witness who shall have been examined in the course of such trial or proof to be recalled."

In Todd,[37] Lord Sorn explained section 4 in these terms:

> "This is not a section giving the presiding judge a right to recall witnesses, but a section which empowers the presiding judge, on the motion of either party, to permit a witness to be recalled. If such a motion is granted, the witness is not the judge's witness but the witness of the party recalling him, and the evidence to be elicited is not limited to the

clearing/

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[37] Todd v MacDonald, 1960 JC 93, Lord Sorn at p 96; followed in H M Advocate v Maclennon, (1972) 36 JCL 247, and approved in Lindie v H M Advocate, 1974 SLT 208.

[38] Davidson v M'Fadyean, 1942 JC 95, L J-C Cooper at pp 99-100, Lord Wark at p 100, Lord Jamieson at p 101.

[39] Collison v Mitchell, (1897) 24 R (J) 52, L J-C Macdonald at p 55.

[40] Saunders v Paterson, (1903) 7 F (J) 58, Lord Kyllachy at p 61; cf Wilkie, (1886) 1 White 242.

[41] Repealed so far as relating to criminal proceedings by Sched 10, Part I, of the 1975 Act, secs 149 and 350 of which provide: "In any trial, on the motion of either party, the presiding judge may permit a witness who has been examined to be recalled."

> clearing up of ambiguities. We have not gone deeply into this matter, so I shall express it only as my present understanding that it is open to a party to make a motion under section 4 at any time up to the closing of his case, but that, once he has closed his case, the section is no longer available to him. Subject to this, the whole matter is within the discretion of the presiding judge either to allow the motion for recall, or not to allow it, and, if it is granted, to control the taking of additional evidence, and keep it within proper limits."

Lord Justice-General Clyde stated in the same case that section 4 contemplated a situation where, in the course of the trial or the proof, a party had accidentally omitted to put some point to a witness: the section, he said, entitled the party to ask the court's leave to recall the witness, in order that the party might put to the witness the point which he had inadvertently omitted to put. This view of the section, with which Lord Carmont concurred, is based on a statement by Lord Young in Wilkie[40] to the effect that a witness could not be recalled unless to rectify some accidental omission. It is, however, submitted with respect that the section is not limited to that situation but may be invoked wherever the interests of justice require that a witness should be recalled: for example, where fresh facts, which could not have been previously ascertained by proper diligence, come to the notice of the party only after the witness has left the witness-box. It may be desirable to make that clear in any new legislation.

(2) Right of prosecutor to adduce new evidence after his case has closed

8.56 A prosecutor may make a motion under section 4 at any time up to the closing of his case, but once he has closed his case, the section is no longer available to him. "A prosecutor has no right to adduce any new/

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[40] Saunders v Paterson, (1903) 7 F (J) 58, Lord Kyllachy at p 61; cf Wilkie, (1886) 1 White 242.

new evidence after his case has closed, and the court has no power to permit him to do so."[42] Sheriff Gordon comments:[43]

> "... it may be that 'after their case has been closed' is too ritualistic a formula ... and that what is really meant is 'after the defence case has opened.' For there can be little harm in the Crown saying: 'That is my case ... oh no, I'm sorry, I call Mr Smith.' And little harm in their closing their case at night and reneging in the morning, at least if the defence are given an adjournment should justice require it. At any rate, there can be little harm in giving the judge a discretion to break the magic spell of 'My case is closed' in such circumstances. For what is prohibited, by a defensible if dogmatic rule, is proof in replication,[44] and not a breach of an injunction to speak now or forever hold your peace."

It is thought that these observations should be carefully considered if any restatement of the law is attempted.

8.57 The question whether evidence in replication should be admitted, contrary to the present "defensible if dogmatic rule", has been studied by the Thomson Committee, whose recommendations are quoted below at para 8.60. A more general question is whether the prosecutor should be permitted to call further evidence after the closing of his case, or after the defence case has opened. It is of interest that it has been held in England that as an exceptional course, the prosecution may be permitted to call further evidence, even if that evidence is not of a strictly rebutting character - such as evidence which has come to his notice only after his case has been closed; but the court must be vigilant to prevent injustice to the accused and grant an adjournment if fresh matters arise.[45] However, there is no room for lengthy adjournment/

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[42] Lindie v HMA, 1974 SLT 208, at p 210.

[43] G H Gordon, "Lindie v H M Advocate", (1974) JLSSc 5, at pp 5-6.

[44] Docherty v Graham and M'Lennan, 1912 SC (J) 102, 6 Adam 700; M'Neilie v H M Advocate, 1929 JC 50.

[45] R v Doran, (1972) 56 Cr App R 429; cf R v Pilcher, (1974) 60 Cr App R 1.

adjournment in a criminal jury trial;[46] and applications under any new provision would no doubt be strictly controlled by the court.

8.58 It is suggested that in any event consideration should be given to the question of overruling M'Neilie v H M Advocate,[47] where it was held incompetent for a prosecutor to recall a witness to speak to a statement alleged to have been made by a defence witness and denied by him. The Thomson Committee have made a recommendation to that effect, which is set out below at para 8.60. At present, if a prosecutor wishes to take advantage of section 3 of the Evidence (Scotland) Act, 1852,[48] he must call the defence witness himself, put the statement to him, and if he denies it, adduce evidence to prove that he did in fact make it.[49] This seems an unnecessarily elaborate procedure, and it may be doubted whether it was intended by Parliament. Sections 147 and 349 of the 1975 Act, like section 3 of the 1852 Act, provide that evidence may be led to prove that the witness has made the different statement, without specifying any stage of the trial at which that may not be done, and thus do not forbid the prosecutor to lead evidence to contradict the denial of a witness called by the defence. It is difficult to see what legitimate interest of the defence would suffer if that procedure were followed. There is also a question whether the prosecutor should be entitled in certain circumstances to have the accused recalled for cross-examination as to character and previous convictions (see/

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[46] Cf Boyle v Glasgow Corporation, 1944 SC 254, L J-C Thomson at p 261.

[47] 1929 JC 50; and see Todd v HMA, 1960 JC 93, at p 96, and Chapter 19, paras 19.46-19.58 below.

[48] Now, so far as relating to criminal proceedings, secs 147 and 349 of the 1975 Act. See Chapter 19, paras 19.46-19.58 below.

[49] Walkers, para 343(a); R & B, para 18-74.

(see para 5.22 above). The Thomson Committee's recommendation 121a would appear to permit this. It is suggested below that the prosecutor should also be entitled to lead evidence of a defence witness's previous convictions after he has given evidence denying them (paras 16.12-16.13, 16.18 below).

(3) Right of defence to adduce new evidence after defence case has closed

8.59 It is now clear that the presiding judge has no power, in his discretion, to admit additional evidence for the defence after the case for the defence has been closed where the Crown has not consented to its admission.[50] There is a question whether the law should be altered. Sheriff Gordon[51] comments:

> "The law is, then, that it is incompetent for the defence to call a witness after closing their case. Strictly speaking, if such a procedure is incompetent, it cannot be properly adopted even with the consent of all concerned, but in practice it would be open to the judge to allow it where such consent was present. The question now is, should the law be altered so as to give the court a discretion to allow such evidence to be led? There would appear to be no strong objections to such a change, and some arguments in its favour. It is clearly in the interests of justice that the jury have before them all the available evidence. The most likely effect of a rule which absolutely prohibits the calling of such evidence is an appeal based on a motion for the evidence to be heard by or on behalf of the appeal court, a notoriously unsatisfactory procedure.[52] The course adopted in Jeannie Donald[53] was clearly sensible, and should be open, even in the absence of Crown consent ... The leading of such evidence by the defence does not involve any element of proof in replication, or any question of the leading of further prosecution evidence in rebuttal, both of which might be regarded as objectionable. Where there are more than one accused, problems might arise in allowing A to lead fresh evidence after his and
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> B's/

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[50] Lindie v H M Advocate, 1974 SLT 208.

[51] See (1974) 19 JLSSc 5, at p 6.

[52] See "Criminal Appeals in Scotland (First Report)", 1972, Cmnd 5038.

[53] High Court, July 1934. The defence called a new witness after closing their case with leave of the judge and by consent of parties.

B's cases were closed, and these problems might be good ground for the judge refusing to allow such evidence. Indeed, the stage at which the additional evidence is tendered is clearly of importance, and a compromise might be to allow it only where there can be no question of any rebuttal evidence on behalf of a co-accused: ie, to allow it only before any other accused had closed his case. In Lindie, there was no possibility of evidence in rebuttal. The trial had proceeded further than in Jeannie Donald, but the necessity of the advocate-depute making a second speech to the jury is hardly such an inconvenience as to justify an absolute bar on further defence evidence. It may be that such evidence could in certain circumstances be appropriately allowed at any stage before verdict."[54]

8.60 In England, the Criminal Law Revision Committee have recommended the enactment of a rule to the effect that all evidence to be given on behalf of either party shall be given before the conclusion of the party's case except in so far as the court in its discretion otherwise allows, provided that an accused who has elected not to give evidence may not change his mind and do so after the defence have said that their case is closed.[55] The recommendations of the Thomson Committee are in the following terms:

"120. At any time prior to the commencement of speeches to the jury, in exceptional circumstances on the motion of either the prosecution or the defence, the court should have the power in the exercise of its discretion and on cause shown to allow fresh evidence which has just come to notice, whether from a new or recalled witness (paragraph 43.10).

"121. Evidence in replication should be allowed as follows: a. The court should have power, on a motion made by the Crown at the close of the defence case and before speeches to the jury, to allow the Crown to lead additional evidence (whether from a new or recalled witness) solely for the purpose of contradicting relevant and material evidence given by any

defence/

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[54] Cf the meaning of "at every stage" as discussed in Clark and Bendall v Stuart, (1886) 13 R (J) 86; 1 White 191, where it was held that an accused could not give evidence after the sheriff in a summary trial had delivered his decision in which he had commented on the accused's failure to give evidence (Sheriff Gordon's note).

[55] CLRC, paras 209-216, pp 186-187, 231-232.

defence witness provided that the court is satisfied that the Crown could not reasonably have foreseen that the defence would lead such evidence; and

b. If a witness denies that he made a previous statement which is different from his evidence, the court should have power, on a motion by the Crown at the close of the defence case and before speeches to the jury, to allow the Crown to lead additional evidence (whether from a new or recalled witness) to prove that the witness did make a different statement (paragraph 43.11).

"122. For the limited purpose set forth in recommendations 120 and 121, the Crown and the defence should be permitted to lead evidence from witnesses whose names are not included in the respective list of witnesses (paragraph 43.13).

"123. Recommendations 120 and 121 should apply mutatis mutandis to summary proceedings (paragraph 43.13)."

(4) Recalcitrant witness

8.61 The learned editor of Renton and Brown notes that a practice seems to be growing up whereby a recalcitrant witness who has been detained for prevarication will be allowed to purge his contempt by returning to the witness-box to contradict his earlier protestations of ignorance.[56] It is thought that it is ordinarily the best practice for the court to refrain from making any finding that the witness has been guilty of contempt in respect of prevarication until the conclusion of the trial. If in the meantime the witness offers to return to the witness-box and tell the whole truth, it seems possible to allow him to do so only by the device of permitting his recall on the motion of one of the parties, since the judge's common law power to recall a witness is limited to the purpose of clearing up ambiguities. But if the prosecutor has closed his case before the witness makes his offer to return to the witness-box, he cannot make the motion; and it may well not be in the interests of the defence to do so. It is thought that the law should be altered to permit the recall of a witness in such a situation.

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

13. Comment on failure to call witness

8.62 Reference has been made above to the right of the judge or advocates to comment to the jury on the failure by an accused or his spouse to give evidence.[57] It is thought that if this matter is to be regulated, provision should also be made as to comment on the failure by any party to call witnesses. If comment may be made on the failure of the accused himself to give evidence, it seems reasonable to permit comment on the failure to call a witness. In practice, such comment is sometimes made by the presiding judge,[58] and it seems particularly justified where it does not appear until the trial that the defence then put forward is one which could be/

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[57] Paras 5.21-5.27, 5.34, 6.25.

[58] In McGregor v H M Advocate, 25th October 1973, unreported, where the defence to a series of assaults and statutory offences was that the appellant had been involuntarily intoxicated by a combination of alcohol and drugs, the drugs having been administered to him in drinks without his knowledge, the appellant made no criticism of Lord Fraser's comment to the jury in the following terms: "Ladies and gentlemen, you will bear in mind the very remarkable fact that no evidence was called from the friends who were with him that evening to show what the accused was drinking throughout the evening. His counsel said the friends did not want to know about it, they would not come. Well, you will consider that. There is machinery for compelling witnesses to come. Of course, witnesses who are compelled to come unwillingly are not so helpful as those who come willingly, but it can be done. You would need to consider seriously whether you were going to accept the accused's evidence, which stands wholly unsupported. He was with a man he says is quite an old friend in this man's flat, and this man and his fiancee and the other people, none of them are here to substantiate what the accused said. The accused does not require corroboration, you can believe his evidence if you think fit, but you would need to consider why it is that there is no other witness who supports him on this."

be verified or disproved by the missing witness.[59] It is suggested that it would be desirable to make it clear that such comment may be made not only by the judge, but by the Crown and by the defence. A provision in somewhat similar terms could no doubt be devised for civil jury trials, if thought to be necessary.

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[59] The most recent English authority on the propriety of comment by the judge on failure by the defence to call witnesses is R v Gallagher, [1974] 1 WLR 1204, in which it was held that it was permissible for the judge in an appropriate case to tell the jury that they were entitled to take into account the defendant's failure to call a potential witness; but in making any comment the judge must exercise care, as when commenting on a defendant's failure to give evidence, and in particular, must take care to avoid the possibility that injustice might be done by leaving the jury under the impression that the failure to call a witness was something of importance when there might have been some good reason for it. For comment on this decision see [1974] Crim L R 543.

Chapter 9

ORAL EVIDENCE VII: THE RECORDING OF EVIDENCE[1]

9.01 There are several comparatively minor difficulties and anomalies in the law relating to the recording of evidence. In the following paragraphs the statutory provisions bearing on the matter are listed, and various problems are considered in relation to the types of proceeding in which they arise. Finally, some proposals regarding the mechanical recording of evidence are briefly noticed.

1. Statutory provisions

(1) Civil causes[2]

9.02 (a) Court of Session. "There are several methods of recording the oral evidence at a proof set forth in the Conjugal Rights (Scotland) Amendment Act, 1861,[3] and the Evidence (Scotland) Act, 1866.[4] Thus, the Lord Ordinary may himself take and either write down with his own hand the oral evidence, in which case it shall be read over to the witness by the judge in open court, and shall be signed by the witness, if he can write; or the Lord Ordinary may record the evidence by dictating it to a clerk, in which case it shall also be read over to and signed by the witness; or the Lord Ordinary may cause the evidence to be taken down and recorded in shorthand by a writer skilled in shorthand writing, to whom the oath de fideli administratione officii shall be administered; and the Lord/

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[1] Walkers, paras 159, 347; Maclaren, Court of Session Practice, pp 559-560; R & B, paras 10-33, 14-10; Dobie, Sheriff Court Practice, pp 227-228; J M Lees, "Shorthand in the Sheriff Court", (1887) 3 Sc L Rev 157.

[2] As to the recording of submissions as to competency and relevancy in civil causes in the sheriff court, see para 8.43 above.

[3] 24 and 25 Vict cap 86, sec 13.

[4] 29 and 30 Vict cap 112, sec 1.

Lord Ordinary may, if he think fit, dictate to the shorthand writer the evidence which he is to record; and the shorthand writer shall afterwards write out the evidence so taken by him; and the extended notes of such shorthand writer, certified by the presiding judge to be correct, shall be the record of the oral evidence in the cause."[5]

9.03 It is thought that the provisions referred to by Maclaren[3,4] should be consolidated. Although rules 113 and 130 of the Rules of Court provide that evidence shall generally be recorded by a shorthand writer, it may be desirable to preserve the other methods, which could be employed in the event of a shorthand writer not being available. Provision could also be made for the adoption of any mechanical means of recording evidence which had been approved by Act of Sederunt. It is recommended below that provision should also be made for the recording and reproduction of the charge in a civil jury trial.[5]

9.04 (b) Sheriff Court. The relevant provisions are rules 65, 66 and 137 of the Sheriff Court Rules. In the new summary cause procedure the evidence, other than evidence taken to lie in retentis, is recorded only in the notes made by the sheriff for his own use.[6] It is recommended below that express provision should be made for the taking and recording of evidence in consistorial causes.[7]

9.05 (c) Generally. It is suggested that the following matters should be considered. It no longer appears to be necessary to make provision/

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[3] 24 and 25 Vict cap 86, sec 13.
[4] 29 and 30 Vict cap 112, sec 1.
[5] Maclaren, Court of Session Practice, pp 559-560.
[5] Post, para 9.12.
[6] Sheriff Courts (Scotland) Act, 1971 (cap 58), sec 36(3); Act of Sederunt (Summary Cause Rules, Sheriff Court), 1976, Sched, rules 34, 43.
[7] Post, paras 9.14-9.15.

provision for the recording of evidence in narrative form.[8] It should be made clear, by a provision in general terms, that the Lord Ordinary or sheriff may take evidence of new, as where the extended notes of evidence are destroyed[9] or are found to be inaccurate or incomplete,[10] or where the notes cannot be extended due to the illness of the shorthand writer, or for any other necessary cause. At present, rule 66 of the Sheriff Court Rules provides that if the correctness of the notes of evidence be questioned, the sheriff may satisfy himself in regard thereto by the examination of witnesses or otherwise, and may amend the record of evidence.

(2) Criminal trials

9.06 (a) On indictment[11] Section 274(1) of the 1975 Act requires that in all trials on indictment, shorthand notes of the proceedings must be taken.[12] It appears that sections 3 and 4 of the Justiciary and Circuit Courts (Scotland) Act, 1783,[13] which provides that in certain trials before these courts the oral evidence of witnesses may, but need not, be recorded in writing, should be repealed.

9.07 If it is thought that the presiding judge should continue to be obliged to take and preserve a note of the evidence or proceedings it would be desirable to enact a provision expressly to that effect. The present/

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[8] As in rule 65 of the Sheriff Court Rules.

[9] As happened in Yates v Robertson, (1891) 18 R 1206: the pursuer's petition to the nobile officium was not dismissed as unnecessary, but L P Inglis was "rather inclined to think that this matter might have been set right in the sheriff court."

[10] As happened in Wilson v MacQueen, (1925) 41 Sh Ct Rep 278, 1925 SLT (Sh Ct) 130, where the sheriff on appeal remitted to the sheriff-substitute to take the evidence of new.

[11] R & B, para 10-33. The recovery of transcripts of trials on indictment is considered at paras 25.16-25.18 below.

[12] See also sec 275.

[13] 23 Geo III, cap 45.

present provisions, which require a sheriff to authenticate and preserve his notes of the evidence[14] and require a presiding judge or sheriff to furnish his notes of the proceedings to the Clerk of Justiciary in the event of an appeal,[15] should be reconsidered. The Thomson Committee in their Third Report recommended that the latter provision should be repealed, and replaced by a provision giving the High Court express power to call for the judge's notes at any time;[16] but they do not appear to have considered the former provision.

9.08 A very minor matter which seems to require attention is that in criminal trials, the declaration de fideli administratione officii should apparently be administered to the shorthand writer at the beginning of each trial. The form of minute laid down by section 276 of the 1975 Act seems to imply that this must be done. When the original shorthand writer is replaced by another in the course of a trial, the declaration should no doubt be administered to the new writer. The declaration is never administered in civil causes, except to a newly fledged shorthand writer embarking on his duties for the first time; and it is thought that no more should be necessary in criminal practice.

9.09 (b) Summary procedure. It is submitted that there should be some reform of the law relating to the matters which are required to be recorded in summary proceedings. The 1975 Act provides by section 359:

> "Proceedings in a summary prosecution shall be conducted summarily viva voce, and, except where otherwise provided, no record need be kept of the proceedings other than the complaint, the plea, a note of any documentary evidence produced, and the conviction and sentence or other finding of the court:
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> "Provided/

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[14] 1975 Act, sec 146.

[15] 1975 Act, sec 237(1).

[16] Cmnd 7005, para 2.27.

"Provided that any objections taken to the competency or relevancy of the complaint or proceedings, or to the competency or admissibility of evidence, shall, if either party desires it, be entered in the record of the proceedings."

Normally there is no official shorthand note of the evidence in a summary criminal trial.[17] The question whether all the evidence given in such a trial should be recorded was considered by the Grant Committee[18] and by the Thomson Committee in their Third Report.[19] Both Committees concluded that the recording of evidence in all summary trials was not practicable. These conclusions are accepted, and it is proposed to raise here only two matters relating to the recording of the proceedings in the minutes.

9.10 It is submitted, first, that the names of the witnesses examined should be recorded. At present this is unnecessary; but in any case of importance, "and more especially in any case likely to be made the subject of an appeal, it is desirable that a record of the names and designations of the witnesses examined should be preserved for future reference."[20] Since it is often impossible to tell in the course of a trial whether or not the case is likely to be made the subject of an appeal, it is suggested that the names of the witnesses should be recorded in every case.

9.11 It is submitted, secondly, that all documents produced or referred to should be noted in the minutes. The present law, which is that any documentary evidence produced must be noted, is a source of unnecessary confusion and difficulty. The phrase "documentary evidence" in section 359 "applies only to documents actually produced by the witnesses as evidence in the case, and which are competent evidence. What is truly documentary evidence of the character/

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[17] Official shorthand notes were taken in a recent summary criminal trial of unusual length and complexity: Skeen v Fraser, The Scotsman, 25th May 1978.

[18] Grant, paras 757-760.

[19] Cmnd 7005, paras 6.01-6.08.

[20] R & B, para 14-10.

character which should be noted is often a question of some difficulty."[21] Further, the opinion has been expressed that the noting of documents which are not competent evidence is fatal to a conviction.[22] It is thought that that should not be so, and that any new statutory provision should clarify the matter. In order to obviate any erroneous failure to record documentary productions, successive editions of Renton and Brown have recommended a somewhat elaborate procedure, in these terms:

> "Any risk of error in connection with failure to record documentary productions would be obviated, if, when a document is produced by a witness, the Clerk of Court would ask either the prosecutor or the agent for the accused, as the case may be, whether it is desired to make that document a production in the case. In the event of any difference of opinion as to whether or not it is compulsory to treat the document as a production requiring to be put in, the decision of the court should be taken on the point."23

This procedure would be unnecessary if the procedure now proposed were to be adopted.

2. Civil jury trial

9.12 It would be useful to provide that the judge's charge in a civil jury trial should be recorded, and in the case of an appeal, printed for the use of the appeal court. The practice of making no part of the judge's charge available to higher courts other than that quoted in a note of exceptions, has been criticised;[24] and in cases where the charge has/

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[21] R & B, para 14-12.

[22] Eastburn v Robertson, (1898) 2 Adam 607, L J-C Macdonald at p 615, Lord Trayner at pp 617-618; 1 F (J) 14 at pp 19-20, 21.

[23] R & B, para 14-12.

[24] Douglas v Cunningham, 1963 SC 564, Lord Guthrie at p 570; M'Arthur v Weir Housing Corporation, 1970 SC 135, Lord Wheatley at pp 138-139; cf Robertson v Federation of Iceland Co-operative Societies, 1948 SC 565, L J-C Thomson at pp 571-572.

has been reproduced,[25] no harm has been done. Rule 137 of the Sheriff Court Rules, which provides that unless parties put in a minute dispensing with a record of the proceedings, the same shall be taken by a shorthand writer, appears to envisage that the charge shall be recorded; and it seems to be the practice in the sheriff court to record the charge.[26]

3. Sheriff Court

(1) General

9.13 The Grant Committee recommended that in an ordinary action in the sheriff court, it should be competent, with the consent of the parties, to dispense with the recording of evidence: any appeal would then be on law only.[27] If a shorthand-writer is required, his attendance should be arranged by the sheriff-clerk[28] and paid for by the Exchequer.[29] Shorthand notes of evidence should be extended only by order of the sheriff or at the request of a party making an appeal.[30] Evidence should not be recorded in undefended ordinary actions requiring proof.[31]

(2) Consistorial causes in the sheriff court[32]

9.14 The Court of Session Acts of 1830 and 1850[33] provide that in the Court of Session a decree may not be pronounced in a consistorial cause, even if the action is undefended, until the grounds of action are substantiated by sufficient evidence. In the sheriff court, however, there/

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[25] Ferguson (recte Hammond) v Western SMT Co Ltd, 1969 SLT 213 (the fact that the charge was reproduced is not apparent from the report); Ward v UCS Ltd, 1973 SLT 182 (see p 185).

[26] Walkers, para 347, n 53; Ward, n 25 supra.

[27] Para 597, rec 238.

[28] Para 536, rec 185.

[29] Paras 534-535, rec 183.

[30] Para 598, rec 239.

[31] Para 599, rec 240.

[32] Walkers, para 159.

[33] 11 Geo IV and 1 Will IV, cap 69, sec 36; 13 and 14 Vict cap 36, sec 16 (adherence).

there is no equivalent statutory provision, and it may be thought desirable that some such provision should be made. The only statutory reference to such actions in the sheriff court is contained in rule 23 of the Sheriff Court Rules, which merely excludes actions of separation and aliment, adherence and aliment, and actions regulating the custody of children, from a procedure whereby decree in absence may be obtained by a written crave endorsed on the initial writ. The rule appears to leave the pursuer in any such action free to enrol and move for decree in open court. In practice, however, the rule applicable in the Court of Session is applied, and decrees in actions of separation and aliment and adherence and aliment are not pronounced, even when the action is undefended, until the grounds of action are substantiated by sufficient evidence.[34] It would seem logical that the practice should be given statutory sanction.

9.15 It is thought that just as the rule requiring proof in consistorial causes should be extended from the Court of Session to the sheriff court, so also should the rule that the evidence in consistorial causes must be recorded in full. The rule is laid down for the Court of Session in the Conjugal Rights (Scotland) Amendment Act, 1861, and in the Rules of Court,[35] but there is no similar provision for the sheriff court, although in practice the evidence in such cases is recorded in full there also.

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[34] Grant v Grant, (1908) 24 Sh Ct Rep 114. The rule 23 therein referred to was superseded by a new rule 23 introduced by the Act of 1913, and later amended in 1954 and 1963. See also Barrow v Barrow, (1960) 76 Sh Ct Rep 3, 1960 SLT (Sh Ct) 18. As to actions of custody in the sheriff court see Beverley v Beverley, 1977 SLT (Sh Ct) 3.

[35] 24 and 25 Vict cap 86, sec 13; R C 113. Rule 65 of the Sheriff Court Rules is permissive.

4. Tape-recording and shorthand

9.16 The relative merits of tape-recording and shorthand have been considered in recent years in the United Kingdom by the Grant Committee, by a working party set up by the Lord Chancellor's Office, and by the Law Society of Scotland. They have also been much discussed in the United States of America.

9.17 The Lord Chancellor's Office recently set up a working party with the following remit:

> "To examine the comparative cost and efficiency of tape-recording and shorthand as a means of court reporting; to formulate an optimum policy for the new Court Service, and to make proposals for any further implementation of tape-recording or improvements in shorthand reporting, in the light of that policy."

The working party issued a report in July 1972,[36] which recommended that permanent mechanical recording facilities should be installed where it is possible to do so, and that such facilities should always be installed in new buildings. It also recommended that the best results were likely to be achieved by a combination of shorthand transcripts and mechanical recordings, the latter being used to record charges and judgments. Some use is now made of tape-recording for judges' charges in Scotland. A study group set up jointly by the Lord Chancellor's Office and the Scottish Office is now engaged on an examination of verbatim reporting.

9.18 A committee of the Law Society of Scotland has also considered the mechanical recording of evidence. The committee obtained information about the use of mechanical recording in The Netherlands, Sweden and West Germany, and ascertained that the Scottish shorthand-writers had no recruiting problem and considered that they could cope with an increase in the volume of shorthand-writing/

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[36] See (1972) 17 JLSSc 189; (1973) 18 JLSSc 294.

shorthand-writing work. The Council of the Society decided not to make any recommendation on the subject.[36]

9.19 To assess the relative merits of shorthand-writing and the mechanical recording of evidence is outwith the scope of this paper. In order to determine the feasibility of any change from the present system, it would be necessary to undertake a study which would evaluate the accuracy, manpower requirements and expense of the various methods of recording evidence, including the traditional shorthand method. Such a study was undertaken by a Special Committee on the Recording and Transcription of Los Angeles Superior Court Proceedings, which reported in September 1972.[37] The results of the Committee's study indicated that the method of recording court proceedings by stenographic reporters was effective, and that any benefits to be derived from the utilisation of electronic recording systems were rather limited at that time. The Committee considered that although a combination of systems might provide the optimum means of recording and transcribing court proceedings, their tests indicated that electric recording systems might be applicable only in approximately 5 per cent of the court's proceedings. In the light of that indication, they recommended that no further testing and analysis of court recording systems be undertaken at that time by or in the Los Angeles Superior Court. There does not appear to be any equivalent in Scottish practice to the types of proceedings comprised in the 5 per cent referred to. A study of a less formal kind than the Los Angeles Committee's was carried out in Alaska, where an experimental system/

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[37] The text of the report is published in 1973 National Shorthand Reporter 19, under the title "Recording and Transcription of Los Angeles Superior Court Proceedings."

system of automated electronic court reporting was adopted in or about 1960. The Vice-President of the United States Court Reporters Association carried out a survey of the system in 1969,[38] and concluded that the quality of the transcripts produced was so poor that it would not be acceptable in most courts in the United States. He found that it was impossible to make a transcript from a tape unless it had been logged and monitored in court, and that the quality of the transcript depended on too many variables, including courtroom control of the participants and electronical or other interference, as well as the skill of the logger and the transcriber. These and other conclusions, which were generally unfavourable to the system, were supported by Mr Edgar P Boyko, a former Attorney-General of Alaska, in an article in the American Bar Association Journal.[39]

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[38] Samuel M Blumberg, "Latest Survey of Electrical Recording in Alaska", 1970 National Shorthand Reporter 12.

[39] (1971) 57 ABAJ 1009, reprinted in 1972 National Shorthand Reporter 9.

Chapter 10

ORAL EVIDENCE IX: WRITTEN STATEMENTS IN LIEU OF ORAL EVIDENCE

1. General

10.01 As a general rule, any fact required to be proved in proceedings both civil and criminal must be proved by the examination of witnesses orally in open court. There are several well-recognised exceptions to the rule: there may be a view by the judge, or by the judge and jury;[1] in a criminal trial the judge may hear evidence in the absence of the jury at a trial-within-a-trial;[2] in a civil case evidence which has been taken on commission may be lodged and read out or referred to;[3] various statutory provisions allow certificates to take the place of oral evidence;[4] certified statements may be accepted in petitions for the variation of trust purposes;[5] and affidavits may be used in commissary, bankruptcy and various other proceedings including Admiralty and commercial causes in the Court of Session[6] and under the Bankers' Books Evidence Act, 1879.[7] Section 7(1)(e) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1976,[8] enables the Lord Advocate to make rules in relation to inquiries thereunder providing that written statements and reports may, on such conditions as may be specified in the rules, be admissible in lieu of parole evidence; and provision is now/

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[1] Paras 25.27-25.31, 25.50 below.
[2] Paras 20.37-20.52 below.
[3] Paras 24.47-24.49 below.
[4] Walkers, paras 206, 384.
[5] W A Wilson and A G M Duncan, Trusts, Trustees and Executors, chapter 12 (by Mr W A Elliott, QC), p 164.
[6] Walkers, paras 407-409; Succession (Scotland) Act, 1964 (cap 41) sec 21; RC 152.
[7] See para 3.30 above, paras 12.37, 25.19 below.
[8] 1976, cap 14.

now made for these by rule 10 of the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules, 1977.[9] The following paragraphs consider the admissibility of written statements in lieu of oral evidence in the general fields of civil and criminal proceedings.

2. Civil causes

10.02 The Administration of Justice (Scotland) Act, 1933,[10] provided by section 16 that the Court of Session should have power by Act of Sederunt -

> "(e) to provide for the admission, on such conditions as may be prescribed, of affidavits, in lieu of parole evidence, in any issue not affecting the status of any person."

Similarly, section 32(1) of the Sheriff Courts (Scotland) Act, 1971,[11] enacted that the power of the Court of Session to regulate civil procedure in the sheriff court should extend to -

> "(e) providing for the admission, on such conditions as may be prescribed, of affidavits in lieu of parole evidence."

These provisions have been amended by section 29 of the Administration of Justice Act, 1977.[12] Section 29(1), amending section 16(e) of the 1933 Act, enables the Court of Session

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

Section 29(2) amends section 32(1)(e) of the 1971 Act by conferring on the Court power to provide for the admission of written statements and reports as well as affidavits.

10.03 It may be that the documentary evidence for which these amendments make provision could be employed with advantage in applications for/

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[9] SI 1977, No 191.
[10] 23 and 24 Geo V, cap 41.
[11] 1971, cap 58.
[12] 1977, cap 38.

for provisional remedies such as interim interdict and interim custody and aliment, and in any new summary judgment procedure[13] which might be introduced. The amendment of section 16 has already enabled provision to be made for the hearing of undefended divorces in the Court of Session by a wholly documentary procedure.[14]

3. Criminal trials

10.04 In England, section 9(1) of the Criminal Justice Act, 1967, provides that a written statement by any person is admissible in criminal proceedings, other than committal proceedings, to the like extent as oral evidence to the like effect by that person, if the conditions set out in section 9(2) are satisfied.[15] The most important of these conditions is that all parties should consent to the admission of the statement. It seems doubtful whether a provision on these lines is necessary in Scotland, in view of the nature of the Scottish provisions as to minutes of admission and agreement.[16]

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[13] See para 2.22 above.

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

[15] 1967, cap 80. See Ellis v Jones, [1973] 2 All ER 893.

[16] See paras 2.31 et seq above.

Chapter 11

DOCUMENTARY EVIDENCE I: PUBLIC DOCUMENTS

1. Governmental documents

11.01 Proof of governmental documents such as statutes, Orders in Council, royal proclamations, statutory instruments, Acts of Sederunt, Acts of Adjournal, and the like is governed by a large number of statutes and decisions and by the practice of the courts.[1] A comprehensive restatement of the law would no doubt contain provisions simplifying the subject, but it is doubted whether the present state of the law causes much difficulty in practice,[2] except perhaps in the cases of (1) statutory instruments, (2) ancient records and (3) foreign statutes and similar governmental documents.

(1) Statutory instruments

11.02 Doubts about the proof of statutory instruments have already been noted.[3] It is difficult to find a completely general statutory provision on/

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[1] Walkers, chap 18 (by Sheriff P G B McNeill). See also Phipson, paras 1823-1843. To the classes of document there considered must now be added Community instruments. All Community instruments which are published in the Official Journal of the Communities are to be judicially noticed under section 3(2) of the European Communities Act, 1972 (cap 68). If, exceptionally, an instrument has not been published in the Official Journal it may be proved under section 3(3)-(5) by production of an appropriate copy.

[2] It has been said that Hansard, the reports of committees of the House of Commons, their minutes of evidence, and other periodical records "need and deserve a status before the courts no different from that belonging to other established public records" (The Times, 23rd July 1975). Difficulty had been encountered during the preparation of the Attorney-General's case in Attorney-General v Jonathan Cape Ltd (the "Crossman Diaries" case, [1975] 3 WLR 606) by a resolution of the House of Commons in 1818 that any party to a law-suit who wishes to cite in evidence the record of proceedings of the House must petition for direct leave from the House for its appropriate officer to prove the document in evidence before the court.

[3] Para 2.03 ante.

on the matter. Sir Rupert Cross, describing English practice, writes:[4]

> "Cases sometimes have to be adjourned so as to give a party an opportunity of producing a Stationery Office copy.[5] The courts vary in their attitude towards insistence on the proper proof of statutory instruments and Orders in Council, sometimes describing it as the imprescriptible right of a litigant to have it properly proved and, on other occasions, describing the insistence on proper proof as a technical triviality."[6]

In Scottish practice it has been assumed that a statutory instrument need be proved only in case of doubt as to its terms, and that at least prima facie evidence of these may be given by the production of a Stationery Office copy under the Documentary Evidence Acts, 1868 and 1882,[7] and of its date of issue by a list issued by the Stationery Office under section 3(1) of the Statutory Instruments Act, 1946.[8] It has been pointed out, however, that although the production of a Stationery Office copy usually passes without objection, occasionally further evidence of the issue of the instrument is necessary in English practice;[9] but the Court of Appeal has indicated that the word "Order" in the 1868 Act should be given a wide meaning.[10] In view of these difficulties it may be desirable to enact in a United Kingdom statute a provision to the effect that judicial notice shall be taken of all statutory instruments, and that in case of doubt as to their terms they may be established by reference to a Stationery Office copy.

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[4] Cross, p 526, n 5. See also Phipson, para 49.

[5] Snell v Unity Finance Co Ltd, [1964] 2 QB 203.

[6] See Duffin v Markham, (1918) 88 LJKB 581, and Tyrrell v Cole, (1918) 120 LT 156.

[7] 31 and 32 Vict cap 37; 45 and 46 Vict cap 9.

[8] 9 and 10 Geo VI, cap 36.

[9] See Nokes, pp 60, 435; Royal v Prescott-Clarke, [1966] 1 WLR 788.

[10] R v Clarke, [1969] 2 QB 91.

(2) Ancient records

11.03 Doubts have also been expressed about the necessity for proof, mode of proof, and evidential value of some of the classes of older public documents: private Acts of the Scottish Parliament,[11] Orders in Council before 1948,[12] pre-1708 Scottish subordinate legislation,[13] and Acts of Sederunt and Acts of Adjournal before 1893.[14] It is thought that judicial notice should be taken of these, if cited in an apparently reliable form,[15] without prejudice to the question of the reliability of any statement of fact in private Acts of the Scottish Parliament making grants or ratifications *salvo jure cujuslibet*.

(3) Foreign governmental documents[16]

11.04 The Evidence Act, 1851, which makes provision for the proof in England of foreign and colonial governmental documents and judicial records, does not extend to Scotland.[17] There are statutory provisions in language which now seems inappropriate as to the proof of "dominion" and "colonial" statutes.[18] Provisions as to the proof of facts in foreign public registers are contained in the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933.[19] The Hague Convention of 5th/

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[11] Walkers, para 195.

[12] *Ibid*, para 198(a).

[13] *Ibid*, para 199.

[14] *Ibid*, para 201.

[15] In the case of private Acts of the Scottish Parliament it may be desirable to specify the Record Edition.

[16] See Dickson, paras 1319-1327; Walkers, para 203; Anton, *Private International Law*, pp 556-559.

[17] 14 and 15 Vict cap 99, sec 18.

[18] Colonial Laws Validity Act, 1865 (28 and 29 Vict cap 63); Evidence (Colonial Statutes) Act, 1907 (7 Edw VII, cap 16).

[19] 23 and 24 Geo V, cap 4.

5th October 1961 makes provision for a system whereby an authority of the country from which a foreign public document emanates certifies its authenticity by an "Apostille". The convention has been ratified by the United Kingdom, and the view has been expressed that foreign public documents certified as authentic in terms of the Convention would be regarded as authentic by the Scottish courts.[20] In that situation it may be unnecessary to propose a comprehensive provision to facilitate proof of foreign statutes and similar governmental documents. Such a provision might enact, in effect, that if a copy of a foreign governmental document is produced, which the court is satisfied is an authentic copy of the document, and the court finds that the original, if otherwise proved, would be admissible in evidence, a copy should be received as prima facie evidence of the contents of the original.

2. Judicial records

(1) Convictions as evidence in civil proceedings

11.05 Sections 10-12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968, introduced into the law of Scotland provisions corresponding to sections 11-13 of the Civil Evidence Act, 1968, which followed the recommendations of the Fifteenth Report of the English Law Reform Committee[21] and were based on two principles: (1) that any material which has probative value upon any question in issue in a civil action should be admissible in evidence unless there are good reasons for excluding it; and (2) that any decision of a court in the United Kingdom upon an issue which it has a duty to determine is more likely/

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[20] Anton, n 16 supra, p 557.

[21] Cmnd 3391 (hereafter "LRC 15")

likely than not to have been reached according to law and to be right rather than wrong.[22] The new provisions have caused certain difficulties, but it is suggested that they could usefully be modified and extended.

(a) Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968, sec 10

11.06 The Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968, enacts by section 10:-

> "(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall ... be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence ...
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere -
> (a) he shall be taken to have committed that offence unless the contrary is proved ..."

These provisions have given rise to a number of questions.

11.07 (i) Averment. Should the party who seeks to prove that the offence was not committed aver specifically that the person convicted did not commit the offence? It is thought that he should,[23] but there seems to be no settled practice.

11.08 (ii) Standard of proof. What standard of proof faces that party?[24] It is thought that the standard is proof on a balance of probabilities;[25] but the question does not seem to have been fully argued in the Scottish courts.

11.09/

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[22] LRC 15, para 8.

[23] Fardy v SMT Co Ltd, 1971 SLT 232.

[24] Caldwell v Wright, 1970 SLT 111.

[25] King v Patterson, 1971 SLT (Notes) 40; Taylor v Taylor, [1970] 1 WLR 1148, Davies L J at p 1152; Stupple v Royal Insurance Co, [1971] 1 QB 50; Public Prosecutor v Yuvaraj, [1970] AC 913.

11.09 (iii) Corroboration. Is the statutory restriction of the rule requiring corroboration in personal injuries cases applicable to the party who, in such a case, is in effect undertaking to disprove the verdict of the criminal court?[24] It seems to be assumed that the rule is applicable, but it is doubtful whether that is desirable, because it would be unfortunate if differences in the law of corroboration were to lead to different results in proceedings relating to the same facts.[26] On the other hand it may be thought unlikely that that would occur in practice, because the evidence of one witness would generally not be sufficiently weighty to satisfy a civil court, even on the civil standard of proof, that the party had not committed the offence.

11.10 (iv) Weight. What weight is to be given to the conviction? Different views have been expressed in the English courts in relation to the corresponding English provision, section 11 of the Civil Evidence Act, 1968.[27] In Stupple,[25] Lord Denning M R observed that its weight depends on the circumstances and must be evaluated by the judge at the civil trial: the defendant may explain that his conviction proceeded on a plea of guilty which was tendered in error, or to save time/

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[24] Caldwell v Wright, 1970 SLT 111.

[25] King v Patterson, 1971 SLT (Notes) 40; Taylor v Taylor, [1970] 1 WLR 1148, Davies L J at p 1152; Stupple v Royal Insurance Co, [1971] 1 QB 50; Public Prosecutor v Yuvaraj, [1970] AC 913.

[26] It is, however, suggested in Chapter 23 below, that the rules as to corroboration should be reconsidered.

[27] Cross, pp 395-396; C J Miller, "Evidence of Conviction in Civil Proceedings", (1971) 121 NLJ 573, 598, 622; A Zuckerman, "Previous Conviction as Evidence of Guilt", (1971) 87 LQR 21, commented on by J D Heydon, Cases and Materials on Evidence, p 378.

time and expense when the offence was trivial, or that his conviction was not appealed because the leniency of the sentence did not make appeal worth while. It appears that in Lord Denning's view, if such an explanation were accepted, the conviction on a plea of guilty would carry less weight than the verdict of a jury in the High Court. Similarly, in Taylor,[25] Davies L J said it was obvious that a jury's verdict was "a matter which is entitled to very great weight when the convicted person is seeking, in the words of the statute, to prove the contrary." Taylor, however, antedates the decision of the Court of Appeal in Stupple and the present question does not seem to have been before the court. In Stupple, Buckley L J expressed a different view:

> "... proof of conviction under this section gives rise to the statutory presumption [that the defendant committed the offence] which, like any other presumption, will give way to evidence establishing the contrary on the balance of probability, without itself affording any evidential weight to be taken into account in determining whether that onus has been discharged."

In Wright,[28] Stirling J agreed with the latter view. It is respectfully suggested that the latter view is correct, and that the proof of conviction which gives rise to the presumption of guilt is similar in function to the proof of marriage which gives rise to the presumption of legitimacy: it is exhausted by bringing the presumption into play. The different views have practical consequences. The former view involves an assessement not only of the defender's explanations but of the relative values of unanimous and majority verdicts, and of decisions by sheriffs and lay and stipendiary magistrates. Such assessments would be unpredictable, and/

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[25] King v Patterson, 1971 SLT (Notes) 40; Taylor v Taylor, [1970] 1 WLR 1148, Davies L J at p 1152; Stupple v Royal Insurance Co, [1971] 1 QB 50; Public Prosecutor v Yuvaraj, [1970] AC 913.

[28] Wright v Wright, (1971) 115 SJ 173.

and could not be performed by a jury. The latter view may have the result that a party relying on a conviction which according to the former view is very weighty, such as a conviction by the verdict of a jury, ought as a matter of tactics to adduce more evidence of the commission of the offence than an adherent of the former view would think necessary. It would therefore be useful to make clear which view is correct.

11.11 (v) Unsatisfactory or unjustifiable convictions. In the second of the undernoted articles[27] Mr Miller points out that the only evidence which is apt to rebut the presumption of guilt is evidence tending to establish innocence, and not evidence which does no more than suggest that a conviction is unsafe or unsatisfactory, or even wholly unjustifiable - as where there has been misdirection or improper admission or exclusion of evidence by the judge, or where key prosecution witnesses have given perjured evidence. It seems unsatisfactory that such convictions should create the statutory presumption of guilt. It must be noted, however, that although in England an appeal against conviction may be allowed if the court think that the jury's verdict should be set aside on the ground that under all the circumstances of the case it is "unsafe or unsatisfactory",[29] that ground of appeal is not available in Scotland, and the Government have accepted the Thomson Committee's unanimous recommendation that it should not be adopted in Scotland.

11.12 (vi) Mode of inquiry. Should cases in which a party seeks to prove that the offence was not committed, be tried by jury? If there were a rule that they should go to proof, there would at least be a saving/

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[29] Criminal Appeal Act, 1968 (cap 19), sec 2(1)(a).

saving in any time, inconvenience and expense which may still be devoted to inconclusive procedure roll discussions on these issues, and an assurance that the difficulties which at present arise would not be lost sight of in any subsequent inquiry.

11.13 (vii) Identity of issues. In particular cases, it may be difficult to ascertain whether or not there is an identity of issues between the civil and criminal proceedings. It was held in R v Ball[30] that a conviction on a charge of dangerous driving may or may not involve a finding that the driver was negligent; and in Caldwell v Wright[31] doubt was accordingly expressed as to the relevance of such a conviction in an action of damages arising out of a road accident. Ball has now been disapproved,[32] but the question of identity of issues could arise in other circumstances: if a conviction on a charge of unlawful sexual intercourse with a girl under 16 years of age were to be followed by a civil action of damages for assault at the instance of the complainer, lack of consent would have to be proved in the civil proceedings although it had not been an ingredient of the criminal offence. It is thought that in such a case the conviction should be held to be irrelevant.[33]

11.14/

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[30](1966) 50 Cr App R 266.

[31]1970 SLT 111.

[32]R v Gosney, [1971] 2 QB 674.

[33]It may be noted that in certain other cases the defender may, notwithstanding his admission in the civil proceedings of the commission of the crime for which he was convicted, quite properly escape liability wholly or partly, by establishing defences such as ex turpi causa non oritur actio, volenti non fit injuria and contributory negligence, which could not have been open to him in the criminal proceedings; Murphy v Culhane, [1977] QB 94.

11.14 All these issues may be thought to be of limited practical importance because convictions are normally pleaded in road accident cases, and very frequently when a conviction is pleaded in such a case the action is settled or liability is admitted; but some clarification is nevertheless desirable.

(b) Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968 section 12

11.15 This section provides that a conviction of a criminal offence is conclusive evidence that the person concerned committed it, when the action is one for defamation and the question is whether or not he committed it. It corresponds to section 13 of the Civil Evidence Act, 1968,[34] which followed the Fifteenth Report of the Law Reform Committee and the cases of Hinds v Sparks[35] and Goody v Odhams Press[36] in which the plaintiffs sued defendants who had asserted that they were guilty of the offences of which they had been convicted. Parliament did not accept the Committee's recommendation[37] that where the accused is acquitted of the offence proof of the acquittal should be conclusive evidence of his innocence in actions for defamation.

11.16 Here again, the question of identity of issues between the two proceedings may cause difficulty. In Levene v Roxhan,[38] the defendants had published an article about the activities of the plaintiff, who had been convicted of sexual offences and five offences relating to giving false information by telephoning railway stations and embassies and saying/

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[34] Cmnd 3391 ("LRC 15").
[35] The Times, July 28 and 30, 1964; [1964] Crim LR 717.
[36] [1967] 1 QB 333.
[37] LRC 15, paras 26-33.
[38] [1970] 1 WLR 1322.

saying that bombs were on the premises and the like. Relying on section 13, the defendants produced an affidavit with certificates of the plaintiff's convictions annexed to it, and applied to strike out the statement of claim on the ground that it was an abuse of the process of the court. The application was refused because, among other reasons, the certificates of conviction failed to show the real nature of the offences. The article alleged that one of the plaintiff's telephone calls had caused a four-hour shutdown of Victoria Station, but the certificate of conviction merely showed that at Archway underground station, N 19, he did maliciously abstract a quantity of electricity, the property of Her Majesty's Postmaster-General, contrary to section 10 of the Larceny Act, 1916.

(c) Identification of person to whom conviction refers

11.17 It is now clear that in an undefended action of divorce for cruelty an extract conviction does not by itself provide corroboration of the pursuer's evidence, because corroborative evidence from some third party is necessary to identify the person to whom the conviction refers as the defender in the action.[39] Similarly, in criminal cases, the application of a previous conviction to the person to whom it is alleged to refer must be proved by the normal rules of evidence: it is not enough to produce an extract conviction of a person of the same name.[40]

(d) Verdict of acquittal as evidence in civil proceedings

11.18 There remains one case which it seems impossible to reconcile with the general principle that apart from the statutory exceptions provided by sections/

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[39] Andrews v Andrews, 1971 SLT (Notes) 44.

[40] Herron v Nelson, 1976 SLT (Sh Ct) 42.

sections 10-12 of the 1968 Act,[41] section 3(1) of the Divorce (Scotland) Act, 1976,[42] and other limited exceptions, the decree or verdict - as distinct from a judicial admission - in an earlier cause is not admissible as evidence in another cause.[43] The case is Shaw v Craig,[44] a running-down case in which Lord Ormidale refused to exclude from probation an averment by the defender that his driver had been charged with reckless driving and acquitted by the jury on a verdict of not proven. It is thought that even if such an averment in exculpation were to be made in a present-day action, it is unlikely that the case would be followed, because it appears to be generally accepted that a verdict of acquittal is not admissible in evidence. In England, the Law Reform Committee stated in their Fifteenth Report that an acquittal had no probative value.[45]

11.19 It is thought that it would be imprudent to permit a trier of fact to draw from a verdict of acquittal, or from the quashing of a conviction on appeal, the inference that the accused did not commit the conduct libelled in the indictment or complaint. An acquittal, unlike a conviction, does not necessarily imply that certain facts have been found proved: it means only that the case against the accused has not been proved beyond reasonable doubt. One of several possible reasons for a verdict of acquittal may be that the jury, or summary judge, was satisfied of the accused's guilt on the balance of probabilities/

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[41] Secs 10 and 12 have been discussed above. Sec 11 provides that findings of adultery and paternity in earlier proceedings shall establish the adultery or paternity in other proceedings unless the contrary is proved. See paras 11.25-11.27 below.

[42] Sec 3(1) enables a divorce to be granted after a decree of separation.

[43] Walkers, paras 32, 164.

[44] 1916, 1 SLT 116.

[45] LRC 15, para 15.

probabilities, but not beyond reasonable doubt. It does not seem justifiable to distinguish between verdicts of not guilty and of not proven, making only the former admissible on the view that it means, "We are satisfied that he did not commit the crime", while a verdict of not proven means, "We are not satisfied that he committed the crime."[46] Whatever the distinction between the two verdicts may be, it is never explained to the jury in the charge of the presiding judge; and whatever verdict of acquittal may be returned, it will usually be impossible to identify the ground or grounds of acquittal. It is doubtful whether it is necessary to make provision for the rare case where the only issue in dispute at the criminal trial was one in which the onus of proof was on the accused.

(e) Rehabilitation of Offenders Act, 1974[47]

11.20 In considering the admissibility of conviction as evidence in civil proceedings it will be necessary to observe how the provisions of the Rehabilitation of Offenders Act, 1974, will operate in practice. The Act provides that after a rehabilitation period which may be as long as ten years, depending on the sentence imposed, a conviction resulting in a non-custodial sentence or a custodial sentence of not more than 30 months must be treated in law as spent and the convicted person must be treated as a rehabilitated person, provided that he has not meanwhile been convicted of anything more serious than a summary offence. Evidence of spent convictions is rendered inadmissible in judicial proceedings other than criminal proceedings and proceedings concerning minors/

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[46] The distinction in these terms was suggested by the late Sheriff J G Wilson, QC, in his Not Proven (1960), pp 8-9. See also M'Nicol v HM Advocate, 1964 JC 25, at p 27; Introduction to Scottish Legal History (Stair Society, vol 20), p 442; I D Willock, The Jury in Scotland (Stair Society, vol 23), pp 217-222.

[47] 1974, cap 53.

minors and pupils, and questions relating to such convictions may in general either not be asked or, if asked, need not be answered. Further excepted classes of proceedings are provided by the Rehabilitation of Offenders Act 1974 (Exceptions) Order, 1975.[48] The Act does not apply to any of the proceedings mentioned in the Order, which include proceedings before the sheriff under the Mental Health (Scotland) Act, 1960, applications for firearms certificates, and the like: spent convictions may be mentioned in such proceedings and in any appeal from them. Section 7(2) of the Act provides that nothing in section 4(1), which states the effect of becoming a rehabilitated person,

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

11.21 It is not clear how far a party to an action is protected by this provision. For example, may a wife pursuing an action of divorce for cruelty rely on a conviction of her husband for assaulting her which is dated prior to the applicable rehabilitation period? If he had been given a fine or other non-custodial sentence, the period would be five years. It seems unlikely that the defender would be held to "consent to the determination of the issue" simply by defending the action, or by failing to defend it. It may be that the pursuer would have to persuade the court to exercise the discretion to admit evidence of the conviction/

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[48] SI 1975, No 1023.

conviction which is conferred on the court by section 7(3):

> "If at any stage in any proceedings before a judicial authority in Great Britain [not being criminal proceedings, service disciplinary proceedings, proceedings involving minors or pupils, or defamation actions] the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions."

It is difficult to predict how section 7(3) is likely to be operated in practice.[49] It seems that a difficulty similar to that which could arise in the cruelty case figured above, would face a pursuer in an action of damages for personal injuries caused by careless driving, where the defender had been convicted of careless driving and fined: it is not unlikely that such a difficulty could arise because the applicable rehabilitation period in such a case is five years, or two and a half years if the defender was under seventeen years of age at the date of conviction. It would appear that the victim of a 16-year-old convicted careless scooterist would be well advised to bring his action to trial within the latter period.

(2) Convictions and acquittals as evidence in criminal proceedings

11.22 It is suggested that there is room for a provision, corresponding to section 10 of the 1968 Act, relating to the admissibility of convictions in a limited class of criminal proceedings.[50] It is thought that convictions of persons other than the accused should be made admissible in criminal proceedings/

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[49] See Reynolds v Phoenix Assurance Co, The Times, 16 February 1978.

[50] A wider suggestion is made in CLRC, paras 217-220, pp 187-189, 232-234; but see BC, paras 154-156.

proceedings as evidence of the fact that the person convicted was guilty of the offence charged and that on proof of the conviction that person should be taken to have committed the offence charged unless the contrary is proved. If the accused wished to dispute the correctness of the other person's conviction, he would have to prove that it was wrong on a balance of probabilities. Such a provision would be helpful if restricted to cases in which the guilt of the accused depends on another person's having committed an offence and, at present, the prosecution may have to prove again the guilt of the person concerned. Such offences include reset, and the harbouring of thieves, stolen goods, deserters, spies and escapers.[51]

11.23 There is a question whether any provision should be made for the admissibility of a verdict in the following situation. An accused is tried on one charge, and thereafter a supervening event takes place which may form the subject of a different charge based to some extent on the same set of facts as the first charge: the second charge may be competently laid notwithstanding that this involves inquiry into the crime for which the accused has been tried and either convicted or acquitted. Thus a person who has been tried and acquitted, or tried and convicted, on a charge of assault may subsequently be tried on a charge of murder if, after the first trial, the victim dies.[52] It is conceived that in such a case, under the present law, the Crown would seek/

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[51] Gordon, Criminal Law, (2nd ed), paras 20-06, 20-28, 37-29, 37-46, 49-16.

[52] Cobb or Fairweather, (1836) 1 Swin 354; Stewart, (1866) 5 Irv 310; O'Connor, (1882) 5 Coup 206; HM Advocate v Cairns, 1967 JC 37. On the question of a subsequent prosecution for perjury, such as Cairns, see Martin L Friedland, Double Jeopardy (Oxford, 1969), pp 157-160 (although misapprehending Cairns).

seek to establish at the second trial the assault which was the sole de quo at the first trial, and would lead further evidence to establish the casual connection between the assault and the victim's death. Should the verdict in the first trial be admissible in the second trial? It may be argued that if that verdict was guilty, the jury at the second trial should be precluded from considering the issues thereby determined - that at the date and place libelled the victim was assaulted by the accused in the manner libelled - but may consider questions, such as the causation of the victim's death, which could not have been in issue at the earlier trial. But - the argument would continue - while the Crown should be permitted to rely on a verdict of guilty, the accused should not be permitted to rely on a verdict of acquittal, in view of the difficulty or impossibility of determining what was thereby decided. Other possible views are that a verdict of guilty should be inadmissible because, in a situation where the second charge is more serious than the first, the jury at the first trial might have declined to convict on the evidence they heard if the charge before them had been the more serious charge in the second trial; or because, while admitting the irrelevance of a verdict of acquittal, it would be unfair to introduce a rule which would favour only the prosecution.

11.24 In England, Australia and the United States, the question has arisen as one of issue estoppel. In R v Hogan[53] Lawson J held that issue estoppel applied with mutuality as between the Crown and the defendant in criminal proceedings and could operate when the relevant issues were determinable with precision and certainty by reference to the earlier record and what occurred/

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[53] [1974] 1 QB 398, and see commentary in [1974] Crim LR 247.

occurred in relation to them in the course of the earlier proceedings: so that in the murder trial of a defendant who had been convicted of causing grievous bodily harm to the victim with intent, the defendant could not raise issues such as self-defence and specific intent which had been raised and determined in the earlier proceedings. In R v Humphrys,[54] however, the House of Lords held that Lawson J's ruling in Hogan[53] was wrong and that the doctrine of issue estoppel did not apply in criminal cases. The question of the admissibility of a conviction or acquittal in the circumstances figured appears to require discussion in any comprehensive review of the law of evidence in Scotland.

(3) Judgments and findings in civil cases as evidence in civil proceedings

(a) Findings of adultery and paternity

11.25 In their Fifteenth Report the Law Reform Committee took the view that it was not desirable to make a general provision for the admissibility of judgments in civil cases in subsequent civil proceedings. Such judgments, they considered, do not have the same probative value as convictions: the standard of proof is lower, the parties are at liberty to present their cases as they please, and a plaintiff, unlike a prosecutor, is not bound to disclose the existence of information which may assist his opponent. The Committee did, however, recommend two exceptions, in relation to findings of adultery and of paternity. Section 12 of the Civil Evidence Act and section 11 of the Scottish Act[55] consequently provide that a person who has been found guilty of adultery in/

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[53] [1974] 1 QB 398, and see commentary in [1974] Crim LR 247.

[54] [1977] AC 1.

[55] Note the minor amendment of sec 11, consequential on the abolition of the oath of calumny, by the Divorce (Scotland) Act, 1976 (cap 39), First Sched, para 4.

in certain matrimonial proceedings in the United Kingdom, or who has been found to be the father of a child in affiliation proceedings in the United Kingdom, will in any subsequent civil proceedings be taken to have committed adultery or to be the father of the child unless the contrary is proved. Questions as to the necessity for averment and as to the weight to be attached to the finding, which were raised above in relation to convictions as evidence in civil proceedings,[56] also arise here. In relation to findings of paternity, there may be a question whether an English court's finding that a man is the putative father of a child is to be regarded as a finding that he is the father of the child.

11.26 As Clive and Wilson point out,[57] section 11 may be of value not only in relation to previous actions of affiliation or separation but also in relation to previous actions of divorce. A finding that a co-defender has been guilty of adultery may, for example, be used by the co-defender's wife in a later action of divorce at her instance. The utility of the Act would be increased if paramours were now to be named in decrees of divorce. Since the Act of 1600 "anent the mariage of adulterous personis" has been repealed,[58] there appears to be no reason why such a practice should not be introduced.

11.27 If any consolidation is undertaken, it should be noted that while section 11 is now the authority for treating a decree of judicial separation on the ground of adultery as sufficient proof of the adultery in a subsequent action of divorce, section 3(1) of the Divorce (Scotland) Act/

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[56] See paras 11.07, 11.10 above.

[57] At p 470.

[58] By the Statute Law Revision (Scotland) Act, 1964, cap 80, sec 1 and First Sched.

Act, 1976, which is expressed in permissive terms only, remains the authority for similarly treating a decree on other grounds.

(b) Other findings

11.28 Findings of adultery and paternity apart, the Law Reform Committee did not recommend that where there are two civil actions by different pursuers against the same defender, or by the same pursuer against different defenders, which raise the same issue of fact, the finding of the court in the first action should be admissible in the second action.[59] As the law stands at present, the plea of res judicata cannot be successfully maintained in the second action.[60] It is submitted, however, that it is less than realistic to assume that the conclusions of a civil court are less likely to approximate to the truth of a matter of fact than the decision of a criminal court. And when the decision of a summary criminal court in relation to a road traffic offence, or the decision of a sheriff as to adultery or paternity, raises a statutory presumption in civil proceedings, it seems difficult to justify the exclusion of the findings in other civil proceedings, which are often reached after painstaking enquiry, particularly in the commonly encountered case where an insurance company is concerned with a question of fault. The submission has considerable practical significance. In two recent Scottish cases[61] and three recent English cases,[62] all arising out of road accidents, attempts have been made to establish the proposition/

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[59] LRC 15, para 38.

[60] See Walkers, paras 50, 51; Encyclopaedia, IX, paras 1266, 1290, XII, paras 1189 et seq.

[61] Anderson v Wilson, 1972 SC 147; Bacon v Blair, 1972 SLT (Sh Ct) 11.

[62] Bell v Holmes, [1956] 1 WLR 1359; Randolph v Tuck, [1962] 1 QB 175, Wood v Luscombe, [1966] 1 QB 169. On these, see Cross, pp 291-294, and Clerk & Lindsell on Torts (13th ed), para 604, which favour the proposition unsuccessfully advanced in Anderson.

proposition that where there is a multiplicity of potential claims arising out of one road accident the decision on apportionment of liability reached in relation to one such claim constitutes res judicata as regards the other claims. The question is fully discussed by Lord Keith in Anderson,[61] where his Lordship reached the view that to give effect to the argument presented would involve some departure from, or at least significant extension of, the principles which have hitherto governed res judicata in the law of Scotland. There is no doubt that the two Scottish cases were correctly decided, but they indicate that there is a risk that in comparatively simple cases different courts will reach different decisions on the same issues of fact and the same evidence. It is arguable that the risk should be eliminated. Cross writes:

> "A strict construction of the requirement concerning identity of parties and their capacity can be justified on the ground that no one ought to be wholly precluded from arguing a point by a decision taken in proceedings at which he was not represented. It is open to question whether the requirement with regard to identity of issues should be applied so strictly for it is undesirable that there should be conflicting decisions on what is in substance the same issue of fact even though there is a technical ground for treating it as different from that which was the subject of earlier litigation."[63]

11.29 It is interesting to compare Anderson[61] with the South Australian case of Black v Mount and Hancock,[64] where the facts were very similar. Cross makes the following observations:

> "Black and Hunt were passengers in a car driven by Hancock. That car collided with a car driven by Mount, and both Mount and Hancock were held liable to Hunt for personal injuries sustained by him in consequence of the collision. As between Hancock and Mount, Hancock was held 85 per cent to blame for Hunt's injuries, Mount 15 per cent. Black then sued both drivers and was held entitled to

judgment/

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[61] Anderson v Wilson, 1972 SC 147; Bacon v Blair, 1972 SLT (Sh Ct) 11.
[63] Cross, pp 291-292.
[64] [1965] SASR 167.

judgment against each. It was also held that Hancock was estopped, as against Mount, from denying that he was 85 per cent to blame for the injuries sustained by Black. No doubt the duties owed by the drivers to each of the passengers were in law distinct, but the passengers were sitting in the same seat of Hancock's car, and it is difficult to dispute the force of the following remark of Chamberlain J in support of his view that there was an estoppel: 'the duties of care of each driver owed to the two passengers, the breach of those duties and the extent of their responsibility for the damage depended on precisely identical facts in each case.'"[65]

(4) Transcripts of proceedings

11.30 The extent to which a transcript of a shorthand note of evidence in earlier proceedings may be admissible in any case depends on the circumstances of the case, including the use to which it is proposed to put the statements in the transcript - whether as evidence of the truth of the statements made (eg where the maker has subsequently died), or as evidence of the fact that the statements were made (eg where it is sought to prove that a witness has made a previous statement inconsistent with his evidence in the present case). The admissibility of transcripts in such circumstances is discussed in Chapter 19. Admissibility may also depend on the nature and purpose of the proceedings, and whether the evidence was given in open court or in private. If rules as to the proof of transcripts are necessary, it should no doubt be provided that the transcript should have been taken by an official or other disinterested shorthand-writer, and that the whole transcript should be produced, together with any judgment dealing with credibility, in order to disclose whether or not a particular witness was contradicted or disbelieved.[66]

(5)/

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[65] Cross, pp 293-294.

[66] Provision is made as to transcripts by the proviso to sec 2(3) of the Civil Evidence Act, 1968, which enacts that a statement made while giving evidence in some other legal proceedings (civil or criminal) may be proved in any manner authorised by the court. It is thought that the requirements of notice and applications to the court for directions need not be adopted in Scottish practice. See Cross pp 428,432.

(5) Decrees of foreign courts

11.31 The common law as to the proof of foreign judgments rests on comparatively old authority and provides for a variety of methods of certification of copies of such judgments.[67] It may be desirable to enact that an extract authenticated in a prescribed manner, such as by the seal of the court or by the signature of a judge or other prescribed officer of the court, shall until the contrary is proved be sufficient evidence of the judgment. It may be desirable to add a provision requiring, where appropriate, a translation authenticated in a prescribed manner.

11.32 The extent to which a foreign judgment should be admissible as evidence of the facts stated in it is a matter for regulation by statute dealing with particular subjects, such as the Presumption of Death (Scotland) Act, 1977.[68] The Scottish Law Commission recommended, in their Report on Presumption of Death,[69] that where a court in any foreign country in which a missing person was domiciled or habitually resident on the date on which he was last known to be alive has declared that he has died or is presumed to have died, the decree of that court should be sufficient evidence of these facts in any judicial proceedings in Scotland. Section 10 of the Presumption of Death (Scotland) Act, 1977, is designed to implement that recommendation.

3. Administrative documents

11.33 The useful[70] provision[71] as to proof of official documents in summary criminal/

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[67] Walkers, para 426 b; Anton, Private International Law, p 592.
[68] 1977, cap 27.
[69] Scot Law Com No 34, paras 121-123, rec 32.
[70] Compare Hunter v Herron, 1969 JC 64, with Scott v Baker, [1969] 1 QB 659.
[71] 1975 Act, sec 353; see Trotter, Summary Criminal Jurisdiction, p 252.

criminal proceedings could with advantage be extended to all proceedings, although its drafting could be improved.[72]

4. Statutory certificates[73]

11.34 The legislature seems to employ an unnecessary variety of expressions in the statutory provisions relating to the evidential use of certificates. In some cases it is clear that evidence to contradict the certificate is inadmissible, but in other cases the expression used has caused difficulty. It would perhaps be useful to establish a limited number of formulae with distinct prescribed meanings.

11.35 The Thomson Committee has recommended that the procedure in various statutes whereby a certificate is served on the accused within a specified period before the trial and, if not disputed, is accepted as sufficient evidence of its contents, should be extended to other statutory offences.[74]

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[72] See Walkers, para 209.

[73] Walkers, paras 206, 215, 384; McLeary v Douglas, 1978 SLT 140.

[74] Thomson, para 45.03.

Chapter 12

DOCUMENTARY EVIDENCE II: OTHER DOCUMENTS

1. Records

(1) The present law

12.01 The recent statutory provisions relating to the admissibility of records could with advantage be modified and consolidated. Although for convenience they are dealt with in this part of the Volume, they form statutory exceptions to the rule against hearsay.

(a) Criminal Evidence Act, 1965[1]

12.02 This is the first of the recent statutory provisions. It makes certain trade and business records admissible in criminal proceedings. Although it is a United Kingdom statute, it is essentially an adaptation to criminal proceedings of certain provisions of the English Evidence Act, 1938.[2]

> "The Act of 1965 has a history. For some years before the House of Lords' decision in Myers v Director of Public Prosecutions [1965] AC 1001, prosecutors had tried to solve the problem of how to prove marks of identification on mass produced articles. A practice grew up of calling witnesses from the manufacturers, who had no personal knowledge of the facts, to produce records which had come into existence during the course of production. In Myers the House of Lords adjudged that such records were not admissible because they contained hearsay. This decision made the prosecution of some criminals, particularly car thieves and receivers, difficult. Parliament intervened quickly. On June 2, 1965, the Criminal Evidence Act was passed. The fact that it was passed so soon after the decision in Myers does not, however, justify us in inferring that the intention was solely to make admissible the kind of evidence which th House of Lords had adjudged to be inadmissible. Our duty is to infer what Parliament intended from the words in the Act and to construe it accordingly."[3]

12.03/

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[1] 1965 cap 20. P G B McNeill, 1965 SLT (News) 169; Cross, (1965) 28 MLR 571.

[2] 1 and 2 Geo IV, cap 28. The two Acts are compared in Cross (3rd ed), pp 493-4.

[3] R v Crayden, [1978] 1 WLR 604, at p 610.

12.03 The 1965 Act provides by section 1:

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

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

(b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.[4]

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

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

(4) In this section "statement" includes any representation of fact, whether made in words or otherwise, "document"

includes/

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[4] A party seeking to admit a document by virtue of this section must, of course, lay the foundation by which the court can be satisfied that its admission is proper, and indicate which of the circumstances under sec 1(1)(b) are relied on: R v Nicholls, (1976) 63 Cr App R 187.

includes any device by means of which information is recorded or stored and "business" includes any public transport, public utility or similar undertaking carried on by a local authority and the activities of the Post Office."

12.04 It is submitted that the scope of the statute should be extended beyond trade and business records because, as Sir Rupert Cross notes,[5] the courts are still obliged "to come to odd conclusions such as that a car's log book is not admissible evidence of the engine number,[6] or that a statement concerning the place of manufacture inscribed on goods is inadmissible as evidence of that fact."[7] Records of a government department,[8] and of a National Health Service hospital,[9] have been excluded on the ground that these were not "businesses" within the meaning of section 1(4); but it is not impossible that a hospital outside the National Health Service might be adjudged to be a "business".[9]

12.05 Section 1(3) of the 1965 Act, which repeats in part section 2(1) of the 1938 Act, endeavours to assist the court in estimating the weight to be attached to a statement admissible by virtue of the Act. A provision which attempts to assist a tribunal in deciding on the cogency of evidence is unusual in legislation applicable to Scotland, but it is thought that it could usefully be repeated in any new legislation.

(b) Law Reform (Miscellaneous Provisions) (Scotland) Act, 1966, sec 7

12.06 In civil proceedings, the counterpart of section 1 of the 1965 Act is section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1966/

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[5] Cross, p 405. On "record" see Tirado v R, (1974) 59 Cr App R 80; R v Jones (Benjamin), [1978] 1 WLR 195.

[6] R v Sealby, [1965] 1 All ER 701.

[7] Patel v Customs Comptroller, [1966] AC 356; cf State v Lincey & Watson Pty Ltd 1965 (1) SA 572. See also Millar v Howe, [1969] 1 WLR 1510 (description on box may on facts be description of goods inside and not hearsay).

[8] R v Gwilliam. [1968] 1 WLR 1839.

[9] R v Crayden, [1978] 1 WLR 604.

1966,[10] as amended by section 16 of the 1968 Act of the same name.[11] Sections 13 to 15 of the 1968 Act deal with statements produced by computers as evidence in civil proceedings.[12] The greater part of the Evidence Act, 1938, on which the 1965 Act and section 7 of the 1966 Act are based, was repealed by the Civil Evidence Act, 1968, which amended the English law of evidence in civil proceedings, following a number of reports by the English Law Reform Committee. Provisions corresponding to sections 13 to 15 of the Scottish 1968 Act are contained in sections 5, 6 and 8 of the Civil Evidence Act.

12.07 Section 7 of the 1966 Act, as amended, applies to civil proceedings. It provides:

> "(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall be admissible as evidence of that fact if -
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> (a) the document is, or forms part of, a record compiled in the performance of a duty to record information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and
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> (b) the person who supplied the information recorded in the document in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.
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> (2) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a fully registered medical practitioner.
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> (3)/

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[10] 1966, cap 19.
[11] 1968, cap 70.
[12] Paras 12.33-12.36 post.

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

(3A) Where a statement contained in a document is proposed to be given in evidence by virtue of this section it may be proved by the production of that document or (whether or not the document is still in existence) by the production of a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by a person responsible for the making of the copy or in such other manner as the court may approve; and any such copy shall be taken to be a true copy unless the contrary is shown.

(4) In this section 'statement' includes any representation of fact, whether made in words or otherwise, 'document' includes any device by means of which information is recorded or stored, and 'proceedings' includes arbitrations and references, and 'court' shall be construed accordingly.

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

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

(2)/

(2) Reform of the law

12.09 To what extent should these provisions be altered? It is necessary to keep in view that the provisions form exceptions to the general rule against hearsay, and that in theory it may be difficult to justify the reception of hearsay contained in a document while continuing to exclude oral evidence of hearsay. The distinction would, however, be maintainable on the practical ground that at least certain documentary records containing hearsay are much more likely to be reliable than oral evidence of hearsay. It is also necessary to consider to what extent any new provisions should be applicable in criminal proceedings where the accused is unrepresented. A study of American and English models may suggest lines on which the Scottish law could with advantage be reformulated. After these models have been briefly noticed, various specific problems are considered.

(a) Federal Rules of Evidence

12.10 The reform of the law relating to the admissibility of records is a subject which is currently receiving attention in the United States.[13] The Federal Rules of Evidence contain the following class exception to the rule against hearsay, which liberalises the exception known as the "business records" exception. The Rules state the exception as follows:

> "6. Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or the method or
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> circumstances/

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[13] See R Graham Murray, "The Hearsay Maze", (1972) 50 Can BR 1, at pp 14-16.

circumstances of preparation indicate lack of trust-worthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

It is noteworthy that the rule is in very broad terms and specifically includes both diagnoses and opinions, in addition to acts, events and conditions, as proper subjects of admissible entries. It does, however, require personal knowledge, and empowers the court to exclude a record if the source of information or the method or circumstances of preparation indicate lack of trust-worthiness. It may be argued that the method or circumstances of preparation should be a factor affecting weight, but not admissibility.

(b) Civil Evidence Act, 1968

12.11 In England, rules as to the admissibility of certain records as evidence of facts stated are contained in Part I of the Civil Evidence Act, 1968,[14] which is concerned with the admissibility of hearsay evidence in civil proceedings. Section 4(1) provides:

> "Without prejudice to section 5 of this Act [which deals with computerised records], in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty."

Section 8/

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[14] 1968 cap 64. To give a full exposition of this important English statute would be beyond the scope of this Volume and the capacity of the writer. See Michael Kean, The Civil Evidence Act, 1968 (Butterworths, 1969); Cross, chap 18; Cross and Wilkins, chap 6. The commentary and examples in the text are adapted from the two latter works.

Section 8 of the Act provides that the person who originally supplied the information from which a record admissible under section 4 is compiled must be called as a witness, if required by the opponent of the party adducing the statement, unless he is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot be reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement.[15] If he is called as a witness, the record cannot be given in evidence without the leave of the court, and generaly not before the conclusion of his examination-in-chief.

12.12 Thus, a document is admissible which contains information supplied to its maker directly or indirectly by one or more persons. If a police officer takes a statement from a bystander who witnessed an accident, his notebook may be produced as a record compiled by someone acting under a duty from information supplied by someone with personal knowledge of the matters dealt with in the information. Or if the foreman of a factory collects information from a number of workmen concerning work done by them, and in due course the information is passed on to the officer in charge of records, the resultant compilation is an admissible record although it is not a full reproduction of anyone's oral or written statement. Similarly, if a lorry-driver informs a fellow-employee that he delivered a load at X, the fellow-employee makes a note of this fact and passes the note on to another employee who destroys it after entering the delivery in a book/

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[15] These five reasons are disjunctive: Rasool v West Midlands PTE, [1974] 3 All ER 638; Piermay Shipping Co S A v Chester, [1978] 1 WLR 411.

book: the entry in the book is admissible. This process can be continued for any length without affecting the admissibility of the ultimate record, provided that the compiler and all the intermediaries were acting under a duty. But the original supplier of the information need not act under a duty: hospital records are only one of many sets of records compiled from inquiries in relation to which the original source of information, the patient, can hardly be said to have been acting under a duty to supply it. The original supplier of the information must, however, have had personal knowledge of the matters dealt with in the information, or have been someone who may reasonably be supposed to have had such knowledge.[16] In addition, provision is made as to the assessment of the reliability of the information given by the original supplier. Section 6(3) provides that in estimating the weight, if any, to be attached thereto regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular, to the questions whether the information was given contemporaneously with the occurrence or existence of the facts with which it deals, and whether the original supplier, or any person concerned with compiling or keeping the record containing the information, had any incentive to conceal or misrepresent the facts. Section 7 provides that when the original supplier is not called as a witness, any evidence which would, had he been called, have been admissible for the purpose of destroying or supporting his credibility, may be adduced; but evidence may not be given on matters as to which the maker's denials in cross-examination as to credit would have been final.

(c)/

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[16] This is something which will often have to be inferred from the nature of the record and all the circumstances of the case: see Knight v David, [1971] 1 WLR 1671.

(c) Scope and effect of any new provisions

12.13 It will be necessary to determine various questions as to the scope and effect of any new Scottish provisions. It may be desirable to enact a qualifying condition of admissibility such as "Where oral evidence in respect of the matter would be admissible ..." in order to make it clear that evidence which would otherwise be inadmissible, for example double hearsay, would not be admissible under the provisions. Should records of diagnosis and opinion be admitted, as in the Federal Rules? It may be contended that the person giving the diagnosis or opinion ought to be available for cross-examination to permit a proper assessment of the value of his evidence to be made. Should the provision relate only to trade and business records, like the 1965 Act, or should it extend to any record compiled in the performance of a duty, like the Acts of 1966 and 1968? If the former, should there be added to the provision that the record be made in the course of the trade or business a requirement that it be the regular practice of the trade or business to make the record in question (as in the Federal Rules), in order to guarantee a routine, and hence *prima facie* trust-worthiness? Should there be a requirement that the record must have been made at or about the time of the matter recorded? If so it would be necessary to include a provision enabling the production of permanent records made a considerable time after the event from temporary contemporaneous records which are destroyed once the permanent record is made. This question is related to that of the admissibility of information indirectly supplied, which is considered below.[17] The question of the extent to which the provisions for civil and/

[17] *Post*, para 12.15.

and criminal proceedings should be the same is also considered below.[18]

12.14 Whatever the wording of any new general provision for the admissibility of records, it is submitted that it should effect the abolition of the exceptional rule relating to entries in business books and the removal of doubts relating to minutes of meetings. Thus, business books would be admissible without the support of a witness,[19] and minutes of meetings including draft minutes[20] and minutes of meetings in sequestration proceedings and the trustee's sederunt book[21] would also be admissible as evidence of the facts stated therein. It is also submitted that the provisions should cover medical case notes including hospital records and general practitioners' record cards,[22] and the comparable records of other professions, which contain facts and opinions relevant to the issues before the court. The provisions would not directly affect numerous statutory exceptions by which particular certificates, extracts or statements are made admissible, but some of these could become admissible for more purposes than at present. Thus, an extract of an entry in a register of births, deaths or marriages, would not only be, as at present,[23] sufficient evidence of the birth, death or marriage, but would also be admissible as evidence of other facts stated in the entry, including the parentage of a child, at least if/

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[18] Post, paras 12.16-12.17.
[19] Walkers, para 228.
[20] Walkers, para 221.
[21] Walkers, para 222.
[22] See Cross, (1965) 28 MLR 571, at p 572; R v Crayden, [1978] 1 WLR 604.
[23] Registration of Births, Deaths and Marriages (Scotland) Act, 1965, cap 49, sec 41(3); Keenan v Keenan, 1974 SLT (Notes) 10.

if the various new statutory conditions were fulfilled. Any new provision should be so drafted as to be of assistance in the proof of a foreign marriage.[24]

(d) Information indirectly supplied

12.15 In addition to questions of definition, it is necessary to consider to what extent information indirectly supplied to the recorder of the statement should be admissible. The Law Reform Committee considered the rule then applied to English civil proceedings by the Evidence Act, 1938, which was that the recorder of the statement must have received the information recorded directly from a person who had or might reasonably be supposed to have personal knowledge of the matters dealt with. The Committee took the view that that rule was "unduly narrow." They explained:-

> "Direct reporting to the record-keeper is not usual in modern business methods. The operative stamps the serial number of the car upon the engine; the inspector inspects it and makes his own note which is handed to the office; from that the appropriate record is entered in the books or on the card and the inspector's note destroyed. The recording may, indeed, be done mechanically. The requirement that the recorded information should be received directly by the recorder from a person with personal knowledge of the matters recorded in the statement has been abandoned in the Criminal Evidence Act, 1965, and should be abandoned in civil cases also. Provided that the information originates from a person with personal knowledge of the matters dealt with and there is a duty all the way down the chain from him to the person who actually made the record to pass on the information, the statement should be admissible. The length of the chain goes to probative value only in so far as it increases the risk of error in transmission of the information."[25]

12.16 Section 4(1) of the Civil Evidence Act, 1968, accordingly provides, as has already been noted,[26] that a statement contained in a document/

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[24] See Clive and Wilson, pp 636 et seq, 641-642. A provision similar to rule 39 of the English Matrimonial Causes Rules, 1971, noted on pp 636-637, may be desirable.

[25] LRC, 13, para 16(c).

[26] Para 12.11-12.12 above.

document is admissible if the supplier of the information (whether acting under a duty or not) had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and if the information, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler indirectly through one or more intermediaries each acting under a duty. It may be argued that while an extension of this kind may be acceptable in civil proceedings, it is doubtful whether the risk of error in transmission of the information, referred to by the Law Reform Committee, should be tolerated in criminal proceedings. On the other hand, it is noteworthy that the Criminal Law Revision Committee has proposed a clause corresponding in this respect to section 4(1),[27] and the proposal has been accepted by the English Bar Council.[28] It could be useful: for example, under the clause, if a person voluntarily gives information to a policeman, and the policeman passes it on in the form of a message to the police station, where the officer on duty records it, the entry in the record would be admissible.

(e) Extension of civil provisions to criminal proceedings

12.17 It is suggested that in all proceedings both civil and criminal, information supplied by a person in the categories defined and contained in a document should be admissible if the document is, or forms part of, a record compiled in the performance of a duty to record information. It has already been submitted[29] that the scope of the Act of 1965, which is confined to records kept for trade or business purposes, is unduly narrow; and it is now submitted that the same requirements should be generally/

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[27] CLRC, para 258, pp 194-5, 243-244; discussed by Glanville Williams, "New Proposals in Relation to Double Hearsay and Records", [1973] Crim LR 139.
[28] BC, para 178.
[29] Para 12.04 above.

generally applied in both civil and criminal proceedings. The fact that the compiler is under a duty to record the information may be thought to make it unlikely that he is guilty of inaccuracy. Some possible exceptions to the proposed general rule have been noted above, and possible procedural regulations are noted below.

(f) Definitions

12.18 Whatever new formulations may be thought desirable, it is suggested that in the first place, assuming that the terminology of the current provisions may be repeated, consideration should be given to the definition of the following expressions: "document", "statement", "duty", and "unfit by reason of his bodily or mental condition to give evidence as a witness."

12.19 (i) "Document". In section 1(4) of the 1965 Act and section 7(4) of the 1966 Act it is provided that in these sections " 'document' includes any device by means of which information is recorded or stored." On the other hand, section 10(1) of the Civil Evidence Act, 1968, provides that in Part I of that Act:

> " 'document' includes, in addition to a document in writing - (a) any map, plan, graph or drawing; (b) any photograph; (c) any disc, tape, sound-track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and (d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom."

Section 10(2) deals with references to a copy of a document. Section 10(1) and (2) are followed in clause 41 of the draft Bill of the Criminal Law/

Law Revision Committee;[30] and it is thought that they could be adopted in any new Scottish provisions. In any event it seems desirable to adopt some form of words which is capable of including all possible existing and future mechanical, electronic or other technological devices capable of producing or reproducing anything capable of being tendered in evidence.

12.20 (A) Copies of documents. Under the present Scottish provisions, copies of the documents to which they apply are admissible in civil cases, by virtue of section 7(3A) of the 1966 Act, but not in criminal cases. It may be thought that copies should be admissible in all cases. Section 6(1) of the Civil Evidence Act, 1968, provides an alternative form of wording to section 7(3A), and, as already noted, the term "copy" is comprehensively defined in section 10(2) of that Act.

12.21 (B) Provision for particular classes of document. There is a question whether any classes of document should be excluded from the statutory provisions, or should be the subject of special rules: in particular, (aa) precognitions, (bb) statements to the police in criminal cases, (cc) statements made to investigators after accidents, and (dd) transcripts of evidence. Discussion of the first three categories is necessary because of the doubts, difficulties and controversy surrounding the question of the admissibility of precognitions and kindred documents. The admissibility of these is further discussed in Chapter 19.

12.22 (aa) Precognitions. A precognition may be regarded as a record of a witness's statement compiled by the precognoscer in the performance of a duty to record the information given by the witness, which he owes to his client, or to the prosecutor. Many practitioners, however, are opposed to/

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[30] CLRC para 265, p 250.

to the production of precognitions in legal proceedings:

> "... one reason why reference to precognition is frowned on, is that in a precognition you cannot be sure that you are getting what the potential witness has to say in a pure and undefiled form. It is filtered through the mind of another, whose job it is to put what he thinks the witness means into a form suitable for use in judicial proceedings. This process tends to colour the result. Precognoscers as a rule appear to be gifted with a measure of optimism which no amount of dissolutionment can damp."[31]

One possible solution is that precognitions should not be admissible, with the possible exceptions of signed precognitions, or precognitions recorded on tape or in writing in question and answer form, or precognitions on oath.[32] It may be that some practitioners would favour allowing the production of the precognition and the evidence of the precognoscer if the maker of the statement has died or become unable by reason of health to give evidence either in court or on commission.

12.23 (bb) Statement to police. "What amounts to a precognition is a question of some considerable difficulty. That has been pointed out on a number of occasions."[33] A distinction is drawn between, on the one hand, precognitions taken in civil cases, precognitions taken by the defence in criminal cases, and statements taken in criminal cases after apprehension on the authority of the Procurator-Fiscal for the purposes of a trial; and, on the other hand, statements to the police in the course of their investigations before apprehension. The latter are admissible, but the former are not.[34] It is questionable whether the distinction is convincing. If the objection to the admissibility of the former is that they have been edited by the taker of/

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[31] Kerr v HM Advocate, 1958 JC 14, L J-C Thomson at p 19.

[32] See Chapter 19 below, paras 19.47-19.50.

[33] Kerr, n 31 supra, at p 18.

[34] HM Advocate v Stark, 1968 SLT (Notes) 10; Hall v HM Advocate, 1968 SLT 275.

of the statement, the same is true of police statements in the latter category: and the literate, well-ordered statements said by the police to have been volunteered by accused persons, which are admitted in daily criminal practice, are obviously in many cases just as heavily edited as any precognition. But if the distinction is thought to be convincing, it should no doubt be provided that statements in the latter category should be admissible, but those in the former category should not.[35]

12.24 (cc) Statements to investigators. It may also be possible to draw a distinction between precognitions on the one hand, and on the other, statements made to persons under a duty to record information other than for the purposes of a trial. In McNeill v Richard Costain (Civil Engineering Ltd[36] Lord Leechman held to be admissible under section 7 of the 1966 Act, as amended, statements taken after an accident by an employee of the defenders, in the course of his duties, from employees who subsequently could not be traced. It is thought that such statements should continue to be admissible.

12.25 (dd) Transcripts of evidence. If it is thought that statements made in other proceedings could usefully be made admissible, it would be desirable to make special provision for the admissibility of transcripts of evidence. It may seem artificial to regard witnesses, and the judge when directing the jury, as supplying information to the shorthand-writer or to the audio-typist who types the transcript from a tape dictated by the court shorthand-writer from the notes which he took in court.[37] Proof of transcripts is considered at paragraph 11.30 above.

12.26/

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[35] Cf CLRC paras 237(iv), 258, pp 195, 244. See Chapter 19 below, para 19.51.
[36] O H Lord Leechman, 27th November 1970, unreported.
[37] But cf Taylor v Taylor [1970] 1 WLR 1148, Davies L J at p 1154.

12.26 (ii) "Statement". In the present Scottish legislation, and in section 10(1) of the Civil Evidence Act, 1968, " 'statement' includes any representation of fact, whether made in words or otherwise."[38] Should it also include expressions of opinion? As a result of section 1 of the Civil Evidence Act, 1972, written statements of witnesses are admissible as to evidence of opinion as well as to evidence of fact. It has already been noted[39] that entries in the form of opinions and diagnoses are admissible under the proposed Federal Rules of Evidence. It could at least be useful to enact a provision whereby the report of an expert, who is unavailable for any of the reasons specified in the present legislation, should be admissible, provided that it is confined to relevant matters of expert opinion and to statements of fact known to the maker as a result either of his own observation or of his general professional knowledge or experience.[40]

12.27 (iii) "Duty". The requirement of action under a duty has been criticised on the ground that the reliability of a record derives from the fact that it was made in the course of ordinary repetitive business practice, not from any duty: the relevant considerations ought to have been the likelihood of accuracy, of accurate recording, and of accurate transmission.[41] The requirement does not appear in the Criminal Evidence Act, 1965. If it is to be retained, certain difficulties/

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[38] 1965 Act, sec 1(4); 1966 Act, sec 7(4).
[39] Para 12.10 above.
[40] Cf LRC 17, paras 23-26, pp 31-36. Experts' reports are also considered in Chapter 17 below.
[41] M Newark and A Samuels, "Civil Evidence Act, 1968", (1968) 31 MLR 668, at p 670.

difficulties of definition should be resolved. "Duty" is not defined in the Act of 1966, but section 4(3) of the Civil Evidence Act, 1968, provides:-

> "Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him."

This provision does not appear to be exhaustive. If a public-spirited citizen, who has not seen a road accident, repeats to a police officer what he had been told by a witness, now untraceable, about the registration number of the car and other details, is his social or moral duty to preserve and pass on the information sufficient to make the record admissible? It is thought that it should be. It would also be desirable to make it clear that the person supplying the information need not have been acting under a duty.

12.28 (iv) "Unfit". It should also be made clear that unfitness to attend as a witness means inability to give evidence either in court or on commission.

(g) Procedure

12.29 It is doubtful whether provision need be made by rules of court as to the procedure to be followed and the conditions to be fulfilled before a record can be admitted by virtue of the proposed provisions. It seems that it has been possible to operate section 1 of the 1965 Act and section 7 of the 1966 Act without introducing special procedural rules. It would be useful to ascertain the views of practitioners as to the operation of the rules as to computer evidence.[42] If special procedural/

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[42] See paras 12.33-12.36 below.

procedural rules as to records are thought desirable, then rules on the following lines, suggested by the corresponding English civil rules and the present Scottish rules relating to statements made by computers, may be suitable, at least in civil cases.

12.30 The party desiring to give in evidence a record admissible by virtue of the provisions must serve notice of his intention on all other parties to the proceedings, giving them a copy of the record, the name and address (if known) and description of the supplier of the information, and a declaration (where applicable) that he is dead, abroad, unfit to be called as a witness, unable to be identified or found, or unable to recollect the matters dealt with. If the supplier is available, the party upon whom the notice is served may, by counter-notice, require him to be called; but the court is empowered to make him bear the expenses of calling the supplier if the court considers it unreasonable to have required him to be called. It is conceived that if the supplier of the information were to be called as a witness, the record would be inadmissible unless the court were satisfied that he was unable to recollect the matters referred to, or unless it were admissible under the rules relating to previous statements by witnesses which are considered elsewhere.[43] If a counter-notice is served, the record is not admissible unless the court is satisfied that the supplier of the information is unavailable or cannot reasonably be expected to recollect the matters dealt with. If no counter-notice is served and the supplier of the information is not called, the record is admissible as/

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[43] Chapter 19 below.

as evidence of the fact stated in it, by what amounts to the agreement of the parties. The court nevertheless has a residual discretion to admit or exclude a record where the procedure prescribed has not been followed, for example through the inadvertence of a party litigant.

12.31 It is thought that while such rules could be applied in civil proceedings, they do not seem suitable for criminal proceedings: the notice would have to be served before the service of the indictment; there is no machinery in the criminal courts for incidental applications by way of motion prior to trial for the resolution of any difficulties that might arise; and it would be difficult to apply elaborate procedural rules in cases where the accused was unrepresented. It is questionable whether such rules are necessary or desirable in any event, in civil or in criminal proceedings.[44]

12.32 It is thought that any new legislation could with advantage include provisions relating to the estimation of the weight of evidence,[45] the drawing of inferences from the form or content of the document, and the use of medical certificates.[46]

(h) Statements produced by computers[47]

(i) The present law

12.33 The admissibility as evidence in civil proceedings of statements produced by computers is provided for by section 13, 14 and 15 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1968 and the undernoted/

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[44] Cf CLRC, para 258.
[45] 1965 Act, sec 1(3); 1966 Act, sec 7(3).
[46] 1965 Act, sec 1(2); 1966 Act, sec 7(2); Civil Evidence Act, 1968, sec 8(5).
[47] Colin Tapper, Computers and the Law.

undernoted rules.[48] Such a statement is admissible provided that a number of conditions are satisfied, and provided that the party who wishes to rely on it complies with procedural requirements by giving notice to the other parties and, if served with a counter-notice by them, furnishing them with specified information and, if required by them, producing oral evidence. Two matters seem to require comment: the elaborate conditions, and the cumbersome procedural requirements, which have to be satisfied. The nature of the provisions is due to the fact that sections 13 to 15 are based on the corresponding provisions of the Civil Evidence Act, 1968, relating to the admissibility of statements produced by computers. It was apparently thought necessary to have the same provisions for Scotland in order to permit large concerns operating throughout the United Kingdom to take advantage of the provisions. It is now submitted, however, that although it is obviously reasonable that statements produced by computers should be admissible in evidence in both Scotland and England, it is unnecessary to adhere to a copy of the English conditions and provisions if simpler, but at least equally effective, rules can be devised. The use of computerised records in the business community and in government is now so widespread that there is no greater margin of error in such records than in the case of ordinary commercial records; and the provisions governing their use should be simple, capable of broad and flexible interpretation, to bring the realities of business and professional practices into the courtroom. As Lord Campbell, C J, said:

"It/

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[48] A S (Computer Evidence in the Court of Session), 1969; A S (Computer Evidence in the Court of Session Amendment) 1970; A S (Computer Evidence in the Sheriff Court), 1969; A S (Computer Evidence in the Sheriff Court Amendment), 1970.

"It is the business of Courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind ...."[49]

12.34 As to the conditions in the Scottish and English provisions, it has been pointed out that

"the key to their comprehension lies in the substitution for the requirements of section 4 [of the Civil Evidence Act, 1968] of personal knowledge on the part of the supplier of the information and duty on the part of the intermediaries of the requirement of the regular operation of the computer system resulting in the document tendered in evidence. The conditions are that the document should have been produced by the computer during a period of regular use to store or process information for the purpose of any activities regularly carried on; that over that period the computer was regularly supplied with information of the kind contained in the statement tendered in evidence; that the computer was operating properly throughout the period; and that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities. A commentator on these conditions has said, 'it is suggested that the whole turgid repitition could be abridged by making the sole condition of admissibility that the computer should have been operating properly at all material times.'[49a]

"A provision of the South Australia Evidence Act, inserted in 1972, simply required the court to be satisfied that the data from which the output is produced by the computer is systematically prepared upon the basis of information that would normally be acceptable in a court of law as evidence of the statements or representations contained in or constituted by the output. In addition to its simplicity, the advantage of the South Australian provision is that it gives the court more control than does section 5 of the 1968 Act over the reliability of the information fed into the computer. A further merit of the South Australian provision is its adoption of computer language. 'Data' takes the place of 'information', and 'output' takes the place of 'statement'."[50]

12.35 As to the procedural requirements of notice and counter-notice, it is thought that these would be unnecessary if either Mr Tapper's suggestion or the South Australian provision were adopted. It may be added/

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[49] Humfrey v Dale, (1857) 7 EB 266, at pp 278-279.

[49a] Colin Tapper, Computers and the Law, p 29.

[50] Cross, p 434.

added that some of the terminology of the present provisions could give rise to difficult questions of fact. When is a computer "used regularly"? When are activities "regularly carried on"? When is a computer not "operating properly"? Is there any implicit limitation on the wide definition of "computer" in section 13(6)?[51] It seems desirable to eliminate as many as possible of these potential difficulties. It may be sufficient to provide that when a record is made by the use of a computer, the output thereof in a form which may be understood is admissible if the record would be otherwise admissible, and to add a qualifying condition as to proper operation or the like.[52] There may be little justification for imposing elaborate safeguards of reliability and other rules for records kept by use of a computer which differ from those applicable to records kept by other means. There should perhaps be only one provision for the admission of statements in records, expressed in terms which include records kept by the use of a computer.

(ii) Criminal trials

12.36 It has been suggested that statements produced by computers should also be admissible in criminal proceedings, because the increasing use of computers by the Post Office, local authorities, banks and business firms to store certain kinds of information will make it more difficult to prove certain matters, such as cheque frauds, unless it is made possible for/

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[51] On some of these questions see Standard Oil Co of California v Moore, (1958) 251 F 2d 188, at p 215. On the factors affecting the reliability of computers and their operators, see D E Harding, "Modification of the Hearsay Rule", (1971) 45 ALJ 531, at p 552.

[52] See Ontario Law Reform Commission, Report on the Law of Evidence, pp 188-192; Law Reform Commission of New South Wales, Working Paper on Evidence (Business Records), pp 44-46, 86-90.

for this to be done from computers.[53] It is submitted that the elaborate procedure of notice and counter-notice, even if retained in civil proceedings, should not be adopted in criminal proceedings, for the reasons already discussed in relation to records.[54] The Criminal Law Revision Committee,[53] with the approval of the Bar Council,[55] proposed that there should be no requirement to give notice, but that the court should be enabled, "for special cause" to require oral evidence to be given of the production of the document and the operation of the computer.

2. Bankers' books, etc

12.37 It is suggested that if the Bankers' Books Evidence Act, 1879,[56] were to be unaffected by any new provisions as to the admissibility of records, or of statements produced by computers, there would be room for some simplification of the procedure which it prescribes. The Act provides that a copy of an entry in a banker's book shall, in all legal proceedings, be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded. Before the copy can be received, four conditions must be satisfied: (a) the book must have been one of the ordinary books of the bank when the entry was made; (b) the entry must have been made in the usual course of business; (c) the book must be in the custody or control of the bank; and (d) the copy must have been examined against the original entry and found to be correct. Proof of (d) must be given by the examiner, and of the other three/

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[53] CLRC, para 259.
[54] Para 12.31 above.
[55] BC, para 178.
[56] 42 and 43 Vict cap 11, secs 3-5: see Lewis, Manual, pp 209-210; Walkers, para 301. Applications under sec 7 are considered at paras 25.19, 25.48 below.

three matters by a partner or other officer of the bank, in each case either by oral evidence or by affidavit.[57] It has been suggested that these provisions are unnecessarily elaborate and that copies should be received if they are certified as true copies by the signature of an officer of the bank.

12.38 There is a question whether these provisions, or a simplified version of them, should be extended to other financial institutions, or indeed to documents used for recording the financial transactions of a wide variety of undertakings. A further question is whether it should be made possible to prove by the affidavit of a prescribed official that a person does not have an account with a bank or other financial institution of the type with which people commonly have accounts.

3. Maps and plans[58]

12.39 If the statutory provisions as to admissibility of records were consolidated in the manner suggested above, a map or plan would be admissible as evidence of boundaries and natural and other features if it could be inferred that it had been compiled from information supplied by persons who had, or might reasonably be supposed to have had, personal knowledge of the matters dealt with.[59]

12.40 In any event, some guidance on the weight to be attached to Ordnance Survey maps would be useful. Section 12 of the Ordnance Survey/

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[57] For a form of affidavit, see Wallace and McNeil, Banking Law (8th ed), p 456.

[58] Walkers, para 224.

[59] Paras 12.09-12.32 above. Maps, plans, graphs, drawings and photographs are included in the term "document" in the Civil Evidence Act, 1968: see sec 10(2)(a) and (b). See Knight v David, [1971] 1 WLR 1671.

Survey Act, 1841,[60] provides that nothing done under the Act alters boundaries, and all right and title remain as if the Act had not been passed. The Sheriffs Walker[58] observe that section 12 does not seem to have been brought to the notice of the court in two cases[61] where, however, it was held that the Ordnance Survey map is insufficient to establish a parish boundary. But in Miller v Jackson[62] Lord Emslie pointed out that in these cases the Ordnance Survey line of the boundary had not been uncontradicted by other evidence, whereas in the case before him the parish boundary had followed the same line as the Ordnance Survey maps since 1859 and was so shown in the plotted sketch maps made under the Act of 1841 from the rough sketch prepared at the time of the survey of the ground. All these maps and sketches were produced, and the Court heard evidence from the Assistant Regional Officer of the Ordnance Survey, Scotland. In these circumstances his Lordship saw no reason to doubt that the Ordnance Survey maps, supported by a particular plotted sketch map, and uncontradicted by any other evidence, properly showed the boundaries of the parish.

12.41 It is submitted that Ordnance Survey maps should be sufficient evidence of boundaries and other features, making elaborate proof of the composition of the maps unnecessary in the absence of challenge.[63] In addition/

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[58] Walkers, para 224.

[60] 4 and 5 Vict cap 30.

[61] Gibson v Bonnington Sugar Refining Co, (1869) 7 M 394, Lord Mure at p 396, Lord Neaves at p 400; Meacher v Blair-Oliphant, 1913 SC 417, esp Lord Kinnear at pp 437-438.

[62] O H Lord Emslie, 15th March 1972, not reported on this point at 1972 SLT (Notes) 31.

[63] Cf the evidential value of a definitive map prepared by a surveying authority in England or Wales pursuant to duties under sec 32 of the National Parks and Access to the Countryside Act, 1949 (12, 13 and 14 Geo VI, cap 97): R v Secretary of State for the Environment, ex p Hood, [1975] QB 891; Suffolk County Council v Mason, [1978] 1 WLR 716.

addition, if there were to be no general provision on the lines suggested as to the admissibility of documents, it would be useful to enact that other maps, plans and histories are admissible as evidence of boundaries and other features, such weight to be given to them as the court considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.[64]

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[64] Cf Highways Act, 1959 (7 and 8 Eliz II, cap 25), sec 35.

Chapter 13

REAL EVIDENCE

13.01 In this chapter are considered a variety of processes and things, other than documents, which are examined by or described to the tribunal as a means of proof. In recent years the Scottish courts have considered a number of problems relating to scientific and other novel means of proof, including narco-interrogation,[1] dental impressions,[2] wireless telephony,[3] the behaviour of tracker dogs,[4] the results of a type of market research survey,[5] blood tests and tape recordings. The issues raised in such cases have been dealt with on general principles, and it is proposed to notice here only blood tests in civil proceedings,[6] evidence of physical resemblance, and recording devices.

1. Blood tests in civil proceedings

13.02 The present law as to the use of blood tests for determining paternity in civil proceedings appears to require revision in the light of the undoubted scientific value which is now generally attached to blood tests as a means of excluding paternity. The most recent Scottish decisions/

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[1] Meehan v HM Advocate, 1970 JC 11; cf R v Wong, (1977) 1 WWR 1, cit [1977] CLY para 543, where the Supreme Court of British Columbia held to be admissible, notwithstanding the Crown's opposition to its admission as unreliable and an irrelevant previous consistent statement, the evidence of a polygraph (lie detector) test voluntarily undertaken by the accused which indicated his innocence. Sir Roger Ormrod has observed that the article on the lie detector in Gradwohl's Legal Medicine (2nd ed) "provides ample factual justification for English prejudices against this device" ("Scientific Evidence in Court", [1968] Crim LR 240, at p 243).

[2] Hay v HM Advocate, 1968 JC 40. As to fingerprint evidence see R & B, para 18-93.

[3] Hopes v HM Advocate, 1960 JC 104.

[4] Patterson v Nixon, 1960 JC 42.

[5] Coca-Cola Co v Wm Struthers & Sons Ltd, 1968 SC 214; cf Customglass Boats Ltd v Salthouse Bros Ltd, [1976] RPC 589 (Supreme Court of New Zealand).

[6] Blood tests in criminal proceedings are considered in Chapter 25 below, paras 25.32-25.35.

decisions of significance are Whitehall v Whitehall[7] and Imre v Mitchell.[8] In Whitehall, a husband seeking to divorce his wife on the ground of adultery averred that she had given birth to a child of whom he was not and could not be the father. He enrolled a motion to ordain the defender for herself and the pupil child to allow a sample of their respective bloods to be taken for testing. The child was not a party to the action. The court refused the motion on the ground that to compel a party, let alone a stranger, to a litigation to undergo a surgical operation with a view to providing material for the other party's case would be an invasion of private right inconsistent with the principles of fairness on which litigation is conducted in Scotland. In Imre, an action of declarator of bastardy and putting to silence, the pursuer adduced medical evidence based on blood tests of herself, the defender and the child, intended to show that the defender could not be the father. The Lord Ordinary admitted and accepted that evidence, the effect of which he considered to be that the chances were at least 100,000 to 1 against the defender being the father of the child. In the Inner House, however, the Lord Ordinary was reversed on the facts and different views were expressed both as to the admissibility and as to the effect of the evidence; but indications were given that in the future such evidence might be valuable if the necessary consents were obtained. Lord President Clyde observed (at pp 465-466):

> "This method of obtaining evidence of paternity may well become more generally employed as medical knowledge about it increases ... The advisers of a party who is asked to give such a sample should therefore make sure that that party really appreciates the consequences and is none the less willing to give a sample of blood for analysis; and the advisers of a child whose blood is to be so tested should hesitate before

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[7] 1958 SC 252.
[8] 1958 SC 439.

they allow a course to be taken which may have a devastating and lasting effect on that child's whole life, especially when it is a course which the court will not compel anyone to adopt."

Lord Sorn, comparing the evidence with finger-print evidence, said (at p 476):

"... the finger-print system is not a system based upon theory and it has been so well tested over many years that it can claim, as nearly as may be, to be infallible. And when finger-print evidence is presented in court it is accompanied by photographic reproductions for all to see and understand. In my opinion we are not - or not yet - in that realm here. I have not a word to say in criticism of the way in which the medical experts carried out their tests or of the evidence given by them with proper professional moderation; and it may be that tests like these have a part to play in consistorial litigations if the necessary consents are forthcoming."

13.03 Since these days, the reliability of blood-group evidence has become widely recognised;[9] and it is suggested that it would now be opportune to consider the formulation of rules for the production of such evidence. There is force in the observations of Ormrod J in Holmes v Holmes:[10]

"When, as I think in these days, it is possible to enable the courts to do justice on a footing of fact and not to do injustice on a basis of presumption, I should greatly hope that no difficulties will ever be put in the way of a child's blood being supplied for blood-grouping. I know it is a sad thing to bastardise a child, but there are graver wrongs. This is a matter which I am sure all those concerned will approach with great caution because there is nothing more shocking than that injustice should be done on the basis of a legal presumption when justice can be done on the basis of fact."

Professor/

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[9] See S v S, [1972] AC 24, Lord Reid at p 41; A R B, "Paternity Blood Tests: A Solicitor's Guide", (1966) 11 JLS 328; Barbara E Dodd, "The Scope of Blood Grouping in the Elucidation of Problems of Paternity", (1969) 9 Med Sci & Law 56; Law Com No 16 (n 16, infra), Appendix B; Mary Hayes, "The Use of Blood Tests in Pursuit of Truth", (1971) 87 LQR 86; Cross, pp 46-47; Report of Hamburg international congress on forensic haematogenetics, The Times, 28th September 1977.

[10] [1966] 1 WLR 187, at p 188.

Professor R M Jackson, advocating the use of blood group tests, wrote:

> "Clearly blood group tests cannot be the sole evidence for determining paternity in all cases, but whilst accepting that other evidence is needed in many and perhaps in nearly all cases, the fact remains that there is always some evidential value in blood group tests. Or, putting this in another way, if a group of scientifically minded inquirers was entrusted with arriving at conclusions about the paternity of a child they would treat blood group tests as a necessary step in their inquiry. I do not see how our law courts can, over the years, have a credible reputation for deciding issues of fact unless the methods adopted include those that would be accepted by current scientific inquiries."[11]

As the law of Scotland stands at present, however, there are three major limitations on the use which may be made of blood tests:[12] the court will not ordain an adult to submit to a blood test against his will, there is difficulty in relation to consent on behalf of a pupil child, and there is no procedural machinery to ensure that blood tests are properly conducted and the parties properly identified.[13]

13.04 English experience suggests possible changes in the law whereby these limitations might be overcome. In 1968, against a background of changing judicial attitudes in England,[14] the English Law Commission proposed, inter alia: (1) that the presumption of legitamacy should be rebuttable by proof on a balance of probabilities;[15] (2) that any civil court before which the question of paternity arises should have the power to direct a blood test of the parties, including the child and its mother; and (3) that a person refusing to be so tested shall not be forced to, but the courts may draw any inference it thinks appropriate from/

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[11] R M Jackson, The Machinery of Justice in England (Cambridge U P, 6th ed, 1972), p 244.

[12] Clive and Wilson, pp 467-468.

[13] Cf Sproat v McGibney, 1968 SLT 33.

[14] See Victor Tunkel, "Blood Tests in the Establishment of Paternity", (1969) 9 Med Sci & Law 53.

[15] This question is considered in Chapter 22 below, para 22.36.

from the refusal.[16] The English Law Commission's proposals, with modifications, were implemented in Parts III and IV of the Family Law Reform Act, 1969,[17] which does not extend to Scotland. Parts III and IV were brought into operation on 1st March 1972, when a number of procedural regulations on the subject also came into force.[18] The relevant provisions of Part III of the Act may be very briefly summarised thus. In any civil proceedings in which the paternity of any person falls to be determined the court may, on an application by any party to the proceedings, give a direction for the use of blood tests on samples from that person (normally a child), the mother of that person and any party alleged to be the father; but no blood test shall be carried out on a person unless he consents. Provision is made for consent to be given on behalf of mental patients and children under 16. The court may draw such inferences as appear proper from the failure of a person to comply with a direction to submit a blood test; and if that person is claiming relief in reliance on the presumption of legitimacy, his claim may be dismissed notwithstanding the absence of evidence to rebut the presumption. In effect, the court is provided with an indirect means of obliging adults to submit to a blood test. The regulations prescribe the procedure for taking and testing blood samples and providing a report for the court, and are designed to ensure the accuracy of the blood tests. They do not apply to voluntary blood tests, which remain lawful, but in practice it is desirable that those who carry out voluntary tests should comply as far as appropriate with the regulations.

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[16] Blood Tests and the Proof of Paternity in Civil Proceedings (Law Com No 16, 1968).

[17] 1969, cap 46.

[18] See (1972) 12 Med Sci & Law 283; Blood Tests (Evidence of Paternity) Regulations 1971 (SI 1861); Family Division Practice Note, [1972] 1 WLR 353.

13.05 It may be that provisions on somewhat similar[19] lines could with advantage be introduced into the law of Scotland. The issues are discussed by Lord Reid, with whom Lord Guest agreed, in S v S,[19] an English appeal on a question whether a serological examination of a child should be ordered, which was decided before Part III, but after Part IV, of the Act came into operation. In the course of his speech Lord Reid said:

> "Blood tests have now been used extensively for many years in many countries and it is now generally recognised that, if a test is properly carried out by a competent serologist, its results are fully reliable ... I accept the view that on average it is still a considerable disadvantage to be illegitimate. But I doubt whether, again on average, this disadvantage would be greatly diminished by a decision in favour of legitimacy seen to have been based on inadequate evidence after refusal to allow a blood test. I think that the final abolition of the old strong presumption of legitimacy by section 26 of the Act of 1969 shows that in the view of Parliament public policy no longer requires that special protection should be given by the law to the status of legitimacy.
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> "I must now examine the present legal position with regard to blood tests. There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will. In my view, the reason is not that he ought not to be required to furnish evidence which may tell against him. By discovery of documents and in other ways the law often does this. The real reason is that English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty ... Parliament has clearly endorsed our view by the provision of section 21(1) of the Act of 1969 [which preserves the right of an adult to refuse to give a blood sample, in spite of a direction by the court.]
>
> "But the position is very different with regard to young children ... I would, therefore, hold that the court ought to permit a blood test of a young child to be taken unless satisfied that that would be against the child's interests. I say a young child because as soon as a child is able to understand these/

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[19] Some minor criticisms of the English provisions are expressed by D J Lanham, "Reforms in Blood Test Law", (1969) 9 Med Sci & Law 172. And see S v S [1972] AC 24, Lord Reid at p 45; P D G Skegg, "Consent to Medical Procedures on Minors", (1973) 36 MLR 370.

these matters it would generally be unwise to subject it to this operation against its will. The court must protect the child, but it is not really protecting the child to ban a blood test on some vague and shadowy conjecture that it may turn out to be to its disadvantage: it may equally well turn out to be for its advantage or at least do it no harm."

13.06 It is thought that provisions for Scotland on the lines of Part III of the English Act would have considerable practical value. They would probably be most widely employed in actions of affiliation and aliment. In many cases the court would be able to find in favour of a credible pursuer without resorting to the anomolous doctrine of corroboration by false denial;[19a] and a dishonest pursuer would be exposed by a defender who under the present law is able to offer little in the way of evidence beyond a straight denial that he is the father. It is suggested that the defender should be notified that he has the right to ask for blood tests. It may be that the provisions would also be quite frequently operated in actions of divorce based on adultery where the husband claims that he is not the father of his wife's child. In England it is now usual, whenever a question of paternity needs to be resolved, to direct the use of blood tests under the appropriate rules of court; and it is found in practice that the report on the blood tests often in effect disposes of the issue or dispute.[20] It should be noted, however, that parties may be unable to afford to pay for expert reports. If the court cannot ex proprio motu direct tests or direct that the cost of tests be paid out of public funds, it may then be obliged to decide the case in the knowledge that a blood test would have been helpful if not conclusive.

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[19a] Discussed in Chapter 23 below, paras 23.25-23.27.

[20] See Practice Direction (Paternity: Guardian and litem), [1975] 1 WLR 81.

2. Physical resemblance

13.07 The laws of Scotland and England differ on the question of the admissibility of evidence of physical resemblance between a child and its supposed parent. In England it is admissible[21] but in Scotland it is not, unless in highly exceptional or rare cases involving difference of colour or, perhaps, physical peculiarity.[22] There may be room for the view that the Scottish rule is somewhat too strict and that evidence of the resemblance which a child bears to its alleged parent should be admissible as some, although very weak, evidence of parentage.

3. Recording Devices

13.08 There are unresolved questions as to the admissibility of recordings made by mechanical devices, the procedure to be followed and the standard of proof to be applied where the authenticity of the recordings is challenged, and the admissibility of copies of the recordings.

(1) Admissibility of recordings

13.09 In Hopes v H M Advocate,[23] a tape-recording of a conversation between a blackmailer and his victim was made a production in the case and was played over to the jury in the course of the evidence. No objection was taken to the competency of that evidence, and Lord Justice-General Clyde (at p 110) regarded it as primary and direct evidence admissible as to what had been said and picked up by the machine. But the question was not argued, and in R v Mills[24] the Court of Criminal Appeal/

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[21] C v C, [1972] 1 WLR 1335; Cross, p 11; Phipson, para 286.

[22] Grant v Countess of Seafield, 1926 SC 274. And see S v S, 1977 SLT (Notes) 65.

[23] 1960 JC 104.

[24] [1962] 1 WLR 1152.

Appeal in England, having considered Hopes, expressed no opinion on the point. In R v Maqsud Ali[25] the same court again considered Hopes, noted that there appeared to be decisions both ways in the American courts, and held that there was no difference in principle between a tape-recording and a photograph: accordingly, a tape-recording was admissible provided that its accuracy could be proved and the voices properly identified and that the evidence was relevant and otherwise admissible; but the court would not lay down any exhaustive set of rules by which the admissibility of such evidence could be judged, for it always had to be regarded with caution and assessed in the light of all the circumstances of each particular case. In The Statue of Liberty[26] the plaintiffs in an action arising out of a shipping collision sought to adduce in evidence a film of echoes recorded at a shore station by radar apparatus while it was not being monitored by human agency. Sir Jocelyn Simon P, applying R v Maqsud Ali,[25] held that the evidence was admissible, observing: "The law is now bound to take cognizance of the fact that mechanical means replace human effort." It may be thought that if similar questions were raised in the Scottish courts as to the admissibility of recordings, Scottish judges would be very likely to express similar views, and that a statutory provision on the matter is unnecessary. In Scottish criminal practice no objection is taken to the production and playing in court of tape-recordings of 999 calls, telephone calls to newspaper offices and the like, supported by the evidence of witnesses who identify the voices and indicate how the recording/

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[25] [1966] 1 QB 688.
[26] [1968] 1 WLR 739.

recording was brought into existence.[27] Nor is objection taken to the production of transcripts of tape-recordings made and spoken to by experienced transcribers.

(2) Procedure

13.10 It is not entirely clear, however, what procedure would be adopted if the defence were to challenge the authenticity of a tape or the accuracy of a transcript. In solemn procedure, should there be a trial within a trial? That is apparently the English practice. English experience indicates that such trials may be lengthy: in R v Maqsud Ali,[25] the trial within a trial lasted two and a half days, in R v Stevenson[28] seven days of the trial within a trial were occupied with evidence, and in R v Robson[29] the evidence at the trial within a trial occupied ten days. It will be submitted, however, that in Scotland the trial-within-a-trial procedure should be abolished, or that if it is retained it should be used only in exceptional cases, where objection is taken to evidence of an alleged confession, as recommended by the Thomson Committee.[30] Questions of the authenticity or accuracy of tapes or transcripts appear to be essentially jury questions.

(3) Standard of proof

13.11 In the event of the authenticity of a recording being challenged, it/

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[27] In HMA v Waddell there were played to the jury a tape-recording of an alleged confession by the accused to a journalist and a video-cassette recording of another such confession. (The Scotsman, 20th and 23rd November 1976).

[25] [1966] 1 QB 688.

[28] [1971] 1 WLR 1.

[29] [1972] 1 WLR 651.

[30] See Thomson, paras 47.07-47.15; Chapter 20 below, paras 20.37-20.52.

it would no doubt be for the prosecutor as the party seeking to put forward the recording to prove it to be authentic. In R v Stevenson[28] it was contended that the standard of proof which the prosecutor must satisfy was proof beyond reasonable doubt, but the question was not decided. In R v Robson,[29] however, counsel were agreed that the standard was the balance of probabilities, and it was held that the recordings were admissible if the prosecution made out a prima facie case of admissibility by evidence which defined and described their provenance and history up to the moment of production in court, and the evidence appeared to remain intact after cross-examination: but if the judge held that they were admissible, the jury would have to be satisfied of their authenticity beyond reasonable doubt before taking any account of their contents. Lord Justice-Clerk Thomson's opinion in Chalmers v H M Advocate[31] seems to indicate that the Scottish courts would take a somewhat similar view, but the matter is not entirely clear. It is thought that if any objection were taken to the admissibility of a recording, for example on the ground that it had been unfairly or irregularly obtained, that objection would be disposed of by the judge on the basis of the evidence already led, or agreed facts, or both, together with the submission of the parties; and if the objection were repelled, the authenticity of the recording, like any other question as to the weight of the evidence adduced, would be a matter for the jury.

(4) Copies of recordings

13.12 A further question relating to the issue of authenticity is the admissibility/

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[28] [1971] 1 WLR 1.

[29] [1972] 1 WLR 651.

[31] 1954 J C 66, at pp 82-83.

admissibility of copies of recordings, such as a re-recording of a tape. The Supreme Court of Victoria has recently held that a tape-recording is not a document for the purposes of the rule excluding secondary evidence and therefore a re-recording of an original tape is admissible in evidence even if it is possible to produce the original.[32] In Scotland, however, tape recordings appear to be included in the definition of "document" in section 1 of the Criminal Evidence Act, 1965, and section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1966. Copies of the "documents" to which section 7 applies are admissible in civil cases by virtue of section 7(3A).[33] It has already been submitted that in any new legislation the word "document" should be defined in the widest terms and that copies of "documents" should be admissible in both civil and criminal cases. It would be necessary for a trier of fact to keep in view, when assessing the weight of a copy of a tape-recording, the consideration that it is possible by re-recording to disguise interference with an allegedly original tape.

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[32] R v Matthews & Ford, [1972] V R 3.

[33] See paras 12.19-12.20 above.

Chapter 14

REFERENCE TO OATH[1]

14.01 It is proposed that reference to oath should cease to be a competent mode of proof. It is thought that it should be possible to abolish the procedure of reference to oath without infringing the rules of law which require proof by writ. These rules are now being examined by the Scottish Law Commission, and a discussion of the extent to which proof by writ should continue to be required will be found in their recent memorandum no 39, "Constitution and Proof of Voluntary Obligations: Formalities of Constitution and Restrictions on Proof". But the sole requirement of the rules is proof by writ, not "proof by writ or oath": reference of a cause or disputed question of fact to the oath of the other party is always an alternative to proof by his writ, since reference to oath is competent in any civil action except in the case of an obligatio literis or a consistorial cause.[2]

14.02 The procedure of reference to oath of party was developed when a party was not a competent witness in his own cause,[3] but was expressly saved when parties became competent witnesses in 1853.[4] A typical explanation/

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[1] Walkers, chaps 11, 25; James Walker (Lord Walker), "Oath on Reference", in Encyclopaedia, vol ix, p 395; J J Gow, "Constitution and Proof of Voluntary Obligations", 1961 Jur Rev 1, 119, 234; A L Stewart, "Proof by Writ or Oath", (1966) 11 JLSSc 28; W A Wilson, "In Modum Probationis", 1966 Jur Rev 193.

[2] Walkers, para 117. On reference to oath in relation to extrinsic evidence in written contracts see Gloag, Contract (2nd ed), p 376; Walkers paras 266(c), 272(b).

[3] Professor D M Walker, "Evidence", in Introduction to Scottish Legal History (Stair Society, vol 20), at pp 311-312; R W Millar, "The Formative Principles of Civil Procedure", (1923) 18 Illinois Law Review 1, 94, 150, reprinted in A Engelmann, A History of Continental Civil Procedure (London, 1928), p 3, at pp 44-47.

[4] Evidence (Scotland) Act, 1853, secs 3, 5. See Appendix A.

explanation of its function was given by Lord Moncrieff in 1846:[5]

> "... it has been a fixed rule of the law of Scotland for centuries, that a party, pursuer or defender, even after all other methods of discussion or evidence have failed, may say to his adversary before the court, though I cannot produce other evidence to show the truth, I appeal it to your own oath - to your own conscience as a Christian man. And our law, though different from others, allows this, on the simple principle, that, however strong a case a man may apparently have on documents or apparent evidence, he ought not to be permitted to maintain it against conscience; and that, if he cannot himself swear to the facts as averred by him, and which, if true, must be known to himself, or deny upon oath the material averments of his adversary, though not otherwise proved, he shall not be permitted to avail himself of the appearance of evidence on the one side, or the absence of it on the other, to take a judicial sentence contrary to the truth as revealed by his own conscience.
>
> "This appears to me to be a very reasonable principle."

The procedure was a usual and ordinary method of ascertaining fact so long as a party was not admitted as a competent witness, but since 1853 it has been rarely resorted to and is now confined, it is thought, to cases where the applicable law requires proof by writ and no writ is available.[6] It is thought that it must be only in the rarest cases, if ever, that the facts referred are established; but the experience of readers will be of interest.

14.03 In their report entitled Reform of the Law Relating to Prescription and Limitation of Actions,[7] which preceded the Prescription and Limitation (Scotland) Act, 1973,[8] the Scottish Law Commission expressed the view that reference to oath is not a satisfactory mode of proof/

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[5] Pattinson v Robertson, (1846) 9 D 226, at p 229; see also Adam v Maclachlan, (1847) 9 D 560, L J-C Hope at p 567, Lord Medwyn at p 574, Lord Moncrieff at p 576; Paterson v Paterson, (1897) 25 R 144, Lord Young at p 152.

[6] Lewis, Manual, p 149.

[7] Scot Law Com No 15, paras 45-46 and appendix B paras 10-17.

[8] 1973, cap 52.

proof. They pointed out that it excludes the testimony of independent witnesses and restricts the evidence to the word of the least independent witness, the debtor himself, which must be accepted "however palpably and disgracefully false it may appear."[9] They added that the circumstances of modern business, where many transactions are carried on by incorporated companies, make the procedure even less appropriate. They enumerated technical procedural questions which had caused difficulty: the extent to which apparently false evidence of the debtor can be controverted by previous specific admissions or how far negative evidence can be countered by presumptions that the debtor must be able to recall the circumstances of the transaction; the problem of whether qualifications of an oath are intrinsic or extrinsic; and the problem of reference to oath when the debtor is deceased or is a corporate body. Subsequently, in the law relating to prescription the procedure ceased to apply when the triennial, quinquennial and sexennial prescriptions were abolished by the Act of 1973. The writer would add to the considerations referred to by the Commission the rule that references to oath "are very much subject to the discretion of the court, according to the circumstances of the case"[10] : the court may refuse to allow a reference if it thinks allowance would be inequitable.[11] It is submitted that in view of the restrictive, technical and discretionary character of/

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[9] Hunter v Geddes, (1835) 13 S 369, Lord Jeffrey at p 377. Even the conviction of the deponent for perjury does not affect the matter (Walkers, para 308, n 6).

[10] Pattinson v Robertson, (1846) 9 D 226, Lord Moncrieff at p 229; Bell, Principles (10th ed), para 2263; Walkers para 314.

[11] Hamilton v Hamilton's Exrx, 1950 SC 39, L J-C Thomson at p 42.

of the procedure, it is difficult to justify its retention as a mode of proof. In Lord Walkers' words:

> "As a mode of proof the oath of verity is an anomalous proceeding in an age when parties are competent witnesses."[12]

14.04 Since the procedure is nowadays invoked, it is believed, only in cases where the law requires proof by writ, the practical consequence of abolition of the procedure would be that the following matters would be capable of proof by writ only: the loan, advance or payment of money exceeding £100 Scots;[13] declarator of trust, under the Blank Bonds and Trusts Act, 1696;[14] conventional obligations of relief;[13] the discharge or performance of an obligation constituted by writing, or vouched by a document of debt;[13] the payment of money exceeding £100 Scots in implement of an antecedent obligation;[13] the renunciation, without, payment or performance, of rights constituted in writing;[13] the modification of an agreement constituted in writing;[13] gratuitous obligations;[13] innominate and unusual obligations;[13] improbative or verbal agreements, not being obligationes literis which the parties have agreed to execute in probative form, and on which rei interventus or homologation has followed;[15] and, perhaps,[16] a verbal agreement relating to heritage (other than a lease for a period of less than one year) on which rei interventus or homologation has followed;[17] a verbal contract/

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[12] Encyclopaedia, vol ix, para 807.

[13] See Walker, Principles, pp 502-507.

[14] 1696, cap 25; see Walker, Civil Remedies, pp 130-131. The reference in the Act to the oath of party would have to be repealed. The other cases in this paragraph rest on the common law.

[15] Walkers, para 97, n 75, on Clark v Clark's Trustees, (1860) 23 D 74.

[16] The following cases are doubtful.

[17] See Errol v Walker, 1966 SC 93.

contract of service for a period of more than one year on which rei interventus has followed;[18] and an improbative cautionary obligation or hire-purchase contract on which rei interventus or homologation has followed.[19] It would be more appropriate to consider the requirements of proof in relation to these matters in the context of a revision of the law of voluntary obligations, rather than in the context of the reform of the law of evidence. The Scottish Law Commission have recently discussed, and invited comment on, four possible schemes for the reform of the law of constitution and proof of voluntary obligations.[20]

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[18] Brown v Scottish Antarctic Expedition, 1902, 10 SLT 433; cf Walker v Greenock Hospital Board, 1951 SLT 329, Lord Sorn at p 332; Cook v Grubb, 1963 SC 1.

[19] Walkers, paras 113-114; Stewart, (1966) 11 JLSSc 28, at p 29.

[20] Constitution and Proof of Voluntary Obligations: Formalities of Constitution and Restrictions on Proof (Scot Law Com memo no 39), paras 53-100.

PART IV

ADMISSIBILITY OF EVIDENCE

Chapter 15

THE ADMISSIBILITY OF EXTRINSIC EVIDENCE IN RELATION TO DOCUMENTS

1. Introduction

15.01 This chapter is devoted to an examination of the general rule that it is incompetent to contradict, modify or explain writings by extrinsic evidence.[1] "Extrinsic evidence" here means any evidence, written or oral, extraneous to the document the contents of which are under consideration. It does not, however, include an admission made by a party on a reference to his oath.[2] The problem presented by this branch of the law of evidence is that the general rule is so heavily qualified by exceptions that it is difficult, if not impossible, to state the law with certainty. While some of the exceptions are obvious, others are subtle and complicated. The American jurist J B Thayer said of the equivalent English rule:

> "Few things are darker than this, or fuller of subtle difficulties."[3]

As to the Scottish and English rules the Sheriffs Walker observe:

> "In so far as contradiction and modification are concerned the general rule in Scotland appears to be the same as the
>
> equivalent/

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[1] See Dickson, paras 1015-1103; Lewis, Manual, Part III, chap 3; Gloag, Contract (2nd ed), chaps 20, 21; Walkers, chap 21; Gow, The Mercantile and Industrial Law of Scotland, pp 13-14; Gloag and Henderson, Introduction to the Law of Scotland (7th ed), chap 12; Walker, Principles of Scottish Private Law (2nd ed), i, pp 110-112, 602-606.

[2] Gloag, Contract (2nd ed), p 376; Walkers, paras 266(c), 272(b). The abolition of reference to oath is recommended in chap 14 above. As to proof by writ, see para 15.18 below.

[3] A Preliminary Treatise on Evidence at the Common Law (1898), chap 10, p 390, cit by the Law Commission, Law of Contract: The Parole Evidence Rule (Working Paper no 70, 1976), para 3.

equivalent English rule, which provides that extrinsic evidence is inadmissible to contradict, vary, add to or subtract from the terms of a writing.[4] The English statement of the rule differs from the Scottish in that, subject to exceptions, it admits extrinsic evidence for the purpose of explaining or interpreting a writing. The distinction between the two statements of the rule, however, is theoretical rather than practical, because the exceptions to this part of the Scottish rule are so numerous and extensive that little harm would probably result if the English method of statement were to be adopted."[5]

In this chapter an attempt is made to summarise the present state of the law in very brief terms, to indicate in the course of the summary the areas where the law is unclear, to consider the various justifications of the general rule in the light of the actual state of the law, and to consider to what extent the general rule continues to serve any useful purpose. The summary is based on the exposition of the law in chapter 21 of the Sheriffs Walker's treatise, and contains notes of some recently reported Scottish decisions. First are considered the writings to which the general rule applies, then the general exceptions to the rule, the exceptions connected with the explanation of a writing, and finally the exceptions which in certain circumstances allow the variation of a writing to be proved by extrinsic evidence. It will be submitted that the latter exceptions should not be dealt with in the context of the reform of the law of evidence.

2. Application of the general rule

(1) Writings to which the general rule applies

15.02 The general rule applies to any transaction which has been reduced to, or recorded in, writing, either by requirement of law, or agreement of the parties,[6] including writings which discharge obligations. It/

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[4] Bank of Australasia v Palmer, [1897] AC 540, Lord Morris at p 545.

[5] Walkers, para 240.

[6] Walkers, para 243.

It accordingly applies not only to all documents embodying transactions which the law requires to be constituted in writing,[7] but also to all writings in which, by agreement of the parties, their obligations have been constituted or an earlier oral or informal agreement has been subsequently embodied in a formal and effective written contract with the intention that it should take the place of the earlier agreement;[8] and to informal writings;[9] a contract constituted by letters passing between the parties;[10] unilateral writings which constitute or create or discharge obligations on the part of the granter, or from which such obligations or their discharge are inferred;[11] conveyances of heritage, where the disposition supersedes the original contract in so far as it relates to the sale of heritage;[12] the terms of a written contract which are implied by law;[13] rights and obligations constituted by statute, judicial decree and similar writings;[14] and writings other than the document under consideration if that document shows, by express reference or clear implication, that these writings are intended to be incorporated in it, or to be looked at in construing it.[15] Difficulties have arisen in relation to (a) contracts constituted by letters, (b) conveyances of heritage and (c) writings which are ex facie incomplete and defective.

(a) Contracts constituted by letters

15.03 The Sheriffs Walker observe that if it is averred that, instead of an unqualified acceptance of the written offer, there was an acceptance/

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[7] Walkers, para 245.
[8] Walkers, para 246.
[9] Walkers, para 247.
[10] Walkers, para 248.
[11] Walkers, para 249.
[12] Walkers, para 250; Equitable Loan Co of Scotland v Storrie, 1972 SLT (Notes) 20.
[13] Walkers, paras 251, 273(d).
[14] Walkers, para 252.
[15] Walkers, para 253.

acceptance subject only to conditions, or a counter offer, it is difficult to understand how, in principle, the general rule can apply, since the terms of the contract must then be sought, not in the writing alone, but partly in the writing and partly in the oral communings following thereon. They consider that in such circumstances parole proof is not only admissible but essential.[16] It is thought, with respect, that that proposition must be correct, although it is not stated by Gloag,[17] and the general rule was applied in Thomson v Garioch[18] where it was averred by the defender that the oral acceptance of the written offer was subject to additional provisions which the pursuers in turn accepted orally.

(b) Conveyances of heritage

15.04 (i) Waiver of general rule. It has been held that the parties may agree, before the disposition is granted, that the general rule shall not apply, and that, for certain purposes, the original contract shall continue to govern their rights and obligations.[19] It is stated by Gloag and Henderson, without qualification, that "parties may competently agree to waive the ordinary rule";[20] but the Sheriffs Walker are of the view that the decisions noted below[19] were pronounced in very special circumstances.[21]

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[16]Walkers, para 248.

[17]Gloag, Contract (2nd ed), p 364.

[18](1841) 3 D 625. Walkers observe that the terms of the interlocutor nevertheless indicate that parole proof was held to be incompetent because what the defender wished to prove was illegal.

[19]Wood v Magistrates of Edinburgh, (1886) 13 R 1006; Young v McKellar Ltd, 1909 SC 1340; Fraser v Cox, 1938 SC 506.

[20]Introduction to the Law of Scotland (7th ed), p 121.

[21]Walkers, para 250(c).

15.05 (ii) Application of general rule to conveyances which follow decrees-arbitral. Gloag states that it is somewhat doubtful how far the general rule extends to the case where the documents in question are a decree-arbitral and a conveyance following upon it. He concludes that it is probably the law that reference to the decree-arbitral is permissible only in the event of ambiguity in the conveyance.[22] The examination of the decisions by the Sheriffs Walker supports that view,[23] but the case of Guthrie v Glasgow and South Western Railway Co[24] and the speeches in the House of Lords in Duke of Fife v Great North of Scotland Railway Co,[25] which gave rise to the doubt, have never been formally disapproved.

(c) Writings ex facie incomplete or defective

15.06 The Sheriffs Walker state that when a writing, which is founded upon by one of the parties as constituting a right, is construed by the court as incomplete or defective for this purpose, evidence of facts extrinsic to the writing, purporting to show that the right was nevertheless constituted, is inadmissible.[26] The two cases which are cited by the learned authors as illustrations of this proposition appear to be open to comment. In Johnston v Clark[27] an alleged written agreement for the sale of heritage provided that it was not to be binding unless the purchaser intimated his adherence to it in writing within fourteen days. He did so, but on various "understandings" about matters which had not been mentioned in the agreement, but which, he/

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[22] Gloag, Contract (2nd ed), p 369.
[23] Walkers, para 250, n 79.
[24] (1858) 20 D 825.
[25] (1901) 3F (HL) 2.
[26] Walkers, para 254.
[27] (1855) 18D. 70.

he averred, recorded his understanding of the seller's oral representations previous to, and at, the time the written agreement was entered into. It was held that he could not competently prove these representations by parole evidence. Gloag observes that the Court applied "very strictly" the rule that acceptance must be unconditional.[28] It may also be observed that it is not impossible that if a similar case arose today the parole proof sought would be allowed under the exception to the general rule which permits proof of collateral agreements.[29] In Davidson v Logan[30] a decree-arbitral was issued which bore to be signed by the two arbiters and the oversman, who was entitled to act only if the arbiters disagreed. It was held that it was incompetent to prove by parole evidence that the oversman had never acted and that the award was that of the arbiters alone, notwithstanding that the evidence led had established that the oversman had not in fact acted. The case is an example of the application of the general rule which seems to show how the rule can operate as an obstruction to the ascertainment of the truth.

(2) Writings to which the general rule does not apply

15.07 In their paragraph dealing with contracts only partly in writing, to which, by definition, the general rule does not apply,[31] the Sheriffs Walker notice the case of Claddagh Steamship Co v Steven & Co[32] which, they say, is difficult to classify. It was there held competent to prove an oral agreement whereby two ex facie independent written contracts were in fact interdependent. Gloag appears to be dissatisfied/

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[28] Gloag, Contract (2nd ed), p 41.
[29] See para 15.12 below.
[30] 1908 SC 350.
[31] Walkers, para 244; H Widdop & Co Ltd v J & J Hay Ltd, 1961 SLT (Notes) 35.
[32] 1919 SC (HL) 132.

dissatisfied with the decision,[33] and the Sheriffs Walker state that it seems to be truly a departure from, rather than an exception to, the general rule.[34] The terms of the summary of the Lord Ordinary's opinion in Wann v Gray & Son[35] suggest that he followed Claddagh, but Wann is difficult to understand.[36]

3. General exceptions to the rule

15.08 Under this heading will be considered the exceptions to the general rule other than those which are connected with the explanation of a writing and those which in certain circumstances allow the variation of a writing to be proved by extrinsic evidence. All these exceptions are numerous and extensive, and as the Sheriffs Walker observe,

> "the more important exceptions have acquired subsidiary rules of their own. An attempt has been made to group the decisions into defined classes, but in doubtful cases an arbitrary classification has been necessary."[37]

The "general exceptions" to the rule may be classified in the following way. The general rule does not apply: (1) when it is sought to reduce a writing on the ground of fraud, essential error or illegality;[38] (2) when one party to a written contract avers that, as a result of a drafting error, the writing misrepresents the agreement and intention of both parties;[39] (3) when it is alleged that the writing was not intended to be a true record of the contract, but was merely a cover for some ulterior/

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[33] Gloag, Contract (2nd ed), p 369; see also Gloag and Henderson, Introduction to the Law of Scotland (7th ed), p 17.

[34] Walkers, para 244, n 29.

[35] 1935 SN 8.

[36] See Walkers, para 250, n 76.

[37] Walkers, para 256.

[38] Walkers, para 257.

[39] Walkers, para 258; MacDonald v MacInnes, 1969 SLCR App 21; Hudson v Hudson's Trustees, 1978 SLT 88.

ulterior transaction of a different nature;[40] (4) when it is alleged that a person who was not a signatory to a writing was in fact the principal of one of the signatories, and is entitled to sue or is liable to be sued upon it;[41] (5) when it is alleged that the contractual relationship between co-obligants is different from that expressed or implied in the writing which constitutes their contractual relationship with the creditor;[42] (6) in relation to agreements which are collateral to a writing;[43] (7) when it is held that in a written contract which has been acted upon there is a term missing or incompletely expressed which is essential for its fulfilment;[44] (8) when it is alleged that a written contract, ex facie unconditional, was delivered or signed subject to a condition that it was not to take effect until the condition was purified;[45] (9) in certain circumstances, in a question between persons who are not parties to the writing, but have an interest, or between such persons and one of the parties;[46] (10) when the party founding upon a writing admits on record, or by writ or oath, that it does not contain a true account of the transaction.[47] There are statutory exceptions to the general rule in relation to (11) the sale of goods[48] and (12) bills of exchange.[49] It is necessary to notice difficulties in relation to most of these exceptions.

(1) When real nature of written contract in issue

15.09 Dickson[50] cites with approval the observation of Lord Cottenham in/

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[40]Walkers, para 259; para 15.09 below.
[41]Walkers, para 260; paras 15.10-15.11 below.
[42]Walkers, para 261.
[43]Walkers, para 262; paras 15.12-15.13 below.
[44]Walkers, para 263; para 15.14 below.
[45]Walkers, para 264.
[46]Walkers, para 265; para 15.15 below.
[47]Walkers, para 266; paras 15.16-15.18 below.
[48]Walkers, para 259(b)
[49]Walkers, para 112; para 15.19 below.
[50]Dickson, para 1041.

in Scottish Union Insurance Co v Marquis of Queensberry[51] that it is competent for a court of equity to give effect to a transaction different from what the deeds executed represent to be the character of it. But, as the Sheriffs Walker observe,[52] such a general statement of exception (3) above appears to leave no content to the general rule. Lord Cottenham's observation is inconsistent with the subsequent case of Muller & Co v Weber & Scheer,[53] in which it was apparently not cited, and the Scottish Union Insurance Co case was later explained by Lord Keith of Avonholm in Anderson v Lambie[54] on the basis that the real nature of the transaction was implied by the terms of the deeds themselves. The Sheriffs Walker's proposition that this exception must in general be restricted to transactions where there is an element of collusion or deceit, appears to be sound, but is not explicitly established by authority.

(2) Undisclosed principal

15.10 (a) Justification. This paragraph is concerned with exception (4) above, whereby it is competent to prove that a person who was not a signatory of a writing was in fact the principal of one of the signatories, and is entitled to sue or is liable to be sued upon it. The textbook writers are not agreed as to the proper justification of this exception. Gloag states that it is justified on the ground that it does not discharge any liability which appears ex facie of the contract, but merely adds a party to it.[55] The Sheriffs Walker, however, state/

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[51](1842) 1 Bell's App 183, at p 198; (1839) 1 D 1203.
[52]Walkers, para 259(a).
[53](1901) 3 F 401.
[54]1954 SC (HL) 43, at pp 68-69.
[55]Gloag, Contract (2nd ed), p 127.

state that this is not an adequate justification because the general rule excludes additions to the writing as well as contradictions: in reality the position here appears to be that a rule of the law of principal and agent conflicts with, and takes precedence over, the general rule of the law of evidence.[56] They assume, with justification it is thought, that Anderson v Gordon,[57] where the general rule was applied in these circumstances, would not now be followed.[58]

15.11 (b) Exceptions. This exception is complicated by the fact that there are exceptions to it: Gloag[55] states:

> "Where, however, the contract is in writing, and the agent who signs it contracts in terms which amount to an assertion that the signatory is the only party concerned, proof of the existence of the principal is excluded, because his introduction would amount to a direct contradiction of the terms of the writing. This does not cover the case where the signatory is described in the body of the contract as holding a definite contractual position, eg, as 'the charterer' in a charter party. Such a description does not exclude the possibility that he holds that position as an agent.[59] But it is probably the law that if the contract relates to a particular thing, and involves obligations which no one but its owner can render, the description of the signatory as owner, proprietor, or other equivalent term[60] excludes proof of the existence of an undisclosed principal. Other exceptions to the general rule are that no person is liable as drawer, endorser, or acceptor of a bill of exchange or promissory note who has not signed it as such,[61] though the signature may be by some other person who has his authority to sign;[62] and, in England, that only the actual parties to a deed are bound by, or have rights under it, a rule which finds no place in the law of Scotland."[63]

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[55] Gloag, Contract (2nd ed), p 127.
[56] Walkers, para 260(b).
[57] (1830) 8 S 304.
[58] Walkers, para 260(b), n 89.
[59] Drughorn Ltd v Rederi Transatlantic, [1919] AC 203.
[60] Humble v Hunter (1848) 12 QB 310; Formby Bros v Formby, (1910) 102 LT 116; Argonout v Hani, [1918] 2 KB 247.
[61] Bills of Exchange Act, 1882 (45 and 46 Vict cap 61), secs 23, 89.
[62] Ibid, sec 91.
[63] Pollock, Contract (9th ed), 106.

(3) Collateral agreements

15.12 It is difficult to state the ambit of this exception with certainty. In Perdikou v Pattison[64] Sheriff-substitute Allan G Walker, as he then was, said:

> "The pursuer's solicitor directed my attention to some of the cases in which what have been called 'collateral agreements' were allowed to be proved, in spite of the existence of a written contract. It is impossible to deduce any principle underlying these exceptions to the general rule (see Gloag, pp 371-372), and many of them appear to contradict other equally authoritative decisions ... The only generalisations which seem possible regarding these exceptions are (1) that the oral agreement may not be proved if it contradicts a term of the writing, (2) that it is an argument in favour of admitting the oral agreement, that the writing is informal, and (3) that further exceptions should only be made if they are already covered by previous authoritative decision on similar facts."[65]

On appeal, Lord Justice-Clerk Thomson said:

> "The argument for the pursuer was that this agreement was merely collateral. No doubt there are a number of cases where oral agreements of various sorts, dealing with incidental or collateral matters, have been allowed to be proved by parole. Just what is a 'collateral' matter may sometimes be a nice question but it certainly does not cover something which alters the effect of an express stipulation as to one of the essentials of a lease."[66]

The Sheriffs Walker observe that some of the cases appear to indicate that any agreement may be proved as collateral which is not found in the writing, and is not directly contradictory of anything found there, but this has been said by Gloag[67] to leave very little content to the general rule. The learned authors consider that the exception must be strictly confined to agreements between the parties or their successors in title which are shown by the terms of the writing, as construed by the/

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[64] 1958 SLT 153.
[65] Ibid, at p 155.
[66] Ibid, at p 157.
[67] Gloag, Contract (2nd ed), p 371.

the court, not to form part of the matter with which the writing was properly concerned.[68] In England, on the other hand, where the courts have adopted the device of constructing from a preliminary oral promise or assurance a collateral contract in consideration of the execution of a written contract, it has been denied by Professor Wedderburn that the oral agreement can stand only if the written contract is wholly silent about, or does not deal with, the matter. He points out that in a number of English cases a lease dealt with the matters affected by the promise, and the oral contracts survived because they were not contradicted by the writing. In consequence of the rule prohibiting contradiction, he says, a court which desires to uphold an oral agreement which at first sight seems to conflict with the written one will go to great lengths to construe the latter so as to avoid such contradiction.[69]

15.13 In McInally v Esso Petroleum Co Ltd[70] Lord Avonside considered an oral agreement which in England would probably have been held to be such a collateral contract. The pursuer entered into an agreement with the defenders whereby they agreed to lend him money for the purchase and development of a petrol-filling and service station, and he agreed to buy his total requirements of motor fuels from them. The pursuer averred that before he signed the agreement he had agreed orally with the defenders' representative that the defenders would supply his first load of petrol on deferred payment terms. In effect on the faith of that oral agreement, the pursuer signed the written agreement. Lord Avonside found that the oral agreement did not contradict the written agreement, and/

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[68] Walkers, para 262.
[69] K W Wedderburn, "Collateral Contracts", [1959] CLJ 58, at p 81.
[70] 1965 SLT (Notes) 13.

and allowed a proof before answer. His Lordship did not, however, found on the fact that the pursuer had entered into the written agreement on the faith of the oral agreement.[70a] He also eschewed the use of the term "collateral".[71] The term was employed in argument in William Masson Ltd v Scottish Brewers Ltd,[72] but appears only in the opinion of Lord Guthrie, who said:[73]

> "But an agreement is not collateral if its effect would be to alter an express stipulation in the writ embodying the main contract. To hold that it was would offend against the meaning of the word 'collateral' and would also be contrary to the general principle of Inglis v Buttery & Co.[74] I refer to the opinion of Lord Justice-Clerk Thomson in Perdikou v Pattison and Others."[75]

It accordingly remains impossible to say more, on the basis of recent authority, about the nature of a collateral contract which falls within the exception than that it cannot alter an express stipulation in the writ embodying the main contract. Beyond that, just what is such a collateral contract remains "a nice question."[75]

(4) Missing term in written contract

15.14 It may be difficult to decide whether a given situation will fall within the exception relating to proof of a missing term in a written contract, whereby a term essential to the fulfilment of a contract/

[70a] The only reported Scottish example of an allowance of proof of a prior agreement on the basis that it was on the faith of it that the parties had entered into the written contract appears to be British Workman's and General Assurance Co v Wilkinson, (1900) 8 SLT 67.

[71] See para 15.14 below.

[72] 1966 SC 9.

[73] Ibid, at pp 16-17.

[74] (1878) 5 R (HL) 87.

[75] 1958 SLT 153, at p 157.

contract which has been acted upon may be proved by extrinsic evidence; or within the exception regarding collateral agreements; or within the rule that extrinsic evidence is inadmissible to show that a right was constituted notwithstanding that the document founded on as constituting it is incomplete or defective. In McInally,[70] where it might have been possible to allow proof on the basis that the oral agreement was a collateral one, Lord Avonside pointed out that the case could be disposed of on the basis that the written agreement was not completely expressed. His Lordship said:

> "Moreover, this can be looked at from a different angle, although it may only be a matter of nomenclature. Where it is sought to prove parole an agreement in face of a formal contract that may be permissible where the subject which the agreement deals with is left in doubt in the contract or is not covered expressly or by proper implication by its terms. Examples are contained, I think, in Renison v Bryce, (1898) 25 R 521, 5 SLT 222, and De Lassalle v Guildford, [1901] 2 KB 215 to take an English case. To call such agreements 'collateral' is perhaps to invite trouble in an academic sense; and it may not be desirable to particularise them by any description. Defence by appeal to a formal contract rests on its being assumed to contain the whole agreement between parties. If its terms are such as to show that something is lacking or not fully covered, then no violence is done by asserting that the gap was filled by another agreement, albeit non-formal. There is, in my opinion, something absent in clause 4(3) of the Supply Agreement and the pursuer is entitled to point to the alleged verbal agreement as consistently elucidating it so far as the first consignment of petrol was concerned."

It appears, however, that there is no general agreement as to the "missing term" exception. In Gloag and Henderson's Introduction to the Law of Scotland[76] and in Professor Walker's Principles[77] it is said that it is probably the law that it is incompetent to prove a term in a written/

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[70] 1965 SLT (Notes) 13.
[76] (7th ed), p 119.
[77] (2nd ed), p 604.

written contract which is not expressed, and which is not implied by law. But Gloag and Henderson state that Renison and De Lassalle, the cases referred to by Lord Avonside, render it difficult to make any confident statement on the point.

(5) Questions with third parties

15.15 In dealing with the exception relating to questions with third parties, Gloag states without qualification that the finality of a written contract is a principle which holds only in a question between the parties to that contract, or others deriving right from them, not in questions with or between third parties who may have an interest to prove what the real intention of the contract was.[78] The Sheriffs Walker, however, only go so far as to say that it has been held in certain circumstances that the general rule does not apply in a question between persons who are not parties to the writing, but have an interest, or between such persons and one of the parties.[79] They also note that in Wink v Speirs[80] differing opinions were expressed as to whether a trustee on the sequestrated estate of one of the parties to the writing, as representing his creditors, can be regarded as a third party for this purpose.

(6) Writing admittedly inaccurate

15.16 The general rule does not apply when the party founding upon a writing admits on record,[81] or in the witness-box,[82] or by writ or oath,[83] that it does not contain a true account of the transaction.

There/

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[78] Contract (2nd ed), pp 377-378: see also p 390.

[79] Walkers, para 265. They also dispute Gloag's classification under this exception of cases under section 61(4) of the Sale of Goods Act, 1893.

[80] (1867) 6 M 77.

[81] McMenemy v Forster's Trustee, 1938 SLT 555, at p 558.

[82] Pickard v Pickard, 1963 SC 604, Lord Sorn at pp 619-621, Lord Guthrie at pp 622-623.

[83] Walkers, para 266.

There are questions as to the application of this exception when the writing is a deed of trust, and as to admissions contained in a subsequent writing.

15.17 (a) Deed of trust. The question whether the exception is applicable in relation to a deed of trust was raised in Cairns v Davidson.[84] The Lord Ordinary (Lord Skerrington)[85] and Lord Guthrie[86] expressed the opinion that parole evidence was admissible where it was admitted that a deed of trust did not accurately express the parties' legal rights, but Lord Salvesen[87] was inclined to the view that it was not. In Pickard,[82] where Cairns[84] was apparently not cited, the admissibility of extrinsic evidence in such a situation seems to have been assumed.

15.18 (b) Proof by writ. There is some doubt as to the ambit of proof by writ in contradiction, modification or explanation of writings. According to Gloag,

> "An alternative to a reference to oath is proof by writ of the defender, and it would appear that in a question as to the construction of a written contract it is always competent for one party to prove that the intention of the parties was what he avers it to be by the writ of the opposing party, provided that the writ is subsequent to the date of the contract or conveyance in question."[88]

Gloag refers, first to Stewart v Clark,[89] where the Court held that an alleged verbal agreement made prior to a lease could be proved only by the oath of the landlord or his writ subsequent to the date of the lease, apparently on the footing that rei interventus had been relevantly averred/

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[82] Pickard v Pickard, 1963 SC 604, Lord Sorn at pp 619-621, Lord Guthrie at pp 622-623.
[84] 1913 SC 1054.
[85] Ibid, at p 1055.
[86] Ibid, at pp 1058-1059.
[87] Ibid, at p 1057.
[88] Contract (2nd ed), pp 376-377.
[89] (1871) 9 M 616.

averred.[90] Gloag also refers to Boyle & Co v Morton & Sons,[91] where there was apparently no plea stated as to proof by writ and, although it is not said that the parties renounced probation, a hearing took place before the Lord Ordinary, seemingly of consent, upon the record and certain correspondence which had passed between the parties after the date of their agreement. The case appears to be classifiable as one in which the Court relied upon subsequent correspondence in order to construe an agreement.[92] The Sheriffs Walker doubt whether, unless there is ambiguity in the original writing, it is sound in principle to say that if it is admitted in a subsequent writing that the true contract between the parties was of a different nature from that described in the original writing, the latter may be disregarded and the true contract proved prout de jure if it is of a kind which permits of such proof.[93] It seems clear that a subsequent agreement to vary the terms of a writing can be proved by writ.[94]

(7) Bills of exchange

15.19 By section 100 of the Bills of Exchange Act, 1882,[95] it is provided:

> "In any judicial proceedings in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence ..."

It is well known that section 100 "is a provision which there have been none/

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[90] See Walkers, para 279(d), n 93.
[91] (1903) 5 F 416.
[92] See Walkers, para 275(c).
[93] See Walkers, para 266, n 51, para 275(a).
[94] Dickson v Bell, (1899) 36 SLR 343.
[95] 45 and 46 Vict, cap 61; amended by the Prescription and Limitation (Scotland) Act, 1973 (cap 52), Fifth Sched, Part I.

none to love and very few to praise"[96] and that examples of circumstances in which it has been judicially held to apply are few.[97]

4. Exceptions connected with the explanation of a writing

15.20 "If, after the basic rules of construction have been applied, the language of a writing still requires elucidation, either because it appears to the court, or it is averred by the parties, that its meaning is uncertain, or that there is uncertainty about its application to the facts, extrinsic evidence, subject to one qualification, is in general admissible to explain and clarify. The qualification relates to evidence of direct declarations of intention or understanding, which, in general, is inadmissible."[98]

There are several difficulties surrounding this rule. These are related to (1) the supposed distinction between patent and latent ambiguities; (2) the exception to the exclusion of direct declarations of intention in the case of equivocation; (3) the admissibility of clauses which were cancelled or rejected before the execution of the writing; (4) the admissibility of evidence of the actings of the parties after the execution of the writing; and (5) the admissibility of evidence of custom or usage.

(1) Patent and latent ambiguities

15.21 It is said in Bell's Principles and in several textbooks that while extrinsic evidence is admissible to resolve a latent ambiguity in a document, it is not admissible to resolve a patent ambiguity. A patent ambiguity, it is said, must be resolved on a construction of its terms, though evidence of the actions of the parties may assist.[99] The distinction is derived from the speeches/

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[96] Nicol's Trs v Sutherland, 1951 SC (HL) 21; L P Cooper at p 21.

[97] Gloag, Contract (2nd ed), pp 384-385; Walkers, para 112; Thompson v Jolly Carters Inn Ltd, 1972 SC 215; and see the discussion in Gow, The Mercantile and Industrial Law of Scotland, pp 451-453.

[98] Walkers, para 268.

[99] Bell, Principles (10th ed), paras 524, 1871; Dickson paras 1078-1082; McLaren, Wills and Succession (3rd ed), i, paras 715-716; Gloag, Contract (2nd ed), p 372; Gloag and Henderson, Introduction to the Law of Scotland (7th ed), p 119; D M Walker, Principles of Scottish Private Law (2nd ed), i, pp 108-109, 606.

speeches of Lord Brougham in two Scottish appeals[1] and is based upon what is now[2] said to be a misapplication of an English rule of pleading propounded by Lord Bacon. Dickson and Gloag seem unenthusiastic about the distinction. Dickson observes:

> "There is, however, not a little looseness and some conflict in the English authorities on the point; while no satisfactory reason has yet been given for the distinction in this respect between patent and latent ambiguities."[3]

Gloag finds the distinction "not always very satisfactory or easy to apply."[4] It seems to have been accepted by Lord President Inglis,[5] but it is said that in practice the distinction appears never to have been applied in Scotland, and in a number of reported cases patent ambiguities have been resolved by the admission of extrinsic evidence.[6] In England, the distinction has been criticised by Lord Simon of Glaisdale,[7] and Sir Rupert Cross writes:

> "The only circumstances in which extrinsic evidence is inadmissible to explain a patent ambiguity in the loose sense [of any kind of inaccuracy] is when it is prohibited or rendered unnecessary by some rule of law such as that which prevents the reception of extrinsic evidence to fill in total blanks, or section 9(2) of the Bills of Exchange Act, 1882,[8] under which the words prevail over the figures in the event of their conflicting with regard to the sum payable under a bill of exchange."[9]

The Sheriffs Walker suggest that the supposed distinction between patent and/

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[1] Morton v Hunters & Co, (1830) 4 W & S 379, at pp 386-387; Logan v Wright, (1831) 5 W & S 242, at p 246.

[2] Cross, p 551.

[3] Dickson, para 1082.

[4] Contract (2nd ed), p 372.

[5] Ritchie v Whish, (1880) 8 R 101, at p 104.

[6] Walkers, para 269.

[7] Wickman Machine Tool Sales Ltd v L Schuler A G, [1974] AC 235, at p 268. See para 15.23 below.

[8] Cf Gordon v Sloss (1848) 10 D 1129.

[9] Cross, p 551.

and latent ambiguities may now be ignored in practice, except perhaps in connection with direct declarations of intention or understanding, which are mentioned in the following paragraphs.

(2) Equivocation

15.22 Evidence of direct statements by the writer as to what he intended the writing to mean, or as to his understanding of its meaning, is in general inadmissible; but there is an exception to the exclusion of direct declarations of intention in the case of equivocation, which arises when the language of the writing, though intended to apply to one person or one thing only, is equally applicable in all its parts to two or more, and it is impossible to gather from the context which was intended. The Sheriffs Walker explain the present state of the law in this way:

> "While referring to the general terms of Lord Brougham's pronouncements on [the supposed distinction between patent and latent ambiguities], most of the Scottish textbook writers appear to have altered and restricted the application of the distinction. In the first place, the tendency has been to restrict the use of the term latent ambiguity to that particular kind of latent ambiguity which in England is called an equivocation.[11] In the second place, when speaking of the use of extrinsic evidence in the case of latent ambiguities, thus defined, they say, not that it is admissible in the case of latent and inadmissible in the case of patent ambiguities, but that, in the case of latent ambiguities, extrinsic evidence of intention is admissible, whereas in the case of patent ambiguities it is not.[12] It is made clear that, in the case

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[10] Bell, Principles (10th ed), paras 524, 1871, appears to be the only exception. (Walkers' note).

[11] See Dickson, paras 1075, 1077, 1078; McLaren, Wills and Succession (3rd ed), i, para 715. Both writers define latent ambiguity as if it meant equivocation. (Walkers' note).

[12] Dickson, paras 1079, 1081, 1083; McLaren, i, paras 717, 720, 723; Gloag, Contract (2nd ed), p 372. The examples given by Gloag of extrinsic evidence held admissible in cases of latent ambiguities, are, however, examples of circumstantial evidence which would have been equally admissible if the ambiguities had been patent. In one of them (Robertson's Trs v Riddell, 1911 SC 14) the ambiguity was in fact patent and not latent. (Walkers' note).

of both kinds of ambiguity, circumstantial evidence of intention is admissible,[13] and that it is only with regard to direct declarations of intention that any distinction exists.[12] The distinction at one time recognised between patent and latent ambiguities appears, therefore, to have been replaced by a distinction, relevant only in connection with direct declarations of intention, between the particular kind of latent ambiguity known as an equivocation and all other ambiguities, whether latent or patent.

"In view of the opinions cited above it must be accepted that, in theory at least, direct declarations of intention or understanding are admissible in evidence, when, but only when, there is an equivocation. There seems to be no reported decision in Scotland, however, in which the question has arisen."[14]

15.23 As the learned authors observe, the reason for the exclusion of direct declarations of intention appears not to have been discussed in Scotland, and there appears to be no logic in allowing direct declarations of intention in a case of equivocation and refusing them in a case of misdescription.[15] No doubt evidence of such declarations might be unreliable, or even falsified, but these observations seem applicable to cases of misdescription as well as equivocation. The exception for cases of equivocation has been borrowed from English law, and its explanation has been said to be "historical rather than rational."[16] Sir Rupert Cross explains it thus:

"In the words of Thayer:[17]

'For centuries there had arisen certain familiar questions of ambiguity. In matters of record, in specialties,

and/

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[12]Dickson, paras 1079, 1081, 1083; McLaren, i, paras 717, 720, 723; Gloag, Contract (2nd ed), p 372. The examples given by Gloag of extrinsic evidence held admissible in cases of latent ambiguities, are, however, examples of circumstantial evidence which would have been equally admissible if the ambiguities had been patent. In one of them (Robertson's Trs v Riddell, 1911 SC 14) the ambiguity was in fact patent and not latent. (Walkers' note).

[13]Walkers, para 271. (Walkers' note).

[14]Walkers, para 270.

[15]Walkers, para 270, nn 1, 4.

[16]Nokes, p 263.

[17]Preliminary Treatise on Evidence at Common Law, p 417 (Cross's note).

> and in other writings, there had often been occasion to deal with the problem of a name or description equally fitting to two or more persons, places or things.'
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> In such cases it had been recognised, long before the nineteenth century, that extrinsic evidence of intention was admissible, and no distinction seems to have been taken between circumstantial evidence and direct declarations by the author of the document under consideration. During the nineteenth century, extrinsic evidence came to be received in cases of misdescription or incomplete description, but it was open to the courts to do, what they could not do in the case of equivocations, namely, to admit circumstantial evidence and reject direct declarations. This is what they did, although it is doubtful whether the consequences of their action have proved beneficial."[18]

Sir Rupert Cross cites Stephen's view that one course or the other should be followed both in the case of misdescription and in that of equivocation.[19] He also notes that although it is arguable that in England evidence of the testator's declarations of intention has been rendered admissible in all cases by section 2(1) of the Civil Evidence Act, 1968, the English courts will probably hold that the effect of that Act on the law governing the admissibility of such evidence is minimal.[20] In the Wickman Machine Tool case Lord Simon of Glaisdale criticised the distinction drawn in the law of England in these terms:

> "... the distinction between the admissibility of direct and circumstantial evidence of intention seems to me to be quite unjustifiable in these days. And the distinctions between patent ambiguities, latent ambiguities and equivocations as regards admissibility of extrinsic evidence are based on out-moded and highly technical and artificial rules and introduce absurd refinements."[20a]

Recently, in England, the Law Reform Committee in its report on the Interpretation of Wills recommended the retention of the present rule whereby/

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[18] Cross, pp 552-553.

[19] Stephen, Digest, note XV.

[20] Cross, pp 554-555; Cross and Wilkins, pp 242-243.

[20a] Wickman Machine Tools Sales Ltd v L Schuler A G, [1974] AC 235, at p 268.

whereby the testator's statements of intention are admissible to resolve an equivocation, but a minority recommended the reception of such evidence in aid of interpretation in all cases. The majority took the view that the general admission of direct evidence of the testator's intention might lead to an increase in litigation based on unmeritorious claims and to delay in the administration of estates.[21]

(3) Revoked or rejected clauses

15.24 Although, when there is ambiguity in connection with a writing, evidence of the surrounding circumstances is in general admissible, there is a doubt as to whether the court may legitimately take cognisance of the fact that clauses suggested for inclusion in the writing were deliberately cancelled or rejected by the parties before the writing was executed.[22] As to contracts, it was held in the leading case of Inglis v Buttery & Co[23] that in the construction of a contract embodied in a formal deed the court is not entitled to look at words in the deed which have been deleted before signature. But it seems difficult to reconcile that case with Taylor v John Lewis Ltd[24] where the majority of the court were of opinion that it was competent to consider words which had been deleted from a particular clause in a form of charter-party and to draw an inference from the deleted words as to the meaning of the words which remained. As to testamentary writings, there is doubt as to the extent to which a revoked will may be used as an aid to construction. That has been said in the Court of Session[25] to be legitimate for the purposes of identifying the subject-matter/

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[21] The Law Reform Committee: Nineteenth Report: Interpretation of Wills (1973, Cmnd 5301), paras 49-59.
[22] Walkers, para 274.
[23] (1878) 5 R (HL) 87.
[24] 1927 SC 891.
[25] Devlin's Trs v Breen, 1943 SC 556, L J-C Cooper at p 571; Lord Wark at pp 582-583; see also Lord Jamieson at p 586.

matter of the gift and of identifying the beneficiary; but expressions of opinion in the House of Lords[26] leave the matter in doubt.

(4) Subsequent actings of parties

15.25 In Inland Revenue v Ferguson[27] Lord Guthrie said:

> "It is doubtful whether the past actings of the parties in implement of a contract may be looked at as an aid to the construction of the deed."[28]

It is said by the Sheriffs Walker that even where there is an ambiguity,[29] evidence regarding the actings of the parties, or of the granter, after the execution of the writing is, strictly speaking, irrelevant, except in so far as it throws light retrospectively upon the circumstances prevailing at the time of execution.[30] Gloag states that as a general rule such evidence is inadmissible, being at best only indirect evidence of what the parties' real intentions were.[31] These writers are agreed that there is an exception with regard to writings of ancient date, and Gloag draws attention to some decisions, with the ratio of which he clearly disagrees, which support a relaxation of the rule in cases where a contract contains provisions of doubtful legal import.[32] It has recently been held by the House of Lords in Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd,[33] an English appeal, that in general a contract/

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[26] Magistrates of Dundee v Morris, (1858) 3 Macq 134, Lord Wensleydale at p 171; Gordon v Gordon's Trs, (1882) 9 R (HL) 101, Lord Watson at p 105; Devlin's Trs v Breen, 1945 SC (HL) 27, Lord Thankerton at p 32; and see Walkers, para 274(c).

[27] 1968 SC 135, at p 142.

[28] His Lordship referred to observations in Inland Revenue v Hogarth, 1941 SC 1, by L P Normand at p 8 and Lord Moncrieff at p 11.

[29] If there is no ambiguity, evidence of subsequent actings is inadmissible: Scott v Howard, (1881) 8 R (HL) 59, Lord Watson at p 67, followed in A M Carmichael Ltd v Lord Advocate, 1948 SLT (Notes) 88.

[30] Walkers, para 275(a).

[31] Contract (2nd ed), pp 375-376.

[32] See Hylander's Exr v H & K Modes Ltd, 1957 SLT (Sh Ct) 69, sub nom Sumrie v H & K Modes Ltd, (1957) 73 Sh Ct Rep 253.

[33] [1970] AC 583, Lord Reid at p 603, Lord Hodson at p 606, Viscount Dilhorne at p 611, Lord Wilberforce at pp 614-615.

contract cannot be construed by reference to the subsequent conduct of the parties. In subsequent English appeals it has been indicated that there is an exception to that rule where there must be a relevant term in the contract but what that term is cannot be ascertained otherwise than by looking at what the parties did;[34] and that there may remain a possible further exception, based on weak English authority, for the case of the construction of a document of title or contract concerning land in the light of subsequent operations or possession.[35] It is thought that the principle of Whitworth Street Estates (Manchester) Ltd[33] would probably now be applied by the Scottish courts. In that event, however, there would be a clear distinction between the principle applicable to contracts and that applicable to writings of ancient date and to testamentary writings. There would also be a clear distinction between the Scottish and English courts' approach to the construction of contracts and that adopted by the courts of several other countries.

15.26 (a) Writings of ancient date. Gloag and Henderson find it an "unsatisfactory rule" that evidence of the subsequent actings of the parties under a contract is competent in contracts of ancient date, but not in contracts de recenti.[35a] The justification for the rule is said to be that the actings following the writing, being the parties' own exposition/

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[33] [1970] AC 583, Lord Reid at p 603, Lord Hodson at p 606, Viscount Dilhorne at p 611, Lord Wilberforce at pp 614-615.

[34] Wickman Machine Tool Sales Ltd v L Schuler A G, [1974] AC 235, Lord Kilbrandon at p 272; Liverpool City Council v Irwin. [1976] AC 239, Lord Wilberforce at p 253; see Wilson v Maynard Shipbuilding Consultants A B, [1978] 2 WLR 466, at p 472.

[35] Wickman Machine Tool Sales Ltd, n 34 supra, Lord Reid at p 252, Lord Morris of Borth-y-Gest at p 260, Lord Wilberforce at p 261, Lord Simon of Glaisdale at p 269, Lord Kilbrandon at p 272.

[35a] Introduction to the Law of Scotland (7th ed), p 119.

exposition of their language and intentions, is the best mode of explaining obscure or obsolete expressions.[35b] If that is correct, it is difficult to see the logic in allowing such evidence in the case of an ancient document and disallowing it in the case of a recent document. It is thought that the same rule should be applicable to both.[35c] Such evidence has, in fact, been allowed in some cases where ambiguities arose in documents of recent date relating to personal obligations.[36] The matter could with advantage be clarified.

15.27 (b) Testamentary writings. It is thought that the actings of a testator, after the date of his will, are admissible in order to show his intention, or his understanding of its meaning.[37]

15.28 (c) Foreign law. Various foreign legal systems take the view that evidence of subsequent actings is of value in the construction of a document. The approach of the American courts is described in this way:

> "In the process of interpretation of the terms of a contract the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or receiving performance under it ... In cases so numerous as to be impossible to full citation here the courts have held that evidence of practical interpretation and construction by the parties is admissible to aid in choosing the meaning to which legal effect will be given."[38]

As to the law of France, it is said:

> "... l'intention des parties peut être recherchée même en dehors du texte du contrat: dans les actes d'exécution de celui-ci, dans d'autres conventions

des/

[35b] Dickson, para 1087; Walkers, para 275(b).

[35c] Cf Wickman Machine Tool Sales Ltd v L Schuler A G, [1974] AC 235, Lord Kilbrandon at p 272.

[36] See Borthwick-Norton v Gavin Paul & Sons, 1947 SC 659, Lord Keith (Ordinary) at p 662, Lord Mackay at pp 679-680, Lord Jamieson at pp 693-695, Lord Stevenson at p 699.

[37] Walkers, para 275(d).

[38] Corbin on Contracts, (1960), vol iii, sec 558 cit F A Mann, (1973) 89 LQR 464.

> des mêmes parties, et même dans tout acte quelconque de nature a la manifester."[39]

In Germany and Italy there are similar rules;[40] and the Vienna Convention on the Law of Treaties, 1969, provides by article 31(3)(b) that the interpreter of a treaty is to take into account

> "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[40]

15.29 (d) Justification of the rule. The rule in Whitworth Street Estates has been justified on various grounds. Lord Reid said:

> "Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."[41]

In the Wickman Machine Tool case Lord Simon of Glaisdale added the following reasons. First, subsequent conduct is of no greater probative value in the interpretation of an instrument than prior negotiations, which are inadmissible, and direct evidence of intention, which is admissible only in certain circumstances by virtue of an undesirable rule. Secondly, subsequent conduct is equally referable to what the parties meant to say as to the meaning of what they said; and it is only the latter which is relevant. Thirdly, the practical difficulties involved in admitting subsequent conduct as an aid to interpretation are only marginally, if at all, less than are involved in admitting evidence of prior negotiations.[42] Lord Wilberforce stated that evidence of the parties' actions subsequent to contract was excluded by the general rule that extrinsic evidence is not admissible for the construction of/

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[39] Planiol et Ripert, Traite Pratique de Droit Fransais (2nd ed), vi, p 462, cit Mann n 38 supra.

[40] See Mann, n 38 supra.

[41] [1970] AC 583, at p 603.

[42] [1974] AC 235, at pp 268-269.

of a written contract.[43] The justifications of the general rule itself will be considered later in this chapter.[44]

(5) Custom or usage of trade

15.30 The authorities relating to this subject are difficult to classify. The Sheriffs Walker state the law in this way:

> "Evidence of custom or usage is admissible in four cases, (1) where the writing expressly refers to and incorporates the custom, (2) on a point for which the writing makes no provision, express or implied, (3) where it is averred that words or phrases are used with an unusual meaning and there is some ambiguity, and (4) to modify the rights and obligations which the law would normally infer. It must, however, be admitted that it is difficult to distinguish cases which have been held to fall under one of those classes from others which have not."[45]

As to the justification of the admissibility of evidence of custom, Gloag observes:

> "The effect given to custom of trade in the interpretation of contracts amounts in many cases to an exception to the rule that extrinsic evidence is not admissible in the construction of written contracts. It has been attempted, somewhat fancifully, to reconcile the admission of proof of custom and the exclusion of other evidence on the ground that the former is to be regarded as a mercantile dictionary, and that proof of it is necessary to enable the court to read the contract, as a translation might be necessary if the contract were expressed in a foreign language."[46]

It is, perhaps, less fanciful to say that proof of the custom is admitted on the basis that the parties must be presumed to have accepted it as part of their contract.[47] Lord Buckmaster, L C, said in "Strathlorne" Steamship Co v Baird & Sons:

> "It [the custom] is in fact to be regarded as though it were

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[43] [1974] AC 235, at p 261.

[44] Paras 15.33-15.36 below.

[45] Walkers, para 276(a). The learned authors disagree with Gloag's statement that a custom may not run counter to the general law of the country (see their n 10). In addition to the cases cited by them at n 12 see Dick v Cochrane & Fleming, 1935 SLT 432.

[46] Contract (2nd ed), p 378, citing Bowes v Shand, (1877) 2 App Cas, Lord Cairns, L C at p 468.

[47] Walker, Principles (2nd ed), i, p 622.

> a term so well known in connection with the particular transaction that it was nothing but waste of time and writing to introduce it into the contract."[48]

5. Exceptions connected with the variation of a writing

15.31 This section of the chapter is concerned with the exceptions to the general rule which excludes extrinsic evidence for the purpose of proving an oral agreement to vary the terms of a written contract. Of this topic Lord Avonside has observed:

> "This aspect of law, or evidence, has produced a crop of subtleties more welcome to the academic than to the practical mind."[49]

The Sheriffs Walker introduce their exposition of the subject with the remark that the decisions regarding the exceptions to the rule are difficult to reconcile, and it is not easy to deduce general principles from them.[50] The learned authors nevertheless state the law, in summary, as follows:

> "With regard to alleged oral agreements for the permanent variation of a written contract, it is thought that an attempt must be made to distinguish contracts which require writing for their constitution from written contracts which the law does not require to be in writing. In both kinds of contract an agreement to vary may be proved as an inference from facts and circumstances. Apart from this, while in both cases an agreement to vary must be proved by writ or oath, it is necessary also, when a variation of the first kind of contract is in question, to aver and prove actings which constitute homologation or rei interventus."[50]

The learned authors also criticise Rankine's suggestion[51] that, as a result of the speech of Lord Chelmsford, L C, in Wark v Bargaddie Coal Co[52] an anomalous exception has been created which affects only an oral agreement to vary, as distinct from an oral agreement to constitute/

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[48] 1916 SC (HL) 134, at p 136. See also Bruce v Smith, (1890) 17 R 1000, Lord Young at p 1007.

[49] Starrett v Pia, 1968 SLT (Notes) 28.

[50] Walkers, para 279(a).

[51] Leases (3rd ed), pp 110f.

[52] (1859) 3 Macq 467.

constitute, a contract which requires writing for its constitution, with the result that the oral agreement to vary, as well as the rei interventus which follows it, may be proved by parole evidence.

15.32 As to the general rule, Gloag observes that while it may be stated as well established,

> "its exact nature and limits are not so easy to determine. Is it a rule of evidence, limiting the methods of proof of the fact that a verbal agreement to alter the terms of the written contract has been arrived at? Or is it a principle of contract that the terms of a written agreement cannot be derogated from except by an agreement in writing (ie, by an agreement recorded in writing at the time when it was made), so that any alteration not so made, and not followed by actings upon it, is not binding, and leaves to each party the opportunity to resile?"[53]

He submits that the preponderating weight of authority is in favour of the latter hypothesis.[54] If that is accepted, it would seem appropriate that the question of any alteration of the general rule discussed in this section should be considered in the context of the reform of the law of contract, and not in that of the reform of the law of evidence.

6. Justification of the rule

15.33 The remainder of this chapter is concerned with the general rule that it is incompetent to contradict, modify or explain writings by extrinsic evidence. The general rule which excludes extrinsic evidence for the purpose of proving an oral agreement to vary the terms of a written contract will not be discussed, for the reason given in the foregoing paragraph.

15.34 Various reasons have been advanced in justification of the former general rule. Lewis regards it as an example of the operation of the best evidence rule.[55] From the decisions it seems possible to discover/

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[53] Contract (2nd ed), pp 392-393.

[54] Ibid, p 394.

[55] Manual, p 91.

discover two grounds on which the rule has been justified: (1) that it gives effect to the presumed intention of the parties, and (2) that it achieves certainty and finality. It is submitted that, in the present state of the law, neither ground affords a sufficient justification of the rule.

15.35 (1) The intention of the parties. In Inglis v Buttery & Co Lord Gifford said:

> "I think it is quite fixed, and no more wholesome or salutary rule relative to written contracts can be devised, that where parties agree to embody and do actually embody their contract in a formal written deed, then in determining what the contract really was and really meant a Court must look to the formal deed and to that deed alone. This is only carrying out the will of the parties."[56]

Similarly, in Young v M'Kellar Ltd, Lord Low, dealing with the inadmissibility of extrinsic evidence to modify contracts for the sale of heritage and the subsequent disposition, said:

> "The reason for the rule, however, seems to me to be that it gives effect to the intention of the transaction."

That the rule is not absolute, but an inference from the presumable intention of the parties, appears from his immediately following statement that the parties may choose to make a special agreement which renders the rule inapplicable.[57] It seems clear, however, from such cases as Davidson v Logan,[58] that although the rule may be designed to give effect to the intention of the parties, it can operate in such a way as to exclude consideration of the true factual situation. It may also be objected that in many cases, on the other hand, evidence of the intention/

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[56] (1877) 5 R 58, at p 69; affd (1878) 5 R (HL) 87. See also M'Adam v Scott, 1913, 1 SLT 12, Lord Kinnear at p 15.

[57] 1909 SC 1340; and see Gloag, Contract (2nd ed), pp 368-369.

[58] 1908 SC 350; see para 15.06 above.

intention of the parties is admitted notwithstanding the existence of the rule. As Sir Rupert Cross points out, it would be impossible to interpret most documents if some extrinsic matter were not allowed to be proved:[59] thus, it is usually necessary to consider the surrounding circumstances of the making of a will, and it is always competent to lead evidence of the circumstances surrounding the parties at the time when a contract was made.[60] The extent to which a document may be treated as conclusive as to the meaning of its terms is therefore a question of degree.[59] Lord Carmont observed, in relation to the construction of testamentary writings, that the courts have always been astute to guard against attempts to introduce parole evidence as to what the testator intended under guise of evidence of the surrounding circumstances.[61] But Gloag states that the principle that such evidence may be admitted may often result in the admission of evidence of the intention of the parties to a contract, and there are many cases in which evidence of the surrounding circumstances practically amounts to evidence of the intention of the parties. The learned author observes that if a judge, called upon to construe an ambiguous phrase, satisfies himself, by evidence admitted as proof of the surrounding circumstances, of what the real meaning of the parties was, he will usually construe the ambiguous phrase in accordance with that meaning.[60] It is thought that the same considerations may apply when evidence of earlier communings or negotiations, superseded by the execution of a written contract, are considered, ostensibly not for the purpose of showing intention but in order to discover/

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[59] Cross, p 541.

[60] Gloag, Contract (2nd ed), pp 373-374; Reardon Smith Line Ltd v Hansen-Tangen, [1976] 1 WLR 989, Lord Wilberforce at pp 996-997.

[61] Hay v Duthie's Trustees, 1956 SC 511, at p 529.

discover the knowledge of the parties as to the then existing facts and circumstances in the light of which they executed the contract.[62]

15.36 (2) Certainty and finality. Lord Gifford also said in Inglis v Buttery & Co:

> "The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings, partly consisting of letters and partly of conversations."[56]

Underlying this line of thought there may perhaps be discerned a justification of the rule on the grounds of expediency, in two respects: once parties have reduced a transaction to writing, it is inexpedient that the writing should be liable to be set aside by oral evidence which may be unreliable or even false; and that there should be any extensive litigation arising therefrom. In other words, the rule is considered to be of value because it achieves certainty and finality. The undesirability of such litigation has been referred to in English appeals in the House of Lords. It was said in Mercantile Agency Co Ltd v Flitwick Chaleybeate Co[63] that the admission of parole evidence in addition to or in contradiction of written documents could lead to "great inconvenience and troublesome litigation in many instances." In the Wickman Machine Tool case Lord Simon of Glaisdale stated as one of the reasons for excluding evidence of the actings of parties subsequent to a contract that the practical difficulties involved in admitting subsequent conduct as an aid to interpretation are only marginally, if at all, less than are involved in admitting evidence of prior negotiations.[64] It has been suggested that/

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[56](1877) 5 R 58, at p 69; affd (1878) 5 R (HL) 87. See also M'Adam v Scott, 1913, 1 SLT 12, Lord Kinnear at p 15.

[62]See Walkers, para 273(b).

[63](1897) 14 TLR 90, per Lord Halsbury, L C.

[64][1974] AC 235, at p 269.

that in jurisdictions where civil cases were normally tried by jury, the parol evidence rule was a valuable expedient for narrowing the issues and keeping the dispute within reasonable bounds. There, it is said, the rule chiefly stems from an anxiety to protect written bargains from rewriting by juries:[65]

> "It is not intended to suggest that these doctrinal devices were newly invented by the judges, consciously, to meet this need in modern times. Thayer and Wigmore have traced too clearly the origin of the parol evidence formula against 'varying the writing' to a primitive formalism which attached a mystical and ceremonial effectiveness to the carta and the seal. (5 Wigmore, Evidence (2nd ed), 1923, para 2426). The writer merely ventures to submit that this formalism, abandoned elsewhere in so many areas of modern law, had here a special survival value - the escape from the jury - which led the judges to retain for writings the conception that they had a sort of magical effect of erasing all prior oral agreements."[66]

It is submitted that whatever value on grounds of expediency the rule may have possessed in the past, any advantages which it may once have had of achieving certainty and finality have largely gone.[67] It is thought that the examination earlier in this chapter of the writings to which the rule applies, and of the exceptions to the rule, both the general exceptions and those connected with the explanation of a writing, demonstrates that the scope of the rule is much reduced and that there is considerable uncertainty as to the ambit of its application.

7. Reform of the law

15.37 The exceptions to the rule are so numerous and so extensive that it may be argued that the rule itself has been largely destroyed.[68] Certainly that/

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[65] Charles T McCormick, "The Parole Evidence Rule as a Procedural Device for Control of the Jury", (1932) 41 Yale L R 365, at p 368, n 6.

[66] Ibid, at p 369, n 8.

[67] The Law Commission have expressed the same view, in their Working Paper No 70: Law of Contract: The Parol Evidence Rule, para 25.

[68] Cf Law Com Working Paper No 70, para 21.

that part of the rule which prohibits extrinsic evidence in explanation of a writing is subject to so many exceptions that the distinction between the Scottish rule and the equivalent English rule which, subject to exceptions, admits extrinsic evidence for the purpose of explaining or interpreting a writing, has been said to be theoretical rather than practical.[69] As to the general exceptions to the rule, it may be argued that their effect is to reduce the rule to this: that when the writing is the whole contract, the parties are bound by it and extrinsic evidence is excluded; but when it is not, evidence of its real nature or of the other or accurate terms must be admitted. So reduced, the rule appears to say little more than that the parties are bound, as usual, by the terms which, from an objective point of view, were "intended" by them to be contractually binding.[70]

15.38 If the significance of the rule has been reduced to that extent, and the traditional justifications for it can no longer be maintained, there is a question whether it continues to serve any useful purpose. It has been suggested that the rule should

> "be phrased and operate as a rule of presumption. When the terms of an agreement have been reduced to writing by the parties, let it be presumed that the writing contains with exactness and completeness all those terms, but allow this presumption to be overcome by clear and convincing proof to the contrary."[71]

In England, the Law Commission in their Working Paper No 70 have gone further:

> "40. Whilst we have doubts about the parol evidence rule we do/

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[69] Walkers, para 240.

[70] Cf K W Wedderburn, "Collateral Contracts", [1959] CLJ 58, at pp 60-61.

[71] W G Hale, "The Parole Evidence Rule", (1925) 4 Oregon L Rev 91, at p 122, cit McCormick, n 65 supra, at p 379, n 30.

do not doubt that written agreements should bind the parties to what they have agreed. Where all the terms have been accurately recorded in a written contract that contract should be binding as it is under existing law. Evidence of different or additional terms that might have been agreed, but were not, must be irrelevant and accordingly inadmissible; in this sense the document is exclusive of other evidence. However, our provisional conclusion is that the exclusivity of writing should be justified not by the parol evidence rule or any technical presumption but by the fact that the parties have agreed upon the writing as the record of all they wish to be bound by.

The consequences of abolishing the rule

41. The consequences of abolishing the parol evidence rule would be that very many cases would be decided exactly as they are today, either where the writing prevails over oral evidence (not because the oral evidence is excluded but because this gives effect to what the parties are found to have agreed) or where the oral evidence prevails over the writing (not because the courts have discovered an exception to the parol evidence rule but again because this gives effect to what the parties are found to have agreed).

42. Some cases, such as Evans v Roe,[72] would no doubt be decided differently, and we think that this is right. Nevertheless we do not envisage any inconvenience resulting. Where the parties put their contract in writing in order to achieve certainty, we would expect the courts to continue to uphold the document so as to give effect to what the parties themselves wanted to achieve. This would apply to most commercial transactions where writing was used. With bills of lading and bills of exchange certainty is of particular importance because the documents may be transferred by one of the original parties to someone else, but the abolition of the parol evidence rule would not in the normal way affect the transferee of such documents. Section 1 of the Bills of Lading Act, 1855 gives the transferee of a bill of lading rights and duties vis-a-vis the carrier as if a contract in the terms set out in the bill of lading had at the time of shipment been made with himself,[73] so he would not be affected by terms which were agreed orally between the original parties and not included in the bill of lading. As for bills of exchange, although evidence of terms agreed orally between the original parties to the bill would be admitted more readily than at present[74] the rights of the

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[72](1872) LR 7 CP 138.

[73]Scrutton on Charterparties (18th ed, 1974), p 61.

[74]See, for example, Hitchings & Coulthurst Co v Northern Leather Co of America and Doushkess [1914] 3 KB 907.

holder in due course[75] would remain the same as under the existing law ...[76]

Provisional recommendation

43. Our provisional conclusion is that the parol evidence rule no longer serves any useful purpose. It is a technical rule of uncertain ambit which, at best, adds to the complications of litigation without affecting the outcome and, at worst, prevents the courts from getting at the truth. We accordingly make the provisional recommendation that it should be abolished."

The abolition of the rule in Scotland would, it seems, make the law of Scotland in this regard approximate to the law of France where, it is said, the construction of a contract is within the sole province of the judges of fact who are entirely free to use whatever material seems relevant to them, apparently without unsatisfactory results.[77] If the abolition of the rule were to be contemplated in Scotland, it would be necessary to consider whether abolition should be limited to cases of contract only or, if not so limited, the extent to which special provision should be made in relation to proof of trust[78] and in relation to testamentary writings. It would in any event be necessary to consider whether the rule should be dispensed with in questions with third/

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[75] "A holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact: (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." Bills of Exchange Act, 1882, s 29(1).

[76] As between immediate parties and as regards a remote party other than a holder in due course parol evidence may be adduced to show that delivery of the bill was conditional or for a special purpose only and not for the purpose of transferring the property in the bill. However, so far as a holder in due course is concerned, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed. Bills of Exchange Act, 1882, s 21(2).

[77] See n 39 supra.

[78] See Walkers, paras 122-123.

third parties, and if not, then to what extent the "third parties" exemption discussed above in para 15.15 should be clarified.

15.39 If the general rule is not to be abolished, it is suggested that consideration should be given to the resolution of a number of the particular difficulties which have been mentioned in this chapter. In particular, as to patent and latent ambiguities, and equivocation, it is submitted that it should be made clear that extrinsic evidence is admissible to resolve patent ambiguities,[79] and that consideration should be given to the abolition of the rule permitting direct evidence of intention in cases of equivocation only and the substitution of a rule permitting the reception of such evidence in aid of interpretation in all cases.[80] The rule as to the inadmissibility of evidence of the subsequent actings of the parties to a contract may merit further examination.[81]

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[79] See para 15.21 above.

[80] See para 15.23 above.

[81] See paras 15.25-15.29 above.